



JOURNAL OF SPORTS LAW POLICY AND GOVERNANCE

ISSN (O): 2584 - 1122

WHERE SPORTS LAW BEGINS



**CENTRE FOR SPORTS LAW
BUSINESS & GOVERNANCE**

CORE - EDITORIAL BOARD

Prof. (Dr.) Shaun Star

Editor-in-Chief

Prof. Subhrajit Chanda

Managerial Editor

Prof. Apoorvi Jha

Associate Editor

Prof. Simran Bhinder

Associate Editor

Prof. (Dr.) Vidya

Subramanian

In-house Editor

Prof. (Dr.) Tejpavan

Gandhok

In-house Editor

Joshua McLeod

Guest Editor

STUDENT BOARD

Trusha Modi

Student Editor

ABOUT JGLS VISION

The vision in establishing JGU and JGLS is to impart globalised education with a view to producing world-class professionals, scholars, and academics in law and other disciplines. Globalisation has opened various opportunities and challenges which have created the need for competent academics, scholars and professionals. The vision of JGU and JGLS is to fulfil this need by equipping their students and faculty with the knowledge, skills, scholarship and vision to meet these challenges and demands of globalisation. To achieve the vision of providing globalised education in India, JGLS has recruited the best faculty from across the globe. JGLS has entered into collaborations, exchange programmes, research partnerships and other forms of engagement and interaction with top universities and institutions across the globe which are willing to share their invaluable intellectual resources developed over decades. JGU aspires to build upon the experiences of the past and the innovations in teaching that are taking place at present to create for the future an institution of global excellence.

JSLPG

The Journal of Sports Law, Policy, and Governance is a distinguished publication that serves as a platform for cutting-edge research, analysis, and discussion on various legal, policy, and governance issues in the field of sports.

Published by the Centre for Sports Law Business & Governance at Jindal Global Law School, OP Jindal Global University, India, the journal brings together academicians, practitioners, and scholars from around the world to contribute their insights and expertise. At the heart of our journal's mission is the exploration of the complex and dynamic intersection of law, policy, and governance in the realm of sports. We aim to foster a deeper understanding of the legal frameworks, regulatory systems, and ethical considerations that underpin the sporting landscape globally. By addressing emerging trends, challenges, and opportunities in the sports industry, the journal strives to contribute to the development of effective policies and practices that promote fairness, integrity, and sustainability in sports.

Our editorial team comprises esteemed scholars and practitioners with extensive experience in sports law, policy, and governance. They meticulously review and select articles that offer novel perspectives, rigorous analysis, and valuable insights into the diverse dimensions of the subject. The journal welcomes submissions from researchers, professionals, and students who wish to contribute to the advancement of knowledge in sports law, policy, and governance.

The Journal of Sports Law, Policy, and Governance embraces an interdisciplinary approach, encouraging submissions that explore the intersections between law and other disciplines such as economics, sociology, ethics, and political science. By fostering dialogue and collaboration among scholars, policymakers, and practitioners, the journal aims to facilitate the exchange of ideas and foster the growth of the field. We invite you to explore the Journal of Sports Law, Policy, and Governance and engage with our publication's thought-provoking articles, case studies, and commentaries. Together, let us delve into the fascinating world of sports law, policy, and governance, and contribute to the development of a more informed and effective sports industry.

Published by

Centre for Sports Law, Business and Governance
Jindal Global Law School, O.P. Jindal Global University,
Sonipat Narela Road, Near Jagdishpur Village, Sonipat,

Haryana 131001.
<https://jgu.edu.in/csלבg/>

All rights reserved.

ISSN: Awaited

Copyright

© 2020 Jindal Global Law School, O.P. Jindal Global University, Haryana, India

Disclaimer:

All opinions expressed in JSLPG are those of the contributors. The views expressed by the contributors/authors are not necessarily endorsed by the Editorial Board, Centre for Sports Law Business and Governance, Jindal Global Law School, India. The Editorial Board, Centre for Sports Law Business and Governance, Jindal Global Law School, India, hereby disclaims any liability and responsibility for any errors or omissions in this publication. In the event of any binding defects, misprints, missing pages, etc., the publisher's liability is limited to replacing the defective copy.

All non-subscription requests for the Journal may be directed by email/post:

Faculty In-charge,
The Editorial Board,
Journal for Sports Law, Policy and Governance,
Centre for Sports Law, Business and Governance
Jindal Global Law School, O.P. Jindal Global University,
Sonipat Narela Road, Near Jagdishpur Village, Sonipat,
Haryana 131001.
<https://jgu.edu.in/csלבg/>
Email: csלבg@jgu.edu.in

Preferred Mode of Citation: Author name (2022) Article Title. Journal of Sports Law Policy and Governance 3(1):<Page No>.

FROM THE DESK OF THE EDITORIAL BOARD

CHAMPIONING THE CAUSE

The JSLPG has moved into the third year of its existence and to mark this momentous occasion, we are happy to bring forth this *unique* issue for our readers. In the past three years, JSLPG has traversed a sea of remarkable changes in its character, quality and leadership. From our humble origins in 2018, the foundational year of JSLPG that saw an effort of two tumultuous years finally coming to fruition with a small team of dedicated volunteers, to the glory heydays the Journal is witnessing right now, we have experienced all the highs and lows of operating a high-end quality-driven publication. The trials and tribulations of this small but enigmatic journey is a bright spot for all of us at JSLPG. Despite creating a ripple effect for the revolutionary growth of sports law in the country and achieving a diverse readership, JSLPG has always cherished its *not for profit* persona and continues to do so. This persona is our hallmark and drives us to value the worth of this JSLPG family more than the material gains that come with a paid project. As a natural corollary, our Journal has always reposed its faith on the astute leadership that operates it and the team has never failed to deliver. Though we all shared some mistakes and errors at our ends, there has been no looking back for the JSLPG till now. We eventually take this opportunity to honour the perseverance and assiduity of both our former and current members at the helm of affairs in JSLPG.

This issue of JSLPG is ubiquitous for two grand reasons. *Firstly*, this issue has been developed under the aegis of a newly-formed Student Board and Chairmanship of our Chief Editor, Prof. Shaun Star. *Secondly*, this issue is by far the most heterogeneous among the slew of our leading compositions. To delve in further, the current issue has a list of articles which cover almost the entire spectrum of issues related to sports law, policy and governance. We first begin *outside the playing field* and discuss sports spectators and the consequent liability for the act of hooliganism that revolves around spectatorship. We then move *on-field* and flesh out the issue of doping and sex-testing policies.

We have also tried to cover the latest issues related to sports issues both on and off the field in terms of advertising and the impact of *COVID-19* pandemic. We would have loved to see the Olympics in Tokyo this year as planned, but even though it could not go ahead, and keeping up with the spirit, we have included an article on *Olympics* and sponsorships. The impact of the pandemic, however, goes beyond the *Olympics* and it's crucial to discuss the possible financial and contractual ramifications arising from the pandemic as well. We did just that for our interested readers. Beyond the stadium, we have endeavoured through this issue to tap into the heart of the modern digital world. The last decade is a success story for the gaming sector and esports in particular. From multi-millionaire gaming kingpins like Faker to the mushrooming of esports tournaments, the esports industry is turning the tide of business interests in its favour. To start an impending foray in this digital schema of affairs, we have incorporated articles that deal with all sorts of ethical, policy-based and governance challenges in this sector. We have also touched upon a lesser talked of but a sensitive issue of political speech in sports, and look forward to evoking a healthy debate on the subject.

In toto, the current issue is the outcome of an exhaustive effort collated by our Editorial Team and its able members who have relentlessly worked under the supervision and encouragement of Mr MS Jadon. Mr Jadon deserves a special mention for pushing the publication ahead under the dark clouds of the pandemic. In the upcoming years, we further aim to expand our reach across countries with more international contributions and a bigger editorial and advisory board. The support received from all our well-wishers and NLUJAA for this issue also deserves a colossal mention. JSLPG would not have existed and thrived without it. Hats off to our team of Editors, Executive Board and Peer reviewers (including Guest Reviewers) for continuously supporting us in the venture. We also express our gratitude to the Patrons who have stood as a guiding light for the Journal.

To see all of you again in healthier times and the new Olympic Year, 2021.

Citius, Altius, Fortius

EDITORIAL BOARD,

JSLPG

TABLE OF CONTENTS

LONG ARTICLES

- 1. GENDERED BARRIERS IN THE GAMING INDUSTRY** 1

Tanya Singh

- 2. THE REQUIREMENT FOR TRANSFORMATION OF THE LOAN SYSTEM IN FOOTBALL: THE NEED TO CURB THE EXPLOITATION OF PLAYERS BY FOOTBALL CLUBS** 23

Hitesh Mallick, Nandighosh Karan Nanda, & Sidheswar Sahoo

- 3. CASHING IN ON THE ESPORTS PHENOMENON: INCREASING AWARENESS ON ETHICAL ISSUES AND GOVERNANCE CHALLENGES** 41

Achint Johri

SHORT ARTICLES

- 4. POLITICAL SPEECH IN SPORTS: A CASE FOR NON-PROHIBITION** 61

Anmol Jain

- 5. SPORTS SPONSORSHIP CONTRACTS AND THE PANDEMIC: ADDRESSING THE UNCERTAINTIES** 74

Mustafa Rajkotwala & Dhanishta Mittal

6. THE DISCRIMINATION AND INADEQUACY IN THE SEX-TESTING POLICIES EMPLOYED BY SPORTS AUTHORITIES 87

Rohan Mandal

7. SPECTATORIAL DUTY OF CARE IN SPORTS: FROM HOOLIGANISM TO GAME-DISRUPTION 102

Siddharth Saxena

ESSAYS

8. IMPACT OF A PANDEMIC ON THE SPORTING WORLD: ANALYZING POTENTIAL CONTRACTUAL DISPUTES IN SPORTS DUE TO THE SPREAD OF COVID-19 114

Angad Singh Makkar

9. THE IMPACT OF THE OLYMPICS ON AMBUSH MARKETING LAWS OF A HOST-NATION 125

Paras Marya

10. CHALLENGES TO THE ANTI-DOPING REGULATIONS IN ESPORTS 133

Pranav Bafna

11. GENDER VERIFICATION TEST: ANALYZING THE LEGAL RAMIFICATIONS ON WOMEN ATHLETES 145

Adeeti Singh

GENDERED BARRIERS IN THE GAMING INDUSTRY

Tanya Singh

Lawyer, Bar Council of Karnataka

tanyasingh962@gmail.com

ABSTRACT

As of 2019, there are an estimated 2.5 billion gamers globally. Roughly half of all gamers are female. Despite the figures, there is a serious underrepresentation of female gamers in the professional gaming and game development community. It is thus important to examine the underlying causes hindering equally capable female gamers and game developers from pursuing a serious career in gaming, at par with their male counterparts. In this article, the author examines the impact of the cultural association of games with the male demography, stereotypes and structural barriers limiting women from realizing their full potential, female representation in video games and workplace, pervasive misogyny and sexual harassment of women across all levels in the industry, and lastly, the steps that can be taken to better the status quo in favour of women.

KEYWORDS

Female gamers, Esports, Video Games, Sexism.

1. INTRODUCTION

“‘You’re never going to be good at this game.’ ‘You’re always going to lose to a dude’. ‘You’re ugly.’ ‘You’re fat.’ ‘Go back to the kitchen.’ ‘You will die in the first ten seconds.’ or ‘You’re a fake gamer.’”¹

These are among the lighter sexist remarks amidst other forms of serious online abuses faced by female gamers. Despite this kind of abuse being a perennial problem in the gaming industry, a horde of such negative experiences and interactions encountered by female gamers and game developers go unnoticed. Evidently then, a female gamers’ experience remains one of the most

¹ Liz Clarke, *Silencing the haters: Female gamers compete in a space where basic rules of civility are lacking*, WASHINGTON POST (December 24, 2019), <https://www.washingtonpost.com/graphics/2019/sports/toxic-online-culture-women-esports/>.

under-researched areas². The ‘gamer experience’ that people around the world resonate with is singularly that of male gamers’.³ The tragically high levels of targeted sexual harassment, doxing,⁴ death threats, rape threats, bomb threats, and hostility towards women in the gaming industry is rarely something a male gamer will experience.⁵ Such toxic behavioural patterns seen in male gamers against their female counterparts have been overlooked to the point that it has now become a prevalent culture in the industry.⁶

The present state is saddening because the gaming industry was originally conceptualized to provide family entertainment, gainful employment, honing of cognitive skills, game development skills, technological advancement and for instilling the spirit of sportsmanship for everyone without exceptions. Studies suggest that the sexist behaviour portrayed by male gamers aligns with their fear of disruption of their established positions in the social hierarchy. Thus, by lashing out and bullying female gamers, male gamers tend to prevent women from rising above them, maintaining the status quo. This behaviour is further confirmed in a 2015 psychological study⁷ conducted by Michael Kasumovic and Jeffrey Kuznekoff, which showed that male gamers with less skill respond with sexist behaviour towards female gamers simply because “*they cannot lose to a woman*” or cannot risk “*their masculinity being challenged by a woman*”. It was found in the same study that the same lower-skilled male gamer does not respond with hostility if a higher skilled player is a male, because losing to a man is acceptable but losing to a woman is not!

This psychology of male gamers forms the basis of the negative social interactions that women in the gaming world face on a regular basis. Such exposure leaves a strong psychological impact on women, actively dissuading them from being part of the industry, and immortalizing the toxic ‘video games are not for women’ cycle.

² Lavinia McLean & Mark D Griffiths, *Female Gamers’ Experience of Online Harassment and Social Support in Online Gaming: A Qualitative Study*, INTERNATIONAL JOURNAL OF MENTAL HEALTH & ADDICTION, 970–994 (July 23, 2018).

³ Lopez-Fernandez et al, “*Female Gaming, Gaming Addiction, and the Role of Women within Gaming Culture: A Narrative Literature Review*”, 10 FRONTIERS IN PSYCHIATRY, 454 (July 10, 2019).

⁴ Ryan Goodrich, *What is Doxing?*, TECHNEWS DAILY (April 2, 2013), <https://web.archive.org/web/20141029095609/http://www.technewsdaily.com/17590-what-is-doxing.html>.

⁵ JH Kuznekoff & LM Rose, *Communication in multiplayer gaming: Examining player responses to gender cues*, NEW MEDIA & SOCIETY, 541–556 (2013).

⁶ Mary Elizabeth Ballard & Kelly Marie Welch, *Virtual Warfare: Cyber bullying and Cyber-Victimization in MMOG Play*, 12(5) GAMES AND CULTURE, 466-491 (2017).

⁷ Michael Kasumovic & Jeffrey Kuznekoff, *Insights into Sexism: Male Status and Performance Moderates Female-Directed Hostile and Amicable Behaviour*, 10(9): e0138399 PLOS ONE (July 15, 2015).

2. WHO IS A REAL GAMER?

A rough historical context in the changing audience of the gaming industry gives valuable insight into understanding the start of the cultural association of gaming with male gamers. As pointed by Krotoski,⁸ towards the start of the video gaming industry, games were aimed at everyone - men and women, old and young alike, seen as a source of family entertainment. However, that changed post the video game crash or the Atari crash of 1983.

It is worth mentioning that Atari controlled 80 % of the videogame market in 1982. Its crash was a result of various factors like competition from a growing home computer game market, the release of its glitch-ridden game Pac-Man resulting in lower consumer confidence, and its own business decisions.⁹ Following the crash, there was a mass burial of thousands of Atari's unsold video game cartridges of games like Extra-Terrestrial, Space Invaders, Centipede, and Asteroid in Alamogordo landfill in New Mexico.¹⁰

Post this industry-wide debacle, Japanese Nintendo revived the North American video game industry by releasing their Famicom (Family Computer) console, the Nintendo Entertainment System (NES) in 1985. As a foolproof method to avoid such a crash from happening again, Nintendo ran background research to accurately target the demography interested in playing their games. It accordingly aimed its products at children, foremost boys¹¹, to find a more secure and economically profitable audience. This shift in marketing and production strategy changed ideas about who the consumers of digital games were.¹² Thus, in the 1980s and the early 1990s, video games were considered a boy's toy and the game developers were predominantly men, leading to marginalization of women¹³ and birthing a stereotype that thrives till today.

⁸ Aleks Krotoski, *Socialising, subversion and the Self: Why women flock to Massively Multiplayer Online Role Playing Games*, in DIGITAL GAMEPLAY: ESSAYS ON THE NEXUS OF GAME AND GAMER 174-188 (Nate Garrelts ed., 2005).

⁹ Ryan Lambie, *The 1983 videogame crash: Could it happen again*, DEN OF GEEK (Feb. 20, 2013), <https://www.denofgeek.com/games/the-1983-videogame-crash-what-went-wrong-and-could-it-happen-again/>.

¹⁰ Ted Trautman, *Excavating the Video-Game Industry's Past*, THE NEW YORKER (Apr. 29, 2014), <https://www.newyorker.com/business/currency/excavating-the-video-game-industrys-past>.

¹¹ Tracey Lien, *No girls allowed*, POLYGON (Dec. 2, 2013), <https://www.polygon.com/features/2013/12/2/5143856/no-girls-allowed>.

¹² Lina Eklund, *Who are the casual gamers? Gender tropes and tokenism in game culture*, in SOCIAL, CASUAL AND MOBILE GAMES: THE CHANGING GAMING LANDSCAPE 15-30 (Tama Leaver & Michele A Wilson ed., 2016).

¹³ Leslie Haddon, *Electronic and Computer Games: The History of an Interactive Medium*, 29(2) SCREEN 52–73(1988).

Earlier, the term ‘gamer’ evoked the image of an “*isolated, pale-skinned teenage boy [sitting] hunched forward on a sofa in some dark basement space, obsessively mashing buttons*”¹⁴, however, this stereotype is slowly fading¹⁵ with the influx of a variety of games and gamers of all ages and backgrounds. A quick look into the meaning of the word ‘gamer’ will introduce an individual to the varied prevalent classifications within the term, for example, Core gamer, Hardcore gamer, Casual Gamer, Newbie, Gamer girl/Girl gamer/Female gamer, Professional gamer and Gaymer.

Broadly, these classifications are based on the player’s gender, type of games played, level of complexity, choice of the gaming device, level of competition, the amount of time spent playing the game, and awareness of development in hardware and software. Women are typically stereotyped into the ‘casual gamers’ category, as they are only believed to play easy and non-competitive games like *Candy Crush* on inferior gaming devices like mobile phones.¹⁶ Women are not perceived to possess the skill required to play difficult games to be considered a core/hardcore gamer. Due to such stereotypes around gaming, women are ridiculed when they self-identify as a ‘gamer’. Thus, a person who plays video games cannot easily self-identify as a gamer simply because the myriad classifications within the term have systematically evolved to be more exclusive than inclusive.¹⁷

The gamer identity itself is influenced by multiple external factors like parents, societal framing of gaming, self-perception, and institutionalized game marketing.

“Social Identity Theory¹⁸ posits that groups provide a sense of belonging to an individual. Furthermore, when individuals identify with a group, a process of in- and out-grouping begins. Individuals who belong to the same group are favoured over those who do not belong to the group. These effects can be positive for

¹⁴ Dmitri Williams, *A brief social history of game play*, PROCEEDINGS OF THE 2005 DiGRA INTERNATIONAL CONFERENCE: CHANGING VIEWS – WORLDS IN PLAY. VANCOUVER, CANADA: DIGITAL GAMES RESEARCH ASSOCIATION (Jan. 2005).

¹⁵ R Kowert, R Festl, & T Quandt, *Unpopular, overweight, and socially inept: Reconsidering the stereotype of online gamers*, 17(3) CYBERPSYCHOL. BEHAV. SOC. NETW. 141–146 (2014).

¹⁶ Benjamin P. et al, *What is a True Gamer? The Male Gamer Stereotype and the Marginalization of Women in Video Game Culture*, 76 SEX ROLES 421- 435 (2016).

¹⁷ Mike Fahey, *Is Gamer a Dirty Word*, KOTAKU (Jan 14, 2011), <https://kotaku.com/is-gamer-a-dirty-word-5733811>.

¹⁸ H. TAJFEL, HUMAN GROUPS AND SOCIAL CATEGORIES: STUDIES IN SOCIAL PSYCHOLOGY 255 (Cambridge University Press, 1981).

facilitating in-group interactions and cooperation but potentially negative as the out-group people may be stereotyped and be treated unfairly.”¹⁹

This theory helps to explain the reason behind the hostility meted out to women, people of colour, and the LGBTQ community historically understood to be the out-group in the gaming culture. The out-group cannot be considered ‘*true gamers*’ by the in-groups for the simple reason that the term remains strongly associated with being male²⁰. And for this very reason, it is hard for women to visibly self-identify as gamers, a term exclusively reserved for an all-boys club for the past 30 years.

3. MISOGYNY IN THE INDUSTRY

Misogyny and hostility perpetuate itself on different levels within the gaming industry. Some of the most visible forms of misogyny in the industry can be seen in the representation of female characters in video games, online hate mobs exclusively targeting women, gender pay gap and the systematic exclusion of women from game developing roles.

3.1. REPRESENTATION OF FEMALE CHARACTERS IN VIDEO GAMES

The Electronic Entertainment Expo or E3 is the world’s premier event for computer and video games. In 2015, the event celebrated women taking stronger roles, heralding the rise of women gamers. Big companies like Sony and Microsoft released games like *ReCore* and *Horizon: Zero Dawn* respectively, with female protagonists. On the surface, it looked like the change had arrived. However, Anita Sarkeesian and Carolyn Petit of an independent non-profit organization called the Feminist Frequency attended all the E3 events from the year 2015 to 2019 and conducted a statistical analysis to accurately record all the games featuring female protagonists to understand the change in representation, if any.²¹ They found that the representation only got worse from the year 2015 to 2019. The percentages of games featuring female protagonists recorded were: 2015 – 9%, 2016 – 3%, 2017 – 7%, 2018 – 8%, 2019 – 5%,

¹⁹ William T. Hove et al, *Concerning gamer identity: An examination of individual factors associated with accepting the label of gamer*, 24 FIRST MONDAY 3 (2019).

²⁰ Adrienne Shaw, *What is video game culture?* *Cultural Studies and Game Studies*, 5(4) GAMES AND CULTURE 403–424 (2010).

²¹ Anita Sarkeesian, Carolyn Petit, *Female Representation in Videogames Isn't Getting Any Better*, WIRED (Jun. 14, 2019), <https://www.wired.com/story/e3-2019-female-representation-videogames/>.

of the total number of games featured. These figures highlight the rigidity towards change and the non-inclusive nature of the gaming industry.

In 2013, ‘The Best Show in the Universe’ channel’s vlogger on YouTube, Maddox said “*video games are created by men for men*”²² as a justification towards the unfair portrayal of female characters in video games, either as a *damsel in distress (Princess Peach/ Zelda)* or a *hypersexualized (Lara Croft)* character, if at all. Maddox’s two-minute justification emphasizes that *a fair representation of women in media is not a man’s duty because men do not identify themselves with females or their point of view*. His statement is reflective of the idea that expanding a female character’s scope from her traditional portrayal as an object of sexual fantasy is a disruption or unnecessary interference in the gaming industry, limiting its real fan base (male) from fully enjoying video games in the hands of interlopers (female gamers).

This vituperative thought process often sums up the mindset behind the blatant objectification of female characters in video games. Keeping this audience in mind, game developers make impractical armour/clothing for female characters, resulting in their sexualization and portray them as subordinates²³ to male characters, which often need to be saved or romanced. Thus, effectively denying any form of independent existence to a female character in the game.

As pointed out by Anita Sarkeesian,²⁴ developers of games like ‘Halo Universe’ or ‘Metal Gear Solid V: The Phantom Pain’ provided very bizarre rationale behind the sexualization of their female characters in the games. For instance, in the Halo Universe series, *Cortana*, the super-intelligent Artificial Intelligence (AI) companion, is completely naked as opposed to her male counterpart, who wears clothes. Halo franchise director Frank O’Connor reasoned that:

“One of the reasons she does it is to attract and demand attention. And she does it to put people off so they are on their guard when they are talking to her and that she has the upper hand in those conversations. It’s kind of almost like the opposite of that nightmare you have where you go to school in the nude, and you’re terrified

²² Maddox, *Quick Rant- The solution to sexism in video games!*, THE BEST SHOW IN THE UNIVERSE: YOUTUBE (Jun. 7, 2013), <https://www.youtube.com/watch?v=MpJGkG1g-Lk>.

²³ Teresa Lynch et al, *Sexy, Strong, and Secondary: A Content Analysis of Female Characters in Video Games across 31 Year*, 66(4) JOURNAL OF COMMUNICATION 564-584 (2016).

²⁴ Anita Sarkeesian, *Lingerie is not Armor*, FEMINIST FREQUENCY (Jun. 6, 2016), <https://feministfrequency.com/video/lingerie-is-not-armor/>.

and embarrassed. She's kind of projecting that back out to her audience and winning intellectual points as a result."²⁵

Similarly, the developers of 'Metal Gear Solid V: The Phantom Pain' spun a ridiculous story about the game's female characters' past to justify the sexualization as essential to the game as "*she is breathing through her skin and clothing would suffocate her*".²⁶

As part of her doctoral project,²⁷ Teresa Lynch compiled 571 playable female characters from 1989-2014 to examine them for signs of hypersexualization, which included nudity, over-enlarged breasts or hips, and unrealistically narrow waists. It was found that the sexualization of female characters peaked in 1995 and then declined, but games still objectify female characters and feature them more often in secondary roles.²⁸

Lara Croft, the most famed female character from the Tomb Raider game series blew up the gaming culture, but predominantly with her sex appeal. Her oversized bosom was a result of a coding error, but the error was appreciated amongst the male game developers of the Tomb Raider franchise and thus kept in the final edit.²⁹ Lara Croft's sexualized character was both revered and marred with many legal battles and sexist ad campaigns. One famous ad campaign called "*where the boys are*"³⁰ plainly suggested that Lara Croft was a commodity solely for the consumption of straight male gamers. Such was the sexualization of *Lara Croft* that the character found its name and game logo printed next to nude models in the magazine by Playboy Enterprises. Ultimately a British High Court ruled in favour of the Tomb Raider trademark owners - Core Design Ltd, and barred the magazine from using the game logo as Lara's 'squeaky-clean image' would be 'tarnished for all time' by any association with soft-core pornography.³¹ In the same vein, it is worth mentioning that Lara Croft's character has seen a tremendous transformation in her appearance with more realistic body proportions

²⁵ Pete Haas, *Why Cortana Is Naked In Halo*, CINEMABLEND, (Oct. 30, 2015), <https://www.cinemablend.com/games/Why-Cortana-Naked-Halo-95967.html>.

²⁶ ANITA SARKEESIAN, *supra* note 24.

²⁷ TERESA LYNCH, *supra* note 23.

²⁸ Lora Strum, *Study tracks 31-year history of female sexualization in video games*, PBS NEWS HOUR (Jul. 8, 2016), <https://www.pbs.org/newshour/science/study-tracks-31-year-history-of-female-sexualization-in-video-games>.

²⁹ Aja Romano, *Why we've been arguing about Lara Croft for two decades*, VOX (Mar. 17, 2018), <https://www.vox.com/culture/2018/3/17/17128344/lara-croft-tomb-raider-history-controversy-breasts>

³⁰ Tomb Raider Empire, *Tomb Raider 2 - Commercial - where the boys are? Long version*, YOUTUBE (Sep. 2, 2012), https://www.youtube.com/watch?v=4ExFpdv_0C8&feature=youtu.be.

³¹ Vikram Dodd, *Lara Croft saved from Playboy*, THE GUARDIAN (Jul. 15, 1999), <https://www.theguardian.com/world/1999/jul/15/vikramdodd>.

clothing, and armour since the change in the Tomb Raider franchise's game developers (Crystal Dynamics) in 2013.³²

As people are slowly becoming conscious of the issues faced by women in the gaming industry, they are coming forward with their support in effective ways. For instance, the Warehouse Group³³ in New Zealand stopped the sale of R18³⁴ games, their decision was influenced by the graphic sex scenes and extreme violence towards women in Grand Theft Auto (GTA) V. Similarly GTA V was taken off the racks³⁵ from the Australian branch of mega-retailer Target after a petition³⁶ led by former sex workers demanding its removal was signed by 48,142 supporters. GTA V provides the players with an array of options to kill female sex workers after engaging in various sexual acts with them. The premise behind the mindless killing is to steal the money paid to the sex workers after engaging in their services. The methods of killing the sex workers include: punching her unconscious, killing her with a machete, bat or guns, or running her over with a car, and even setting her alight.

In an age where gamers take cultural cues and influences from games, building tolerance towards sexually violent games and viewing them as 'normal' or playing them in the name of 'entertainment' is a very disturbing trend that is capable of leaving an irreversible impact on the society.

3.1.1. IMPACT ON FEMALE GAMERS

The blatant objectification of female game characters points towards a deep-rooted problem in the gaming industry i.e., the association of sexualization with power and meaningfulness in female characters. The idea that women can only be celebrated or deemed desirable by a

³² Rozanne Els, *The Evolution of Lara Croft*, VULTURE (Mar. 13, 2018), <https://www.vulture.com/2018/03/lara-croft-rebooted-the-tomb-raider-is-back-in-new-movie.html>.

³³ Jamie Gray, *The warehouse take R18 entertainment off the shelves*, NZ HERALD (Nov. 24, 2014), https://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=11363676.

³⁴ New Zealand, *Classification Labels*, <https://www.classificationoffice.govt.nz/find-ratings/new-zealands-classification-labels/>.

³⁵ Erik Kain, *Target Bans 'Grand Theft Auto V' Sales In Australia*, FORBES (Dec. 3, 2014), <https://www.forbes.com/sites/erikkain/2014/12/03/target-bans-grand-theft-auto-v-sales-in-australia/#1861fe3f66fa>.

³⁶ *Target: Withdraw Grand Theft Auto 5 – this sickening game encourages players to commit sexual violence and kill women*, CHANGE.ORG (2014), <https://www.change.org/p/target-withdraw-grand-theft-auto-5-this-sickening-game-encourages-players-to-commit-sexual-violence-and-kill-women>.

straight male if they are sexualized. This idea impacts female gamers negatively and reinforces itself even in the real world.

In some studies, it has been shown that as a result of such exposure, female gamers report self-objectification and consequently perceive low levels of self-efficacy.³⁷ Another study suggests that female gamers tend to suffer from stress and annoyance due to the unsuitability of video games on offer and its departure from something they would naturally select to play. This would suggest that women play less than men simply due to annoyance that video games are not developed with female audiences in mind, as much as their male counterparts.³⁸ Lack of role models is one of the important factors perpetuating the exclusion of female gamers in the gaming industry.

3.2.MISOGYNIST ONLINE MOVEMENTS

There have been a few prominent misogynist online movements in the gaming community that were an affront to women's dignity, worth, and capabilities. It brought to fore the inherent sexism and toxicity in the male-dominated video gaming industry. Quinspiracy or #Gamergate and #Notmybattlefield are noteworthy movements in this respect.

3.2.1. QUINSPIRACY OR #GAMERGATE, 2014

Masked as a campaign against corruption in video journalism, Quinspiracy was a faceless online campaign that systematically harassed, heckled, abused, and doxxed several female game developers and outspoken feminist women³⁹, threatened by the widening horizons and cultural diversification in the gaming sphere. The three main targets of this hate mob were *Zoe Quinn*,⁴⁰ *Anita Sarkeesian*⁴¹, and *Brianna Wu*.

³⁷ Meghan Gestos et al, *Representation of women in video games: a systematic review of literature in consideration of adult female wellbeing*, 21(9) CYBERPSYCHOL. BEHAV. SOC. NETW. 535-541 (Sep. 1, 2018).

³⁸ Christopher J. Ferguson & M. Brent Donnellan, *Are Associations between "Sexist" Video Games and Decreased Empathy Toward Women Robust? A Reanalysis of Gabbiadini et al.*, 46(12) J YOUTH ADOLESC. 2446-2459 (2017).

³⁹ Aja Romano, *What we still haven't learned from Gamergate*, VOX (Jan. 20, 2020), <https://www.vox.com/culture/2020/1/20/20808875/gamergate-lessons-cultural-impact-changes-harassment-laws>.

⁴⁰ Sarah Jeong, *When the Internet chases you from your Home*, THE NEW YORK TIMES (Aug. 15, 2019), <https://www.nytimes.com/interactive/2019/08/15/opinion/gamergate-zoe-quinn.html>.

⁴¹ Emily Van Der Werff, *#Gamergate: Here's why everybody in the video game world is fighting*, VOX (Oct. 13, 2014), <https://www.vox.com/2014/9/6/6111065/gamergate-explained-everybody-fighting>.

Zoe Quinn, a game developer, was at the forefront of this harassment campaign for developing a game called *Depression Quest*⁴² in 2013. Although her game received good reviews⁴³ in the gaming media, she faced a backlash from faceless anonymous attackers on various internet forums. The backlash was a result of the game being a departure from the usual videogame formats in that there was nothing traditionally ‘fun’ or ‘entertaining’ and no provision of victorious endings in the game. Quinn developed the game with an aim to promote mental health discussion based on her own experiences with depression. However, this movement took an ugly turn and a faceless mob gathered on forums like *WordPress*, *4chan*, *8chan*, and *Reddit*, starting an online revolution against Quinn. The Quinspiracy hate mob gained further momentum when *Full Metal Jacket* actor Adam Baldwin posted two video links on his Twitter handle in support of Quinspiracy with a hashtag, *#Gamergate*.⁴⁴ Quinspiracy movement then morphed itself into Gamergate. The harassment and life threat by Gamergate intensified to the point that it chased Quinn away from her home for her safety.

Anita Sarkeesian, is the founder of Feminist Frequency,⁴⁵ a not-for-profit educational organization that analyses modern media’s relationship to societal issues such as gender, race, and sexuality. Around the same time that Quinspiracy was boiling over, Anita released a new video in her video series *Tropes v. Women* which criticizes the stereotypical and negative roles of female characters in video games and became another prominent target of the hate mob. She also faced harassment by the faceless mob in a similar fashion and was emailed images of herself being raped by video game characters.⁴⁶ An interactive online game was developed by the mob called ‘Beat up Anita Sarkeesian’ which allowed players to beat her until she bruised. She was also compelled by Gamergate to flee her home. Lastly, Brianna Wu, an independent game developer, was another prominent target engulfed by Gamergate. Wu in one of her weekly podcasts criticized the sexualization of women in games and disapproved the normalization of such treatment around the same time as Gamergate. The mob took note of it

⁴² DEPRESSION QUEST, <http://www.depressionquest.com/>.

⁴³ Phil Owen, *4 Video games that help you understand and deal with your depression*, KOTAKU (Apr. 19, 2013), <https://kotaku.com/4-video-games-that-help-you-understand-and-deal-with-yo-473476131>.

⁴⁴ ALISON NOVAK & IMAANI JAMILLAH EL-BURKI, *DEFINING IDENTITY AND THE SCOPE OF CULTURE IN THE DIGITAL AGE* 129-130 (IGI Global 2016).

⁴⁵ FEMINIST FREQUENCY, <https://feministfrequency.com/>.

⁴⁶ KARLA MANTILLA, *GENDERTROLLING: HOW MISOGYNY WENT VIRAL* 72 (Praeger 2015).

and along the same lines as Anita and Quinn, sent her rape and death threats, made her private information public, and forced her out of her own home.⁴⁷

3.2.2. #NOTMYBATTLEFIELD, 2018

America's second-largest video gaming company, Electronic Arts' or EA released a trailer of their Second World War-set game series, Battlefield V. The trailer drew flak from gamers and grew into a Twitter movement under the hashtag #NotMyBattlefield because it featured too many female characters as soldiers. Online petitions were also signed to reverse the new change in the game. Twitter critics complained of 'historical inaccuracy', 'revising history', 'political correctness of EA', 'disrespect towards millions of men that died', 'making the game unrealistic', and 'ignoring the fan base', as the actual reason behind their rage. According to the critics, women played a *minuscule role* in combat during WW2 and were mostly involved in the role of nurses, factory workers, and other 'logistically vital' fields but were never in the front line fighting the actual battle. They argued that the minority case (female troops) should not be expounded to outrageous proportions. As historically inaccurate⁴⁸ and uninformed as these opinions can be, this movement was yet another show of mindless and baseless resistance against women in the gaming industry.

3.2.3. ONLINE MOVEMENTS DEMANDING LEVEL PLAYING FIELD

Amidst the negativity, there have also been many positive online movements in the gaming world demanding equality and fairness from time to time. For instance, #IreasoWhy⁴⁹ trended for many months on Twitter in 2012 where women working in the gaming industry tweeted about the harassment they faced from their male colleagues and paved way for discussion panels to highlight and address these issues. Similarly, #INeedDiverseGames⁵⁰ movement began as a backlash against games solely pandering to white male players and #Gamergate. #Everyone's Battlefield⁵¹ also emerged in response to the #NotMyBattleField movement.

⁴⁷ Brianna Wu, *A moment that changed me - Gamergate*, THE GUARDIAN (Aug. 21, 2015), <https://www.theguardian.com/commentisfree/2015/aug/21/gamergate-sexism-games-industry-women-trolls>.

⁴⁸ Christina Roeckenwagner, *The Invisible Soldiers Women in War II, Article 7*, UCN (2018), <https://www.ucn.ca/sites/mftn/spring2018/Pages/Article-7.aspx>.

⁴⁹ Mary Hamilton, *#IreasoWhy: the hashtag that exposed games industry sexism*, THE GUARDIAN (Nov. 28, 2012), <https://www.theguardian.com/technology/gamesblog/2012/nov/28/games-industry-sexism-on-twitter>.

⁵⁰ Emma Boyle, *Interview: Tanya DePass, creator of #INeedDiverseGames*, GADGETTE (Oct. 23, 2015), <https://www.gadgette.com/2015/10/23/interview-tanya-depass-creator-of-ineeddivegames/>.

⁵¹ Ravi Sinha, *Battlefield 5 Community Manager Says "This is Everyone's Battlefield"*, GAMINGBOLT (May 27, 2018), <https://gamingbolt.com/battlefield-5-community-manager-says-this-is-everyones-battlefield>.

3.3.FEMALE GAME DEVELOPERS

According to a survey by Statista⁵² in 2019, only 24% game developers out of the total number who responded to the survey worldwide, were women. This is an abysmally small number considering the percentage of male game developers' demographic, making up for an overwhelming 71% of all game developers worldwide. Game development is yet another sphere of the gaming industry which is difficult for any non-white, non-heterosexual or female entity to permeate through.

Artist Jane Ng in the book *Women in Game Development: Breaking the Glass Level-Cap (2016)*, highlights that her years of experience were often overlooked and noted how “well-meaning professionals could still perpetuate a sexist culture where women were continuously put through trials to prove their worth.”⁵³ So, Gamergate controversy summed up was nothing but an attack against a female game developer who developed a game moving away from the usual narratives of action and racing favoured by the straight male gamers.

Notably, a vicious circle of underrepresentation also exists in the industry, where fewer people of colour and women see themselves represented and as a result are less likely to apply for those jobs.⁵⁴ This toxic cycle continues to discourage women from even applying for jobs, lowering their chances of being hired or promoted. Thus, while the number of female gamers continues to grow exponentially, female game developers are seeing a slow rise in number.

Among the factors dissuading women from pursuing careers in the gaming industry, the gender pay gap remains on top of the list. Companies like Sony in their UK Gender Pay Gap Report 2018⁵⁵ have noted that the gender pay gaps are particularly prevalent in STEM (Science, Technology, Engineering, and Mathematics) sectors because of the significantly higher number of men working in the industry. The reasons regarding the imbalance in the STEM industry are pointed towards the minuscule percentage of women enrollment in STEM courses leading to

⁵² Christina Gough, *Distribution of game developers worldwide from 2014 to 2017 by gender*, STATISTA (2018), <https://www.statista.com/statistics/453634/game-developer-gender-distribution-worldwide/>.

⁵³ *Women in Game Development: Breaking the Glass Level-Cap*, 64, (Jennifer Brandes Hepler ed., CRC Press, 2017).

⁵⁴ Chella Ramanan, *The video game industry has a diversity problem – but it can be fixed*, THE GUARDIAN (Mar. 2017), <https://www.theguardian.com/technology/2017/mar/15/video-game-industry-diversity-problem-women-non-white-people>.

⁵⁵ *2018 UK Gender Pay Gap*, SONY INTERACTIVE ENTERTAINMENT EUROPE (2019), https://www.playstation.com/en-gb/content/dam/content/dam/territories/en-gb/SIEE/UK_Gender_Pay_Gap_2018_FINAL.pdf.

fewer women entering STEM-related careers and, as a result, fewer women in line for leadership positions in later years. Eileen Pollock, a professor of creative writing at the University of Michigan, throws light on the struggle that young girls and women go through while trying to study subjects such as physics and mathematics. She argues that the lack of social conditioning, encouragement and paucity of opportunities prove to be the major reasons for the absence of women in STEM fields and not unfounded biological excuses such as the presence of an extra 'X' chromosome.⁵⁶

A survey⁵⁷ statistic as of June 2018 presents the mean salary (sum of every employee's hourly rate of pay divided by the total number of employees) of employees in the game industry worldwide, broken down by gender at \$51.75 thousand for male employees, while in comparison their female counterpart earned a mean salary of \$46.7 thousand (In US Dollars). This gap is caused due to a lack of female representation in the senior levels and well-paid disciplines. Another underlying reason for the lack of female representation in the senior leadership positions at workplaces can be attributed to the fact that women in their later twenties are primarily and disproportionately responsible for childcare responsibilities at home and hence are more likely to choose homely duties over job promotions.⁵⁸

4. ESPORTS AND WOMEN

Esports or professional and competitive video gaming has seen immense popularity in the last decade in terms of revenue, participation, and viewership, turning itself into a billion-dollar industry.⁵⁹ This growth in membership and viewership is only going to peak with better accessibility to the internet infrastructure and the rampant development in technology, graphics and hardware around the world.

However, it does remain a matter of concern that despite women making up for half the gamers in the world one is hard-pressed for even a dozen female gamers' names in the professional

⁵⁶ Eileen Pollack, *Why Are There Still So Few Women in Science?*, THE NEW YORK TIMES MAGAZINE, (Oct 3, 2013), https://www.nytimes.com/2013/10/06/magazine/why-are-there-still-so-few-women-in-science.html?pagewanted=all&_r=1&.

⁵⁷ Christina Gough, *Average salaries in the games industry worldwide as of June 2018, by gender*, STATISTA (Sep 11, 2018), <https://www.statista.com/statistics/882946/games-industry-salaries-by-gender/>.

⁵⁸ Jayita Poduval & Murali Poduval, *Working Mothers: How Much Working, How Much Mothers, And Where Is The Womanhood*, 7(1) MENS SANA MONOGR 63–79 (2009).

⁵⁹ James Ayles, *Global Esports Revenue Reaches More than \$1 Billion as Audience Figures Exceed 433 Million*, FORBES (Dec. 3, 2019), <https://www.forbes.com/sites/jamesayles/2019/12/03/global-esports-revenue-reaches-more-than-1-billion-as-audience-figures-exceed-433-million/#c9c0a7313298>.

gaming community. The reasons for it are lack of role models, the fear of sexism, dearth of supportive institutional structures, and non-perception of women as a ‘target group’ of the gaming industry. Like any other sport, women teams in Esports do not receive the same coverage as the men’s team, and not due to lack of skill or physical disadvantage.

Realizing these challenges, many organizations have launched women’s-only events, and clubs like *Singularity*, *Counter Logic*, and *Gen.G* have aggressively added all-female teams to their rosters to spur women’s participation.⁶⁰ Further, women’s-only professional circuits have evolved to encourage women to play without the fear of discrimination.

4.1. ALL WOMEN ESPORTS TOURNAMENTS: PROS & CONS

Female-only esports tournaments took off as a stop-gap effort to “*provide a platform that offers opportunities for women to grow and develop their competitiveness in esports.*”⁶¹ They provide a stepping stone for women to participate in games without automatically comparing themselves with the opposite sex and judging their capability as a gamer. The participation of women has seen growth and representation due to such initiatives.

However, Female-only-leagues should not be seen as the only answer to solving the gender problem. For better representation, the goal should be to enable all-women teams to participate in all types of tournaments including coed tournaments and not segregate an already segregated community.

The gender pay gap also remains a persistent problem in Esports. Out of the 500 top esports earners, only one woman, *Scarlett*, a *Starcraft 2* champion, broke in at rank 301⁶² with \$296,000 earnings, in comparison to the winner, *KuroKy* with \$4.1 mil in earnings.

⁶⁰ Luke Winkie, *Women-Only Esport Competitions Are on the Rise — But Where’s the Money*, ONE ZERO (Jun. 21, 2019), <https://onezero.medium.com/women-only-esport-competitions-are-on-the-rise-but-where-s-the-money-35316acdebc6>.

⁶¹ Jay Castello, *Women-only e-sports events are building toward a future where they’re unnecessary*, THE VERGE (Oct. 22, 2019), <https://www.theverge.com/2019/10/22/20925850/girl-gamer-esports-festival-madrid-league-of-legends-fortnite-overwatch>.

⁶² Ali Jones, *Only one female esports player makes it onto the list of the top 500 earners*, PC GAMES (Sep. 10, 2019), <https://www.pcgamesn.com/starcraft-ii/top-earning-female-esports-players>.

Dignitas Female has been one of the most successful esports women's teams on the planet⁶³. Yet after all their wins in prestigious all-women tournaments like 2018's *GIRLGAMER Esports Festival*, 2019's *Copenhagen Games*, and *Intel Challenge Katowice* in 2019 and 2018, their total earning amounts to \$65,524, a fraction of what they would make for similar victories in coed tournaments. The sponsors are relatively fewer for all-women sports tournaments and hence the prize money in such events. The all-women tournaments themselves are far and few in between and resultantly female esports gamers have to take on side jobs to sustain themselves as opposed to male gamers who can make a living off of professional gaming.

Thus, there is a strong need to balance out the representation of women and the gender pay gap while simultaneously fighting against the stereotypes that work against female gamers.

This stereotype plays out itself even when female gamers are being signed in teams for gaming leagues. Managers of many esports teams avoid hiring non-male players because they draw more flak than encouragement in doing so. Signing women in professional gaming are seen as a 'PR stunt' or a 'fake show of diversity' and so teams like to steer clear of such hurdles⁶⁴. The subtext is that hiring female players in professional gaming is seen as nothing more than a sort of tokenism for improving diversity with an underlying implication that they lack the requisite skills of a good player.

5. SEXUAL HARASSMENT OF WOMEN IN GAMING

In a survey⁶⁵ conducted amongst 388 female gamers, it was found that 57% of female gamers experienced harassment while playing online games after revealing their gender. Sexual harassment in gaming is a form of Cyber-bullying. It is understood as unwelcome sexual advances or other conduct that targets someone based on their sex (inclusive of gender harassment) in the form of making suggestive or discriminatory comments, rape jokes, death threats, rape threats, and sexual coercion. It takes place over digital devices like mobile phones, computers, laptops, tablets, etc. through online chat forums, social media websites (Twitter,

⁶³ Shlomo Sprung, *Meet Team Dignitas CS:GO Fe, The All-Female Gaming Team Taking the Esports World by Storm*, FORBES (Jul. 3, 2019), <https://www.forbes.com/sites/shlomosprung/2019/07/03/meet-team-dignitas-csgo-fe-the-all-female-gaming-team-taking-the-esports-world-by-storm/#5b8403ec72b4>.

⁶⁴ Ashley Oh, *An Overwatch Women's League isn't the answer*, POLYGON (Jan 18, 2018), <https://www.polygon.com/2018/1/18/16896858/overwatch-league-women-esports-sexism-geguri>.

⁶⁵ *Women in Esports: Exploring Gender Inequality in Esports Participation and Viewership*, CASINO.ORG, <https://www.casino.org/gender-stereotypes-in-esports/>.

Instagram, Snapchat, and Facebook, etc.), game platforms, text messages, or emails. Cyberbullying leaves adverse physical and psychological effects on the victims.

The most notable example of cyber-bullying and sexual harassment of women in the gaming industry was undoubtedly the Gamergate scandal of 2014.⁶⁶ The online attacks against the targets in Gamergate got so sinister that it posed a very real risk of its victim's physical safety. The helplessness in the victims and a lack of understanding of cyber-crimes in law enforcement agencies further emboldened the perpetrators to do anything they so wished, behind the veil of anonymity. Ultimately, in law vs. the faceless mob scenario, the Gamergate mob won and the victims were not remedied.

As can be seen from the Gamergate scandal, Cyberbullying is often difficult to effectively deal with due to the jurisdictional challenges and anonymity of the perpetrators in most cases. The principle of territorial jurisdiction does not apply because these crimes can also be committed through a server located anywhere on the globe. Most of the developing and developed nations in the world do not have specific legislation addressing the virtual crime of cyberbullying. Generally, criminal harassment statutes or existing laws provide a basis for prosecuting individuals suspected of committing cyberbullying. India too does not have special legislation addressing or defining the crime of cyberbullying. Reliance is placed on existing statutes like the Indian Penal Code, 1860,⁶⁷ and the Information Technology Act, 2000 for prosecuting perpetrators.⁶⁸

Thus, specific laws addressing the crime of cyberbullying need to be developed and regular training concerning the ever-evolving forms of cyber-crimes must be imparted to law enforcement agencies and police officials to tackle these issues effectively and make the internet a safer space for everyone.

5.1.TOP METHODS EMPLOYED BY WOMEN TO AVOID HARASSMENT WHILE GAMING ONLINE

Due in part to the desensitization in players towards harassment faced by female gamers, unregulated gaming chat rooms, and the lack of functional sexual harassment policies in place,

⁶⁶ See *Supra* Section 3.2.

⁶⁷ Indian Penal Code, 1860.

⁶⁸ Information Technology Act, 2000, No. 21 Acts of Parliament, 2000 (India).

women employ various non-confrontational methods to survive the sexist trolls in the gaming world. The findings⁶⁹ in a survey conducted amongst 388 female gamers revealed that women either;

- i. Block or mute Toxic players: 74.5%
- ii. Avoid verbal communication with other players: 70.4%
- iii. Avoid visual communication with other players: 57%
- iv. Gender neutralize screen names: 50.3%
- v. Lie about the real name: 27.8%
- vi. Lie about gender: 23.2%
- vii. Create a male avatar: 22.2%
- viii. Lie about age: 17.8%, or
- ix. Did nothing to stop harassment: 2.2%

6. WHAT CAN BE DONE?

Much can be done to remedy the current imbalance of gender representation and the allied issues in the gaming culture and bring about a spirit of community. A few important ones are as discussed below.

6.1. EDUCATIONAL POLICIES

The change should first be attempted at grassroots level i.e. quality education at the school level, targeting women and people of colour towards STEM courses and coding. STEM courses, computer games technology, and allied courses necessary for breaking into the gaming industry can be introduced through education fairs or made part of the curriculum to acquaint female students with the industry and boost their enrollment in such courses at the college level. Recently, the government of India introduced the New Education Policy (NEP) 2020, according to which students will be taught Coding as a subject from as early as standard 6th⁷⁰. Such progressive educational policies in place can enable students as young as 10-12 years to

⁶⁹ CASINO.ORG, *Supra* note 65.

⁷⁰ *New Education Policy: Students To Learn Coding From Class 6*, THE QUINT, (Jul. 30, 2020), <https://www.thequint.com/news/india/new-education-policy-students-to-learn-coding-from-class-6th-onwards#:~:text=The%20New%20Education%20Policy%20allows,coding%20from%20class%206th%20onwards.&text=According%20to%20the%20New%20Education,as%20early%20as%20class%206th.>

inculcate an interest in developing games irrespective of their gender and defy the established stereotypes.

6.2.REMOVING STRUCTURAL BARRIERS THROUGH INCLUSIVE COMPANY POLICIES

To enable working women in the gaming industry to effectively thrive in a male-dominated atmosphere, functional policies addressing workplace harassment, training for senior job roles, bridging of the gender pay gap, and formalizing of policies in the interest of working mothers like *work from home* or *part-time working options* should be brought in the work culture. Addressing these structural barriers will go a long way in making the industry more inclusive.

Companies should also actively address the concerns and complaints of sexual harassment by their employees and take proactive actions by introducing policies that can effectively tackle the situation. As was seen recently, gaming company *Ubisoft* conducted a thorough investigation into the tidal wave of sexual misconduct allegations that emerged publicly against the upper management across several of its studios. Resultantly, several of its top executives accused of sexual misconduct were fired. The CEO of *Ubisoft* also committed to bringing in sweeping internal changes aimed at addressing the culture issues at *Ubisoft*, including appointing a head of workplace culture and setting up an “*online confidential alert platform*.” It also planned to introduce a system of tying employee bonuses to “*their ability to create a positive and inclusive workplace environment*”.⁷¹ Gaming companies on their end can also introduce a system of reserved internship slots for female students to reduce their struggle in finding the right opportunity to build upon their interests, passion and gain practical experience.

6.3.ROLE OF SOCIAL MEDIA PLATFORMS

Social media platforms like Facebook, Twitter, etc. have an undeniably important role to play in creating a safer space for female gamers. Twitter today serves as a platform where creators, streamers, and esports legends all share their opinions, reviews, and spark conversations around their respective fields which heavily engages gamers. However, it has been seen time and again that such conversations can easily take shape of an online hate mob and violent verbal attacks. Thus, Twitter finds itself in an important position to monitor such conversations or trending

⁷¹ Jay Peters, *Ubisoft reportedly fires one of its most influential execs following allegations of sexual harassment*, THE VERGE (Aug. 3, 2020), <https://www.theverge.com/2020/8/3/21353197/ubisoft-fires-tommy-francois-allegations-sexual-harassment>.

hashtags and block the ones that are racist, sexist, violent or violative in nature. Leader of streaming platform Amazon's *Twitch* is also looking at overhauling their internal policies and culture after being recently marred by a barrage of sexual misconduct allegations⁷² faced by its female streamers on a day to day basis. Such streaming services should ensure stricter chat room controls to provide a safer space for its female streamers. *Facebook Gaming* was also proactive in suspending⁷³ Michael 'THINND' McMahon's page which has close to 940,000 followers after allegations of abuse emerged from his ex-partner.

Therefore, seriously attempting to evaluate reports and complaints of sexual misconduct, impropriety, bad work cultures and actively pursuing such issues can aid in developing technologies, algorithms, and policies, which allow female gamers to consider themselves a part of the community.

6.4. ORGANIZATIONS SHOWING THE WAY FORWARD

Taking the matter into their own hands several NPOs and NGOs have been training and encouraging girls and women about technology with an aim to decrease the gender gap in areas such as technology, game development, and design in the video game industry. Some of these organizations are *Girls Who Code*, *Girls Makes Games*, and *Pixelles* etc. *Girls Who Code* work with a mission to “close the gender gap in technology and to change the image of what a programmer looks like and does” offers girls with school club programs, summer campus programs, and longer summer immersion programs among others. Recently, *Girls Who Code* was launched in India as well⁷⁴. Similarly, *Girls Makes Games* has partnered with major companies like Thomson Reuters, Google Play, Intel, Ubisoft, Sony, Xbox, PopCap Games, Humble Bundle, MIT etc. to provide an ultimate crash course to its students in game design and development by working alongside established industry professionals⁷⁵.

⁷² Jacob Kastrenakes, *Twitch Reckons With Sexual Assault As It Begins Permanently Suspending Streamers*, THE VERGE, (Jun. 25, 2020), <https://www.theverge.com/2020/6/25/21303185/twitch-sexual-harassment-assault-permanent-bans-streamers>

⁷³ Olga Kharif, *Game Streamers Suspended on Twitch and Facebook Move to YouTube*, BLOOMBERG QUINT (Jul. 29, 2020), <https://www.bloombergquint.com/onweb/game-streamers-suspended-on-twitch-and-facebook-move-to-youtube>.

⁷⁴ Rekha Balakrishnan, *Girls Who Code launches in India*, YOURSTORY (Nov. 7, 2019), <https://yourstory.com/herstory/2019/11/girls-who-code-india-launch-utc-technologies-reshma-saujani>.

⁷⁵ Liz Lanier, *How Girls Make Games Is Inspiring the Next Generation of Game Developers*, FORBES (Jul. 16, 2019), <https://www.forbes.com/sites/lizlanier/2019/07/16/girls-make-games-laila-shabir-profile/#514533f77532>.

Pixelles is “committed to helping more women make and change games.”⁷⁶ It also supports women in their mid-career and organizes free monthly workshops, a mentorship program for aspiring women-in-games, game jams, socials, etc.

7. CONCLUSION

It is nothing short of inspirational that despite all odds, women have continued their fight for an inclusive gaming industry. The responsibility also lies upon every stakeholder to not be a bystander or a mere spectator of unequal treatment of women, LGBTQ community, and people of colour in the hands of bullies and trolls. No member of the gaming community should be discriminated against simply based on their gender or nationality. The complacent attitude of the industry in dealing with toxic and unfriendly behaviour against women, LGBTQ and people of colour should also be challenged. Standardized gaming guidelines educating gamers about acceptable gaming behaviour should be developed by industry stakeholders in the interest of safe online gaming. Every attempt at removal of structural barriers which hinder women in the gaming industry, positive representation of women in video games, and diversity in the workplace by industry stakeholders should be appropriately rewarded to set an example and encourage others to follow suit.

Law enforcement agencies and lawmakers must also equip themselves with the ever-changing face of online gaming, and the myriad ways of online harassment to effectively develop laws and regulations to tackle this largely unregulated sphere and provide a safe digital space for all. Concerned government bodies should actively involve itself in regulating gaming companies from making or selling sexually violent games degrading women in the name of ‘entertainment’. Social media websites like Facebook or Twitter should be held equally responsible for regulating/blocking violative and sexist content and taking appropriate steps like invoking a ban against such defaulters from being able to use such platforms again. A thorough background check of streamers and players is thus essential on platforms like Twitch, Facebook Gaming, and YouTube etc for accountability purposes.

With the shift in ideas about ‘gaming’ and ‘gamers’, more women are slowly seeing themselves as capable of playing games and form roughly half the demography of gamers worldwide.

⁷⁶ James Batchelor, *Pixelles is helping mid-career mothers stay in games*, GAMEINDUSTRY.BIZ (Aug. 12, 2019) <https://www.gamesindustry.biz/articles/2019-08-12-pixelles-is-helping-mid-career-mothers-stay-in-games>.

Given the current demography of female gamers in the world, it will only serve in the interest of gaming companies to tap into this market and invest in making gender-inclusive and female-centric games. Gaming companies should strive to offer a wide range of choices for players from all age groups and gender without attaching any stigma towards who can *rightfully* play a game and *acquire* the status of a gamer.

THE REQUIREMENT FOR TRANSFORMATION OF THE LOAN SYSTEM IN FOOTBALL: THE NEED TO CURB THE EXPLOITATION OF PLAYERS BY FOOTBALL CLUBS

Hitesh Mallick¹

Nandighosh Karan Nanda²

Sidheswar Sahoo³

¹National Law University Odisha

hiteshmallick1897@gmail.com

²National Law University Odisha

nknkaran@gmail.com

³National Law University Odisha

siddhusahoo99@gmail.com

ABSTRACT

Football in the last two decades has seen a clear shift from being just a beautiful game to being a commercially viable venture with enormous amounts of money involved. Of all the money flushed into the system, a huge chunk is used for the transfer of players. While permanent transfers command more currency, it can be said that loan deals have assumed importance in today's transfer market. Rules and laws regarding permanent as well as temporary transfer (loans) of players from one club to another have now been codified by the game's governing body FIFA. However, big clubs have always exploited loopholes in the rules and laws concerning transfers that defeat FIFA's purpose of keeping the game ethical. In this short article, we attempt to understand how the loan system has evolved over the years with all its advantages and disadvantages with a special focus on English Football. Further, we look to analyse the recent recommendations by FIFA concerning International loans and the Football Association (Governing body of football in the UK) regarding domestic loans. We analyse their implications and put forth our suggestions to reform the loan system so that the game remains ethical and fair to big and small clubs alike and at the same time upholding its purpose of youth development over commercial gains.

KEYWORDS

Loans, Football, FIFA, Football Association, Transfer.

1. INTRODUCTION

FIFA, the governing body for football, has always been quite proactive in revamping the transfer system according to the needs of the time. Earlier this year, FIFA Football Stakeholders Committee (FSC) in its meeting decided that there need to be restrictions¹ when it comes to the loaning of players, concerning international loans² of players aged 22 or above, stating that this would “ensure that they have a valid sporting purpose.”³ The regulations, which were to come into force from July 2020, were subject to the approval of the Player’s Status Committee (PSC) and the FIFA Council.⁴ The decision, in our opinion, seems to be one in the right direction. Before discussing the particular measures decided by the FSC, it is imperative to throw some light on the existing transfer system.

Firstly, a Transfer in football means the moving of a player from one club to another club.⁵ Transfer Window is the time during which the clubs are free to trade their players.⁶ Secondly, Transfers in football can be of two types: a) Permanent Transfers and b) Loans. For a Permanent Transfer to take place, the buying club pays compensation, known as the transfer fee, to the selling club so that the player is relieved from his contract at the selling club and can now sign a new contract to register himself for the buying club. In loan deals, the player involved moves to the club loaning him in, while being contractually bound to the club loaning him out. It is a temporary transfer⁷ rather than a permanent one, and the player has to return to his old club after the period of the loan expires. The loan system has always been of help to young players who would like to get some precious playing time because, at a young age,⁸ it is very unlikely that the player would break into the first team or play week in week out for their parent club, with so many seasoned players ahead in the pecking order. Also, seasoned players

¹ *Clubs face loan restrictions after FIFA announces new regulations*, BBC (Feb. 27, 2020, 1:20 AM), <https://www.bbc.com/sport/football/51665904>.

² International Loans are when the player moves to a club associated with a different association.

³ *Football stakeholders agree further steps in the reform of the transfer system*, FIFA (Feb. 27, 2020, 1:40 AM), <https://www.fifa.com/who-we-are/news/football-stakeholders-agree-further-steps-in-the-reform-of-the-transfer-system>.

⁴ *Id.*

⁵ *Time is ripe for an overhaul of the football transfer system*, EU OBSERVER (Mar. 27, 2020, 10:15 PM), <https://euobserver.com/stakeholders/143093>.

⁶ *Football Player Transfers Explained*, FOOTBALL STADIUMS (Mar. 27, 2020, 11:20 AM), <https://www.football-stadiums.co.uk/articles/football-player-transfers-explained/>.

⁷ Andi Thomas, *The European soccer transfer market, explained*, SB NATION (Mar. 25, 2020, 7:50 PM), <https://www.sbnation.com/soccer/2014/7/28/5923187/transfer-window-soccer-europe-explained>.

⁸ Daniel Lewis, *Barcelona youngster Alena joins Betis until end of season*, GOAL (Mar. 26, 2020, 8:30 PM), <https://www.goal.com/en-in/news/barcelona-youngster-alena-joins-betis-until-end-ofseason/60abaenevzbz1gcn0mzm7agd>.

who have fallen out of favour,⁹ either due to loss in form or because of differences with the management,¹⁰ have benefited from the loan option. Moreover, it gives the clubs with relatively low financial power a chance to get good players from the so-called bigger clubs¹¹ without having to spend a lot of money in the form of a transfer fee. Furthermore, teams could get players as a stopgap measure to reinforce their squad, say, in an injury crisis.¹²

Clubs have almost always found loopholes to exploit the transfer regulation system. There are fears that the clubs are taking advantage of the lack of regulation; this could jeopardise the players' careers and the integrity of the transfer market.¹³ Associations have previously investigated clubs on their loan business so that there are no irregularities.¹⁴ Recently, Associations like the Football Association, the national association for Football in England, have taken note of the exploitation and even put their regulations in place.¹⁵ But this won't be enough as it does not apply to clubs in other countries governed by their respective associations. Harmonised rules seem to be the need of the hour.

Therefore, in this write-up, loan deals are exclusively put under the microscope to understand why there is a need to regulate the loan system, how the clubs have been exploiting the system, and why the introduction of restrictions by FIFA FSC seems to be a step in the right direction. In this article, we have primarily focused on the loan system in English Football: the history and reforms.

⁹ Paul Fennessy, *Out-of-favour James Rodriguez joins Bayern Munich in 2-year loan deal*, THE42 (Mar. 29, 2020, 8:10 PM), <https://www.the42.ie/james-rodriguez-joins-bayern-munich-in-2-year-loan-deal-3490286-Jul2017/>.

¹⁰ Danny Ryan, *Barcelona's Philippe Coutinho set to sign for Bayern Munich on loan*, GIVEMESPORT (Mar. 24, 2020, 2:50 AM), <https://www.givemesport.com/1497818-barcelonas-philippe-coutinho-set-to-sign-for-bayern-munich-on-loan>.

¹¹ Alexander John Bond, Paul Widdop & Daniel Parnell, *Topological network properties of the European football loan system*, EUROPEAN SPORT MANAGEMENT QUARTERLY (2019).

¹² Phil McNulty, *Steven Caulker: Liverpool sign QPR defender on loan*, BBC (Mar. 27, 2020, 7:30 PM), <https://www.bbc.com/sport/football/35291772>.

¹³ Barry Lysaght, *Football's International Loan regulations: the 'Wild West'?*, LAWINSPO (Mar. 26, 2020, 3:10 PM), <https://www.lawinsport.com/topics/item/football-s-international-loan-regulations-the-wild-west?highlight=WyJsb2FuIiwJ2xvYW4iLCJsb2FuJyIsImxvYW4nLCIsIidsb2FuJyIsImxvYW4ncyIsIm1hcmtldCIsIm1hcmtldCciLCInbWFya2V0IiwibWFya2V0J3MiLCJtYXJrZXQnLCIsImxvYW4gbWFya2V0Ii0=>.

¹⁴ Dominic Fifield, *Chelsea and Vitesse Arnhem links investigated by the Dutch FA*, THE GUARDIAN (Mar. 27, 2020, 10:20 PM), <https://www.theguardian.com/football/2014/apr/01/chelsea-vitesse-arnhem-roman-abramovich>.

¹⁵ *Football loan transfer rules: Premier League guidelines, limits & full details*, GOAL (Mar. 27, 2020, 10:00 PM), <https://www.goal.com/en-in/news/football-loan-transfer-rules-premier-leagueguidelines/1kbbnfluqauo1jpdowcm1pimp>.

2. HISTORY OF LOAN SYSTEM

The loan system is not something new as it is rooted in history since football's early days. Loaning of a player was done in a position of necessity if there were some grave injury or travel problems.¹⁶ The team would borrow some players from the other to fill up the slots in the squad. This process was quite realistic and straightforward, but the loan system went through a massive transformation after football turned professional.¹⁷ In the later part of the 1800s, the big clubs borrowed good players from teams that were already out of the competition to play in important matches or playoffs. But FA banned this particular system of loaning players for playoffs as it was considered unfair. Still, some teams kept on breaking these rules, and the rules were made stricter afterwards.¹⁸

The Second World War saw the return of loans when there was a suspension of football leagues around Europe. This made top players at that time to change clubs to get some minimal football action, and players even changed clubs within one day. After the war, the loan system was scrapped, which was considered a radical step. It only made a return when the 'retain and transfer' system was scrapped in 1963 which restricted players from leaving their current clubs even after the end of their contract without the club's approval. The scrapping of the 'retain and transfer' system was yet another radical step.

Further, in 1966, another change empowered the clubs to make a maximum of 2 loan transfers and they had to be players from a different division mandatorily. It was done to prevent top clubs from signing good players from smaller clubs and maintain a competitive status quo. In this system, loan deals had to be for a minimum period of 3 months. This same rule was changed again in 2003 where the English Premier League scrapped this law which forbade loans between clubs in the same division.¹⁹ Now, teams could loan out a player directly to a rival team as well. It was done to increase the convenience of a club in signing the players but this change was criticized by many as they believed it would take away the competitive element

¹⁶ Paul Brown, *A bizarre history of loans: Where did it really all begin*, FOURFOURTWO (Mar. 27, 2020, 5:40 PM), <https://www.fourfourtwo.com/features/a-bizarre-history-loans-where-did-it-really-all-begin>.

¹⁷ *History of Football- The Global Growth*, CLASSIC FOOTBALL (Mar. 27, 2020, 6:00 PM), <http://www.fifa.com/classicfootball/history/the-game/global-growth.html>.

¹⁸ PAUL BROWN, *supra* note 16.

¹⁹ Daniel Taylor, *Premier League set to scrap loan ban*, THE GUARDIAN (Mar. 26, 2020, 8:10 AM), <http://www.theguardian.com/football/2003/mar/04/newsstory.sport2>.

of the game and one club could easily influence the destiny of another club.²⁰ The above law was further chopped and changed after deliberation, and the loaned player was not allowed to play against his parent club during the loan duration. Arsenal manager, Arsene Wenger was highly critical of these changes and believed that it would kill the uprightness of the game.²¹ A study reports that the combined revenue of the top 20 earning clubs in the 2018-2019 season stood at over £8.2 billion without including the transfer fees which was an 11% increase in the previous year.²² This number stood at €1.2 billion²³ in the 1996/97 season. This is a testament to the fact that the values have risen exponentially over the past years.

Football transfers and loans play a huge role in it. Loan values too have skyrocketed at an alarming rate over the past years as we have seen from the Kylian Mbappe deal in 2017. PSG paid almost €35 million to get the services of young Mbappe just for a single season. Bayern paid €8.5 million²⁴ to Barcelona for Phillippe Coutinho while they paid as much as €13 million²⁵ for James Rodriguez to get their services just for a year. These are very high amounts being paid by clubs just for one season considering they have to pay the wages too. During the early 90s, a sensation back then, Roberto Baggio's whole transfer fee was around €12 million.²⁶ This is a testament to the fact that the value of loan deals for one year has crossed the transfer values of yesteryears. Directly and indirectly, loan deals affect the revenue of the club and the sport in general. This also shows that football is the highest money generating sport in the world, and football transfers play a huge role in it. As history suggests, the loan system has undergone various changes and now the overall success of a club depends upon the investment of the club, its social media coverage, and the players. Eventually, the squad of the club decides the fate of

²⁰ Andrew Warshaw, *Taylor attacks loan deal strategy*, THE TELEGRAPH (Oct. 7, 2020, 8:30 PM), <https://www.telegraph.co.uk/sport/football/2410147/Taylor-attacks-loan-deal-strategy.html>.

²¹ *Wenger calls for over 21s ban*, SKY SPORTS (Mar. 27, 2020, 10:30 PM), <http://www1.skysports.com/football/news/11670/7456398/wenger-calls-for-over-21s-ban>.

²² THEO AJADI, ZOE BURTON, MATT DWYER, TOM HAMMOND AND CALUM ROSS, *EYE ON THE PRIZE: FOOTBALL MONEY LEAGUE*, (Dani Jones, Sam Boor and Timothy Bridge ed., 23rd Edition, Deloitte Sports Business Group 2020).

²³ *Id.*

²⁴ Phillippe Coutinho, TRANSFERMARKT (Oct. 7, 2020, 8:20 PM), <https://www.transfermarkt.co.in/philippe-coutinho/profil/spieler/80444>.

²⁵ *James Rodriguez*, TRANSFERMARKT (Oct. 7, 2020, 8:25 PM), <https://www.transfermarkt.co.in/james-rodriguez/profil/spieler/88103>.

²⁶ Roberto Baggio, TRANSFERMARKT (Oct. 7, 2020, 8:30 PM), <https://www.transfermarkt.co.in/roberto-baggio/profil/spieler/4153>.

a club throughout the season.²⁷ The authors would want to emphasize the need for a better loan system considering the amount of money that is at stake.

3. UNDERSTANDING THE LOAN SYSTEM

Article 10 of the Regulations on the Status and Transfer of Players states that “*A professional may be loaned to another club on the basis of a written agreement between him and the clubs concerned.*”²⁸ The recipient club cannot send the player on loan again without proper authorisation from the parent club of the player.²⁹ In the current system, there are two transfer windows per season when loan deals can be conducted. Teams may loan out a player due to various reasons and it has gradually changed over the years.

Previously a team used to loan out a player because they could not find a buyer for the concerned player and the club wanted some money by selling the player. Keeping the same player in reserves would mean loss of money to the club and also a loss to the player’s market value due to inconsistent displays. So, loaning out to a small club would mean a win-win situation for both parties as the player would get more exposure and the club would get their desired money. But currently, most of the top clubs are self-sufficient, and loaning out a player is due to different reasons. The needs and necessities of every big club are quite different, particularly in this modern era of football.³⁰ Managerial tactics define the playing style of a club and it is his mentality which largely shapes what players are needed to build on the formation he wants to play.

There may be some world-class players who are not needed in a particular club for a particular season. But the same player may become an efficient pawn in making another team a world-beater. Rather than going for an all-out transfer, clubs resort to a season-long loan and they split the player’s annual salary. Clubs avoid unnecessary multi-million deals in the pricy transfer market by making shrewd temporary transfers for a season. This is also a victory for both parties as the player grows and develops rather than getting benched at his parent club. For example, the recent Alexis Sanchez loan deal in the summer window from Manchester United to Inter Milan for the 2019-2020 season was a win-win deal for both parties as Sanchez

²⁷ Liu XF, Liu YL, Wang QX & Wang TX, *The Anatomy of the Global Football Player Transfer Network: Club Functionalities versus Network Properties*, 11(6) PLOS ONE (2016).

²⁸ FIFA Regulations on the Status and Transfer of Players, art. 10.

²⁹ *Id.*

³⁰ ALEXANDER JOHN BOND, *supra* note 11.

had become a fringe player at United. Inter would have to pay half of Sanchez's £390,000 weekly salary after the completion of the deal and he would be back to United after a year if Inter decided not to buy him permanently.³¹

4. ADVANTAGES OF THE LOAN SYSTEM

The very basic advantage of the loan system is that it maintains the consistency for a player rather than forcing him to waste a full season on the bench and reduce the opportunity for him to display his skill.³² Getting some game time is far better than no game time because the player is frequently exposed to the crowd pressure. The loan is the fundamental behind creating a player with a strong mentality. A player on loan has a point to prove to his parent club and he can gain their trust by playing well at the club he is loaned out to. It tests the player's attitude because his future at his parent club is uncertain.³³

A good performance would lead to a call back to his previous team. The loan system is a boon to clubs from lower divisions as they work on a tight budget. It helps them in building and completing their squads for a particular season. These loan deals also help in building a relationship between two clubs. If a loanee progresses well in the club he was loaned to, the parent club may send more players to the same club.³⁴ Edgar Davids to Barcelona, Carlos Tevez to Manchester United, and Thibaut Courtois to Atletico Madrid are some of the recent examples where the loan system worked wonders for all parties associated with the deal.³⁵

5. DISADVANTAGES OF THE LOAN SYSTEM

However, there are many downsides to a loan system gone wrong. The art of scouting and developing is lost somewhere as the lower league clubs depend on the big clubs to sign some player who would be acquired by them. The club which acquires the player may not focus on his development as much as it focuses on other players, as the loan is a short term plan. They

³¹ Murad Ahmed & John Burn-Murdoch, *How player loans are reshaping European football's transfer market*, FINANCIAL TIMES (Mar. 30, 2020, 2:20 PM), <https://www.ft.com/content/9bd82b30-caf2-11e9-a1f4-3669401ba76f>.

³² Pete Spencer, *The Loan System – Does it Work?*, TALE OF TWO HALVES (Mar. 27, 2020, 10:40 AM), <https://taleoftwohalves.uk/featured/loan-system-work>.

³³ *Id.*

³⁴ *The Loan System- Good or Bad?*, FOOTBALLAGENTS.ORG.UK (Mar. 30, 2020, 1:30 AM), <http://footballagents.org.uk/blog/loan-system-good-or-bad>.

³⁵ Umid Dey, *5 Best Loan Deals in Football History*, 90MIN.IN (Mar. 27, 2020, 8:10 PM), <https://www.90min.in/posts/6473921-5-best-loan-deals-in-football-history>.

can just use the player for one season and send him back to his parent club when his contract gets over. Generally, when a club from second-tier qualifies to the first tier, the loaned players play a big role in their achievement. Rarely do these same players stick with the same squad and that particular team faces difficulty in matching to the league's standard. Inadequate restrictions enable big clubs to buy and pile up players which they do not even need. This hampers the growth prospect of the young players as eventually they get loaned out to small clubs. For a player to know that he is staying at a club for one season, winning the hearts of the fans and supporters is a herculean task. One or two bad performances can bring negativity among the fans and it gets difficult for a player to redeem himself after that. There are only a few players in history who have won over the fans in a single season and achieved cult status.³⁶

There is also a fear of nepotism as it happened in the case of Manchester United and Darren Ferguson who was the manager of Preston. The manager of United, Sir Alex Ferguson, had loaned out two players to Preston. United was quick to call back these players after Darren was sacked from his managerial position.³⁷ It was seen as unfair to other teams as they would never get the chance to get these players if it was not for someone in the family. The most recent case in this regard would be that of Watford who bought ten players from Granada (Spain) and Udinese (Italy) during the summer of 2012-2013 season. All three clubs had the same owner and they used a loophole in the rules to make things work.³⁸ In one match, Watford fielded no less than six loaned players which made the footballing world take note of this bamboozling strategy. There were not any restrictions with regards to the number of international loans which meant there could be even eleven international loanees in a team without flouting any rules and regulations.³⁹

The Chelsea-Vitesse relationship is well known to football fans around the world. Twenty-three players have been loaned out to Vitesse by Chelsea since 2010.⁴⁰ It was found that the

³⁶ ALEXANDER JOHN BOND, *supra* note 11.

³⁷ *Manchester United recall loan duo after Preston sack Darren Ferguson*, THE INDEPENDENT (Mar. 29, 2020, 2:15 AM), <https://www.independent.co.uk/sport/football/football-league/manchester-united-recall-loan-duo-after-preston-sack-darren-ferguson-2172876.html>.

³⁸ Joshua Kaye, *The international player loan loophole – should, and could, it be closed?*, LAWINSPO (Mar. 30, 2020, 11:30 AM), <https://www.lawinsport.com/topics/sports/football/item/the-international-loan-loophole-should-and-could-it-be-closed>.

³⁹ *Id.*

⁴⁰ Travis Tyler, *Chelsea-Vitesse partnership the only certainty in the loan army*, FAN SIDED (Mar. 27, 2020, 3:50 PM), <https://theprideoflondon.com/2018/03/27/chelsea-vitesse-partnership-certainty-loan-army/>.

original funder of Vitesse was a close ally of Roman Abramovich, Chelsea's owner.⁴¹ This reaffirms the fact that close friendships can be used to strengthen the squad of another team. From the period of 1997 to 2009, Manchester United loaned no less than 29 players to Royal Antwerp, a Belgian club.⁴² These mass loaning out of players from one club to another may be a beneficial thing to the smaller club, but the main problems which persist is that of unfairness caused to other clubs in the same competition. Only because one club has good connections with a bigger club should not be a striking criterion in determining the result of the league.

The clubs while loaning out players ascribe very little significance to a players' mental health. Consecutive loan deals for a player have a dampening effect to the player's confidence as a footballer. Lucas Piazon, bought by Chelsea in 2012, has played for seven different clubs over these years. In a club like Chelsea which has changed many managers in this period, the prospect of being a starter is still a far-fetched dream for Piazon. In an interview in 2016, Piazon said:

*"It makes no sense to go on loan all the time. It is not good for any player in my experience or the experience of the other boys. I don't see it as a positive thing any more. To be in a different place every year is not good for me at 22."*⁴³

Another big disadvantage of the loan system is that it can be used by clubs to circumvent UEFA's Financial Fair Play (FFP) regulations (A club cannot report a cumulative loss of more than €30 Million over a particular 3 year assessment period). The most high profile recent example of this was the loan with an option to buy transfer of French teenage sensation Kylian Mbappe from French club AS Monaco to another French club Paris Saint Germain (PSG) in the summer of 2017. Having completed the world record transfer of Neymar from FC Barcelona for a record €222 Million in the same summer, it raised many eyebrows when Mbappe arrived at PSG as well. However, to comply with FFP requirements, the transfer of Mbappe was structured as a loan in 2017 with an option to buy for a fee rising up to €180

⁴¹ David Conn, *How Chelsea's links to Vitesse Arnhem run deeper than the public was told*, THE GUARDIAN, (Mar. 27, 2020, 4:00 PM), <https://www.theguardian.com/football/2017/feb/28/chelsea-vitesse-arnhem-links-deeper-public-told>.

⁴² *Where are they now? The 29 players Man Utd. loaned to Royal Antwerp*, PLANET FOOTBALL (Mar. 27, 2020, 4:20 PM), <https://www.planetfootball.com/quick-reads/revisiting-29-players-manchester-united-sent-on-loan-to-royal-antwerp/>.

⁴³ Matt Barlow, *What life is REALLY like as a Chelsea loan starlet...Lucas Piazon reveals all*, DAILY MAIL (Oct. 7, 2020, 8:20 PM), <https://www.dailymail.co.uk/sport/football/article-3775029/What-life-REALLY-like-Chelsea-loan-starlet-Lucas-Piazon-reveals-all.html>.

million in 2018. What this did was that the amortised transfer fee and astronomical wages of Mbappe would go into the books of PSG from the summer of 2018, when the 2015-2018 cycle of FFP would end and a fresh three-year cycle began. Therefore, it gave PSG an extra year to balance their books for the new three-year cycle (2018-2021) by bringing in new sponsorships as well as player sales in order to adjust the burden of both Neymar and Mbappe's huge transfer fees.

6. REFORMS MADE TO THE LOAN SYSTEM OVER THE YEARS

FIFA, in 2018 had announced its intentions to introduce landmark reforms concerning the transfer system which also included loans. This was done to increase transparency in the game and protect its integrity.⁴⁴ FIFA announced that they will be limiting the number of loans allowed per season to ensure that its purpose of youth development is realised. However, it took them some more time to work out the details of the proposal which was finally done on 27th February 2020.

In a press release following a meeting of its stakeholders' committee on 27th February 2020, FIFA announced its intentions of making radical changes to the existing loan system with an intention "*to protect the integrity of the system and prevent abuses.*" These changes are a part of the wide-ranging reforms of the existing transfer system.⁴⁵ The objectives of these proposed reforms in the loan system as we understand are threefold:

- i. To ensure youth development and thus ensure that loans have a valid purpose.
- ii. To prevent hoarding of talented players by big clubs. This has been done to a huge extent by Chelsea. This practice is not only unethical but destabilising as well.
- iii. To prioritise players' development over commercial gains.

The committee endorsed a move to limit the number of international loan deals for players over the age of 22 years that a club could make each season. It has been proposed to implement this measure by giving a transitional period to clubs. For the 2020-2021 season, eight international

⁴⁴ *Football stakeholders endorse landmark reforms of the transfer system*, FIFA (Mar. 30, 2020, 10:25 AM), <https://www.fifa.com/who-we-are/news/amp/football-stakeholders-endorse-landmark-reforms-of-the-transfer-system>.

⁴⁵ FIFA, *supra* note 3.

loans, both in and out of the club, will be permitted which will subsequently be reduced to six each in and out by the 2022-2023 season. Further, a maximum of three loans in and three loans out would be permitted between the same clubs by 2022-2023 season.

As far as domestic loans, i.e., loans between clubs of the same member association are concerned, FIFA has directed the member associations to amend the rules “*in line with the principles established at the international level*” within three years.⁴⁶ However, the problem with this statement by FIFA is that it has not set a limit on the number of loans that the associations should comply with. We believe that not making it strictly mandatory to comply with the numbers prescribed by FIFA and leaving it up to the discretion of the respective national associations for domestic loans is again a loophole that FIFA has given to the clubs to exploit. However, these changes will only be enforced if they are approved by FIFA’s Players status committee and the FIFA council. The regulations were to come into force in July 2020 but we have not been able to find any confirmation about the same.

The English FA, in 2019, had already made radical changes to the loan system for teams playing in the top division of English Football, i.e., the English Premier League. The amended rules are as follows;

- i. Teams can have a maximum of four players on loan from other Premier League teams during the entirety of the season.⁴⁷
- ii. At any given time, they cannot have more than two players on loan from other Premier League teams⁴⁸ and more than one player from the same team.⁴⁹
- iii. Further, a team cannot loan a player they have brought in the transfer window, to another Premier League club, in the same transfer window.⁵⁰
- iv. Also, no Premier League club can loan more than one of its goalkeeper to another Premier League club during a season.⁵¹

⁴⁶ *Id.*

⁴⁷ Premier League Handbook 2019-20 Section V.7.5.

⁴⁸ Premier League Handbook 2019-20 Section V.7.6.

⁴⁹ PREMIER LEAGUE HANDBOOK, *supra* note 47.

⁵⁰ Premier League Handbook 2019-20 Section V.7.1.

⁵¹ Premier League Handbook 2019-20 Section V.7.7.

However, these rules are comparatively quite relaxed for the lower divisions of English football and rightly so, as clubs in the lower divisions do not have the financial prowess nor the big star players to drive them to successful seasons. However, the problem arises when we observe that National Associations across jurisdictions do not have uniform rules regarding domestic loans. Just to give a perspective, Italian club Atlanta which plays in the Serie A (First division of Italian football) have as many as 55 players out on loan this season. This seriously impacts FIFA's intentions of reforming the game and making it more ethical. In the following section, we have suggested measures to improve the loan system. We have taken references from the rules framed by The Football Association for temporary transfers for the 2019-2020 season.

7. SUGGESTIONS

It is understandable that the clubs want to play the best players and wish to build a strong squad only where the fittest can survive but it does not have to become exploitative. The International Charter of Physical Education, Physical Activity and Sport which was adopted by the member states of UNESCO state that "*Top-class sport and sport practised by all must be protected against any abuse*" and "*commercial excesses threaten its moral value, prestige and image.*"⁵² FIFA states that it is strongly committed to upholding human rights and "*embraces all internationally recognised Human Rights including those contained in the International Bill of Human Rights*" and "*the International Labour Organisation's Declaration on Fundamental Principles and Rights at Work.*"⁵³ Moreover, FIFA in its human rights policy of May 2017 stated that it "*is committed to helping protect the rights of football players and will continually evaluate existing regulations*" to address risks.⁵⁴ Likewise, FIFA also remains committed to human rights issues like it is to commercial interests surrounding the game.⁵⁵ By adopting these declarations, FIFA recognises that the commercial excesses can result in the commodification of players and therefore it seeks to protect the rights of the players against any such abuse. Through its proactive adoption of international principles, it not only recognises the aspect of human rights involved in loaning players, but it also opens up avenues to address any violations that might occur while providing safeguards for the players. Therefore, it is of utmost

⁵² International Charter of Physical Education, Physical activity and Sport art. 7.1.

⁵³ FIFA Human Rights Policy art. 2.

⁵⁴ FIFA Human Rights Policy art. 5.

⁵⁵ FIFA 2.0: A VERSION FOR THE FUTURE, 63 (FIFA, 2016).

importance that FIFA improves its regulations as much as possible to create a better atmosphere for the players involved.

As has been discussed in the sections above, there have been quite a few instances where clubs have done questionable acts that jeopardise the integrity of the sport. Therefore, in this section, we would like to categorically discuss a few of those acts and what plausible steps can be taken to curb the seemingly unethical practices. For clarification purposes, all these suggestions should only be taken with regards to players who are 22 or above. Players below 22 are considerably young players and we feel that the clubs, for the sake of the development of these younger players, should exercise some discretion and autonomy.

7.1.CAPPING THE NUMBER OF PLAYERS THAT CAN BE LOANED OUT

This is one of the obvious solutions to stop clubs from hoarding players with or without the intention of ever using them. It is also the direction FIFA is intending to go with. It is understood that FIFA has time and again encouraged clubs to train youngsters and has also brought in the incentive of training compensation to make the practice more efficient.⁵⁶ But a thin line must always be drawn to restrict this practice from turning into a business model. Because then any club can bring multiple players that will never play for the club and would only be used to make a profit when they are sold. There have been allegations that Chelsea has indeed made use of a practice like this where young players are bought at low prices and then sold at higher prices without much representation at the club.⁵⁷ It is a plausible assumption given the number of players that Chelsea sends out on loan. The number in the last season itself is 28 with 15 of them aged 22 and above.⁵⁸ The practice of loaning an exorbitant number of players has applied to Serie A in the past as well. In the 2018-2019 season, Atlanta had 56 players out on loan along with Genoa who had 33, Sampdoria who had 31 and Torino who had 28.⁵⁹ While the intentions of the club can never be determined, one logical deduction that can be made out of this is that most of these players out on loan will never play for their current parent clubs. So, there must be a cap of players that can be loaned out in a season. The FIFA

⁵⁶ Definition 10 of the FIFA's Regulations on Status and Transfer of Players defines Training Compensation as the payments made to cover the training costs of a player. Article 20 of the FIFA's Regulations on Status and Transfer of Players mandates that Training Compensation shall be paid to the Training Club of a player.

⁵⁷ MATT BARLOW, *supra* note 43.

⁵⁸ BBC, *supra* at 1.

⁵⁹ Brad Homeyer, *Serie A clubs are ahead of other European clubs in one area*, THE18 (Mar. 30, 2020, 10:00 PM), <https://the18.com/soccer-entertainment/serie-a-loan-players-atalanta>.

FSC's decision to cap international loans to be reduced to six players from eight by the 2022-2023 season is a step in the right direction. The same meeting also gave three years to the relevant national associations to frame rules for domestic loans which will be in line with the principles established at the international level, but did not set a limit;⁶⁰ this could turn out to be a dangerous practice. The autonomy of the National Associations in the transfer system is to be respected. However, given the exploitation of the loan system in the past, a clear demarcation of a limit could have been helpful.

Another thing that can be suggested is bifurcation on the number of players that can be loaned out in a single transfer window. To be particular, if there is a cap of 8 players that can be loaned out both nationally and internationally, then there can be a bifurcation of 6:2, i.e., six players to be loaned out in the bigger transfer window which is the summer transfer window and two in the winter transfer window. While there is no documented basis or a precedent on bifurcation as to loaning out of players, there is one for loaning in of players. As we have already discussed, the Football Association introduced new rules for loan deals in between the clubs under them for the season of 2019-2020. The rules as having been stated in one of the previous sections stipulate that no club can register more than two loan deals from Premier League Clubs in the same transfer window time or the same transfer window and no more than four loan deals can be registrable in the same season. A similar parallel rule could be introduced for international loans as well as domestic loans. What this bifurcation does is that it gives at least two players, who would have otherwise been shipped out, a chance for some representation at the club. And the biggest problem is the representation which is what we have seen from Lucas Piazon's case. With this bifurcation, most clubs would probably keep those two players who are most likely to break into the first team and had these two players gone out on loan, the club would have spent money to buy a player. Instead, these two players now would stand a chance to break into the first team and even displace some of the first team starters. And in case of an event where things do not work out, the clubs can always choose to send the players on loan in the winter transfer window. Again, the number has been taken in reference to the numbers proposed by FIFA but the domestic leagues could also have an arrangement like this for domestic loans. What this does, in our opinion, is that it minimises the risk of non-representation and maybe, as an added advantage compels the club to make use of resources

⁶⁰ *FIFA set to limit number of international loans clubs can make*, ESPN (28 Feb, 2020, 11:50 PM), <https://www.espn.in/football/blog-fifa/story/4062188/fifa-set-to-limit-number-of-international-loans-clubs-can-make>.

available to them. There remains a chance that the players will still not represent the club but that, in our opinion, would be cases for bigger clubs who have star players.

One thing that also happens with a capping of the number of players a club could loan out is that it also makes the market much smaller for the clubs looking to loan in players which would mean that they would rely more on their youth set up, giving their young players opportunities which would have earlier been taken up by the players their clubs loaned in.

7.2.RESTRICTIONS ON LOANING OUT TO SUPPOSED FEEDER CLUBS

In 2015, the Dutch Football Federation, Royal Dutch Football Association, launched an investigation into the relationship of Dutch Club, SBV Vitesse (Vitesse Arnhem or Vitesse) and London club, Chelsea Football Club (Chelsea) following some allegations from the former owner, Merab Jordania who suggested that Chelsea exerted undue influence on Vitesse Arnhem.⁶¹ This was not the first time that an investigation was launched into the partnership as it was done once before in 2010.⁶² However, both the times the clubs have been cleared of any allegations.⁶³ As has been mentioned, Chelsea has enjoyed a great partnership with Vitesse working as a feeder club to Chelsea as implied by the former manager of Vitesse, Ronald Koeman who suggested that there was an agreement in place but the same was having adverse effects on the Dutch club.⁶⁴

Having the option of Feeder Clubs, in our opinion, have two glaring disadvantages. One, the concerned player does not have a say here. He has to move to the feeder club as part of the agreement even though the feeder club might not be the best place to learn his trade. Former Chelsea Footballer Sam Hutchinson reflected upon his time at Vitesse by saying:

“I was pretty much forced to go. My agent rang on the day my daughter was born and said that Chelsea thought it was best for me. I did not want to go. I was injured. But I did not realise that I was not going out there to play – I was going out there

⁶¹ DOMINIC FIFIELD, *supra* note 14.

⁶² DAVID CONN, *supra* note 41.

⁶³ Joe Brewin, *What’s it like to be a feeder club? How Vitesse fans really see their Chelsea partnership*, FOURFOURTWO (Mar. 28, 2020, 7:40 PM), <https://www.fourfourtwo.com/features/whats-it-be-feeder-club-how-vitesse-fans-really-see-their-chelsea-partnership>.

⁶⁴ Kevin Palmer, *Ronald Koeman questions Vitesse’s player-loan agreement with Chelsea*, ESPN (Mar. 28, 2020, 9:50 PM), <https://www.espn.in/football/southampton/story/2541470/ronald-koeman-questions-vitesse-loan-agreement-with-chelsea>.

to see a physio. Luckily he was amazing and got me fit in six weeks, but they still did not play me. It was frustrating. I came home after four months.”

Moreover of all the loanees to Vitesse from Chelsea, only Nemanja Matic was a player who cemented his position as a first-team player and the idea that can be borrowed is that these loan deals are only helping in commanding bigger transfer fees when the players are eventually sold.⁶⁵

FIFA FSC while putting restrictions on international loans between the same clubs stated that only three players could be loaned in or loaned out from both sides and we feel that this number is on the higher side. The decision creates the impression that the FSC, which contains people connected with professional clubs, has made this decision not to displease the clubs. The decision in itself is bound to create legitimacy for feeder clubs and therefore we suggest that the number be lowered to two players. What we also suggest is that no club should be allowed to loan out to the same club for more than two seasons in a row. For example, if Club A has loaned any of their player(s) to Club B for the seasons of 2018-2019 and 2019-2020, they shall not be allowed to loan any of their players to club B at least for the 2020-2021 season. However, we believe both the clubs should be allowed to enter into permanent deals during any season as the player would at least have stability in terms of his club career for a fixed duration of time. The practice of feeder clubs has limited the talent pool for all other clubs which in our opinion meddles with the integrity of the game. Moreover, this practice leads to the stagnation of the quality of football by depriving ambitious clubs of players fitting their profile.

7.3.RESTRICTIONS ON LOANING PLAYERS OUT WHO WERE BOUGHT IN THE SAME SEASON

Again, the Football Association introduced a restriction for this season which barred clubs from loaning out players who were bought in the same season to the clubs in the same association and we feel that this rule should make its way to rules governing International Loans and even domestic transfers. Although, we feel that a complete ban should not be the way for International Loans. It is quite understandable for domestic leagues to have this sort of systematic arrangement, as, in our opinion, each league has its distinct identity. The Premier League in England is considered quite physical⁶⁶ while Serie A has historically been considered

⁶⁵ Alex Dieker, *A Footballer's Purgatory: Truth about the Vitesse- Chelsea partnership*, FOOTBALL PARADISE (Mar. 23, 2020, 6:45 PM), <https://www.footballparadise.com/chelsea-vitesse/>.

⁶⁶ *Guardiola shocked by Premier League's physicality*, FOURFOUR TWO (Mar. 28, 2020, 8:00 PM), <https://www.fourfourtwo.com/news/guardiola-shocked-premier-leagues-physicality>.

a league that is quite defensive.⁶⁷ So, it makes sense that a club would send the player to a different league if it feels that the player is too young for the division the club is playing in.

Since FIFA has not placed any restrictions on players who have been acquired in the same season being loaned in that particular season; it can be inferred that they do not see this as a problem. But, in our opinion, this practice should be limited to one player per season, i.e., clubs can only loan out one of the players they have acquired in the same season albeit in a different transfer window/registration period. Not regulating this practice might mean that clubs might acquire multiple players and send them out on loan without considering or caring for the footballing interests of those players.

⁶⁷ Theo Rowley, *Does Serie A still fit the traditional Italian Defensive mindset?*, BLEACHER REPORT (Mar. 27, 2020, 2:15 AM), <https://bleacherreport.com/articles/1509489-does-serie-a-stil-fit-the-traditional-italian-defensive-mindset>.

CASHING IN ON THE ESPORTS PHENOMENON: INCREASING AWARENESS ON ETHICAL ISSUES AND GOVERNANCE CHALLENGES

Achint Johri

Rajiv Gandhi National University of Law

achint.johri@gmail.com

ABSTRACT

The foray of esports into the mainstream sports and entertainment industry has been nothing short of spectacular. Gaming is no longer confined to its status of a leisure activity, having become a fully-fledged heavily contested sporting event participated in by 'cyber athletes' worldwide. The competitive gaming industry has witnessed tumultuous growth, attracting widespread spectatorship and burgeoning revenues, so much so, that it has seen esports come up for potential inclusion in the Olympics. However, this rapid upsurge in popularity has not been equally matched by the enforcement of an adequate regulatory mechanism, which has paved the way for a host of regulatory and ethical complexities which could hamper esports from making further inroads. The implementation of a durable governance structure is made increasingly difficult by the disparate framework of the industry, a stark contrast to the successful model adopted in several traditional sports. Esports is currently fraught with ethical issues such as doping, match-fixing, betting as well as unique privacy concerns relating to the misuse of player data and identity deception. Still, in its infancy, esports requires experienced administrators at the helm who understands the industry for what it is. This paper will attempt to discuss the challenges posed by the frail esports regulatory model and how a lack of awareness amongst policymakers needs to be addressed to chalk out a clear pathway for effective governance in the future.

KEYWORDS

Esports, ethics, Regulation, Gambling, Doping, Recognition.

1. INTRODUCTION

Gaming no longer remains confined to its stereotypical status of a leisure activity. Over the past decade, the competitive gaming industry has grown tremendously, typifying the confluence of technology and various facets of human activity. From the first video game

competition, the Space Invader Championship, organised by Stanford University on October 1972,¹ online gaming has taken significant strides forward, becoming a fusion of the sports and entertainment industries, generating a substantial revenue stream and the events attracting high viewership, especially in Asia where the viewership figures of flagship esports events such as the *DOTA* (Dawn of the Ancients) International and *LoL* (League of Legends) Championships have exceeded those of premier sporting events such as the NBA Finals and the Super Bowl.²

This unprecedented success of has led to talks of a potential integration with traditional sports tournaments, with the Asian Games 2018 including esports as a competing category on a trial basis and the International Olympic Committee also considering including esports as a contestable event in the 2024 Paris Olympics.³

The evolution of competitive gaming into a multi-million dollar industry and global spectator-friendly phenomenon, now popularly referred to as ‘esports’ has been meteoric, to say the least, opening up a dearth of new investment, commercial and broadcasting opportunities, which have brought with it a fair share of challenges and complications, which every new industry encounters at its infancy. In relatively no time, esports has grown by leaps and bounds, with a worldwide audience of more than 443 million,⁴ in 2019 alone, making it the fastest-growing sport, with 2020 viewership numbers to increase to 495 million, an increase of approximately 12 %.⁵ Revenues also show no signs of slowing down, with the esports market projected to surpass the billion-dollar mark in 2020.⁶

1.1. THE CONVERGENCE OF ESPORTS INTO MAINSTREAM SPORTS

The English Premier League and Electronic Arts, a leading game developing company, has introduced the e-Premier League, the Premier League’s own official FIFA tournament.⁷ Electronic Arts introduced this initiative from 2019 onwards, in a bid to compete with the likes

¹ *The History and Evolution of Esports*, MEDIUM (Jul. 29, 2020, 6:20 PM), <https://medium.com/@BountieGaming/the-history-and-evolution-of-esports-8ab6c1cf3257>.

² Christopher Ingraham, *These 3 charts show the rapid rise of eSports*, WORLD ECONOMIC FORUM (Mar. 16, 2020, 10:06 AM) <https://www.weforum.org/agenda/2018/08/the-massive-popularity-of-esports-in-charts>.

³ Steven Impey, *Intel and IOC discuss esports Olympic inclusion*, SPORTS PRO (Jul. 29, 2020, 6:31 PM), <https://sportspromedia.com/news/intel-ioc-esports-gaming-olympics-inclusion>.

⁴ Newzoo, *Global Esports Market Report 27* (2020)

⁵ *Id.* at 27.

⁶ *Id.* at 28.

⁷ Premier League, *Premier League and EA launch ePremier League*, PREMIER LEAGUE (Mar. 17, 2020, 9:44 AM), <https://www.premierleague.com/news/870004>.

of *DoTA* and *Counterstrike*, to offer a more immersive competitive and spectating experience that attracts both esports fanatics as well as football enthusiasts, capitalising on the Premier League's immense global reach and huge fan base.⁸ All twenty football clubs in the Premier League are represented by FIFA players in a knockout-format.⁹ Viewership of the English Premier League (EPL) crossed more than 150 million viewers in the 2020 edition,¹⁰ with an invitational format in which football players virtually represented their respective clubs. On similar lines, the National Basketball Association (NBA) and the National Football League (NFL) in the United States, have started their own esports leagues, taking place side by side with the regular season.¹¹ Initiatives such as these offer an opportunity to fans of traditional sports and gamers alike to fulfil their dreams to experience the thrill of competing for their favourite teams in the virtual arena.

2. A DIFFERENT BALL GAME: MAJOR DIFFERENCES AND BARRIERS TO ETHICS AND REGULATIONS

The foray of esports into the mainstream sports community has ushered in a transition which has monumentally altered the way sports have been historically defined and experienced. This has created ambiguity pertaining to the nature of esports – whether they qualify as a sport or not. In various aspects, esports share similar characteristics with 'real' sports. The likeness of esports to traditional sports is based on the level of skill, training and cognition required to excel in competitive gaming, which is a fundamental aspect of a 'sport'.¹² In terms of structure, tournaments are conducted in line with the formats of traditional sports tournaments, organised in the form of a knockout or league-based format participated in by individual players or by teams of players, depending on the nature of the video game in question. The existence of a competitive element, resulting in a winner and loser on the conclusion of an event, is also a major and essential point of similarity which esports share with traditional sports.

⁸ Sara Elsam, *FIFA's fight to join the "big three" of esports*, GAMESINDUSTRY.BIZ (Mar. 17, 2020, 10:09 AM), <https://www.gamesindustry.biz/articles/2019-01-08-over-300-people-are-working-on-esports-at-ea-the-rapid-rise-of-fifa-pro-gaming>.

⁹ Steve McCaskill, *Premier League and EA Sports Launch Official FIFA 19 eSports League*, FORBES, (Mar. 17, 2020, 10:17 AM), <https://www.forbes.com/sites/stevemccaskill/2018/10/04/premier-league-and-ea-sports-launch-official-fifa-19-esports-league/#6d5678fd2d5c>.

¹⁰ Jonathan Easton, *Inaugural ePremier League Invitational nets 150 million viewers*, DIGITAL TV EUROPE (Mar. 17, 2020, 10:31 AM), <https://www.digitaltveurope.com/2020/05/05/inaugural-epremierleague-invitational-nets-150-million-viewers/>.

¹¹ *Id*; Derek Helling, *Traditional Sports and Esports Converging for Mutual Benefits*, SPORTS AND POLITICS (Mar. 17, 2020, 11:24 AM), <https://www.sportsandpolitics.org/traditional-sports-and-esports-converging/>.

¹² Zach Carrabine, *Paris 2024 GLHF: Esports' Quest for Olympic Inclusion*, 26 SPORTS LAW J. 229, 233 (2019).

The same aspect has been recognised by the International Olympic Committee (IOC), which has strongly supported the consideration of esports being within the ambit of sporting activity, with an added emphasis on conformance to a code of rules and regulations governing this competitive aspect of esports. The recently concluded Giro D'Italia and Race Across America (RAAM) cycling competitions took place via integrating the racecourses on virtual cycling platforms Zwift¹³ and Fulgaze¹⁴ respectively, showcasing the competitive interface of the digital and physical sports. Esports players, or 'cyber athletes' as they have come to be popularly referred to, undergo extensive training and coaching prior to competing in tournaments, including cognitive training involving hand-eye coordination and mental fitness, which are similar, if not more rigorous, to the level of preparation executed by their traditional sports counterparts, setting aside the popular assumption of esports not requiring substantial skill.¹⁵ With regards to the business aspect and commercial viability which includes various sources of revenue generation, the role of advertising, merchandising, sponsorship, streaming and ticketing revenues is measurably the same in esports as compared to traditional sports. Though it is apparent that esports and traditional sports have some corresponding characteristics, there are notable points of difference which make the governance of esports as a belligerent task prone to a multitude of roadblocks, which are discussed below.

2.1. PLAYER EXPLOITATION

Professionals in the esports arena stand on a considerably different footing than their more 'athletic' contemporaries. The most visible of the differences are average age and career spans of players. Players begin competitive gaming as early as age fourteen, with most players ranging from their late teens to their mid-twenties. Careers of esports professionals are drastically shorter than what, for example, a footballer might enjoy (averaging above eight years)¹⁶ spanning a meagre three to five years. The reason for players enduring such short-lived careers is due to the intensive demands of esports vis-à-vis traditional sports. Training in traditional sports is largely confined to maintaining physical fitness. Esports players, however,

¹³ Michael Pavitt, *RCS Sport to hold virtual Giro d'Italia and raise funds for Italian Red Cross*, INSIDE THE GAMES (Jul. 29, 2020, 7:13 PM), <https://www.insidethegames.biz/articles/1093248/virtual-giro-ditalia-cycling-rcs-sport>.

¹⁴ Andrew Hood, *Race across America goes virtual*, VELONEWS (Jul. 29, 2020, 7:22 PM), <https://www.velonews.com/culture/race-across-america-goes-virtual/>.

¹⁵ Dan L Burk, *Owning E-Sports: Proprietary Rights in Professional Computer Gaming*, 161 U. PA. L. REV. 1535 (2013).

¹⁶ Seife Dendir, *When do soccer players peak? A note* (2016) 2 JOURNAL OF SPORTS ANALYTICS 89.

rely on extremely high reaction times and mental sharpness as opposed to physical fitness.¹⁷ Maintaining reaction times requires an excruciating level of practice which trumps the demands of traditional sports, increasing the possibility of ‘burnout’ relatively quickly, resulting in shorter careers.¹⁸

Players are also not able to leverage their rights due to the absence of player unions, which raises many labour issues due to the absence of collective bargaining agreements, which further gives rise to accountability concerns as players can be subject to arbitrary contract terminations.¹⁹ Esports players often join competitive teams at a young age, ill-equipped to understand the contractual obligations they bind themselves by the contract.²⁰ Owing to their unawareness of the legal implications of the contracts entered into by them, players are exploited by their employing teams. Resultantly, players are forced to abide by unfair contractual terms (for example, the independence to earn revenue through streaming and utilising in-game content is sometimes entirely retained by contracting teams)²¹ and incommensurate remuneration, a massive blow to their already limited career prospects, while at the same time losing out on business opportunities through restrictions on allowing them to monetize their virtual persona.²² The unique nature of the esports industry, with video games having a short shelf life, with annual updates, also acts as a barrier for successful unionising²³, as the number of players competing in one game is shuffled constantly. With teams competing in a league format persistently vying for survival, underperforming players are ousted in next

¹⁷ Jack Cohen, *The Myth of Reaction Time and Why Professional League of Legends Careers Are So Short*, DBLTAP (Oct 7, 2020, 10:49 PM), <https://www.dbltap.com/posts/the-myth-of-reaction-time-and-why-professional-league-of-legends-careers-are-so-short-01ecqq0r749m>.

¹⁸ *Id.*

¹⁹ Noah Smith, *It's not as awesome as people imagine: Esports players say 'dream job' is more than fun and games*, THE WASHINGTON POST (Mar. 17, 2020, 12:42 PM), <https://www.washingtonpost.com/sports/2018/12/13/its-not-awesome-people-imagine-esports-players-say-dream-job-is-more-than-fun-games/#:~:targetText=In%20a%202016%20interview%2C%20George,the%20NFL%2C%20according%20to%20ESPN>.

²⁰ Richard Wee, *Three key legal issues currently facing the Esports industry: A perspective from Asia*, LAWINSPORT (Mar. 17, 2020 1:28 PM), <https://www.lawinsport.com/topics/item/three-key-legal-issues-currently-facing-the-esports-industry-a-perspective-from-asia#sdfnote2sym>.

²¹ Adam Fitch, *Player contract illustrates unfair and unethical conditions*, ESPORTS INSIDER (Oct 7, 2020, 11:07 PM), <https://esportsinsider.com/2019/12/unfair-player-contract/>.

²² Dom Sacco, *Smooya situation outlines need for better esports contract clarity & advice*, ESPORT NEWS UK, (Mar. 17, 3:11 PM), <https://esports-news.co.uk/2017/11/12/smooya-contract-situation-epsilon/>; Jonathan L. Israel, *It's Not Just A Game – Addressing Employment Law Issues in Esports*, FOLEY (Mar. 17, 2020, 3:39 PM), <https://www.foley.com/en/insights/publications/2019/06/employment-law-issues-in-esports>.

²³ David Zhou, *Why the unionization of esports is a difficult if not impossible road*, POLYGON (Mar. 18, 2020, 9:17 AM), <https://www.polygon.com/2013/7/19/4506524/gaming-will-be-a-legitimate-profession-for-hundreds-in-next-few-years>.

to no time, highlighting the easily dispensable nature of the players.²⁴ Moreover, the ‘professional grind’ that esports players are compelled to subject themselves to long working hours is more excruciating than what athletes in traditional sports are expected to, with more than fourteen hours daily practice for six days a week at the minimum just to sustain their jobs, coupled with their merchandising and sponsorship commitments.²⁵ Though player associations have been formed by *Counterstrike* and *LoL* players,²⁶ they suffer from an obvious lack of legal pedigree (the sticking point being them being considered independent contractors and not employees, the latter being a prerequisite to unionise)²⁷ which renders them ineffective in adequately dealing with the ethical troubles faced by players.²⁸

2.2. STRUCTURAL DISCREPANCIES

Unlike mainstream sports, such as tennis or football, which have a well-defined regulatory apparatus governed by codified rules, specifically formulated for the particular sport in question, such consistency is lacking in esports.²⁹ This can be attributed to the variation in the rules of gameplay between separate video games. For example, the rules applicable to the *LoL* Championship inherently differ from the rules of the *Counter-Strike: Global Offensive* (CS:GO) Championship, the former being based on a Multiplayer Online Battle Arena (MOBA) (team-based strategy games with each player possessing unique abilities) and the latter based on the First-Person Shooter (FPS) (weapon-based combat games played through an individual perspective) model,³⁰ and also due to characteristic differences such as in the nature of the game, the number of players involved, in-game strategies and the objective of the game (for example, MOBA games epitomize team performance and not individual achievements to win whereas FPS games focus solely on individual performances. Teams work

²⁴ Katherine E Hollist, *Time to Be Grown-Ups about Video Gaming: The Rising esports Industry and the Need for Regulation*, 57 ARIZ. L. REV. 823, 832 (2015).

²⁵ *Id.*

²⁶ Pat Evans, *How Players Associations Could Help Improve Esports' Infrastructure*, FRONT OFFICE SPORTS (Mar. 18, 2020, 9:32 AM), <https://frntofficesport.com/players-associations-esports-infrastructure/>.

²⁷ Roshan Patel, *Esports, Player Positions, and the Benefits of Unionization*, 18(1) DUKE L. & TECH R. 233, 235 (2020).

²⁸ Marijam Didžgalvytė, *Labour Rights in Esports*, NOTES FROM BELOW (Mar. 18, 2020, 10:11 AM), <https://notesfrombelow.org/article/labour-rights-in-esports>.

²⁹ Fabio Schlosser Vila, *Do esports lack structure*, DW (Mar. 18, 2020, 10:51 AM), <https://www.dw.com/en/do-esports-lack-structure/a-36930847>.

³⁰ Joost, *Esports Governance and its Failures*, MEDIUM (Mar. 18, 2020, 11:14 AM), <https://medium.com/@heyimJoost/esports-governance-and-its-failures-9ac7b3ec37ea>.

together in the former whereas a team in the latter is a collective of individual players competing separately).

The fragmented nature of the esports industry, with each video game title being distinct from the other and each having different rules programmed into the game (games have a significant contrast in terms of winning criteria, the permissibility of in-game inputs players. Games of the same genre are also varied in their gameplay and objectives as the same is decided by developers beforehand) by developers, makes the implementation of coherent regulations for esports governance extremely challenging.³¹ A key factor behind this discrepancy is related to the commercial use of gameplay. Developers own the intellectual property related to their video game and licensing agreements often exclude commercial use via streaming.³² The manifold nature of esports titles, unlike a traditional sport which operates on standardised rules extending to all events and tournaments of the sport, also indicates the expanse of the esports edifice, so much so that it can be considered a sub-industry in itself, operating as a part of the larger sports industry.³³ Another structural dissimilarity, which is more or less the consequence of the aforementioned disparity in esports games, is in the organisational setup concerning league ownership. Whereas leagues in traditional sports function under the aegis of a professional supervisory body, often with statutory authority, esports leagues are primarily developer-sponsored,³⁴ with game developers possessing the ownership rights and controlling the operational aspects of the league including tournament organising, broadcasting and funding prize money. A major reason behind the private ownership model adopted in esports tournaments is that developers are better equipped to handle the organising process, being aware of the game mechanics, rules and software intricacies apart from the distribution and licensing of game-related intellectual property (IP) to separate organisers and bodies being cumbersome and involving dilution of control and uniformity.³⁵ Private ownership is more or less a necessity given the lack of an apex organisation to oversee the conducting of tournaments

³¹ *Id.*

³² Roman Brtko, *Intellectual Property in the World of esports*, IPWATCHDOG (Jul. 30, 2020, 10:27 AM), <https://www.ipwatchdog.com/2018/04/02/intellectual-property-esports/id=95245/>

³³ Wanyi Tang, *Understanding Esports from the Perspective of Team Dynamics*, THE SPORT JOURNAL (Mar. 18, 2020, 11:33 AM), <https://thesportjournal.org/article/understanding-esports-from-the-perspective-of-team-dynamics/>.

³⁴ Laura L Chao, *You Must Construct Additional Pylons: Building a Better Framework for Esports Governance*, 86 *FORDHAM L. REV.* 737, 744 (2017).

³⁵ *Id.*

and related events. The pitfall with private ownership, easily observed, is the vulnerability of players and teams to the whims of developers in exercising their control.³⁶

There have been instances of developers using their power arbitrarily, to the detriment of other stakeholders. Riot, the developers of LoL, excluded Immortals,³⁷ a team which was seen as the flagbearer of the league and which had performed well, in its LoL League Championship Series without any rationale behind its decision, citing the team's involvement in the competing Overwatch League and financial problems, despite no apparent evidence of the latter. Similarly, enterprises within the esports ecosystem which monetize developer-owned video game IP and rely on the same for their revenue also stand to lose heavily at the hands of unfettered developers.³⁸ Concerning developer involvement in regulating leagues and tournaments, India specifically is faced by additional hurdle since most game developers are situated outside the country and are thus unable to exercise control to the same degree over events. This raises the question of the model of regulation to be followed. The government pitching in with providing esports with the required recognition and subsequent regulation is crucial in this regard. Fastening adequate authority to an independent organisation is necessary to put a leash on developer power and safeguarding the interests³⁹ for amicable interaction between developers, players, team owners and other stakeholders.

2.3. STREAMING VERSUS BROADCASTING

Television broadcasting of mainstream sports has been commonplace long before fast internet speeds led to the emergence of streaming services. The birth of esports has paved the way for a new generation of sports fans.⁴⁰ Esports viewers mostly consist of people who play the very games they watch, looking for a hands-on experience on the internet, which streaming provides. The TV-centric viewership paradigm at present is not geared towards much of what esports, in essence, stands for, by and large, a product of the twenty-first-century technocracy.

³⁶ Mateusz Kaliski, *Who Holds the Cards: How Developer Control in Esports Can Impact the Ecosystem*, MEDIUM (Sep. 23, 2020, 10:10 PM), <https://medium.com/@matkaliski/who-holds-the-cards-how-developer-control-in-esports-can-impact-the-ecosystem-8cb1589c5c67>.

³⁷ Xing Li, *Why kicking Immortals out of the NA LCS is a mistake*, DOT ESPORTS (Sept. 23, 2020, 11:23 PM), <https://dotesports.com/league-of-legends/news/why-kicking-immortals-out-mistake-na-lcs-18125>.

³⁸ *Id.*

³⁹ KALISKI, *supra* note 39.

⁴⁰ Nathan Edge, *Evolution of the Gaming Experience: Live Video Streaming and the Emergence of a New Web Community*, 4(2) THE ELON JOURNAL OF UNDERGRADUATE RESEARCH IN COMMUNICATIONS 33 (2013).

Right from participation to spectatorship, esports are an amalgamation of internet-reliant stakeholders based upon an all-inclusive community.⁴¹

The emergence of streaming platforms such as YouTube and Twitch are testimony to the booming popularity of user-engaging streaming platforms amongst the younger tech-savvy generation. Twitch, in particular, is a platform specifically targeted towards the gamers, through an interaction-based spectating model⁴² providing viewers with the opportunity to interact with streamers through a live chat system, creating a sense of unison between players and their fans, further increasing the appeal of esports to those looking for a more involved viewership experience.⁴³ The upsurge in the popularity of these platforms for esports consumption has also been down to the fact that popular and influential players can directly interact with their followers, which is unknown territory for existing broadcasting networks, which have over time served the interests of ‘actual’ sports, airing leagues and tournaments and not individual gameplay, a reason why they are playing catch up to services like Twitch.⁴⁴ Broadcasting networks are not lagging, with ESPN entering into contracts with Blizzard Entertainment and Riot Games to broadcast the Overwatch League and LoL competitions,⁴⁵ banking on the burgeoning increase in viewership of esports with the hope to carve out a niche for streamers and as well as television viewers.

2.4. THE GAMBLING DILEMMA

Traditional sports have witnessed gambling and betting becomes a precarious yet ubiquitous component of their ecosystem, and esports, in their short span of existence, have also become a victim to shady gambling practices.⁴⁶ The enforcement of requisite safeguards against such activities in the esports world is also complicated by the presence of in-game gambling markets in the form of wagering on virtual items, in addition to the market for wagering actual

⁴¹ Esther Levine, *How esports streaming platforms are impacting television*, VIACCESS ORCA (Mar. 18, 2020, 12:12 PM), <https://www.viaccess-orca.com/blog/esports-streaming-platforms-impacting-television>.

⁴² Dean Takahashi, *Our deep dive into how esports broadcasting differs from traditional sports*, VENTURE BEAT (Mar. 18, 2020, 12:39 PM), <https://venturebeat.com/2019/04/13/our-deep-dive-into-how-esports-broadcasting-differs-from-traditional-sports/>.

⁴³ Natasha Borders, *Finding Success on Twitch*, TOWARDS DATA SCIENCE (Mar. 18, 2020, 1:04 PM), <https://towardsdatascience.com/streaming-recommender-twitch-e40d4a45e4ee>.

⁴⁴ Amrita Khalid, *The future of live-streaming, for better or worse, depends on Twitch*, QUARTZ (Mar. 18, 2020, 2:25 PM), <https://qz.com/1747158/twitch-grows-as-non-gamer-live-streaming-expands-on-the-platform/>.

⁴⁵ Jacob Bogage, *Esports continue TV push with ESPN and Turner, sparking enthusiasm, ire*, THE WASHINGTON POST (Mar. 18, 2020, 2:46 PM), <https://www.washingtonpost.com/sports/2019/03/28/esports-continue-tv-push-with-espn-turner-sparking-enthusiasm-ire/>.

⁴⁶ LJ Bovey, *Could Gambling Kill eSports?*, THE VERSED (Mar. 18, 2020, 4:11 PM), <https://www.theversed.com/97037/could-gambling-kill-esports/#.kTnfV1UcgD>.

currency.⁴⁷ Profit-driven gaming companies and an insufficient regulatory mechanism have allowed this issue to carry on rampantly unchecked. Esports participants comprise predominantly of underage teenagers unaware of the wide-scale ramifications of gambling.⁴⁸ Games such as *Counterstrike* include in-game virtual items known as ‘skins’ (weapon designs) that are created and sold by players through an online community marketplace, such as Steam (one of the most popular example).⁴⁹ Players can trade their skins on Steam for virtual credits, which can be used to purchase games and other items on the Steam marketplace.⁵⁰

However, players have an alternative option to trade their skins for money or use them to bet on the outcomes of real-time eSports matches⁵¹ or in casino-like games,⁵² similar to sports betting on sites such as *Bet365* and *Betway*,⁵³ through third-party exchange websites such as *CS:GO Lounge*, *SkinXchange* and *Fanobet*,⁵⁴ and herein lie the origins of underage gambling. This is because illicit trading platforms such as the above allow players access just by linking their accounts on gaming marketplaces such as Steam, the user agreement of which requires players to be only a minimum of thirteen years of age to create an account.⁵⁵ Children are tempted to spend money on skin gambling websites, many a time without parental permission, misled under the false pretence of winning big easily, a glaring example being the recent misrepresented winning by two popular CS:GO YouTubers on a gambling site *CSGO Lotto*, who were later found out to be the owners of the website.⁵⁶ What is especially problematic is that unlike the real currency, the gambling of which is subject to statutory limitations, virtual items sit outside the purview of any existing legislation, a grey area which unlicensed gambling

⁴⁷ Justin Ronquillo, *The Rise of Esports: The Current State of Esports, Its Impacts on Contract Law, Gambling, and Intellectual Property*, 23 INTELL. PROP. & TECH. L. J. 81, 94 (2019).

⁴⁸ Ailsa Sherrington, *Esports has a drug and gambling problem*, THE NEXT WEB (Mar. 18, 2020, 4:41 PM), <https://thenextweb.com/events/2018/05/16/esports-has-a-drug-and-gambling-problem/>.

⁴⁹ Eric Yu, *The Start of It All: Skin Gambling*, UNIKRN (Mar. 18, 2020, 6:07 PM), <https://news.unikrn.com/article/the-start-of-it-all-skin-gambling>.

⁵⁰ John T Holden et al., *Esports Corruption: Gambling, Doping, and Global Governance*, 32 MD J INT'L L 236 (2017).

⁵¹ Navanwita Sachdev, *Underage skin gambling on the rise*, THE SOCIABLE (Mar. 19, 2020, 10:27 AM), <https://sociable.co/web/underage-skin-gambling-on-the-rise/>.

⁵² Shaun Assael, *Skin in the Game*, ESPN (Mar. 19, 2020, 11:13 AM), [espn.com/espn/feature/story/_id/18510975/how-counter-strike-turned-teenager-compulsive-gambler](https://www.espn.com/espn/feature/story/_id/18510975/how-counter-strike-turned-teenager-compulsive-gambler).

⁵³ Maddy Myers, *How Esports Gambling Works*, KOTAKU (Mar. 19, 2020, 11:38 AM), <https://compete.kotaku.com/how-esports-gambling-works-1823959797>.

⁵⁴ Taylor Stanton Hardenstein, *Skins in the Game: Counter-Strike, Esports, and the Shady World of Online Gambling*, 7 UNLV GAMING L.J. 117 (2017).

⁵⁵ Kamali Melbourne & Matthew Campbell, *Professional Video Gaming May Have an Underage Gambling Problem*, BLOOMBERG, (Mar. 19, 2020, 12:00 PM), <http://www.bloomberg.com/news/articles/2015-09-07/professional-video-gaming-has-an-underage-gambling-problem>.

⁵⁶ Colin Campbell, *The True Cost of Counter-Strike Skin Gambling*, POLYGON (Mar. 19, 2020, 12:23 PM), <https://www.polygon.com/features/2016/7/18/12203534/counter-strike-cs-go-skin-gambling>.

sites have conveniently exploited to full effect.⁵⁷ Although Valve, the developer of CS:GO attempted to curb the unregulated skins gambling market by issuing cease-and-desist notices,⁵⁸ the practice has branched out to other popular esports titles such as Overwatch, DoTA and Fortnite as well, with ‘loot boxes’ (virtual crates containing a random combination of in-game items)⁵⁹ replacing skins as hot property in online trading.⁶⁰

2.4.1. MATCH FIXING WOES

The unabated rise of esports betting and gambling has culminated into match-fixing scandals across esports tournaments⁶¹, where players have been accused of ‘throwing’ (deliberately losing or rigging) matches to win bets placed through virtual gaming items. There have been repeated instances over the past few years where multiple CS:GO professionals have been handed indefinite suspensions for indulging in match-fixing.⁶² A similar controversy took place in South Korea, where certain players were given lifetime bans by the Korean eSports Association (KeSPA) for their involvement in match-fixing.⁶³

2.5. DOPING AND ADDICTION CONCERNS

Esports have been no stranger to the usage of performance-enhancing drugs becoming widespread by players, who seek to gain that extra edge to trump their competitors and in pursuit of which resort to drugs such as Adderall and Ritalin⁶⁴ for cognitive enhancement and

⁵⁷ Kevin Wimer, *Betting is esports’ biggest and most underappreciated opportunity*, VENTURE BEAT (Mar. 19, 2020, 12:59 PM), <https://venturebeat.com/2019/06/03/betting-is-esports-biggest-and-most-underappreciated-opportunity/>.

⁵⁸ Valve, *In-Game Item Trading Update*, STEAM (Mar. 19, 2020, 1:16 PM), <https://store.steampowered.com/news/22883/>; Andrew Meola, *How eSports has given rise to competitive gaming betting and gambling – with skins and real money*, BUSINESS INSIDER (Mar. 19, 2020, 1:44 PM), <https://www.businessinsider.com/the-rise-of-esports-betting-and-gambling-2018-1?IR=T>.

⁵⁹ Andrew E. Freedman, *What Are Loot Boxes? Gaming’s Big Controversy Explained*, TOM’S GUIDE (Mar. 19, 2020, 1:57 PM), <https://www.tomsguide.com/us/what-are-loot-boxes-microtransactions,news-26161.html>.

⁶⁰ David J. Castillo, *Unpacking the Loot Box: How Gaming’s Latest Monetization System Flirts with Traditional Gambling Methods*, 59 SANTA CLARA L. REV. 165 (2019).

⁶¹ Andrew Nixon et al., *Esports uncovered – Part 3 The biggest risk factors facing the industry*, LAWINSPORT (Mar. 19, 2020, 2:31 PM), <https://www.lawinsport.com/topics/item/esports-uncovered-part-3-the-biggest-risk-factors-facing-the-industry#ftn6>.

⁶² Andy Chalk, *Valve bans seven CS:GO pro players from tournament play for match fixing*, PC GAMER (Mar. 19, 2020, 2:50 PM), <https://www.pcgamer.com/valve-suspends-seven-csgo-pro-players-for-match-fixing/>; Luis Mira, *Epsilon Suspend CS:GO Team*, HLTV (Mar. 19, 2020, 3:09 PM), <http://www.hltv.org/news/14142-epsilon-suspend-csgo-team>; Phil Kornyshev, *A brief history of bans in CS:GO*, ESPORTS INSIDER (Mar. 19, 2020, 3:35 PM), <https://esportsinsider.com/2017/04/brief-history-bans-csgo/>.

⁶³ Philip Kollar, *StarCraft 2 Matchfixing scandal leads to lifetime bans from Korean eSports Association*, POLYGON (Mar. 19, 2020, 4:02 PM), <https://www.polygon.com/2015/10/18/9565509/starcraft-2-matchfixing-scandal-lifetime-bans-kespa-korean-esports-association>.

⁶⁴ James Gatto & Mark Patrick, *Overview of Select Legal Issues with eSports*, 6 ARIZ. ST. U. SPORTS & ENT. L.J. 427 (2017).

keeping nerves under control and reducing fatigue, with hefty prizes at stake.⁶⁵ While the use of stimulants casts doubt over competitive integrity, as in other sports, what's more, worrisome are the health repercussions.⁶⁶ Unlike sports involving physical exertion, esports involve prolonged mental focus and concentration for hours on a stretch,⁶⁷ devoid of any physical element, which can take a toll on the body of these young athletes. In response to numerous incidents of doping in esports tournaments, the Electronic Sports League (ESL), the world's largest eSports company organising tournaments covering a series of popular game titles, in 2015, began conducting random doping tests and drug screenings during tournaments with support from the World Anti-Doping Agency (WADA).⁶⁸ However with ESL only having a limited number of leagues under its control, the implementation of an all-encompassing anti-doping policy a difficult task, as players can simply take part in other leagues with less stringent doping restrictions.⁶⁹ Physical constraints worsen the implementation of a uniform mechanism, as preliminary rounds of many tournaments take place remotely over the internet, as a result of which many players using banned substances escape going under the radar.⁷⁰

2.5.1. E-DOPING

Performance-enhancing drugs are not the only way esports players can gain an unfair advantage while competing. The making of in-game changes, by way of altering the inner code and programming of the game, for self-benefit is termed as e-doping.⁷¹ E-doping, unlike doping, is harder to trace as there do not exist any detecting measures and tests for curbing the same as a participant can modify the programming of their individual system unnoticed from the tournament organisers, as other systems remain unaffected by any modifications.⁷² Cheating software such as 'aimbots' and 'wallhacks' respectively allow players to automatically aim at opponents or see through walls, drastically improving their chances at winning. Players also

⁶⁵ Cody Luongo, *ESI Gambling Report: Sex, drugs and esports*, ESPORTS INSIDER (Mar. 19, 7:34 PM), <https://esportsinsider.com/2018/08/esi-gambling-report-sex-drugs-and-esports/>.

⁶⁶ Andrew Masterson, *The rising problem of doping in eSports*, AUSTRALIA'S SCIENCE CHANNEL (Mar. 20, 2020, 1:19 PM), <https://australiascience.tv/the-rising-problem-of-doping-in-esports/>.

⁶⁷ GATTO & PATRICK, *supra* note 67, at 430.

⁶⁸ Lindsay Brandon, *The Future of Anti-Doping Cases May Be In Esports*, OREGON SPORTS NEWS (Mar. 20, 2020, 1:33 PM), <http://oregonsportsnews.com/the-future-of-anti-doping-cases-may-be-in-esports/>.

⁶⁹ Harsh Malpani, *Understanding 'E-Doping' and Need for Fair Competition in E-Sports*, RGNUL STUDENT RESEARCH REVIEW (Mar. 20, 2020, 1:52 PM), http://rsrr.in/2019/07/28/understanding-e-doping/#_edn9.

⁷⁰ *Id.*

⁷¹ Giulia Zappaterra et al., *The concept of eDoping in eSports - cyber security as a safety measure, enforcement and sanctions in case of non-compliance*, LEXOLOGY (Mar. 20, 2020, 2:22 PM), <https://www.lexology.com/library/detail.aspx?g=b3abb0aa-72da-4d26-9ad8-d5ce8204d7c1#:~:targetText=eDoping%20is%20in%20fact%20the,actions%20with%20a%20single%20click>.

⁷² *Id.*

make use of sabotage software, which slows down opponent computer systems.⁷³ A disjointed approach between publishers and tournament organisers aggravates the issue as they focus more on prevention rather than undertaking pre-emptive measures, acting only when such issues surface.⁷⁴ In this regard, Valve introduced its Valve Anti-Cheat System (VAC), which scans computers for usages of identifiable cheats, flagging and permanently banning users found to be guilty of cheating.⁷⁵ The Esports Integrity Commission (ESIC), established in 2016, has also published a Code of Conduct to guard against incidents of cheating cropping up in affiliated tournaments. Though these measures have been impactful, their effectivity has been brought into question with recent reports of e-doping, where an Indian *Counter-Strike* player was caught cheating through a pre-programmed cheating software in a major tournament, which he had installed in his system.⁷⁶ A popular Fortnite YouTuber was also found to be using aimbots in some of his uploaded videos, which invited a lifetime ban.⁷⁷

2.5.2. TACKLING THE SUSCEPTIBILITY TO ADDICTION

The addictive tendencies and mental health implications have been well-documented far before its formalisation into what we now know as esports. Traditional sports, only very recently have opened to the ignored impact of mental health on athletes. The Premier League, in England, launched the *Heads Up* campaign⁷⁸ to raise awareness on mental health and stimulate a conversation on the issue. Esports currently lag in discussing and addressing occupational hazards encountered by players such as psychological distress, social awkwardness, anxiety disorder, burnout and impulsivity.⁷⁹ Analysing why the effects of prolonged and excessive

⁷³ Ian Smith, *The continued rise of eSport – Efforts to combat match fixing and improve integrity*, LAWINSPO (Mar. 20, 2020, 3:06 PM), <https://www.lawinsport.com/topics/item/the-continued-rise-of-esport-efforts-to-combat-match-fixing-and-improve-integrity>.

⁷⁴ Graham Ashton, *Cheating in Esports – How Is It Done, and How Is It Dealt With?*, THE ESPORTS OBSERVER (Mar. 20, 2020, 3:31 PM), <https://esportsobserver.com/cheating-in-esports/>.

⁷⁵ Evan Lahtl, *Valve has 1,700 CPUs working non-stop to bust CS:GO cheaters*, PC GAMER (Mar. 20, 2020, 3:42 PM), <https://www.pcgamer.com/vacnet-csgo/>.

⁷⁶ Fox Sports Asia, *Indian counter strike player caught cheating in Zowie eXTREMESLAND Finals*, FOX SPORTS ASIA (Mar. 20, 2020, 4:15 PM), <https://www.foxsportsasia.com/esports/956454/indian-counter-strike-player-caught-cheating-in-zowie-extremesland-finals/>.

⁷⁷ Elliott Bretland, *How Doping Is Casting a Shadow over the Rise Of eSports*, THE SPORTSMAN (Mar. 20, 2020, 4:30 PM), <https://www.thesportsman.com/features/how-doping-is-casting-a-shadow-over-the-rise-of-esports>.

⁷⁸ *Heads Up*, PREMIER LEAGUE (Sept. 24, 2020, 12:24 AM), <https://www.premierleague.com/heads-up#:~:text=Heads%20Up%2C%20a%20partnership%20between,already%20happening%20across%20the%20game>.

⁷⁹ Thomas Chung et al., *Will esports result in a higher prevalence of problematic gaming? A review of the global situation*, 8(3) JOURNAL OF BEHAVIORAL ADDICTIONS, 384 (2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7044624/>; *Esports gamers face same level of psychological pressure as pro-athletes*, SCIENCE DAILY (Sep. 24, 2020, 1:21 AM), <https://www.sciencedaily.com/releases/2019/11/191112110315.htm>.

gaming have not been accorded the due attention they deserve, it can be observed that the gradual commercialisation of esports and the commoditisation of esports professionals which has seen them become a money-making cog in the machine. Sponsorship deals and the commercial prospects that players present are prioritised as developers and esports teams alike seek to continuously expand and diversify their cash streams, at the expense of the well-being of the players who are fundamental to the proliferation of esports into an industry. This issue is intertwined with concerns regarding player exploitation and a core ethical dilemma which requires urgent addressal and solidifies calls for regulatory bodies that are detached from a solely commercial outlook towards policy making and regulating esports.

3. POLICY PROPOSALS AND RECOMMENDATIONS

3.1. A RECOGNISED REGULATOR

Considerable steps with respect to putting in place a systematic regulatory mechanism have been taken with the constitution of international bodies such as the International Esports Federation (IeSF) and the World Esports Association (WeSA), but both organisations have failed to muster popular support of the various esports teams, players and tournament organisers, due to a clash of interest between rival stakeholders and lacklustre involvement.⁸⁰ The IeSF was established in 2008, adopting a model similar to organisations such as FIFA, which regulates competitive football internationally, seeking to promote a standardisation process within the esports industry and for the regulation of tournaments.⁸¹ Its members comprise of national esports federations from different countries, with China and Korea as its proactive members.⁸² Despite its best efforts to further bridge the gap between esports and traditional sports, its model has proven to be of less utility than supposed, since the lion share of the industry is commanded by mainly private game publishing companies like Riot Games and Blizzard, whose interests have been overlooked.⁸³ Formed as a solution to the shortcomings of the IeSF, the WeSA, was founded in 2016 in consultation with the industry-leading esports teams and the ESL. The WeSA was constituted to bring much-needed stability, standardised

⁸⁰ Jacqueline Martinelli, *The Challenges of Implementing a Governing Body for Regulating Esports*, 26 U. MIAMI INT'L & COMP. L. REV. 499 (2019).

⁸¹ IeSF, *About IeSF*. IeSF (Mar. 20, 2020, 5:47 PM), <https://www.ie-sf.org/iesf/>.

⁸² Graham Ashton, *TEO Q4 Report: How Would a Global Esports Federation Function?*, THE ESPORTS OBSERVER (Mar. 20, 2020, 7:11 PM), <https://esportsobserver.com/global-esports-federation/>.

⁸³ McCarthy Tetrault, *No Pixel Podiums: Lack of governance in esports excludes them from the Olympic Games*, LEXOLOGY (Mar. 21, 2020, 12:13 AM), <https://www.lexology.com/library/detail.aspx?g=964305b7-5df5-4d82-b5d4-a97209a773f4>.

norms and fairness to the esports scene.⁸⁴ However, its efforts have been mostly futile, with inactive members and the confined involvement of the organisation to only the Counter-Strike eSports tournaments, and the CS:GO community downplaying its efforts to a large extent, raising doubts over its credibility.⁸⁵

3.1.1. THE RIGHT APPROACH

The evident lack of an overarching regulatory authority undertaking a watchdog role and organising tournaments in the best interests of all stakeholders is the most immediate concern facing esports regulation. With a commonly applicable set of rules not being possible to implement due to the diverse nature of game mechanics, varying from game to game, emphasis shifts to the maintenance of competitive integrity and keeping check of unethical activities.⁸⁶ The Electronic Sports Integrity Commission (ESIC) has been recently formed in 2016, seeking to achieve unison between the business interests of game developers companies and the interests of e-athletes, promoting ethical values and countering malpractices such as match-fixing and doping.⁸⁷ It has been able to involve major companies such as Intel as well as the ESL and Dreamhack, a popular esports festival held in Sweden, which has provided the much-needed launchpad for regulation in the future.⁸⁸ South Korea, the pioneering nation in terms of integrating esports into the structured governance fabric of mainstream sports, is a country which has inspired many western countries such as France, the UK and the USA to govern the esports industry,⁸⁹ and from which India should ideally draw upon for legitimising the now well-established esports regime in our country. The South Korean government has successfully recognised the impact of digital infrastructure developments and cultural influences on the economic front which has led to the materialisation of the esports industry in the country, forming the Korean eSports Association (KeSPA) with the support of the Ministry of Culture and Tourism in 2000, well before esports burst onto the world scene.⁹⁰ The KeSPA, since its inception, has managed to provide player protection, promptly addressing regulatory

⁸⁴ Colin Campbell, *The who, what and why of the World Esports Association*, POLYGON (Mar. 21, 2020, 12:32 AM), <https://www.polygon.com/2016/5/13/11668182/what-is-wesa>.

⁸⁵ *Id.*

⁸⁶ CARRABINE, *supra* note 15, at 233.

⁸⁷ ESIC, *Who We Are*, ESIC (Mar. 21, 2020, 1:07 AM), <https://esic.gg/about/>.

⁸⁸ Will Green, *Establishing Esports Oversight: The Groups, Issues, And Potential Challenges*, THE LINES (Mar. 23, 2020, 11:12 AM), <https://www.thelines.com/esports-oversight-overview-and-challenges/>.

⁸⁹ CHAO, *supra* note 37, at 757.

⁹⁰ *Id.*

complexities, unlike the widely unregulated functioning of esports in other countries and internationally.⁹¹

Adopting a similar role for regulation to the ESIC in India, the Electronic Sports Federation of India (ESFI) has also been established, to provide a sustainable ecosystem for the operation of esports activities as well as the necessary digital and physical infrastructure to enhance the esports experience for participants and educate consumers about the emerging industry.⁹² The ESFI has been working in collaboration with the Indian Olympic Association, striving towards ensuring that esports are contested on par with other prestigious medal events in the 2022 Asian Games.⁹³ Enhanced government aid and legally empowering the ESFI are essential for establishing a level playing field between stakeholders in the country.⁹⁴ South Korea serves as a perfect model for Indian esports governance to build from, by attaching ministerial affiliation to the ESFI as a regulator (currently the ESFI has not secured recognition from sports authorities in India).⁹⁵ In terms of regulation and controlling ethical practices in esports, enforcing the ESIC Integrity Program, which can prove to be effective given the involvement and sufficient representation of all esports stakeholders in its development.⁹⁶

Esports have been gathering pace for the past few years, especially in 2020, despite the COVID-19 pandemic negatively impacting finances in traditional sports.⁹⁷ Spectator engagement has been unfazed, taking place on streaming platforms without physical crowds – the lack of which has been considerably detrimental to sports leagues such as the IPL.⁹⁸ This has directly resulted in a flurry of investment in Indian esports, with the likes of Red Bull⁹⁹ and

⁹¹ JOOST, *supra* note 33.

⁹² Electronic Sports Federation of India, *Main Objects*, ELECTRONIC SPORTS FEDERATION OF INDIA (Mar. 23, 2020, 11:30 AM), http://esportsfederation.in/#main_objects.

⁹³ Shaun Star & Nirav Bakshi, *The growth of esports in India – a short review of the main legal and regulatory challenges*, LAWINSPOORT (Mar. 23, 2020, 11:48 AM), <https://www.lawinsport.com/topics/item/the-growth-of-esports-in-india-a-short-review-of-the-main-legal-and-regulatory-challenges>.

⁹⁴ *Id.*

⁹⁵ Visvak, *Esports make its way to Asian Games*, THE HINDU (Oct 7, 2020, 11:34 PM), <https://www.thehindu.com/society/esports-is-on-the-rise-in-india/article24770235.ece>.

⁹⁶ Anirudh Rastogi and Vishakh Ranjit, *E-Sports Player Contracts: Common Clauses and Potential Legal Issues in India*, MONDAQ (Oct 7, 2020, 11:52 PM), <https://www.mondaq.com/india/gaming/955392/e-sports-player-contracts-common-clauses-and-potential-legal-issues-in-india>.

⁹⁷ Stephen Hall, *How COVID-19 is taking gaming and esports to the next level*, WORLD ECONOMIC FORUM (Sep. 23, 2020, 11:31 PM), <https://www.weforum.org/agenda/2020/05/covid-19-taking-gaming-and-esports-next-level/>.

⁹⁸ *Not hosting IPL will cause loss to the tune of Rs. 4,000 crore: Sourav Ganguly*, INDIAN EXPRESS (Sep. 23, 2020, 11:44 PM), <https://indianexpress.com/article/sports/ipl/sourav-ganguly-ipl-loss-coronavirus-6411307/>.

⁹⁹ AFK Gaming, *The top Indian esports business developments in June 2020*, ESPORTS INSIDER (Sep. 23, 2020, 11:46 PM), <https://esportsinsider.com/2020/07/india-esports-recap-june-2020/>.

Fnatic¹⁰⁰ partnering with Indian brands and start-ups to further boost the inroads esports are already making. In lieu of such mounting investment, the argument of having an independent organisation in place is strengthened even more, as an incentive for the government to cash in on esports. Another reason for an independent organisation can be seen in the recent decision of the Indian government to ban the popular mobile game PUBG. Popular streamers of the game and tournament organisers who relied on the game for a livelihood and revenue respectively, suffered a significant setback due to this decision, forced to move onto alternate sources.¹⁰¹ Currently, the PUBG Corporation, based in South Korea is working on republishing the game without Chinese affiliate Tencent, whose involvement led to the ban.¹⁰² In the same duration, players have been forced to shift to Call of Duty: Mobile, which swiftly pre-empted the ban by cutting ties with Tencent, as the alternate to PUBG.¹⁰³ The presence of an established organisation would have done a great deal in softening the blow of this ban by mitigating between player interests and the government's concerns. This would have helped in easing the transition to alternate game titles for either party (if necessary) or informing parties of a resolution, instead of coming as a shock to the mobile gaming community as has happened.

4. CONCLUSION

Esports have arrived and they are here to stay. With mounting investments and ever-expanding revenue streams, esports have quickly established themselves as a mainstay in the sports and entertainment industry. Their unstoppable rise to the top, has, however, brought to notice a quandary of ethical and regulatory laxities which stand as impediments to further growth. Game Developers and players are at a crossroads, as the former at their core remain money-minded corporations while the latter seek to protect their interests, which have been continuously exploited, a lack of collective bargaining arrangements being perhaps their most glaring concern. Doping, cheating and match-fixing scandals weaken the cause of the players as a community and tarnish competitive integrity. The unregulated gambling market in esports

¹⁰⁰ Jonno Nicholson, *Fnatic enters India-focused content partnership with Loco*, ESPORTS INSIDER (Sep. 23, 2020, 11:51 PM), <https://esportsinsider.com/2020/06/fnatic-loco/>.

¹⁰¹ *How the PUBG Mobile Ban Affects India*, ESPORTS.COM (Sept. 24, 2020, 12:09 AM), <https://www.esports.com/en/how-the-pubg-mobile-ban-affects-india-124707>.

¹⁰² Soumitra Bose, *PUBG Mobile Ban: Korean Company Boots out China's Tencent to Protect India Business*, OUTLOOK INDIA (Oct 8, 2020, 10:25 AM), <https://www.outlookindia.com/website/story/sports-news-pubg-corporation-cuts-off-tencent-link-to-save-lucrative-indian-battleground/360024>.

¹⁰³ *Id.*

is an added source of worry, with underage gambling and illegal betting being largely unchecked.

For esports to be considered at an equal footing alongside traditional sports, establishing an independent governing body which appropriately addresses the structural dissimilarities within an overlapping ecosystem, along with integrity concerns, is of utmost necessity. Successful regulation warrants striking a balance between clashing interests. The IeSF and the WESA are steps in the right direction, but their inability to involve a sufficient number of stakeholders and a lack of recognition raises questions over their legitimacy. Esports have come a long way, much in their unique way and for them to continue on their bright trajectory, stakeholders must ultimately unite for mutual benefit to drive the industry to even greater heights.

POLITICAL SPEECH IN SPORTS: A CASE FOR NON- PROHIBITION

Anmol Jain

National Law University, Jodhpur

jainanmol23@gmail.com

ABSTRACT

In January 2020, the International Olympics Committee released guidelines under Rule 50 of the Olympic Charter prohibiting any form of political speeches during the upcoming Tokyo Olympics, except during interviews and press conferences, and on social media. This article builds an argument against such blanket prohibition and proposes a regulatory regime that can, on one hand, uphold the freedom of speech of the athletes and on the other, maintain a disciplined athletic culture of sports. It is argued that political speech in sports satisfies all the predominant reasons furthered for guaranteeing a constitutional right to freedom of speech. Unlike a generally followed structure of unrestricted free speech bound by narrowly tailored reasonable restrictions, this article endorses a 'restricted free speech model', the boundaries of which must be defined by the principles of Olympism. This shall ensure that athletes utilize the Olympics as their moment of emancipation and help the world transform and adopt a progressive, non-discriminatory and anti-exclusionary outlook.

KEYWORDS

Olympic Charter, Political Speech, International Olympic Committee, Freedom of Speech.

1. INTRODUCTION

“Sport[ing] events are not just competitions; they are platforms for social interaction and the promotion of many ideals such as respect, fair play, integrity, and solidarity.”

-Wilfried Lemke¹

A free flow of political speech sans the one which attempts to incite violence is one of the primary edifices of a sound democratic system. Any suppression of diverse political views necessarily seeks a tacit promotion of a certain political view, which is believed by the leadership in power as the truth. For instance, in April 2020, the Rajasthan High Court, in a welcoming order, quashed a First Information Report registered against Jack Dorsey, the CEO of Twitter, for holding a poster stating ‘Smash Brahmanical Patriarchy’.² How does this concern sports law? The necessary context comes from the guidelines released in January 2020 by the International Olympics Committee (IOC) concerning political speech by the athletes during Olympic events. ‘To maintain harmony³ between the participating nations and the athletes’,⁴ the IOC has decided to prohibit political speech by expression or gestures, except during interviews and press conferences, and on social media during the Tokyo Olympics,⁵ provoking John Carlos, a former US athlete involved in the famous Black Power Salute during the 1968 Olympic Games, to label the guidelines as ‘nonsense’ and ‘ridiculous’.⁶ Taking a cue from Rule 50 of the Olympic Charter, which states that “[n]o kind of demonstration or political, religious or racial propaganda is permitted in any Olympic sites, venues or other areas”, the guidelines state that protests and demonstrations would not be permitted:

¹ Statement by the Special Adviser to the United Nations Secretary-General on Sports for Development and Peace, quoted by the United Nations Office on Sport for Development and Peace, *Annual Report 2015*, UN 1 (2016), [https://www.un.org/sport/sites/www.un.org.sport/files/ckfiles/files/UNOSDP_Annual_Report_2015%20\(1\).pdf](https://www.un.org/sport/sites/www.un.org.sport/files/ckfiles/files/UNOSDP_Annual_Report_2015%20(1).pdf).

² PTI, ‘Smash Brahmanical Patriarchy’ Poster: Rajasthan High Court Quashes FIR against Twitter CEO, THE WIRE (Apr. 7, 2020), <https://thewire.in/caste/jack-dorsey-smash-brahminical-patriarchy/>.

³ See, IOC Athletes’ Commission, *Rule 50 Guidelines*, <https://www.olympic.org/-/media/Document%20Library/OlympicOrg/News/2020/01/Rule-50-Guidelines-Tokyo-2020.pdf> (last visited Sept. 9, 2020) (See ‘Introduction’ to the document for a repeated use of the term ‘harmony’).

⁴ Katelyn Burns, *Why you might not see any athletes protest at this summer’s Olympics*, VOX (Jan. 9, 2020), <https://www.vox.com/2020/1/9/21058912/summer-olympics-tokyo-ban-athlete-protests>.

⁵ Agencies, *IOC lays down law over Olympics protests by athletes in Tokyo*, THE GUARDIAN (Jan. 10, 2020), <https://www.theguardian.com/sport/2020/jan/10/ioc-lay-down-law-over-olympic-protests-by-athletes-in-tokyo>.

⁶ Dave Zirin, *John Carlos Responds to the New Olympics Ban on Political Protest*, THE NATION (Jan. 14, 2020), <https://www.thenation.com/article/archive/olympics-protest-ioc/>.

“[a]t all Olympic venues, including: On the field of play; In the Olympic Village; During Olympic medal ceremonies; During the Opening, Closing and other official Ceremonies.”⁷

In the words of the IOC Athletes’ Commission:

“It is important, on both a personal and a global level, that we keep the venues, the Olympic Village and the podium neutral and free from any of political, religious or ethnic demonstrations. If we do not, the life’s work of the athletes around us could be tarnished, and the world would quickly no longer be able to look at us competing and living respectfully, as conflicts drive a wedge between individuals, groups and nations.”⁸

The reasoning, far from being logical, can at best be termed as highly paternalistic and depicting either a form of helplessness to support principled protest from its platform or a sense of complete disregard to certain political decisions of the participating states that have widespread humanitarian consequences. It is unfortunate that Olympics, already an event that runs on the forces and vices of neo-liberalism,⁹ instead of taking pride in upholding the interests of the marginalized, chooses to restrict the political voice to itself, not letting it extend to its athletes, even when, as I shall argue later, it has the ability to deliver significant results. If the aim of such restrictions, as stated by Thomas Bach, ‘is to unite and not to divide’,¹⁰ then it must be imperative for the IOC to positively further all those speeches that argue for equality, be it a speech that argues for ‘smashing Brahmanical patriarchy’ in the context of women and Dalits players in India, or concerns regarding other such fault-lines existing in other nations. It seems, quite ironically, that in the façade of adopting a policy that ensures politically neutral Olympics, the IOC itself is taking a political stand.

⁷ IOC Athletes’ Commission, *Rule 50 Guidelines*, OLYMPICS <https://www.olympic.org/-/media/Document%20Library/OlympicOrg/News/2020/01/Rule-50-Guidelines-Tokyo-2020.pdf>.

⁸ Katelyn Burns, *Why you might not see any athletes protest at this summer’s Olympics*, VOX (Jan. 9, 2020), <https://www.vox.com/2020/1/9/21058912/summer-olympics-tokyo-ban-athlete-protests>.

⁹ See JULES BOYKOFF, *CELEBRATION CAPITALISM AND THE OLYMPIC GAMES* (2013); JULES BOYKOFF, *OLYMPIANS: INSIDE THE FIGHT AGAINST CAPITALIST MEGA-SPORTS IN LOS ANGELES, TOKYO AND BEYOND* (2020).

¹⁰ Agencies, *IOC lays down law over Olympics protests by athletes in Tokyo*, THE GUARDIAN (Jan. 10, 2020), <https://www.theguardian.com/sport/2020/jan/10/ioc-lay-down-law-over-olympic-protests-by-athletes-in-tokyo>.

It is interesting how *Vox* has quoted Pierre de Coubertin, the founder of the modern Olympics, to counter this reasoning of the IOC. According to the news agency, de Coubertin emphasized on the aspect of ‘bringing together humanity’ (read as challenging the divides and inequalities to reach an egalitarian world, and not as harmony that silences demeaning differences and stigmatizing prejudices), rather than on ‘celebrating athletic excellence’:

*“To spread these principles is to build up a strong and more valiant and, above all, more scrupulous and more generous humanity.”*¹¹

To logically follow the sequence of events, the ban has come as a reaction to the symbolic protest by two athletes – Race Imboden and Gwen Berry – during the 2019 Pan American Games, where Imboden took a knee and Berry raised his fist during the medal ceremony against ‘racism, gun control, and the mistreatment of immigrants’.¹² These are the issues which have shaped and hugely impacted American history and continue to do so. These issues can never be placed under the category of ‘non-speech’, and games such as the Olympics, which attract viewership in billions across the globe,¹³ must serve as the necessary catalyst for the Governments to rethink their policies.¹⁴ As Imboden puts it, ‘I want my country to change’.¹⁵

It cannot be denied that these protests do have value and courage, something that must be appreciated. However, reflecting an indifferent attitude, the IOC states that ‘the focus for the field of play and related ceremonies must be on celebrating athlete’s performance.’¹⁶ Such statements show a complete disregard of the IOC towards the struggles that an athlete faces back home due to certain ascribed social set-ups¹⁷ and perpetuating politics that runs a vicious

¹¹ Id., quoting from PETER L. DIXON, *THE OLYMPIAN* (1984).

¹² Janelle Griffith, *Olympic fencer and hammer-thrower who kneeled, raised fist in protest put on probation*, NBC NEWS (Aug. 21, 2019), <https://www.nbcnews.com/news/nbcblk/olympic-athletes-who-kneeled-raised-fist-protest-put-probation-n1044826>.

¹³ *Olympic Winter Games global TV audience/viewership from 2010 to 2018 (in billions)*, STATISTA, <https://www.statista.com/statistics/531768/global-audience-of-the-winter-olympic-games/>; *How do we know that Rio 2016 was a success*, INTERNATIONAL OLYMPIC COMMITTEE (Dec. 6, 2016), <https://www.olympic.org/news/how-do-we-know-that-rio-2016-was-a-success>.

¹⁴ See Faraz Shahlaei, *When Sports stand Against Human Rights: Regulating Restrictions on Athletes’ Speech in the Global Sports Arena*, 38(1) LOY. L.A. ENT. L. REV. 95 (2017).

¹⁵ Race Imboden, *I am proud to be an American fencing champion. Here’s why I knelt for our anthem*, THE WASHINGTON POST (Aug. 13, 2019), <https://www.washingtonpost.com/outlook/2019/08/13/im-proud-be-an-american-fencing-champion-heres-why-i-knelt-our-anthem/>.

¹⁶ *International Olympic Committee bans political statements by athletes at games*, NBC NEWS (Jan. 10, 2020), <https://www.nbcnews.com/news/olympics/international-olympic-committee-bans-political-statements-athletes-games-n1113191>.

¹⁷ See ANAND TELTUMBDE, *REPUBLIC OF CASTE: THINKING EQUALITY IN THE TIME OF NEOLIBERAL HINDUTVA* (2018); SURAJ YENGDE, *CASTE MATTERS* (2019); YASHICA DUTT, *COMING OUT AS DALIT* (2019).

cycle of domination of certain groups,¹⁸ while at the same time showing apathy for one's moment of emancipation. To put it in the words of an Olympics scholar, Jules Boykoff has aptly summarized everything that is wrong with the guidelines:

*“The IOC’s edict, as laundered through its Athletes Commission, brims with hypocrisy. Athlete activism emerges from overlapping systems of injustice. To deny athletes the right to express their thoughts and feeling on the political injustices that wrack the world today reeks of authoritarianism, which is political in itself. This policy is a slap in the face to the exciting zeitgeist of smart savvy athletes who are willing to check their brains in at the Olympic door.”*¹⁹

In light of this introduction, it shall be my endeavour in this article to argue for a free flow of political speech during the Olympics. Though the history of political protest at the Olympics and other equivalent games is long,²⁰ the focus here is not to reiterate all such events, but to build an argument that supports a system of regulated speech, drawing inspiration from the principles of the Olympic Charter, and the regulation of free speech in democratic countries such as Canada, South Africa, Germany and India. In the next part, I shall first run a theoretical exercise to argue that political speech in sports satisfies the generally accepted reasoning underlying the guarantee of freedom of speech. Post that, juxtaposed against the blanket ban as directed under the guidelines, I shall argue for a regulatory framework for political speech, which shall ensure the existence of political speech during the Olympics, while checking that the Games do not transform into a platform for furthering unwarranted political motives, and due decency is maintained.

¹⁸ See JOSEPH STIGLITZ, *THE PRICE OF INEQUALITY* (2012); JACOB S. HACKER AND PAUL PIERSON, *WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER – AND TURNED ITS BACK ON THE MIDDLE CLASS* (2011); LARRY BARTELS, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE* (2016).

¹⁹ Dave Zirin, *John Carlos Responds to the New Olympics Ban on Political Protest*, *THE NATION* (Jan. 14, 2020), <https://www.thenation.com/article/archive/olympics-protest-ioc/>.

²⁰ See Faraz Shahlaei, *When Sports stand Against Human Rights: Regulating Restrictions on Athletes’ Speech in the Global Sports Arena*, 38(1) *LOY. L.A. ENT. L. REV.* 95 (2017); Matthew J. Parlow, *Race, Speech, and Sports*, 52(4) *U. RICH. L. REV.* 923 (2018); Melissa Godin, *Athletes Will be banned from Protesting at the 2020 Tokyo Olympics: But the Games Have a Long History of Political Demonstrations*, *TIME* (Jan. 14, 2020), <https://time.com/5764614/political-protests-olympics-ioc-ban/>.

2. REASONS FOR SUPPORTING FREE SPEECH

The role of sports in community development is undeniable.²¹ Sports have truly become an important arena for social cohesion and the realization of human rights. In the words of Peter Stone, the Australian Representative at the United Nations' Sixty-fifth General Assembly's 32nd and 33rd Meetings, which convened to adopt a resolution on 'Sports as Means to Promote Development':

*“A growing body of sport for development research provided strong empirical evidence for the direct role sport played advancing human rights, social inclusion and community development.”*²²

Though this *intrinsic power of sporting activities* to further human rights has been widely recognized, but the idea of sports acting *as a medium* for performing the same functions has been constantly denounced. For instance, when Colin Kaepernick, on multiple occasions, decided to sit on the bench while the national anthem was played as a protest against racial discrimination and police brutality against 'people of colour',²³ attempts were made to deliberately keep him out of the field.²⁴ Much severe were the consequences for players like Vera Caslavka, who was completely barred from sports by the Soviet government for turning her head away from the flag, and John Carlos and Tommie Smith for raising their gloved fists during the medal ceremony, who were suspended immediately from the US contingent.²⁵

²¹ MARTHA E. EWING ET. AL., *The Role of Sports in Youth Development*, in PARADOXES OF YOUTH AND SPORT 31 (Margaret Gatz et. al. eds., 2002); SPORT IN THE CITY: THE ROLE OF SPORT IN ECONOMIC AND SOCIAL REGENERATION (Chris Gratton & Ian P. Henry eds., 2001); Martha Brady, *Creating Safe Spaces and Building Social Assets for Young Women in the Developing World: A New Role for Sports*, 33(1-2) WOMEN'S STUD. Q. 35 (2005); Nico Schulenkorf, *Sustainable Community Development Through Sports and Events: A Conceptual Framework for Sport-for-Development Projects*, 15(1) SPORT MGMT. REV. 1 (2012); See Alex Poinsett, *The Role of Sports in Youth Development*, Report of a Meeting Convened by Carnegie Corporation of New York (March 1996), <https://files.eric.ed.gov/fulltext/ED407376.pdf>.

²² United Nations, Meeting Coverage and Press Releases, *Adopting Resolution on 'Sports as Means to Promote Development', General Assembly Recognizes Potential of Sport to Encourage Tolerance, Social Cohesion*, UNITED NATIONS GENERAL ASSEMBLY GA/11012 (Oct. 18, 2010), <https://www.un.org/press/en/2010/ga11012.doc.htm>.

²³ Steve Wyche, *Colin Kaepernick explains why he sat during national anthem*, NFL (Aug. 27, 2016), <http://www.nfl.com/news/story/0ap3000000691077/article/colin-kaepernick-explains-why-he-sat-during-national-anthem>.

²⁴ Brittney Watkins, *Kaepernick Can Kick It!: Employment Discrimination, Political Activism, and Speech in the NFL*, 59 WASH. U. J. L. & POL'Y 259 (2019).

²⁵ Melissa Godin, *Athletes Will be banned from Protesting at the 2020 Tokyo Olympics: But the Games Have a Long History of Political Demonstrations*, TIME (Jan. 14, 2020), <https://time.com/5764614/political-protests-olympics-ioc-ban/>.

It is argued that such two-faced behaviour must be debunked, and political speech in sports be supported. The argument is not merely based in consequentialism, it does have necessary roots in deontological ethics to meet the consequences. In most established constitutional democracies worldwide, freedom of speech finds a special place for certain commonly accepted reasons. If such reasons are also applicable in the case of political speech in sports, then it should prevail that political speech in sports must be allowed.

The primary reasons for supporting freedom of speech are: *first*, it helps in the discovery of truth; *second*, it helps in the creation of a marketplace of ideas and various viewpoints; *third*, it fulfils the ‘identity’ function, specifically the aspect of self-fulfillment; *fourth*, it secures due participation of citizens in the democratic functioning of the polity; and *fifth*, it allows for ‘suspicion of the government’ or to seek accountability from the government.²⁶ The arguments in the realm of sporting events would not be restricted to a two-way speech, i.e. between the government and the citizens, and between citizens *inter-se*. Rather, they would take place on three platforms – between the players (used liberally to include all stakeholders working along with the players, such as trainers, etc.) and the organizing committee, between the players and the state that they represent, and between players *inter-se*. Using these fronts, I shall cite at least one incident from the past against each of the five abovementioned reasons to establish that speech in the realm of sports is a principled argument, supported by a long-developed jurisprudence of free speech.

There is no better starting point than the 1968 Mexico City Summer Olympics. After winning the gold and the bronze medal in the 200-meter sprint, the US Olympians Tommie Smith and John Carlos faced an angrily booing crowd, screaming the US national anthem to them amidst their protest against black poverty and lynching. The two players climbed the podium barefoot, shared a pair of black gloves and raised their fists in the air when the national anthem played. John Carlos even kept his track-jacket unzipped and wore beads.²⁷ In his book, Carlos writes

²⁶ ERIC BARENDT, FREEDOM OF SPEECH (1985); GAUTAM BHATIA, OFFEND, SHOCK AND DISTURB (2016).

²⁷ DeNeen L. Brown, *They didn't #TakeTheKnee: The Black Power protest salute that shook the world in 1968*, THE WASHINGTON POST (Sept. 25, 2017), <https://www.washingtonpost.com/news/retropolis/wp/2017/09/24/they-didnt-takeaknee-the-black-power-protest-salute-that-shook-the-world-in-1968/>.

that this was ‘a moment of truth’ for them,²⁸ a truth which must be confronted by the world. In his interview with *The Guardian*, Carlos highlights the emancipatory power of his expression:

*“[t]he first thing I thought was the shackles have been broken and they won’t ever be able to put the shackles on John Carlos again. ... Materially, some of us in the incarceration system are still literally in shackles. The greatest problem is we are afraid to offend our oppressors.”*²⁹

The lines which followed are moving and they must make the IOC re-assess its decision to disallow political speech:

*“I had a moral obligation to step up. Morality was a far greater force than the rules and regulations they had. God told the angels that day, ‘Take a step back – I’m gonna have to do this myself.’”*³⁰

This is the courage that must be protected. To better comprehend the weight underlined the above quote, one must consider the works of a prominent Dalit scholar, Anand Teltumbde. He has argued, in his seminal work *Republic of Caste*, that one of the most disturbing parts of the Indian republic is the failure of the Dalit community forwards in fighting and leading the struggle for, and of, the remaining oppressed.³¹ John Carlos had done the same – when he got the right platform, he utilized it to seek an inclusive America. If such actions are strangulated at their moment of inception, it would be nothing but a move to keep the existing fault lines alive in the system, and regularly reinforce them. These protests are an event of self-fulfillment, aimed towards the establishment of real truth and not a politically motivated truth, and seeking accountability by injecting the space with viewpoints of the oppressed.

Set on a similar backdrop is the story of Colin Kaepernick. His protest was for highlighting and standing shoulder-to-shoulder with the subjects of racial injustice and police brutality,

²⁸ JOHN CARLOS AND DAVE ZIRIN, *THE JOHN CARLOS STORY: THE SPORTS MOMENT THAT CHANGED THE WORLD* (2011).

²⁹ Gary Younge, *The man who raised a black power salute at the 1968 Olympic Games*, *THE GUARDIAN* (Mar. 30, 2012), <https://www.theguardian.com/world/2012/mar/30/black-power-salute-1968-olympics>.

³⁰ *Id.*

³¹ ANAND TELTUMBDE, *REPUBLIC OF CASTE: THINKING EQUALITY IN THE TIME OF NEOLIBERAL HINDUTVA* (2018).

which had a great impact and moved many other sportsmen to stand by him.³² He justified his protest in the following words:

“I am not going to stand up to show pride in a flag for a country that oppresses Black People and people of colour. ... To me, this is bigger than football and it would be selfish on my part to look the other way. There are bodies in the street and people getting paid leave and getting away with murder.”³³

Majority of other such instances concern subjects like oppression, discrimination, exclusion and inequality. However, it is ironical how IOC chooses to frame its fundamental principles of Olympism. Consider Principle 6:

“The enjoyment of the rights and freedoms set forth in this Olympic Charter shall be secured without discrimination of any kind, such as race, colour, sex, sexual orientation, language, religion, political or other opinion, national or social origin, property, birth or other status.”

While the principle argues for equality, it makes it subject to the rights and freedoms granted by the IOC through its Charter, necessarily allowing it the infinite power to determine the territories of the equality arguments that can be raised through its platforms. This allows the IOC to preach certain values as window-dressing, but effectively curtail the protests for ensuring the same values at a broader-level, i.e., in the participating state, as it conflicts with IOC's interests. Beyond the charge of hypocrisy, it can also be questioned on the lines of the basic human rights, freedom of speech being one of them, which are ensured to everyone merely by virtue of their human existence and have been developed while having an emphasis on individual dignity.³⁴ Moreover, merely reserving political speech to press conferences and other such events put place-based restrictions, something which acts as a major impediment in

³² Matthew J. Parlow, *Race, Speech, and Sports*, 52(4) U. RICH. L. REV. 923 (2018); Brittney Watkins, *Kaepernick Can Kick It!: Employment Discrimination, Political Activism, and Speech in the NFL*, 59 WASH. U. J. L. & POL'Y 259 (2019).

³³ Mike Florio, *NFL: Players are encouraged but not required to stand for national anthem*, PRO FOOTBALL TALK (Aug. 27, 2016), <https://profootballtalk.nbcsports.com/2016/08/27/nfl-players-are-encouraged-but-not-required-to-stand-for-national-anthem/>.

³⁴ KATE PARLETT, *THE INDIVIDUAL IN THE INTERNATIONAL LEGAL SYSTEM* (2011); Faraz Shahlaei, *When Sports stand Against Human Rights: Regulating Restrictions on Athletes' Speech in the Global Sports Arena*, 38(1) LOY. L.A. ENT. L.A.W. REV. 95 (2017); Universal Declaration of Human Rights, GA Res. 217(III) A (Dec. 10, 1948); International Covenant on Civil and Political Rights, 999 UNTS 171 (Dec. 19, 1966). See K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.

allowing free and effective speech. It is again nothing but a colourable exercise to show solidarity to the protests, but, in reality, is an act of non-concern. All these aforesaid instances and arguments build a case for supporting political speech in the Olympics. In the next part, I shall reflect on how this speech can be regulated so as not to grossly impact the athletic culture, and save it from being overpowered by cross-countering political events.

3. REGULATION OF POLITICAL SPEECH IN SPORTS

Beginning with a basic norm, none of the fundamental freedoms could be unregulated. The regulation provides the necessary balance and helps in ensuring that the freedoms are utilized in a manner that best serves its goals. All constitutional documents guaranteeing the freedom of speech (and expression in certain cases) prescribe certain restrictions, either explicitly, for instance, the Indian³⁵ and the South African³⁶ constitutions, or implicitly, like in the USA, where the courts have read in certain restrictions by invoking the inherent police powers of the state.³⁷ The restrictions in each of such documents, or those restrictions which have born out of court judgments, necessarily share a unique cultural and political history with the individual nations, and thus, varying from nation to nation. At the same time, the manner of restriction of a particular kind of speech may also differ from nation to nation. For instance, hate speech in the US is supposed to be countered with more speech,³⁸ while it is specifically deemed unconstitutional, and thus, criminalized in India³⁹ and Canada.⁴⁰ Similar must be pattern followed while regulating political speech in the Olympics. Therefore, this requires an answer to two queries: (i) what are the interests that the Olympic events seek to promote; and (ii) what is the apt mechanism for regulating the speech.

Olympic Charter serves as an easy solution to the first query. Being a refined document developed over the years, the Charter provides some of the most progressive principles that

³⁵ INDIA CONST. art. 19, cl. 2-6.

³⁶ S. AFR. CONST., 1996, §§ 7, 36.

³⁷ See *Brandenburg v. Ohio*, 395 US 444 (1969) (free speech could be restricted for if it is directed at inciting or producing imminent lawless action, or is likely to incite such an action); *United States v. Xavier Alvarez*, 567 US 709 (2012) (on restricting free speech on the grounds of libel, fraud and perjury); *Miller v. California*, 413 US 15 (1973) (regarding punishing pornography); *Ashcroft v. Free Speech Coalition*, 535 US 234 (2002) (regarding non-coverage of child pornography under free speech protection); *Virginia v. Black*, 538 US 343 (2003) (non-protection of speech used as a threat of violence).

³⁸ *RAV v. City of St. Paul*, 505 US 377 (1992); *Virginia v. Black*, 538 US 343 (2003); *Snyder v. Phelps*, 562 US 443 (2011) – (United States Supreme Court).

³⁹ For an extensive discussion on the same, see Law Commission of India, Report No. 267 – Hate Speech (Mar. 2017), <http://lawcommissionofindia.nic.in/reports/Report267.pdf>.

⁴⁰ *Saskatchewan (Human Rights Commission) v. Whatcott*, [2013] 1 SCR 467 (Canadian Supreme Court).

can govern the regulation of free speech based on principles. In various jurisdictions, the regulation of free speech is done either through specifically drafted restrictions or through certain highly revered principles and constitutional values. For instance, in India, Article 19(2) of the Constitution provides a list of eight restrictions on the freedom of speech and expression. In contrast, the Canadian Charter of Rights and Freedoms places equality and multi-culturalism as the guiding values for exercising (and restriction thereof) the enlisted rights and freedoms.⁴¹ Similarly, Germany⁴² and South Africa⁴³ place dignity and equality at the highest place, thereby giving discretion to the courts to prohibit demeaning and degrading speeches.

I argue that the IOC can adopt the latter approach, as it shall allow the disciplinary body to assess the speech by looking into its content and core intentions. A study of the fundamental principles of Olympism leads to the identification of following values that can govern the freedom of speech: *human dignity* (principle 2); *inclusion* (principle 3); *non-discrimination* (principles 4 and 6); *equality* (principles 4 and 6); and *fraternity* (principle 4). Therefore, any speech (including expressions) that furthers and finds its roots in these principles must be supported and secured by the IOC. The model which is adopted here is not to grant unwarranted free speech to the stakeholders, but to allow limited political speech in consonance with IOC's principles. I believe that an institution with the stature of the IOC would also grow and mature with time and societal progress, and thus, if the future society finds more basic values worth adding to the Olympic Charter, the generally available freedoms under the national Constitutions shall be the source of their inclusion in the Olympic Charter, which would then allow players or trainers to use the platform of Olympics to voice their concerns. So, the territory of limited freedoms shall grow or be contained, along with the conscience of society. I believe that this would not promote majoritarian perspectives unless the national constitutions worldwide falter on checking majoritarianism. Any speech beyond the permitted speech would thus be a non-speech, bringing home disciplinary proceedings.

Some of the most intricate scenarios here, which one could also perceive as a limitation of this model, could be those where the athletes take a particular stance on purely political developments and justify them by citing the abovementioned principles of Olympism. To illustrate, consider a situation where a player *voluntarily* supports, and not on the coercion of

⁴¹ Constitution Act of 1982, §§ 27-28.

⁴² GRUNDGESETZ [GG] [BASIC LAW], *translation at* https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.pdf, art. 1.

⁴³ S. AFR. CONST., 1996, § 36.

the state,⁴⁴ the boycott of Israeli players and refuses to play or share a podium with them. Or, to consider a domestic scenario, a situation where certain players from India undertake an active and visible protest against the government policies regarding Kashmir or Nagaland (not including the concerns of human rights violation). One can identify that the roots of these issues are historical and purely political, and their resolution is generally subject to diplomatic negotiations among the different interested parties. The IOC in itself, as a formidable institution, does not influence such matters. Therefore, for the effective working of the ‘restricted free speech model’, it must be ensured that athletes maintain distance from such grossly political disputes and do not take advantage of the IOC’s platforms for furthering their personal opinions. The aim must be to secure neutrality where it is needed, because such protests carry with themselves a possibility of inviting political implications, disrupting the organization of the event, and might prove to be demeaning to the players standing on the other end of the spectrum. The jurisprudence on these lines could be developed by taking initial guidance from Principle No. 5 of the Fundamental Principles of Olympism. It argues for political neutrality of the organizations involved with the Olympic Movement. This principle can, on the one hand, secure political neutrality of sporting events, and on the other, act as a necessary check against those speeches that originate from political ideologies, religious sentiments or foreign policies. Nevertheless, it is predictable that the body-in-charge of evaluating the conduct of athletes and enforcing athletic discipline would come across many hard cases. It is on their judicious determination of such disputes that the future of political speech in sports depends, at least under the model as proposed in this article.

4. CONCLUSION

Political speech has been the source of many changes and progression in our society. Even revolutions are founded on ideas – ideas which are shared across the civilization with an aim to convince the audience for a change. Sans political speech, the society stands at danger of stagnation – a situation which is inherently unequal and promotes vested interests. Olympics, given its viewership and values, must utilize its influence in taking the world forward, and

⁴⁴ See, for instance, Reuters, *Iran’s Top-Rated Chess Player Alireza Firouzja Won’t Play for Country Due to Ban on Israeli Players*, FIRSTPOST (Dec. 25, 2019), <https://www.firstpost.com/sports/irans-top-rated-chess-player-alireza-firouzja-wont-play-for-country-due-to-ban-on-israeli-players-7824171.html>; Thomas Erdbrink, *Iran Bans Two Soccer Stars for Playing against Israelis*, THE NEW YORK TIMES (Aug. 17, 2017), <https://www.nytimes.com/2017/08/10/world/middleeast/iran-soccer-masoud-shojaei-ehsan-haji-safi.html>.

support its *primary stakeholders* to break their shackles. And it has got the power to do so.⁴⁵ As I have argued elsewhere regarding the rights of the LGBTQ+ community, the IOC host city contract has the ability to transform national laws of the host country as a domino effect of the application of progressive laws to the host city.⁴⁶ Moreover, this might also help in shielding the athletes from the excessive backlash that they might face at the hands of their national governments. A countering voice coming from the IOC shall be influential, if not a strong deterrent. It is hoped that in light of the support that many sporting bodies have extended to the ‘Black Lives Matter’ movement,⁴⁷ IOC would also re-assess its stance and come-up with fresh guidelines that defend balanced political speech before the Tokyo Olympics 2021.

⁴⁵ See Julie H. Liu, *Lighting the Torch of Human Rights: The Olympic Games as a Vehicle for Human Rights Reforms*, 5(2) NW. J. INT’L HUM. RTS. 213 (2007); See also *FIFA against racism: A decade of milestones*, FIFA (Mar. 2, 2011), <https://www.fifa.com/mensyoutholympic/news/fifa-against-racism-decade-milestones-1384919>.

⁴⁶ See Anmol Jain, *Principles of Olympism as Supra-National Constitutional Values*, JURIS OMNIBUS (Jun. 4, 2020), <https://jurisomnibus.com/2020/06/04/principles-of-olympism-as-supra-national-constitutional-values/>.

⁴⁷ Shivam Singh, *When Sports Align with Dissent*, INDIAN EXPRESS (Jun. 26, 2020), <https://indianexpress.com/article/opinion/black-lives-matter-when-sports-aligns-with-dissent-6477907/>; Scroll Staff, *Black Lives Matter: NBA Walkout Sparks Historic Sport Boycott in US; Osaka Withdraws, Tennis Halted*, SCROLL.IN (Aug. 27, 2020), <https://scroll.in/field/971490/black-lives-matter-nba-walkout-sparks-historic-sport-boycott-in-us-osaka-withdraws-tennis-halted>.

SPORTS SPONSORSHIP CONTRACTS AND THE PANDEMIC: ADDRESSING THE UNCERTAINTIES*

Mustafa Rajkotwala¹

Dhanishta Mittal²

¹NALSAR University of Law

mustafa.rajkotwala@nalsar.ac.in

²NALSAR University of Law

dmittal828@gmail.com

ABSTRACT

Sports sponsorships are commercial transactions between sporting organizations, teams etc. and sponsoring entities which result in a partnership by virtue of exchange of certain rights and obligations between the parties thus involved. It is a voluntary association between the two or more concerned bodies aiming to reap commercial benefits out of such an agreement, through the medium of a sporting event. The 21st-century sporting industry has been revolutionized with the advent of such contractual relations, in terms of brand awareness and customer loyalty. However, due to the sudden impact of COVID-19 resulting in indefinite cancellations and suspension of sporting events on a global scale, the immediate scapegoats are these sponsors – with their billions of dollars at stake in lieu of their contractual arrangements. In respect of this, the author(s) of this paper aims at engaging with the various contractual possibilities in terms of the cancellations, invoking force majeure in this situation, and resorting to various other reliefs to safeguard their interests in the longer run.

KEYWORDS

Sports, COVID-19, Sponsorships, Force Majeure, Impossibility of Performance.

* The authors would like to thank Palash Gosrani for his valuable comments towards the piece.

1. INTRODUCTION

As the Coronavirus (COVID-19) pandemic has brought activities on a global platform to a standstill, its negative implications have spread across various sectors, with the sporting industry being one of them. As a precautionary measure, major sporting events across the globe have reached a deadlock, with organizers cancelling the tournament in its entirety, or rescheduling it to future potential dates in the upcoming years, or organizing them with a plethora of strict health restrictions.¹ In its 124-year legacy, the International Olympic Committee (IOC) has retracted the Olympics only once before (during the World War II era), and at present, when they declared a postponement of the *2020 Tokyo Olympics*.² The 133rd edition of the *Wimbledon Championships*, organized by the *All England Lawn Tennis & Croquet Club Limited* (AELTC) has been cancelled,³ and will subsequently take place in 2021.⁴ The 2020 *Association of Tennis Professionals World Tour* (ATP) and the 2020 *Women Tennis Association World Tour* (WTA) had suspended their events indefinitely until July⁵ but returned to schedule with newer health protocols and a limited number of organizers and sportspersons.⁶ The Union of European Football Associations (UEFA) has postponed its *UEFA European Football Championship 2020* to the forthcoming calendar year.⁷ All *Union Cycliste Internationale* (UCI) events are re-scheduled to commence from August 2020 with strict COVID-19 protocols in place.⁸ Additionally, players in the then on-going National Basketball Association (NBA) *2020 Playoffs* were tested positive for Coronavirus, which resulted in the

¹ *Coronavirus: What Sporting Events are Affected by the Pandemic?*, AL JAZEERA (Sep. 20, 2020), <https://www.aljazeera.com/sports/2020/9/20/coronavirus-what-sporting-events-are-affected-by-the-pandemic>.

² Press Release, *Joint Statement from the International Olympic Committee and the Tokyo 2020 Organising Committee*, OLYMPIC (Mar. 24, 2020), <https://www.olympic.org/news/joint-statement-from-the-international-olympic-committee-and-the-tokyo-2020-organising-committee>.

³ Simon Cambers, *Wimbledon Cancelled for the First Time since World War II*, Sony ESPN (Apr. 01, 2020), https://www.espn.in/tennis/story/_/id/28981311/wimbledon-cancelled-due-coronavirus-pandemic.

⁴ Stuart Fraser, *Wimbledon Set to Take Place Next Year—Even if No Fans Can Attend*, THE TIMES (Sept. 29, 2020), <https://www.thetimes.co.uk/article/wimbledon-set-to-take-place-next-year-even-if-no-fans-can-attend-klrj9pqhd>.

⁵ Press Release, *ATP & WTA Announce Further Suspension of Tours*, ATP TOUR (Apr. 01, 2020), <https://www.atptour.com/en/news/atp-wta-tours-announce-further-suspension-wimbledon>.

⁶ Martyn Herman, *French Open Pushed Back a Week, ATP and WTA Announce August Resumption* (Jun. 18, 2020), <https://in.reuters.com/article/tennis-atp-wta-idINKBN23O2HK>.

⁷ Press Release, *UEFA Postpones EURO 2020 by 12 Months*, UEFA (Mar. 17, 2020), <https://www.uefa.com/insideuefa/mediaservices/mediareleases/newsid=2641071.html>.

⁸ Press Release, *The UCI Unveils the Revised 2020 Calendars for The UCI World Tour & UCI Women's World Tour* (May 05, 2020), <https://www.uci.org/road/news/2020/the-uci-unveils-the-revised-2020-calendars-for-the-uci-worldtour-and-uci-women-s-worldtour>.

cancellation of all matches for that tournament.⁹ In light of the sporting world being targeted by such adversity, the author(s) of this paper aim at analysing the various repercussions the sporting industry might have to face both in the near future and the long run, particularly in the context of sponsorship contract deals. They attempt at presenting potential measures to alleviate the losses that would occur in the course of such a predicament, by relying upon *force majeure* precedents from courts of law, deriving authority from various common law jurisdictions around the globe.

2. ASSESSING THE PERNICIOUS EFFECTS OF THE PANDEMIC ON SPORTS SPONSORSHIPS

Organizations such as the IOC have opted for deferring their games until 2021, in the hope that the pandemic would be largely under control by then. However, the same cannot act as a panacea for all sporting events, especially for those that run on an annual basis. The IOC's decision to postpone the 2020 *Tokyo Olympics* to 2021, while retaining their brand name as 'Tokyo 2020' is a welcome decision since the sponsoring entities who had already bid for the media rights, broadcasting rights and/or on-site contracts *et al* have been protected from untimely termination of their contracts on account of non-performance. This action acts as an antidote for sponsors from the punctilious process of conducting a 're-auction', especially as competing entities would introduce greater prices to the foray to close deals for upcoming editions of the event. Furthermore, there is an expected increase in public viewership and participation in upcoming editions of these sporting events, and the termination of existing sponsorship contracts could then act as a possible peril for the prevailing sponsors in terms of conflict from competitors in the course of impending sporting seasons.¹⁰ Additionally, there is dubiety over whether the formerly admissible arrangements of branding and advertisements would continue to be acceptable in the market-space, which further introduces additional predicaments over the sponsoring entities to be adjustable towards the dynamic modifications, post the pandemic.

However, not every sponsor would be in a situation to thrust their prevailing contractual arrangement to the forthcoming calendar year, particularly if they find themselves in a severe

⁹ Steve Aschburner, *Coronavirus Pandemic Causes NBA to Suspend Season after Player Tests Positive*, NBA (Mar. 12, 2020), <https://www.nba.com/article/2020/03/11/coronavirus-pandemic-causes-nba-suspend-season>.

¹⁰ Hitesh Mangtani, *Counter-Punching Corona – How Sports Can Bounce Back from COVID-19*, THE BRIDGE (Apr. 04, 2020), <https://thebridge.in/latest/counterpunching-corona-sports-can-bounce-back-covid-19/>.

monetary crisis. Such sponsors would be pressured into terminating their contractual arrangements and solicit ‘*compensation*’ (if any) or ‘*reimbursement*’ of up-front money on the grounds of the incompetence of various stakeholders in performing their part of the contractual arrangement. For certain sponsoring entities, the stakes might be excessively high, especially if they were determined to utilize a platform as the likes of the *Olympics* to salvage their dying company or channelize the sporting platform to advertise and promote their new product/service.¹¹

Additionally, there is scepticism raised concerning the fear of pandemics, compelling an audience to avoid crowded areas including filled stadiums or compact viewing locations. Even for the plethora of stakeholders who might have vehemently opposed their organizer’s decision to call off an event or postpone it beforehand; it would only be advisable that the organizers should take a call early instead of keeping the event on hold. This could thereby prevent confusion and resentment amongst fans, and underperformance by players due to limited practice. Even when the global governments attempt to restore normalcy, a probability of ban on mass gatherings to avoid the resurgence of the disease in their respective countries would continue to linger. In terms of a recent example, this was evidenced through the Board of Control for Cricket in India’s (BCCI)’s decision to host the notable *Dream 11 Indian Premier League 2020* (IPL) in the United Arab Emirates (UAE) due to the continuance of India’s ban on public gatherings.¹²

Prominent organizations such as the *Federation Internationale de Football Association* (FIFA) have already set up contingency endowments for football clubs, national and local football federations and governmental entities in order to sustain the impact of the pandemic on the football industry, primarily because of the humongous stakes encompassed in such events.¹³ Olli Rehn, head of the FIFA committee, has gone on record to state that the various stakeholders of the football business are set to lose \$14 Billion, due to the impact of the

¹¹ Ch. Tsordia, D. Papadimitriou and P. Parganas, *The Influence of Sport Sponsorship on Brand Equity and Purchase Behaviour*, 26 JOURNAL OF STRATEGIC MARKETING, 85, 85-105 (2018).

¹² Mendra Dorjey Sahni, *Explained: Why IPL Moved to The UAE & How It’s Being Planned*, THE QUINT (Jul. 24, 2020), <https://www.thequint.com/indian-premier-league-ipl/explained-why-ipl-2020-being-played-in-uae>.

¹³ Murad Ahmed, Mark Di Stefano and Anna Nicolaou, *Can the Sports Industry Survive the Coronavirus Shutdown*, THE FINANCIAL TIMES (Apr. 05, 2020), <https://www.ft.com/content/fd7e58ec-7438-11ea-95fed274e920ca>.

COVID-19 pandemic.¹⁴ The international governing body of the Rugby Union, World Rugby, has stated its plan of action of borrowing against its capital reserves to safeguard its cash-crunched members in hopes of preventing them from declaring bankruptcy.¹⁵ Players across various sports, with examples such as Lionel Messi and Cristiano Ronaldo, are taking salary cuts to cope with the losses borne by the industry because of the pandemic.¹⁶ Media rights auctions have been called off in countries like Germany, and sponsors have stated their apathy towards receiving remittances for those sporting events which have been scrapped. Furthermore, sports broadcasters, particularly in the United Kingdom (UK) have permitted viewers to delay their instalments for cumbersome subscriptions, up until live sports do not restore to normality. With the probability of various sporting events getting rescheduled with curtailed tournaments later in the year, this compression will lead to decreased time, mitigated money and detracted audience-base.¹⁷

The global women's sporting community is also doomed to receive a large blow in terms of garnering sponsorship contracts and event organizations. Since decades, the female sporting business has been considered to be at a lower pedestal than that of men's sports of the identical categorization.¹⁸ Due to the current pandemic, their vulnerability is only going to be further accentuated, mainly because most of the female participants in individual sports who are independent contractees and receive funds for their travel, registration fees *et al* are likely to lose out on their sources of income from event participation.¹⁹

3. DOES FORCE MAJEURE CLAUSES ACT AS A PANACEA FOR SPORTS SPONSORS?

While there cannot be an actual ascertainment of the terms of the sponsorship contract, the sponsoring entities, if the contractual terms comprise, may also be compensated for their

¹⁴ Reuters Staff, *COVID-19 Pandemic to Cost Football \$14 Billion This Year, says FIFA*, REUTERS (Sep. 16, 2020), <https://in.reuters.com/article/uk-soccer-fifa/covid-19-pandemic-to-cost-football-14-billion-this-year-says-fifa-idUKKBN2671TC>.

¹⁵ *Id.*

¹⁶ Anonymous, *Cristiano Ronaldo and Leo Messi Take Solidarity Pay Cuts Amid Virus Crisis*, HOLA! USA (Mar. 30, 2020), <https://us.hola.com/celebrities/20200330fm1pvhpc7s/cristiano-ronaldo-lionel-messi-salary-pay-cut-coronavirus>.

¹⁷ John Branch, *Does Coronavirus Mean the End of Sports as We Know Them?*, THE NEW YORK TIMES (Mar. 14, 2020), <https://www.nytimes.com/2020/03/14/sports/sports-coronavirus-canceled-events.html>.

¹⁸ Juliet Macur, *Coronavirus Compounds Financial Concerns in Women's Sports*, THE NEW YORK TIMES (Mar. 21, 2020), <https://www.nytimes.com/2020/03/21/sports/coronavirus-womens-sports.html>.

¹⁹ *Id.*

business losses during this pandemic, on grounds of *force majeure*.²⁰ To invoke this clause, it needs to be determined that the contractual agreement specifically includes the reference to an ‘epidemic’ or ‘pandemic’ as part of the clauses within the contents of the provision. However, innumerable contracts would not have foreseen the probability of the occurrence of such a hardship. In light of this, various insurance corporations have released announcements whereby COVID-19 cannot be utilised as a ‘relief’ apparatus *per se*, for indemnifying against non-compliance of the contractual obligations.²¹ If insurance companies would not cover for losses sustained on grounds of the COVID-19 pandemic, sponsoring entities that are engaged in annual contracts would turn out to be the worst losers, as the ‘non-performance’ of their contractual obligations would become inevitable, either in light of a governmental call on shutdowns or due to a sporting organization’s call to postpone, terminate or defer their event.

However, in this regard, the news of *Wimbledon* recovering about €114 Million through ‘pandemic insurance’ upon cancellation of their event, demonstrates that all hopes are not lost for the organizers and associated sponsors.²² The caveat, however, is that AELTC has been making insurance payments since the 2003 Severe Acute Respiratory Syndrome (SARS) outbreak to insure their event, as a safeguarding measure against any similar catastrophes.²³ Thus, such an insurance receipt acts as a return on investment, which was made by sporting organizers keeping such contingencies in mind. Likewise, the IOC has paid insurance premiums in the past for both, the *2016 Rio Summer Olympic Games*²⁴ and *2018 PyeongChang Olympic Winter Games*²⁵ against cancellation of their events under any unforeseen circumstances. These insurance returns served to compensate the IOC if they would have decided to postpone the event to a subsequent year. However, the magnitude of COVID-19 pandemic is unprecedented in comparison to previous global epidemics. Recent shutdowns by entities and organizations have already begun to cause tremors in the sporting world. Sporting

²⁰ Dhanrajamal Gobindram vs Shamji Kalidas and Co., AIR 1961 SC 1285.

²¹ John Sadler, *Sports Organizations and Coronavirus (COVID-19): Cancel or Mitigate the Risks?*, SADLER (2020), <https://www.sadlersports.com/coronavirus-risk-management-in-sports/>

²² Mike Dickson, *Wimbledon’s Ironclad Insurance Policy Will Help Cover £250m Loss of Revenue as Axe Set to Fall on this Year’s Championships Due to Coronavirus*, THE DAILY MAIL (Mar. 31, 2020), <https://www.dailymail.co.uk/sport/sportsnews/article-8173457/Wimbledons-ironclad-insurance-policy-help-cover-250m-loss-revenue-axe-set-fall.html>

²³ *Id.*

²⁴ Claire, *Insurers Ready for the Summer Olympics*, THE TRIPLE-I BLOG (Aug. 01, 2016), <https://www.iii.org/insuranceindustryblog/insurers-ready-for-the-summer-olympics/>.

²⁵ Noor Zainab Hussain, Carolyn Cohn and Suzanne Barlyn, *Insurers Bet, a Little Nervously, on Smooth Games in South Korea*, REUTERS (Feb. 08, 2018), <https://www.atlas-mag.net/en/article/winter-olympics-in-south-korea-the-cost-of-insurance-compounded-by-the-war-risk>.

entities such as *MSK Zilina* (Slovak football club),²⁶ *USA Rugby* (USA's national rugby governing body)²⁷ and *Alpha Entertainment* (owner of the Xtreme Football League [XFL]),²⁸ among others are already filing for bankruptcy before Courts. This has led industry experts to envision that if shutdowns are extended for a longer duration, and if normalcy in sporting events is not restored, bigger franchises might also have to resort to such extreme measures.²⁹

In terms of Indian jurisprudence, as we examine the purview of Section 56 of the Indian Contract Act (ICA), we can find that the *Force Majeure* clauses are intertwined with the *Doctrine of Frustration* of Contract, which essentially states that the impossibility of performance, without a fault from either party, can lead a contract to get 'frustrated' *i.e.* render it incapable of execution.³⁰ The Indian Courts have granted the scope of this provision an extensive ambit, primarily to safeguard the interests of a party that is incompetent to perform its contractual obligations *in lieu* of unforeseeable circumstances.³¹ Additionally, it has been elucidated that although the performance of the contractual obligation might not be rendered 'impossible' in its entirety, if its conduct turns 'impracticable' in nature, it would nonetheless be assessed under the scope of this clause.³² The occurrence of such *black swan* event puts sporting organizers in an enormous *imbroglio*. In the earlier part of 2020, organizing a mass event would have been impracticable, especially in light of governmental shutdowns being issued in major countries leading to the absence of any live viewers/audiences. Furthermore, it would have been perilous to organize such event(s) due to the potential hazards to public health and safety, if large audiences would gather in consolidated spaces. Although sporting events around the globe are partially resuming in operation, they are far away from returning to 'normality', in terms of its organizational capacities, sponsorship and partnership engagements, and subsequent return on investments. Due to this, event organizers and sponsors are still facing the long-drawn repercussions of the pandemic. Given that this phenomenon is 'novel', we can

²⁶ AFP, *Top Slovak Club in Liquidation after Virus Halts Season*, THE TIMES OF MALTA (Mar. 31, 2020), <https://timesofmalta.com/articles/view/top-slovak-club-in-liquidation-after-virus-halts-season.782168>.

²⁷ Chris Bengel, *USA Bankruptcy Files for Bankruptcy in the Wake of Coronavirus*, CBS SPORTS (Mar. 31, 2020), <https://www.cbssports.com/general/news/usa-rugby-files-for-bankruptcy-in-the-wake-of-coronavirus-outbreak/>.

²⁸ Danielle Allentuck, *The XFL Files for Bankruptcy after Canceling Season*, THE NEW YORK TIMES (Apr. 13, 2020), <https://www.nytimes.com/2020/04/13/sports/football/xfl-bankruptcy-vince-mcmahon.html?auth=login-google>.

²⁹ ANONYMOUS, *supra* note 17.

³⁰ The Indian Contract Act, § 56 (1872).

³¹ *Energy Watchdog vs. Central Electricity Regulatory Commission and Ors.*, (2017) 14 SCC 80.

³² *Satyabrata Ghose v. Mugneeram Bangur and Co. and Anr.*, AIR 1954 SC 44.

only present conjectures about the probable alternatives, as a certain trend of reactions cannot be ascertained at this phase.

The Indian Ministry of Finance (MoF) keeping in line with its view that contractual agreements must be honoured, issued an Office Memorandum on *Force Majeure* Clause (FMC), wherein it was stated that COVID-19 ought to be construed as a natural calamity and allows events to be suspended until the pandemic persists to remain as an on-going threat.³³ Although the Memorandum is not a binding document, it can be raised in a Tribunal as an aegis, especially when the contracts are moreover protected by the existence of an FMC. This clause is traditionally entered into contracts to safeguard the parties from non-compliance of their contractual obligations *in lieu* of an ‘Act of God’ which is ‘unforeseeable’, and renders the performance of the contractual obligations ‘impossible’, if not ‘impracticable’.³⁴ In essence, three cumulative pre-requisites are imperative for the utilisation of the concept of *force majeure*: (i) performance of a party under the contract must be rendered ‘impossible’; (ii) the event giving rise to the ‘impossibility’ of performance must be ‘unforeseeable’ in nature; and (iii) the situation must not be attributable to the party seeking to invoke the principle.³⁵ However, the mere fact that honouring the obligations of a contract has become arduous financially or otherwise does not suffice as valid grounds for invoking this clause – nevertheless, it may be sufficient if it is determined that the factual circumstances caused by the epidemic/pandemic are beyond the ‘reasonable’ control of the contracting parties.³⁶ In April 2020, the Delhi High Court in the matter of *Halliburton Offshore v. Vedanta Ltd.*³⁷ held that in the case of COVID-19, an FMC cannot act as a panacea for all delayed contracts. For a Court to allow for the operation of this clause, there shall be a circumstantial and case-to-case analysis in that regard. If the situation necessitates the completion of contractual obligations before the pandemic, then the application of the FMC would fail. This judgment would apply to all industries, in general.

It is peremptory to analyse the precedents as laid down through occurrence of previous epidemics like the *Spanish Flu*, SARS or the Ebola Virus Disease (Ebola) in the course of performance of contractual obligations. In 2015, the *Confederation of African Football* (CAF)

³³ Government of India, No.F.18/4/2020, MINISTRY OF FINANCE (Feb. 19, 2020), <https://doe.gov.in/sites/default/files/Force%20Majeure%20Clause%20-FMC.pdf>.

³⁴ *Tamplin Steamship Co. Ltd. v. Anglo-Mexican Petroleum Products Co. Ltd.* [1916] 2 A.C. 397, 403.

³⁵ *Satyabrata Ghose v. Mugneeram Bangur and Co. and Anr.*, AIR 1954 SC 44.

³⁶ *Clifford Gardner v. Clydesdale Bank Limited* [2013] EWHC 4356 (Ch).

³⁷ *M/s Halliburton Offshore Services Inc. v. Vedanta Limited & Anr.* [2020] O.M.P. (I) (COMM) 88/2020.

had proposed to postpone the Morocco Edition of the Africa Cup of Nations for six months, in light of the Ebola epidemic, triumphing health over monetary losses. However, eventually, they relegated the event to Equatorial Guinea, the same year.³⁸ In light of this, there arose a dispute between the Royal Moroccan Football Federation (FRMF) and CAF which was taken to the Court of Arbitration for Sport (CAS).³⁹ The case dealt with the issue of FRMF's unilateral withdrawal from organizing and hosting the event in Morocco due to the epidemic, and CAF imposing sanctions on them in that regard. However, the Tribunal held that there was no presence of *force majeure*, as organizing the event was not 'impossible', but rather, 'difficult'. Furthermore, the fact that Equatorial Guinea was successful in organizing the event, and adhere to maintaining adequate sanitary precautions showed that organizing the event was 'possible' in nature. Therefore, the Tribunal allowed sanctions to be imposed on FRMF but reduced the overall amount due to the extraordinary circumstances of the case.

In a China International Economic & Trade Arbitration Commission (CIETAC) (People's Republic of China) Arbitration Award,⁴⁰ the Tribunal held that since the contractual arrangement between the disputing parties had concluded two months prior to the SARS epidemic, it was 'foreseeable' that the activities of the parties in place of the contract had to be tailored in a way that the contract was honoured. Therefore, it was not 'impossible' to perform the contract, and damages had to be paid by the non-performing party.

The notorious *Spanish Flu* of 1918 had led to the 1919 *Stanley Cup* getting abrogated in the midst of a game when one of the players collapsed during gameplay, leading to a "*Series Not Completed*" title being published by the sporting organizers.⁴¹ Despite multiple organizers declaring the cancellation of their events, most of these decisions were flouted and people continued to gather during these events. This was disturbing, primarily because the Flu was operating at its peak and harrowingly taking away the lives of thousands of people, including

³⁸ James Skinner and Aaron CT Smith, *Coronavirus is Not the First Health Crisis to Hit Global Sport, But it's on Much Bigger Scale*, SCROLL (Mar. 19, 2020), <https://scroll.in/field/956638/coronavirus-not-the-first-health-crisis-to-hit-sport-but-will-have-a-big-impact-in-an-olympic-year>.

³⁹ Fédération Royale Marocaine de Football (FRMF) v. Confédération Africaine de Football [2015] CAS 2015/A/3920.

⁴⁰ CIETAC Arbitration Proceeding (L-Lysine case) [2005], <http://cisgw3.law.pace.edu/cases/050305c1.html>.

⁴¹ Jonathan White, *Coronavirus in Sport Echoes Spanish Flu Pandemic that Ended NHL Stanley Cup*, SOUTH CHINA MORNING POST (Apr. 06, 2020), <https://www.scmp.com/sport/football/article/3078560/coronavirus-sport-echoes-spanish-flu-pandemic-ended-nhl-stanley-cup>.

numerous sports players.⁴² Although in the current COVID-19 pandemic time, sporting organizations are ensuring the health and social distancing precautions in the partial conducting of their events,⁴³ the same cannot be practised in other populous and heavily affected regions particularly Europe, India and the United States especially when there are strict complete or partial shutdowns and travel restrictions to contain the spread of the virus.⁴⁴ In such an impediment, cancellation of a mega-sporting event is but a minuscule mandatory precautionary step compelled either by the governmental regulations in that particular country or by the sheer havoc that the virus has the potential to create.

4. ALTERNATIVES FOR SPONSORS TO COPE WITH THE CRISIS

Every connected stakeholder - whether a sporting organizer, a sponsoring entity, a player and/or an off-ground employee, shall bear substantial pecuniary losses, in the case of an event termination. Furthermore, various sponsoring entities utilise sporting events as a launch-pad for the latest goods or services into the market-space.⁴⁵ Therefore, in such a circumstance, it seems advisable in the greater interest of all contracting parties, that either they conciliate with the sporting organizers for 'compensation' or 'reimbursement' of their cumulative losses, or write down these ancillary, antedated costs as 'bad debts' if their contracts are unsuccessful to extract the FMC or 'impossibility of performance' clause as part of their contractual agreements. In the course of preserving the prevailing contractual arrangements, a *pro-rata* reduction mechanism could be correlatively decided upon by the parties, concerning the expenses to be borne *in lieu* of the contractual obligations.⁴⁶ This negotiation would allow for a continuation of the amicable relationship between the organizing committee and the sponsor since both are to benefit from such an understanding.

⁴² Joan Niesen, *The Forgotten Story of... How Spanish Flu Tore Apart the 1919 Stanley Cup Final*, THE GUARDIAN (Mar. 19, 2020), <https://www.theguardian.com/sport/2020/mar/19/spanish-flu-stanley-cup-2019-nhl-montreal-canadiens>.

⁴³ Matias Grez, *Football is Shut Down Across Europe Due to the Coronavirus, But in Belarus it's Business as Usual*, CNN (Mar. 30, 2020), <https://edition.cnn.com/2020/03/29/football/football-continues-belarus-coronavirus-lockdown-spt-intl/index.html>.

⁴⁴ Sunni Upal, *Which Countries are on Coronavirus Lockdown? What's happening in India, Italy and Spain*, THE SUN (Mar. 24, 2020), <https://www.thesun.co.uk/news/11233604/which-countries-are-on-coronavirus-lockdown-spain-italy/>.

⁴⁵ Neil Weilheimer, *A New Era for Endorsement Deals? How the Coronavirus is Changing the Playbook for Sports Brands and Athletes*, FOOTWEAR NEWS (Apr. 09, 2020), <https://footwearnews.com/2020/business/athletic-outdoor/athlete-endorsements-sponsorships-cornavirus-sports-1202964088/>.

⁴⁶ *Supra* note 14.

Accordingly, for sponsors that have an annual contracted arrangement, there ought to be deliberations in the direction that one party does not end up suffering an ‘*undue loss*’ in such a circumstance. The sponsoring entity and the sporting organization could mutually ascertain the essence of ‘reimbursement’ for the probable losses to be borne by the former, in case of termination or deferment of a sporting event. The hitherto loss-bearing sporting organizations could be forced to pay the sponsoring entity for their incompetency to fulfil their obligations under the contractual terms.

Alternatively, there could be no-audience games like those suggested by the United States of America (USA) before the declaration of a complete lockdown.⁴⁷ Additionally, even the 2020 IPL, which after consecutive postponing and a change in the title sponsor, is currently taking place in the UAE, with a no-audience and a fixed ‘*bio-bubble*’ policy.⁴⁸ Similarly, *Formula 1* (F1) has revised its yearly racing schedule to incorporate new locations and latest safety standards to ensure participants and organizers can run the event smoothly, without a live stadium audience.⁴⁹

Nevertheless, this panacea is deleterious, essentially to the interests of ‘on-site’ sponsoring entities, whose business is primarily contingent on the presence of enormous live viewers, as well as the sport-players who are actuated to play for these viewers. However, such kinds of ‘no-viewer’ sporting events can both amplify and undermine the rates of sports broadcasting and media entertainment rights, in the case that viewers, which would have otherwise attended a sporting event, are watching it online instead.⁵⁰ Although, on the contrary, the presence of a live viewership, which builds the spirit of sporting events, will always minimize the appeal that is presented by an online audio-video viewership format.

Additionally, sponsors, as well as the organizers, could use the pandemic period to enhance their Corporate Social Responsibility (CSR) image by engaging in *bona fide* activities directed towards combating the virus, to appeal to consumers and garner popularity. Such sponsors

⁴⁷ Jonathan Harding, *Coronavirus Stops Real Sport, Opens Door to Virtual World*, DEUTSCHE WELLE (Mar. 22, 2020), <https://www.dw.com/en/coronavirus-stops-real-sport-opens-door-to-virtual-world/a-52878429>.

⁴⁸ Amol Karhadkar, *Indian Government Gives BCCI Approval to Host IPL 2020 in UAE*, SPORT STAR (Aug. 10, 2020), <https://sportstar.thehindu.com/cricket/ipl/ipl-news/ipl-2020-moved-to-uae-indian-government-gives-bcci-approval-chennai-super-kings-csk/article32317372.ece>.

⁴⁹ Ian Parkes, *A Formula 1 Season like No Other*, THE NEW YORK TIMES (Aug. 07, 2020), <https://www.nytimes.com/2020/08/07/sports/autoracing/formula-1-season-coronavirus.html>.

⁵⁰ AFP, *Coronavirus: Virtual Sports Proving to be a Game Changer for Boxing, Baseball, Motor-Racing and More*, SCROLL (Mar. 30, 2020), <https://scroll.in/field/957406/coronavirus-virtual-sports-proving-to-be-a-game-changer-for-boxing-baseball-motor-racing-and-more>.

stand a high chance of customer retention, particularly those who strongly believe in using goods and services of only those companies contributing towards the welfare of the society.

Finally, the esports market-space, especially the video gaming industry, is booming over the past decade and now, the *Fantasy Premier League* (FPL), can act as an alternative for user-engagement due to the cancellation of various sporting events.⁵¹ Nonetheless, the actual performances of the sportspersons in the games are primarily dependent for their selection in the virtual sporting arena as well. On top of that, the teams are to be formed *in tandem* with the scheduling of an actual sporting event, thereby resulting in the dearth of pecuniary businesses on this platform. In light of this, a profitable alternative towards assuaging losses suffered during this pandemic season would involve switching onto digital media platforms. Fundamentally, this is because most of the sponsorship arrangements are a long-term commitment to the entirety of a sporting tournament and to jeopardize their interests *in lieu* of an unforeseen crisis would not be a viable option for most of the involved entities.⁵²

However, as determined through various independent studies and surveys, the interest towards the domain of esports is particularly vested in the lower age category of users that lie among the bracket of eighteen (18) to thirty (30) years. Therefore, they are unsuccessful in garnering a market-space that is concentrated on the individuals/entities who otherwise invest heavy amounts of money onto sporting engagements.⁵³ It was opined that a major section of live sports audiences are individuals who lie above the age category of forty (40) years, and comparatively possess a larger potential of investing in the market-space that attracts sponsorship entities and media entertainment brands, and thereby, they show less enthusiasm towards the esports industry.⁵⁴ Thus, the contribution from the esports market-space targeting the lower-age groups does not transform into a profitable investment, in comparison to investing in the live sporting events industry. Although the possibility for the esports market-

⁵¹ MURAD AHMED, *supra* note 13.

⁵² Ashley Rodriguez, *How the Sports-Betting Industry is Responding to the Coronavirus Pandemic that has Halted Most Major Sporting Events*, THE BUSINESS INSIDER (Mar. 22, 2020), <https://www.businessinsider.in/tech/news/how-the-sports-betting-industry-is-responding-to-the-coronavirus-pandemic-that-has-halted-most-major-sporting-events/articleshow/74761866.cms>.

⁵³ Mariel Soto Reyes, *Esports Ecosystem Report 2020: The Key Industry Players and Trends Growing the Esports Market which is on Track to Surpass \$1.5bn by 2023*, THE BUSINESS INSIDER (Dec. 18, 2019), <https://www.businessinsider.com/esports-ecosystem-market-report?IR=T>

⁵⁴ *Id.*

space to grow in the post-pandemic era is encompassing, the likelihood of it substituting the live sporting industry is unfavourable.

5. CONCLUDING REMARKS

“We don’t know what things look like on the other side of coronavirus. But sport can bring people together and show them what is possible in ways that are incredibly inspiring!”

-Jerill Rechter, Basketball Australia

The FMC can be utilised as the fundamental remedy for sponsorship contracts worldwide, but still, its categorical application stands unforeseeable. This is in the light of the fact, that various jurisdictions address this issue based on the scope of their domestic laws and particular contractual arrangements. However, the austerity of this pandemic fulfils the requisites of an event that makes it impossible and impracticable for the parties involved to perform their obligations in the course of the contractual agreement, which could invoke the doctrine of ‘Act of God’ as a defence. Nonetheless, given that the sporting industry has been affected substantially due to the outbreak of the COVID-19, an alteration in the approach towards the subject of ‘sponsorship contracts’ is unavoidable in terms of the responses from the various stakeholders that are involved in the process. Although this pandemic will be a knock-back in terms of substantial pecuniary losses faced by the industry in its entirety, the post-pandemic prospects in terms of engagement and technological advancements present a myriad of opportunities and potential in store for sports sponsoring and partnering entities.

THE DISCRIMINATION AND INADEQUACY IN THE SEX- TESTING POLICIES EMPLOYED BY SPORTS AUTHORITIES

Rohan Mandal

University School of Law and Legal Studies (USLLS), GGS Indraprastha University

mandal.rohan@gmail.com

ABSTRACT

Sports Law is a field encompassing a galore of ideas. Experts agree that the underlying objective of the subject is to ensure fairness. One such area where sports authorities have tried to ensure fairness in sport is sex-testing. This practice involves the ascertainment of whether the female athlete can be deemed to be a genetic female, which would ensure that such athletes are not prejudiced against. In this paper, the author considers the arduous journey that female athletes face due to structural problems in sports development policies. The author through the course of this article further aims to trace the development of the methods used by sports authorities to ascertain the sex of athletes competing in female events. After discussing the various policies adopted by the authorities, the author will discuss the present testosterone testing rule, which links higher testosterone levels to improved athletic performance. The policy has received widespread criticism, such as the fact that the rule has not been applied uniformly across events, and that the underlying testing was insufficient. The policies and pleadings of sports authorities have been termed discriminatory and prejudicial to female athletes in popular disputes involving athletes such as Dutee Chand and Caster Semenya. The author will conclude by analysing whether the sex-testing policies as they exist and have existed are arbitrary and secondly whether they should be modified particularly in light of the new-age jurisprudence on gender, especially the right of self-determination of sex for people with intersex characteristics.

KEYWORDS

Sex-testing, Hyperandrogenism, Caster Semenya, Self-identification.

1. INTRODUCTION

The driving force behind sport is the innate need of individuals to compete, in disciplines where skill and physical prowess may be showcased. Participation in sports was traditionally assigned to men, while women could only participate in a limited number of events. The development of women in competitive sport has since undergone a sea of change, from women being allowed to participate in a restricted number of events in the 1900 Olympics to a position in the present paradigm wherein women can participate in almost the same number of events as that of men. The hurdles faced by female athletes in their journey of becoming elite athletes has been a constant struggle in history, that includes forced gender roles, lack of funding, and more importantly lack of facilities. Female athletes with Differences in Sexual Development (DSD) face an additional level of prejudice, i.e. they have to fight for their right to compete as females in addition to the structural problems faced by them in the process of becoming athletes. DSD is a congenital condition in which development in chromosomal, gonadal, or anatomical sex is atypical.¹

To reduce the confusion surrounding the eligibility of female athletes with DSD, the International Association of Athletics Federation (IAAF) and the International Olympic Committee (IOC) has attempted to define what a ‘female athlete’ is on several occasions. The question that remains unanswered is whether this is affected merely by the biological factors or do social aspects also affect the concept of womanhood? If it is just biological factors, then how these biological parameters are to be understood? The 2018 testosterone rule of the IAAF has fueled the discussion between the right of self-determination of female athletes with hyperandrogenism/DSD and particularly sex-testing in sports. The rule aims to bar female athletes with hyperandrogenism, i.e., a condition wherein the female body produces excess testosterone. However, sex-testing has been historically inadequate and discriminatory to intersex and transgender athletes. We can argue the same by analyzing and answering a slew of pertinent questions. *Firstly*, about the tumultuous history of sex-testing in sports; *secondly*, the effects of the testosterone policy of 2011; *thirdly*, an overview of the New Testosterone Rule of 2018; *fourthly*, identifying the Shortcomings of the 2018 Rule in light of evolving

¹ Peter A. Lee, Christopher P. Houk, *et al.*, *Consensus Statement on Management of Intersex Disorders*, 91(7) ARCHIVES OF DISEASES IN CHILDHOOD, 554, 554–563 (2006).

gender jurisprudence and lack of consensus within the scientific community; and *finally* conclude the analysis.

2. THE HISTORY OF SEX-TESTING IN SPORTS

There have been questions surrounding whether athletes participating in female events were men disguised as female athletes for a long time. In the early 1930s, objections were raised for the first time about this, and about whether the athletes competing in female events could be classified as being female. This was highlighted in the cases of *Mary Edith Louis Weston* (later Mark Weston) and *Zdeňka Koubková*, who were both European intersex athletes, and competed successfully in the European circuit in female events during this period.² Owing to the success experienced by the athletes, American Olympic President, Avery Brudley, requested the International Olympic Committee to establish a system of sex-testing in the 1936 Berlin Olympics.³ Although sex-testing was not introduced in these games, German officials conducted physical examinations on the American athlete, *Helen Stephen*, who won the gold medal in the 100-metre track event, because of her apparent masculine body features.⁴ In 1938, in what was possibly the most controversial incident in sex-testing in sports, German Olympian, *Dora Ratjen* (a female event athlete), was identified as male through a physical test and was made to return her gold medal.⁵ The sex-testing policy of this era was focused on keeping female sports fair, without male athletes fraudulently participating in female events and benefiting unfairly.

In 1950, the IAAF implemented a policy to verify the sex of athletes through physical testing for the first time.⁶ This involved women being paraded nude in front of a panel of doctors. In 1968, the IOC also followed suit and started sex-testing by physical examination. This was done because several participating nations did not have a credible sex-testing apparatus in

² Venessa Heggie, *Testing sex and gender in sports: Reinventing, reimagining and reconstructing histories*, 34(4) ENDEVOUR 157, 159 (2010).

³ Avery Brudley, *Change of sex*, TIME MAGAZINE (Aug. 24, 1936), <https://web.archive.org/web/20110410154717/http://www.time.com/time/magazine/article/0,9171,756527-1,00.html>.

⁴ Ruth Padawer, *The humiliating practice of sex-testing female athletes*, THE NEW YORK TIMES (June 28, 2016), <https://www.nytimes.com/2016/07/03/magazine/the-humiliating-practice-of-sex-testing-female-athletes.html>.

⁵ *Id.*

⁶ Nathan Q. Ha, Shari L. Dworkin, *et al.*, *Hurdling Over Sex? Sport, Science, and Equity*, 43 ARCHIVES OF SEXUAL BEHAVIOUR 1035, 1036- 1037 (2014).

place.⁷ The policy of the IOC involved a two-pronged test wherein, *firstly*, the athletes would undergo physical testing and *second*, the athletes would undergo chromosome testing to ascertain their sex. The chromosomal testing would involve assessing whether the athlete was female, i.e., possession of a XX chromosomal structure. This method was aimed at testing female athletes to ensure that Y-chromosomes are absent. Overall, the method eventually helped in identifying males disguised as female athletes.⁸ In 1992, the IOC replaced the policy of mandatory sex-testing with a policy of testing only those female athletes who aroused suspicion regarding their sex, which was based on the estimation of the authorities. This ‘doubt’ was criticized as it was founded on an arbitrary criterion put forward by the authorities,⁹ and particularly because this would include assessment of the physical appearance of the athlete such as their height, strength etc.

The testing methodology faced severe criticism in the 1990s because of its imprecise results. A manifestation of the failure that comes with this testing methodology was observed in the 1996 Atlanta Olympic Games, wherein eight female athletes who were classified as non-females in the combined physical-chromosome sex-testing regime subsequently competed in the games after receiving fitness certificates to compete as females post a traditional physical test.¹⁰ The chromosome testing era thus failed to provide successful results as athletes with DSD at the chromosomal level, i.e. (who did not have the typical XX chromosome structure) would first fail the test, but still, later on, would qualify to be classified as female athletes.

Thus, due to a lack of success, the IOC discontinued chromosome testing in 1999.¹¹ This was specifically because females with atypical chromosome structures were still being considered female. Also, certain difficulties were experienced in assessing the ‘sex’ of an athlete by just looking at the chromosome structures of the said individuals. The IOC then replaced the policy of mandatory physical and chromosomal testing with a policy where only physical examination was required to ascertain sex that too only if the authorities believed that reasonable suspicion

⁷ Lindsay Parks Pieper, *Sex Testing and the Maintenance of Western Femininity in International Sport*, 31 (13) THE INT. J. ON THE HISTORY OF SPORT 1557, 1559-1564 (2014).

⁸ Katie Thomas, *A Lab is Set to Test the Gender of Some Female Athletes*, THE NEW YORK TIMES (30 July 2008), https://www.nytimes.com/2008/07/30/sports/olympics/30gender.html?_r=2&ref=olympics&oref=login&oref=login.

⁹ Joe L. Simpson *et.al*, *Gender verification in competitive sports*, 16(5) SPORTS MEDICINE 305, 305–15 (Nov. 1993).

¹⁰ Louis J. Elsas & Robert P. Hayes, *Gender verification in the Centennial Olympic Games*, 86 JOURNAL MEDICAL ASSOCIATION OF GEORGIA 50, 50-54 (1997).

¹¹ Dr. Myron Genel, *Gender Verification No More?*, 5(3) MEDSCAPE WOMEN’S HEALTH (2000), <http://womenshealth.medscape.com/Medscape/WomensHealth/journal/2000/v05.n03/wh7218.gene/wh7218.gene.html>.

existed. Technically too, the Chromosomal testing was considered to be inherently inaccurate as incidents of atypical structures amongst women were also reported in addition to their male counterparts. This was further considered by geneticists, endocrinologists, and others in the medical community as discriminatory towards women.¹²

However, the nude test (physical test) did not give accurate results either and received criticism for being discriminatory and invasive of the privacy of athletes.¹³ The issues in the physical test were brought to the forefront when the South African 800-metre runner, *Caster Semenya*, was asked to undergo a mandatory physical examination after her World Championship wins in 2009.¹⁴ The tests that were conducted were a blatant violation of the privacy of Caster Semenya. The tests involved a long arduous assessment of two-hours where Semenya's genitalia was photographed.¹⁵ This was followed by the test results being made available to the media before Semenya. The test results concluded that she had undescended testes and hyperandrogenism, i.e., she endogenously produced testosterone at levels higher than the normal rate prescribed for women. Therefore, the historical position involved a lack of safeguards for athletes. The status quo was one where the whims and fancies of sports authorities determined not only the sex but also the career of the athlete.

3. THE TESTOSTERONE TESTING POLICY OF 2011

Although the IAAF allowed Semenya to participate in international events and revoked her ban 8 months later,¹⁶ the IAAF did not stop its search to find a novel sex-testing policy. The IAAF adopted testosterone testing from 2011 to evaluate the sex of athletes,¹⁷ which was later used by the IOC in the 2012 London Olympics.¹⁸ This would be the first time testosterone

¹² SIMPSON *et al.*, *supra* note at 307-10.

¹³ Katie Thomas, *Gender Test for Olympians: A relic that persists*, THE NEW YORK TIMES (July 30, 2008), <https://www.nytimes.com/2008/07/30/sports/30iht-GENDER.1.14880817.html>.

¹⁴ David Smith, *Caster Semenya sex row: 'She's my little girl,' says father*, THE GUARDIAN (20 Aug. 2009), <https://www.theguardian.com/sport/2009/aug/20/caster-semenya-sex-row-athletics>.

¹⁵ Ariel Levy, *Either/or: sports, sex, and the case of Caster Semenya*, THE NEW YORKER 46, 46-59 (Nov. 2009), <https://www.newyorker.com/magazine/2009/11/30/eitheror>.

¹⁶ Simon Hart, *Caster Semenya given all clear after gender test row*, THE DAILY TELEGRAPH (6 July 2010), <https://www.telegraph.co.uk/sport/othersports/athletics/7873240/Caster-Semenya-given-all-clear-after-gender-test-row.html#:~:text=There%20were%20unconfirmed%20media%20reports,long%20to%20resolve%20her%20case>.

¹⁷ IAAF Regulations Governing Eligibility of Female Athletes with Hyperandrogenism to Compete in Women's Competition (Apr. 12, 2011), <http://tinyurl.com/IAAF-HA-reg>.

¹⁸ International Olympics Committee, *IOC Regulations on Female Hyperandrogenism* (2012), http://www.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2012-06-22-IOC-Regulations-on-Female-Hyperandrogenism-eng.pdf.

testing would have become the standard sex-testing method used by the International sporting bodies. As per the rule, only those female athletes could participate in female events whose endogenous testosterone level was below the threshold level of 10 nmol/L. The policy was problematic as it put restrictions on naturally produced endogenous testosterone in excess to the exogenous testosterone, which is taken by athletes ‘externally’ to improve their performance. This was done to avoid the apparent improved competitive advantage for female athletes who possessed higher testosterone levels. The practice of testosterone doping, wherein athletes increase their testosterone levels has been banned by sporting authorities as it leads to an unfair advantage for athletes. The performance gap between male and female athletes was cited as the reason for implementing this policy, which the sporting bodies had always linked to testosterone levels. This can be manifested by the fact that the mean performance gap between male and female athletes is 10.7% for running performances, 17.5% for jumping events, 8.9% for swimming races, 7.0% for speed skating and 8.7% in cycling events.¹⁹ Thus, there is a gaping performance gap between male and female athletes, and the policy links the same to higher testosterone levels. Therefore, this meant that only those athletes who had endogenous testosterone levels below the threshold level could compete as females.

The testosterone testing policy faced major criticism from academics and members of the medical community alike. The policy was criticized by noted bioethicists such as Katrina Karkazis and Rebecca Jordan-Young in two distinct limbs, who were quick to cite the lack of scientific proof regarding a link between high endogenous testosterone levels and athletic advantage.²⁰ *Firstly, they argued that* it was difficult to establish a direct link between testosterone levels and athletic advantage, as different individuals have complex and varying reactions to similar doses of testosterone.²¹ *Second, out of the nine conditions linked with high endogenous testosterone levels, only six were linked with people that could be classified as being intersex.*²²

The other conditions associated with higher testosterone levels included females with Polycystic Ovary Syndrome (PCOS), a condition wherein females may experience menstrual irregularity, excess hair growth, acne and obesity. Additionally, it is pertinent to note that

¹⁹ Valérie Thibault *et al.*, *Women and Men in Sport Performance: The Gender Gap has not Evolved since 1983*, 9(2) J SPORTS SCI MED 214, 214-223 (2010).

²⁰ Katrina Karkazis *et al.*, *Out of bounds? A critique of the new policies on hyperandrogenism in elite female athletes*, 12(7) THE AMERICAN JOURNAL OF BIOETHICS 3 (2012).

²¹ *Id.*, at 3, 8.

²² *Id.*, at 3-5.

testosterone production in elite female athletes is higher than the testosterone production in other people, and to penalize them for it would be ill-advised. As an alternative to the 2011 policy, it was suggested that legally recognized females should have the autonomy to choose their right to compete in women events.²³ This would be in line with the right of an individual to self-identify as a particular gender.

Dutee Chand, an Indian sprinter, was barred by the Indian authorities from competing in the 2014 Commonwealth and Asian Games by the Indian authorities as her level of endogenous testosterone made her ineligible to compete under the testosterone policy of the IAAF.²⁴ The action of the IAAF under the 2011 policy was challenged before the Court of Arbitration for Sport (CAS) in *Dutee Chand v. Athletics Federation of India*.²⁵ The tribunal held that no evidence linked high testosterone levels to improved athletic performances by female athletes. The judgment placed reliance on research by bioethicists Katrina Karkazis who also testified before the CAS. The tribunal further ordered the IAAF to find evidence linking performance with high testosterone levels within the next two years.²⁶ The decision of the CAS meant that athletes like Dutee Chand with higher levels of endogenously produced testosterone would be allowed to participate in competitive female track and field events. The decision affirmed the view that there was a lack of scientific evidence that linked improved athletic performance with higher testosterone levels.

4. THE NEW TESTOSTERONE RULE OF 2018

Following the decision by the CAS in the *Dutee Chand* case, and to categorically enforce the testosterone rule, the IAAF began conducting studies that linked improved athletic performance of women with higher testosterone levels. It must be noted that the IOC was also in favour of the reinstatement of the testosterone rule as it would reduce discrimination faced by female athletes under the former testing regime.²⁷ The IOC also excluded trans-women from the ambit of athletes who were eligible to compete in female events. Thus, the stance of

²³ *Id.*, at 13.

²⁴ Matt Slater, *Sport & gender: A history of bad science & 'biological racism'*, BBC SPORT (July 28th 2015), <https://www.bbc.com/sport/athletics/29446276>.

²⁵ *Dutee Chand v. Athletics Federation of India (AFI) & The International Association of Athletics Federations (IAAF)*, CAS 2014/A/3759.

²⁶ *Id.*, at ¶ 548.

²⁷ International Olympic Committee, *IOC Consensus Meeting on Sex Reassignment and Hyperandrogenism* (Nov. 2015), https://stillmed.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2012-06-22-IOC-Regulations-on-Female-Hyperandrogenism-eng.pdf.

governing bodies was that assessing the sex of the athletes by looking at testosterone levels would be the most ideal policy in the long run. In 2017, the *Serum test* successfully linked high testosterone levels with improved performances by female athletes in the 400 meters, 400 meters hurdles, 800 meters, hammer throw, and pole vault events.²⁸ However, it is important to note that the study did not analyze broad parameters and only tested the relation between high testosterone levels and these specified events.

Following the 2017 study, the IAAF imposed a new rule wherein athletes competing in female events with Difference of Sex Development (which meant testosterone levels of 5 nmol/ per liter of blood) would not be allowed to compete.²⁹ The 2017 rule was more stringent than the 2011 law that had been ‘discarded’, as the mandated blood testosterone level in the 2017 rule book was merely half the level prescribed in the 2011 rule. Thus, the new rule was more stringent than the former rule that had been deemed unscientific by the CAS. The IAAF claims to have scientific evidence to support the 2018 rule that links improved athletic performances to higher testosterone level through the Serum test. The rule also made provisions for athletes with higher testosterone levels to compete, provided they took medicines that lowered their testosterone levels. Overall, the rule barred female athletes with endogenously produced testosterone beyond the IAAF mandated level from participating in certain events, based on the skewed findings of a myopic study.

The purported rationale behind the incorporation of a specific testosterone level was based on the notion that testosterone supposedly provided competitive advantages to participating athletes. As per the logic, sex is a biological concept and involves chromosomal, gonadal, and hormonal characteristics.³⁰ Thus the interplay of these factors should be used as a defining characteristic to assess the eligibility of an athlete. *Doriane Coleman*, a law professor and a former 800-metre runner is a major proponent of the policy. She argues that the need to have a separate category for females arises to alleviate concerns and allow for greater inclusion of female athletes in sports. In her opinion, it should at the same time allow the athletes a rooted right to participation and a chance at showcasing skills on a global stage. The agenda

²⁸ Stéphane Bermon & Pierre-Yves Garnier, *Serum androgen levels and their relation to performance in track and field: mass spectrometry results from 2127 observations in male and female elite athletes*, 51 BRITISH JOURNAL OF SPORTS MEDICINE 1309, 1309-1314 (2017).

²⁹ *Eligibility Regulations for the Female Classification* (Athletes with Differences of Sex Development), 2018, International Association of Athletics Federation (Apr. 2018), <https://www.worldathletics.org/news/press-release/eligibility-regulations-for-female-classifica>.

³⁰ John C. Achermann & J. Larry Jameson, *Disorders of Sexual Development*, 17 HARRISON’S PRINCIPLES OF INTERNAL MEDICINE 2339, 2339–45 (2008).

conclusively remains to oversee these athletes become agents of social change.³¹ It is further highlighted that intersex athletes would perform up to 10-12% better than male athletes.³² Thus, having a different female event is a just classification in terms of the fact that it allows female athletes to participate in events where they do not merely participate but also have an equal opportunity at grabbing a medal, something that aids in removing social disadvantages female athletes face throughout their careers.³³

Coming back to the discussion, the new rule by IAAF meant that middle-distance runners like Caster Semenya, who had higher testosterone levels, would not be allowed to compete in female events. Semenya thus appealed these new regulations of the IAAF in the Court of Arbitration for Sport, which unfortunately upheld the new rules, as they were backed by scientific studies.³⁴ The CAS referred to Semenya as a woman and an athlete who had competed as a woman (as Ms Semenya³⁵) but disallowed her from participating in events to protect fairness in female events. The panel stated that gender identity could not be the criteria for allowing athletes to participate in female events. They further stated that for a fair status quo to be maintained, biological characteristics would be better served as a criterion. The panel agreed with the submissions of the IAAF that drew a nexus between higher testosterone levels and improved competitive advantages. In the same tune, the panel also argued that the legal notions of sex have to be disregarded.³⁶ Finally, the panel while stating that the achievements of Caster Semenya were bonafide, held that she would be barred from participating in female athletic events and upheld the testosterone rule. Ultimately the IAAF prevailed and the ruling dominantly showed the lacuna in the legal classification of the ‘sex’.

Following this decision, Semenya decided to appeal to the Federal Supreme Court of Switzerland. The court, in its initial interim order, held that the new rule should not be made applicable to Semenya, and she should be allowed to participate. However, in a later interlocutory order, the court reversed the initial order and barred Semenya from participating competitively.³⁷ Therefore, this meant that the IAAF testosterone rule continued to apply to

³¹ Doriane L. Coleman, *Sex in Sport*, 80 LAW AND CONTEMPORARY PROBLEMS 63, 84-105 (2017).

³² *Id.*, at 104.

³³ *Id.*, at 110.

³⁴ *Mokgadi Caster Semenya v. International Association of Athletics Federation*, CAS 2018/O/5798.

³⁵ *Id.*, at ¶ 454, 467.

³⁶ *Id.* at ¶ 559, 560.

³⁷ The DSD Regulations are, for the time being, again applicable to Caster Semenya, Swiss Federal Supreme Court (4A_248/2019).

middle-distance runners like Semenya. The alternate ideas to accommodate the countervailing interest of intersex athletes included suggestions that there should be different categories for different sexual and gender identities.³⁸ However, these are merely ideas at this stage and athletes like Semenya are still barred from competing in female events.

5. THE INHERENT ARBITRARINESS OF THE 2018 RULE

The 2018 rule is purported to be made to ensure fairness in female events, however, the policy itself remains arbitrary. The view that the policy is arbitrary is shared by members of the scientific community as well as social scientists including the likes of bioethicists and anthropologists. The 2018 rule is arbitrary because *firstly*, the policy fails to meet the rights of self-determination of sex; *secondly*, testosterone testing to identify sex lacks consensus in the scientific community; and *thirdly*, the 2018 rule is based on inadequate research.

5.1. THE POLICY FAILS TO MEET THE RIGHTS OF SELF-DETERMINATION OF SEX

The right of self-determination is the right of an individual to self-identify their gender and not be coerced by societal norms of gender identity. This right extends to people with DSD and women with hyperandrogenism. Advocates for an inclusive approach towards people with DSD have demanded the right of self-determination for people with DSD in the Malta Declaration, which includes the right of self-identification of sex.³⁹ This has since been affirmed by the *European Union Commissioner of Human Rights*.⁴⁰

An analysis of self-identification from a strictly legal perspective would also certainly lead to the conclusion that the 2018 rule is arbitrary. The United Nations General Assembly empowered a Commission to prepare a report on gender identity and the right to self-determination in light of the development of evolving gender jurisprudence for a holistic understanding of two major provisions. *First* of them being Article 6 of the *Universal Declaration of Human Rights*,⁴¹ which states that all individuals should be recognized as persons. The *second* being Articles 16 and 17 of the *International Covenant on Civil and*

³⁸ Doriane L. Coleman, *Sex in Sport*, 80 LAW AND CONTEMPORARY PROBLEMS 63, 112 (2017).

³⁹ International Intersex Forum, 2013.

⁴⁰ *Human Rights and Intersex People*, Commissioner for Human Rights, Council of Europe (Apr. 2015).

⁴¹ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), at art. 6. (Dec. 10, 1948).

*Political Rights*⁴², both of which provides individuals with an inherent right to life, and privacy. The essence of the findings can be found in the Yogyakarta Principles that came about as a result stated that intersex individuals have the *right of self-determination of sex*.⁴³ The Yogyakarta principles were a global declaration that came about to bring about codification with respect to the rights of sexual minorities and people with DSD. In the Indian context too, the Supreme Court affirmed that individuals, particularly intersex individuals have the right to self-identify their gender in *NALSA v. Union of India*⁴⁴ while relying extensively on the Yogyakarta principles. Thus, it may be argued that international gender jurisprudence operating for individuals with an atypical chromosomal structure (or hormonal level) grants them the right to identify as either male or female, which is an intrinsic human right.

The right of an individual with DSD to have the autonomy to identify as a particular sex is thus an inalienable right and an attempt to restrict the same is arbitrary. Arbitrariness can be understood as something *unreasonable*, and *irrational* or *capricious*.⁴⁵ The CAS while applying arbitrariness to policies adopted by sporting authorities should have procedural fairness and must be devoid of unreasonableness and arbitrariness.⁴⁶ Thus, general principles of common law surrounding arbitrariness are applicable to sports law, and in case a procedure or policy is arbitrary it should be prohibited.⁴⁷ Thus, a sporting authority cannot act unreasonably and cause prejudice to an athlete or organization.

The rule divests an individual who is legally a female and possess the rights that accrue to a female from exercising the said rights. Thereafter, such discrimination against females with DSD can only be construed as an unreasonable construct in the light of the fact that the right to self-identify as a particular gender exists as an unequivocal and inalienable right. It must be further noted that DSD is ‘sexual terminology’ and not a social term like ‘gender’, with there being only two sex categories in athletic events, the rule being applied here is prejudicial to all athletes who have atypical sex characteristics. The policy has been severely criticized by the *United Nations Human Rights Commission* and has fueled pilot studies in the area of intersex

⁴² International Covenant on Civil and Political Rights, S. Exec. Rep. 102-23, 999 U.N.T.S. 171, at art. 16 & 17 (Dec. 16, 1966).

⁴³ Principle 19-21, Yogyakarta Principles 2007; Principle 31, Yogyakarta Principles, 2017.

⁴⁴ National Legal Services Authority v. Union of India, AIR 2014 SC 1863.

⁴⁵ BLACK’S LAW DICTIONARY 100 (9th ed. 2009).

⁴⁶ AEK Athens v. Union of European Football Associations (UEFA), CAS 1998/200.

⁴⁷ *Id.*, ¶ 156; Federazione Italiana Nuoto (FIN) v. Federazione Internazionale De Natation Amateur (FINA), CAS 1996/157.

rights and female sporting events.⁴⁸ In toto, the testosterone level as a qualifying criterion for being a female athlete is prejudicial to female athletes with DSD and thus should not be allowed to operate. Finally, barring individuals with intersex characteristics from participating in sporting events not only constitutes gender discrimination but also discrimination based on sex.

The advocates of the existing policy based on evaluation of testosterone levels are myopic in their opinion because they remain in sheer ignorance of gender rights and the rights of marginalized intersex athletes. Intersex athletes have been historically discriminated against, including but not limited to infanticide, abandonment, mutilation and broader concerns affecting the right to life.⁴⁹ Excluding these athletes, as competing athletes is not only against the notions of self-identification but further leads to ostracization of these athletes, leaving them with no avenues to compete in athletic events. This not just serves as an impediment on the approach of inclusivity towards sexual minorities, but it further isolates such minorities and pushes them to the fringes of society. While attempting to protect female events, it discriminates against athletes with DSD. This is particularly problematic in the light of the inalienable right to self-identification. Thus, disallowing intersex athletes further discriminates an already ostracized sexual minority.

Additionally, individuals who have undergone Sex Reassignment Surgery (SRS) should also be allowed to compete in such events. This is because such individuals identify themselves as women and are granted all the rights and duties, which should also include competing in sport as females. These individuals undergo transfeminine hormone therapy which stimulates female secondary sexual characteristics, such as breasts and reduced hair. Thus, not allowing them to participate would divest them of their right to participate.

5.2. TESTOSTERONE TESTING TO IDENTIFY SEX LACKS CONSENSUS IN THE SCIENTIFIC COMMUNITY

There is a lack of unanimity in the scientific community that higher testosterone levels translate to improved athletic performances. In a controlled study by *Dr David Handelsmen*, a testicular and androgen function expert, it was found that a direct link cannot be established between testosterone levels and superior performances in track events.⁵⁰ The study looked at a catena

⁴⁸ Elimination of discrimination against women and girls in sport, A/HRC/40/L.10/Rev.1, 2019.

⁴⁹ *Human rights and intersex people*, Commissioner for Human Rights, Council of Europe (April 2015).

⁵⁰ David J. Handelsman et al., *Circulating Testosterone as the Hormonal Basis of Sex Differences in Athletic Performance*, 39(5) ENDOCRINE REVIEW 803, 803-829 (2018).

of research linking testosterone to better athletic performance and stated that a specific threshold level should not be put in place. This was mainly because different athletes react differently to testosterone levels. At the onset, this criterion is flawed to the effect that tests throw up varying results at each go. Therefore, it is advisable to not use testosterone level as the basis for the ascertainment of sex.

The aim of preventing female athletes from participating in events by using the testosterone level is to ensure fairness. However, the higher testosterone production in female athletes with DSD is endogenously produced (should be considered fair) and cannot be termed even remotely as an artificial benefit. Higher testosterone levels are benefits that accrue naturally to an athlete, which are akin to beneficial physical characteristics. Physical or biological characteristics that athletes possess helps differentiate them on the world stage and help them achieve greatness in their respective sporting discipline. This may be the athletic ability and height of LeBron James, or the strength and skill of Serena Williams, which helps them achieve greatness in their respective sport of basketball and tennis.

Therefore, the 2018 policy/guideline is arbitrary, as it discriminates against female athletes who have naturally accruing benefits (which should be deemed to be fair as they are out of the control of the athlete herself). This rule is particularly problematic as studies have systematically shown that there is no direct correlation between athletic performances and higher testosterone levels. Thus, in the absence of cogent evidence, jeopardizing the career of an athlete through such *ill-fated* rules is not only arbitrary but also discriminatory.

5.3. THE 2018 RULE IS BASED ON INADEQUATE RESEARCH

This can be argued in the light of the fact that the policy formed post the tests conducted by IAAF remains inapplicable to a slew of events barring the few specified events in the policy document itself. Despite the IAAF finding a larger than ever link between greater stamina, strength, higher explosiveness in middle distance runners and limited field events with testosterone levels in athletes,⁵¹ the policy's lack of square and fair applicability to all events under the ambit of 'Track & Field' events makes it look suspicious and dubious. This creates a confusion ridden rule wherein competitive advantage is seen with higher testosterone levels,

⁵¹ Stéphane Bermon & Pierre-Yves Garnier, *Serum androgen levels and their relation to performance in track and field: mass spectrometry results from 2127 observations in male and female elite athletes*, 51 BRITISH JOURNAL OF SPORTS MEDICINE 1309, 1309-1314 (2017).

but only in limited events. If stamina, speed and strength were to increase at higher testosterone levels, then leaving short distance running events or field events such as pole vault is wholly unreasonable and arbitrary. Thus, even if the reasoning is that higher testosterone levels are linked to improved athletic performance, then this should be applied across female track and field athletic events. Therefore, even if the study has found a correlation between the higher testosterone levels and athletic performance then applying this to selective sports is an arbitrary policy decision which should not be allowed.

6. CONCLUSION

Female athletes face unfair structural impediments in their journey towards becoming elite athletes, however, these impediments are magnified in case of athletes with DSD who compete in female events. Although the sex-testing rules are well-intentioned, the absence of cogent scientific proof to back the claims of the study and the rules makes it imperative on the authorities to declare such hastily prepared rules inoperative and instead focus on an athlete's career. In the absence of a direct categorical link between improved athletic performance and higher testosterone levels, a formation of rules based on susceptible claims remains arbitrary at best. An athlete cannot be discriminated against for physical characteristics they possess naturally in the form of endogenously produced testosterone. A higher testosterone level in a female athlete is a naturally accruing benefit that helps them achieve greater endurance, speed, and performance levels. This is a biological benefit, i.e. a sexual advantage akin to a favourable physical characteristic such as height, weight etc.

Even if the study that links higher testosterone levels and improved athletic performances were to be considered, then the rule that imposes a selective bar only on female athletes competing in middle distance events is itself arbitrary. If the link does exist, then the testosterone rule should be applied to all track and field events. For example, if higher testosterone leads to greater endurance as the research behind the rule states, then it should also be applied uniformly to long-distance and events. Similarly, if it leads to greater speed or explosiveness then it should be applied to shorter distances as well. The non-imposition of these restrictions across track and field events points to a lack of available research that links athletic performance to higher testosterone. Thus, applying the rule to only selective events is arbitrary even if the rule has been proven, the latter rationale being far away from reality.

Furthermore, the argument that allowing athletes with DSD in female events would be unfair to female athletes is unfounded. Athletes with DSD who identify as females are legally females and should ideally be considered females for the purpose of all-female athletic events. Disallowing intersex athletes from participating in sports events would be discriminatory towards these athletes. It is argued that imposing a testosterone test that is neither broad-based nor satisfactorily proved to prejudice athletes, is also arbitrary. It must be stressed that DSD is a sexual condition that naturally occurs in individuals and to make that as a basis to discriminate against athletes cannot be deemed to be reasonable by any stretch of the imagination. Additionally, not allowing intersex athletes who are discriminated and ostracized in society, makes it difficult for the athletes to legally self-identify in mainstream society. Therefore, discriminating against athletes with DSD who have been raised as a female is unreasonable and should be necessarily discontinued.

It is further argued that individuals who undergo an SRS and take Transgender Hormone Therapy (Male to Female) should not be divested from the right to participate in female events. This goes against the principles of self-determination, wherein an individual is given the right to choose their gender identity, which should entail all the rights and privileges along with it. This includes the right to participate in female events. The continued exclusion of transgender athletes is problematic and irrational. Allowing trans-athletes to participate in the event of their choice would also help in normalizing the *Trans* identities, while at the same time upholding the legal notion of self-identification in sport. Allowing, intersex athletes and athletes who have undergone SRS would lead to more inclusive athletic events while at the same time allowing these athletes to become agents of social change.

Therefore, sex-testing cannot be allowed under the garb of maintaining fairness, when in reality it discriminates against sexual minorities such as athletes with DSD or those who have undergone SRS. This is antithetical to the concepts of fairness that the sex-testing policies aim to uphold.

SPECTATORIAL DUTY OF CARE IN SPORTS: FROM HOOLIGANISM TO GAME-DISRUPTION

Siddharth Saxena

Jindal Global Law School, O.P. Jindal Global University

16jgls-ssaxena@jgu.edu.in

ABSTRACT

The question of who is liable for the offending actions of spectators at sporting events is one that has remained largely unanswered. An understanding of the same becomes especially relevant in light of the increase in recent occurrences of riots, game-disruptions and intra-spectator violence. Therefore, the author hopes to provide a comprehensive answer to this question through a jurisprudential analysis and an application of the principles of tort law to sports within a comparative framework. There are three groups of people on whom such liability could lie — the stadium authorities, the clubs, and the spectators themselves. The lack of a universally applicable answer arises from the fact that the liability does not in every case fall on the same party, but, instead, it is often determined based on whom the duty of care was owed to, and the particular circumstances of the offence. It is even possible for the liability to fall on multiple parties simultaneously. However, the inability to achieve a singular answer should not be seen as counterintuitive. Instead, it holistically enhances the experience of the sport for various actors, because it decreases the likelihood of game disruptions in the future. This concurrent liability pre-emptively seeks to curb not only ordinary and reasonably foreseeable occurrences of violence, but it also allows for the existence of liability imposition and remedies when there is an extraordinary situation that could not have been foreseen.

KEYWORDS

Spectator violence, Game-disruption, Stadium authorities, Clubs, Spectators.

1. INTRODUCTION

On 2nd March 2016, during a semi-final match of the Greek Football Cup, a midfielder for the PAOK Football Club was taken down in the penalty area. The crowd was enraged by this as there was no call by the referee, which would have benefited them since it occurred late into the second-half when Olympiacos were leading 2–1. In the eighty-ninth minute, some of the outraged members of the crowd threw flares onto the field, forcing the members of the team and the referee to be escorted off. This incident caused the first leg of the two-game aggregate to be suspended.¹ A similar incident had occurred during the second day of the final Ashes Test between England and Australia in 1971, but with much more serious consequences. After one of the Australian batsmen was forced to retire due to an injury from accidentally ducking into a bouncer, beer bottles and cans were thrown at the English bowler responsible. Although the English captain initially withdrew his team from the match in disgust, he was forced to return because the match, along with the Ashes, would otherwise be awarded to the Australian team. While the field was being prepared for the match to be continued, one of the attendants was knocked unconscious by a beer can thrown out from the stands. This incident, finally, led to 14 fans being arrested and 190 others being removed from the stadium.²

Such instances of game-disruption are only a symptom of the more significant issue of spectator violence and misbehaviour, be it directed at the participants or other spectators. Spectator hooliganism, in that respect, is not a recent phenomenon. Instead, it has been an ever-present concern for authorities and other spectators alike. Incidents of spectator violence, whether gravely serious or not, can be traced back to more than a century ago. In 1879, international cricket saw one of its first major outbreaks of violence at the Sydney Cricket Ground. 2,000 spectators invaded the grounds during a match between the Australian and English cricket teams and held up the game for approximately 20 minutes. The English captain, Lord Harris, was also injured by one of the spectators during this incident, which is now popularly known as the Sydney Riot of 1879.³

¹ Tom Webb, *PAOK vs. Olympiakos Abandoned after Fans Light Flares and Throw Toilet Paper*, BLEACHER REPORT (Oct. 11, 2020, 10:26 AM), <https://bleacherreport.com/articles/2621393-paok-vs-olympiakos-abandoned-after-fans-light-flares-and-throw-toilet-paper>.

² Arunabha Sengupta, *Ashes 1970-71: John Snow fells Terry Jenner; England almost forfeit Test*, CRICKET COUNTRY (Oct. 11, 2020, 10:39 AM), <https://www.cricketcountry.com/articles/ashes-1970-71-john-snow-fells-terry-jenner-england-almost-forfeits-test-30574>.

³ Maximilian Reid, *Outside Off — Riot of 1879*, ROYAL AUSTRALIAN HISTORICAL SOCIETY (Oct. 11, 2020, 10:50 AM), <https://www.rahs.org.au/outside-off-riot-of-1879/>.

Instances of spectator violence have only increased in the recent past, while the question of liability—upon whom does the duty of care for curbing such spectatorial actions lie—has remained a legal lacuna. Therefore, through this paper, the author hopes to answer this question of liability, employing a jurisprudential lens and comparative analysis of the tortious legal frameworks set up in an array of common law jurisdictions.

There are three parties upon whom such duty of care could lie—the stadium authorities, the clubs, or the spectators themselves. However, there is no singular answer to the question of who is liable for instances of game disruption amongst these three parties. The liability can lie on any of the aforementioned parties, depending on the circumstances of the incident. Accordingly, the paper deals with the question of liability in three parts, each exploring the circumstances under which the stadium authorities, clubs and/or spectators may be held liable, respectively.

2. LIABILITY OF STADIUM AUTHORITIES

It has been well established across various precedents that the spectators attending a sporting event are to be treated as the business invitees of the stadium where the event is being conducted, at least for the purposes of determining the appropriate duty of care. *Roth v. Costa*⁴ was one such case, where the plaintiff, a concert attendee, had been on the receiving end of a criminal attack from one of the other spectators. Although this case deals with concert attendees and not spectators or sporting events, the principle devolved as to the nature of the relationship between the stadium authorities and the spectators would remain unchanged. It would be illogical to hold that the plaintiff would have no longer been a business invitee merely if it had been a sporting event. The nature of the injury she suffered was unrelated to the nature of the event sought to be experienced, so the precedent can be extended to sporting events as well.

The Australian High Court has held, in the case of *Rootes v. Shelton*,⁵ that merely because an injury has occurred during a sport or game would not be a reason to exclude the application of the laws against negligence. When the owner invites spectators to her premises, she is expected to satisfy three requirements.⁶ Firstly, she must exercise reasonable care. Secondly, she must disclose to her invitees all those dangerous conditions that exist on the premises, which are

⁴ 650 N.E.2d 545 (1995).

⁵ ALR 33 (1968).

⁶ *Harris v. Nichans*, 857 S.W.2d 222 (1993).

unlikely to be discovered by them of their own accord. Finally, she has a duty to remedy all such dangerous conditions that exist on the land. If she is unable to do so, she must at least inform the invitees thereof.

However, this does not mean that the owner of the stadium can simply allow the dangerous conditions to exist on her land by merely informing the invitees, as doing so would leave it open to a suit for negligence.⁷ Such was the particular scenario in *William v. Walnut Creek Amphitheatre Partnership*.⁸ The question, in that case, was as to whether the owner created and allowed the continued existence of a dangerous condition by constructing the amphitheatre on a hill and admitting too many invitees, even if the patrons were aware of these risks. The Court answered the question in the affirmative, holding that Walnut Creek was liable since they had negligently failed to rectify the condition even after coming to note their existence. It was this failure of the owner that led to the injury of the plaintiff.

The United Kingdom's Occupiers Liability Act imbibes most of the principles, regarding the liability of stadium authorities, discussed so far. It seeks to imbibe the common law position on duty of care and imposes it on all the occupiers.⁹ However, in practice, the Act does manifest a slight alteration of the jurisprudential positions discussed above. It places a lesser liability on the owner of the premises, as erecting warning signs that state that the organisers would not be liable for accidents to spectators, howsoever caused, and at the entrance to the venue allows them to effectively avoid liability.¹⁰

Finally, the principles applicable to stadium owners culminate in and are clarified by the American case of *Iacono v. MSG Holdings LP*.¹¹ Therein, a photographer, who was caught in between and injured by a riot during the Bowe-Golota boxing fight, sued the Madison Square Garden for its failure to exercise adequate crowd-control measures. The Court held the owners liable, as they could have easily prevented the foreseeable risk of precipitating incidents by exercising reasonable care to secure the stadium. A further clarification that arises out of this case is that the injury caused should have been reasonably foreseeable so that it could be expected of the business to remedy the cause of such injury. Therefore, “*a tortfeasor need not*

⁷ Keeran v. Spurgeon Mercantile Co., 191 N.W. 99 (1922).

⁸ 468 S.E.2d 501 (1996).

⁹ Occupier's Liability Act § 2, (1957).

¹⁰ White v. Blackmore, 2 QB 651 (1972).

¹¹ 801 N.Y.S.2d 778 (2005).

*have contemplated the particular event that occurred, as he may be held liable for anything that could be a natural and probable consequence of his actions.*¹²

However, we can clearly see from both the facts and principles of these cases that the owner of the premises is only likely to be held accountable for injuries occurring to the spectators. We must look elsewhere to locate the liability for actions committed by spectators against participants of the sport. The group upon whom such liability might fall would be the sporting clubs, whose fans are responsible for the misbehaviour.

3. LIABILITY OF CLUBS

Before we begin discussing the liability of clubs for actions committed against participants, we must continue to probe the question of actions committed against other spectators. When it comes to the liability of clubs, it often becomes much easier to place since the clubs may also be the owners of the stadium where the match is taking place. Therefore, not only might they become responsible for the actions of their fans, but they would also be responsible for ensuring the reasonable safety of all spectators watching the match. So, in such cases, the principle of reasonable care owed to business invitees would continue to apply, concomitantly.

In the case of *Harris v. Sheffield United Football Club*,¹³ the issue under consideration was as to whether the club was required to pay the police for its services rendering assistance to manage the crowd at their stadium. The answer to this question depended on determining whether the police were merely carrying out their public function, or whether there was a duty on the club to secure its own stadium — in which the police were only aiding them. The Court held that that the club owed a duty to the spectators and the football authorities, to ensure that the conditions were not such as to occasion a danger to any person or property. Therefore, the police were merely assisting the club in carrying out their necessary duty of ground regulation, crowd control and supervising entry to the venue, which the club could have also outsourced to a private party.

As has been briefly hinted at in the *Sheffield United Football Club* case, the liability of clubs can go beyond that which is owed to the spectators under tort law. They may also be liable under contractual agreements to the sporting authorities, whose guidelines they must comply

¹² *Greenville Memorial Auditorium v. Martin*, 301 S.C. 242 (1990).

¹³ 2 All ER 838 (1987).

with. It is at this point that the duty owed to the participants may also be brought in. A particular example is that of the UEFA Disciplinary Regulations, which hold the clubs strictly liable for the actions committed by their supporters.¹⁴ Article 6 of this regulation provides:

that the “[m]ember associations and clubs are responsible for the conduct of their players, officials, members, supporters and any other persons exercising a function at a match at the request of the association or club.”

This seems to be similar to the approach taken towards accident cases in the American jurisdiction, wherein the breach of the statute is treated as negligence *per se*.¹⁵ The concretisation of this common law position is imbibed to avoid any controversy as to whether due care was exercised in a particular situation or not.

In the case of *PSV Eindhoven v UEFA*,¹⁶ the Court of Arbitration for Sports (CAS) was called upon to interpret and extrapolate the aforementioned Article of the UEFA Disciplinary Regulations. The claimant club had been fined CHF 30,000 by the UEFA Control and Disciplinary Body, in response to one of their supporters unruly screaming at Thierry Henry during a match against Arsenal. Obviously, the tribunal was bound to strictly apply the provision to the facts at hand. However, what is more, important for our understanding of the club’s liability is the CAS’ interpretation of the principle of spectator violence:

“The object of this rule is very clearly to ensure that clubs that host football matches shoulder the responsibility for their supporters’ conduct. (...) If clubs were able to extricate themselves from any responsibility by claiming that they had taken all measures they could reasonably be expected to take to prevent any breach of the UEFA rules, and if supporters still manage to commit such an act, there would be no way of penalising that behaviour, even though it constituted a fault in itself. (...) By penalising a club for the behaviour of its supporters, it is, in fact, the latter who are targeted and who, as supporters, will be liable to pay the penalty imposed on their club. (...) Its objective is not to punish the club as such, which may have

¹⁴ UEFA Disciplinary Regulations art 6, (2002).

¹⁵ EDWIN PEEL & JAMES GOUDKAMP, WINFIELD AND JOLOWICZ ON TORT (19th ed., Sweet & Maxwell 2015).

¹⁶ A 423 (2002).

done nothing wrong, but to ensure that the club assumes responsibility for offences committed by its supporters.”¹⁷

Therefore, it would not merely be enough for the club to take reasonable precautions to prevent any form of hooliganism, but they would be held responsible even if the supporters managed to commit an infringing act despite the club’s efforts to prevent them from doing so. The reason for imposing this higher burden is that it exposes the limitations of the reasonable measures discourse; even though an infringing action might have occurred and harm may have resulted from it to a participant of the sport, it is possible that no one would be held liable for the same because the club has extricated its responsibility by performing the bare minimum required. In such a case, it would become necessary for the disciplinary authority to hold the club liable and enforce upon it a burden to make the requisite changes, to curb the possibility of any future infringements. Furthermore, the authorities cannot move against the spectators themselves because they lack the jurisdiction to do so, as they are only owed a direct contractual obligation by the clubs.

Although in the case of *PSV Eindhoven*, it seems that the Court intended to target the supporters indirectly by penalising the club, who may later pass on the same to the infringing spectator, it may not necessarily be the same in practice. Instead, the possibility of passing on any liability to the spectators seems to be an auxiliary concern to the main aim of ensuring that clubs assume liability for the actions of their supporters. This line of argumentation becomes most obvious when we look at the later cases in which this principle has been applied. For example, in the case of *Feyenoord Rotterdam v UEFA*,¹⁸ where Feyenoord Rotterdam’s supporters had disrupted the match by rioting, both, inside and outside the stadium. The CAS imposed not only a hefty fine of CHF 1,00,000, which may or may not have been enforced against the rioting spectators but also disqualified the team from the UEFA Cup Competition for the period 2006 – 07.

It would be fair to conclude from the analysis so far that the liability of clubs, when treated in a separate capacity from their roles as the owners of the premises, is largely restricted to cases in which the infringing act has been carried out by their fans. However, in such cases, the scope of the actions for which they are liable is much wider than that of just the owner of a premise;

¹⁷ *Id.*

¹⁸ A 1217 (2007).

they can be held liable for the actions of their supporters committed against other spectators and the participants of the sport as well.

4. LIABILITY OF OTHER SPECTATORS

Increasingly, in jurisdictions such as the United Kingdom and Australia, there has been a shift towards holding spectators themselves accountable for their actions and involvement in violent misbehaviour. The means through which this liability has been imposed is a statutory framework that dictates their conduct in public spaces, and even specifically sporting stadiums. Not only is this a shift from the general trend of imposing liability upon the owners of the stadium and/or club, but it also indicates a shift away from an application of the general principles of tort law or contractual obligations to hold the parties liable.

The first legislation enacted to impose an obligation upon the spectators was the Occupier's Liability Act¹⁹ (previously discussed in the section on the 'Liability of Stadium Authorities'). An 'occupier', for the purposes of this Act, includes those exerting control over the premises and their visitors.²⁰

In 1986, for the first time, the courts were statutorily allowed to pass exclusion orders against those convicted of hooliganism.²¹ They did so by treating stadiums as public places, which meant that incidents occurring on the pitch or in the stands would be subject to public order offences.²² These powers were, subsequently, supplanted by the Football Spectators Act 1989, which specifically deals with offences committed by spectators during a football match. It gave the court the power to impose restriction orders, which prevented any spectators convicted of the requisite offences from attending matches outside England and Wales.²³ Therefore, this is the first instance we see of an extra-territorial imposition on spectators convicted of committing football-related offences.

In 1991, the Football (Offences) Act laid out those actions which may be construed as football-related offences, and for which spectators could be legally liable. Therein, it was made an

¹⁹ Occupier's Liability Act § 2, (1957).

²⁰ Shibumi Raje, *Event Organisers' Liability for Crowd Management and Crowd Safety*, THE SPORTS LAW & POLICY CENTRE BLOG (Sept. 28, 2018, 11:23 AM), <https://lawnk.wordpress.com/2012/09/30/event-organisers-liability-for-crowd-management-and-crowd-safety/>.

²¹ Public Order Act, (1986).

²² *Cawley v. Frost*, 64 CHR 20 (1971).

²³ Football Spectators Act § 3, (1989).

offence for a person to throw any projectile into either the playing area or any other area where persons may be present.²⁴ The Football (Offences) Act also deals with the chanting of indecent or racist slogans²⁵ and made it an offence to invade the pitch or to enter any other area generally having restricted access.²⁶

Similar prohibitions are made under the Australian Major Sporting Events Act, 2009. Sections 63 and 65 prohibit persons from possessing *lit* or *unlit* distress signal or firework, while Section 64 makes it an offence to throw a lit distress signal or firework (this refers to the particular instance described in the facts at the beginning of this paper). More generally, Section 68 prohibits the throwing or kicking of projectiles within the stadium, and, under Section 67, spectators are prohibited from entering the play area and disrupting the sporting event.

The Football (Offences and Disorder) Act 1999 amended the Act of 1989 to introduce the concept of banning orders, both domestic and international. However, the Football (Disorder) Act 2002 removed this technical distinction between domestic and international banning order. Instead, it imposed a requirement on the courts to simply seize the hooligan's passports and to impose a banning order that may extend up to a 10-year period.²⁷ The 2002 Act is in many ways much more stringent than any of the previous Acts. A banning order can also be imposed on a mere complaint by the police, if the court is satisfied that either the person has contributed to disorder at a football match within the United Kingdom or outside, or if there is a reason for believing that imposing a banning order might prevent the same in the future.²⁸ During a control period, a person may also be prevented from leaving England, and can, instead, be directed to appear before a magistrate within 24 hours if it is suspected that she has caused disorder at a football match, or that imposing a ban on such person may prevent such disorder in the future.²⁹

Section 87 of the Major Sporting Events Act provides similar powers to the courts in Australia. This Section allows the courts to impose banning orders against persons in certain cases such as throwing projectiles within the stadium and possessing prohibited or dangerous articles. These orders may be applied for a period of up to 5 years, and must also specify the events and/or areas from which the person is prohibited entry. Although banning orders cannot be

²⁴ Football (Offences) Act § 2, (1991).

²⁵ *Id.* at § 3.

²⁶ *Id.* at § 4.

²⁷ Football (Offences and Disorder) Act § 14E (3), (1991).

²⁸ *Id.* at § 14D.

²⁹ *Id.* at § 21A.

imposed for entering the play area, she may be asked to leave the event if she is reasonably suspected of infringing,³⁰ and an infringement notice may be issued to her by the police under the Infringements Act of 2006.³¹ Similarly, under the Major Sporting Events Act, Section 86 deals with repeat offenders, who, by an order of a magistrate, may be prevented from entering any event venue if they are reasonably suspected of being likely to disrupt the event.

There has been a strong pushback by the spectators against this extension of powers, who feel that it is a violation of their liberty and freedom. However, the Court, in *Gough v. Chief Constable of Derbyshire*,³² was of the view that these banning orders represent a contravention of neither the European law on the free movement of persons nor the European Convention on Human Rights. They did go on to delimit the scope of these banning orders though, by explaining the grounds on which they may be imposed:

“Banning orders were only to be imposed where there were strong grounds for concluding that the individual had a propensity for taking part in football hooliganism. It was proportionate that those who had shown such a propensity should be subject to a scheme that restricted their ability to indulge in it.”

An issue that may arise *ex-ante* while holding a particular spectator or group of spectators liable is that of identifying the person(s) responsible. These borderline cases, where it may be difficult to identify the perpetrator, usually arise in fast-paced incidents, such as where, for example, a single projectile is thrown on to the field or an indecent slur has been uttered by one of the spectators. There are three possible ways in which the offenders may be identified. Firstly, in the modern age of technology where most sporting events are recorded and broadcasted, it is quite likely that the incident would have been caught by one of the multiple cameras present in the stadium. Secondly, the infringing spectator could have been identified by one of the numerous security personnel that are usually present in and around the stands — as part of the reasonable security measure that every stadium authority is expected to maintain. Finally, if a general area has been identified where the action was thought to be committed, the person may be identified by speaking to and involving the other spectators in that area of the stand.

³⁰ Major Sporting Events Act § 83, (2009).

³¹ *Id.*, at § 91, (2006).

³² 2 All ER 985, (2002).

Although the focus in the United Kingdom has been on football-related violence and disorder, the principles and strategies used in these statutes can be imported and applied to any other sporting event, as had been done in Australia through the Major Sporting Events Act. The success of these banning orders has been undeniable on two grounds. Firstly, it has efficaciously limited and excluded the movement of those convicted of football-related offences from the stadiums.³³ Secondly, combined with other preventative measures, it has been universally well-received by:

“The police, both at home and abroad, by the football authorities, UEFA, FIFA and the overwhelming majority of fans who appreciate that they are the main beneficiaries when troublemakers are removed from their seats.”³⁴

5. CONCLUSION

It may seem, from the discussion in the previous section on the liability of spectators, that due to the arrival of these statutes, the liability can be singularly imposed on the spectators themselves. However, as had been stated in the introduction, any such search for a single group to place the entire liability on would be simply fleeting. The reason for this is that, at any point in time, more than one such liability can and does often co-exist. The best example of such concurrent liability would be when a spectator, during a football match carries out an infringing action against one of the participants of the sport. Although she may be held personally liable under the Football (Disorder) Act 2002, the club, whose supporter she is, would also be held strictly liable under the guidelines of the sporting authority.

We must not, however, look at this inability to achieve a singular answer to place the liability on only one group of persons as counterintuitive or problematic. Rather, it enhances the experience of the sport for spectators and participants, because it further decreases the likelihood of hooliganism or game disruption in the future. To only impose banning orders on the spectators, would take away any responsibility that could be placed on the clubs or stadiums to prevent such occurrences from happening in the first place. Therefore, not only does this concurrent liability pre-emptively seek to curb ordinary and reasonably foreseeable

³³ SIMON GARDINER ET AL., SPORTS LAW (4th ed., Routledge 2012).

³⁴ Home Office, *Football (Disorder Act) 2002 — Report to Parliament*, (Oct. 1, 2018, 1:41 PM), <https://homeoffice.gov.uk/documents/Football-Disorder-2006.html>.

occurrences of violence, but it also allows for the existence of liability imposition and remedies in case of extraordinary and unforeseeable situations.

IMPACT OF A PANDEMIC ON THE SPORTING WORLD: ANALYZING POTENTIAL CONTRACTUAL DISPUTES IN SPORTS DUE TO THE SPREAD OF COVID-19

Angad Singh Makkar

Jindal Global Law School, O.P. Jindal Global University

15jgls-asmakkar@jgu.edu.in

ABSTRACT

Beyond its extremely concerning health-related implications, COVID-19 has also massively impacted trade and business across all sectors. The realm of sports specifically has faced major setbacks, as most sporting leagues and events have been postponed, cancelled, or left in abeyance. Given the huge sums of money involved in these leagues/events, there are bound to be more than a few stakeholders hoping to cut their losses. This could potentially open the floodgates to litigation and a host of contractual disputes. This paper shall delve into potential defences that a party may rely upon in its attempts to defeat such litigious action. Specifically, this paper focuses on the English common law doctrine of frustration, the foundational theories behind it as well as the Indian iteration of this doctrine. The author also scrutinizes the concept of 'force majeure' and the potential of modern-day 'force majeure' clauses to combat the issue at hand, and in doing so, illustrates how contractual disputes along these lines could influence the legal framework of sports contracts in the future.

KEYWORDS

COVID-19, Frustration, Force Majeure, Contractual.

1. INTRODUCTION: COVID-19 AND SPORTS

The alarmingly rapid rate at which COVID-19, or the Coronavirus, has spread globally and the resultant colossal economic impact cannot be overstated. As early as March 2020, officials had estimated a multi-trillion-dollar loss to the global economy, and the International Monetary

Fund, expecting the situation to only worsen, similarly predicted that the adverse economic impact of this virus could culminate in another ‘Great Recession’ soon.¹ This came as no shock, however, considering that most countries had implemented lockdowns and/or curfews and urged citizens to socially isolate to stymie the transmission of this novel viral disease. Businesses, trades, and professions across the globe were left scrambling in an attempt to adjust to these restrictions, justified and necessary as they may have been.

The sporting world, of course, was no exception. Some of the most riveting and eye-catching sporting events of this year – be it ongoing or scheduled to start from June/July onwards – had been either cancelled, postponed, or left in an unnerving state of limbo. The 2020 Olympic Games which were to be held in Tokyo from July 24 - postponed to 2021. The 2019-20 NBA season was initially suspended indefinitely but did make a solid return (likewise for the National Hockey League in the US). Football leagues across the world too were suspended, with rumours of eventual cancellation or voiding the entire season, but with time, circumstances improved, and these leagues are now running relatively smooth. The English Premier League, the German Bundesliga, the Italian Serie A, and the Spanish La Liga are a few such prominent leagues whose top officials were tasked with making a plethora of hard decisions (with possibly dire economic ramifications).² The grave impact of COVID-19 on Indian sports could be best observed through the quagmire that the Board of Control for Cricket in India (BCCI) found itself in vis-à-vis the Indian Premier League (IPL). An initial postponement of the tournament’s starting date to April 15 by the organizers was premised on the hope that the situation around the pandemic would perhaps gradually improve in India. However, with India imposing a 21-day lockdown period from March 25 onwards, cancellation of IPL 2020 seemed not only probable but arguably inevitable at that point of time.³ Eventually, the IPL did come to fruition on 19 September and got concluded on 10 November 2020, with the Mumbai Indians winning their fifth championship title.⁴

¹ Eric Martin, *Coronavirus economic impact ‘will be severe’, at least as bad as Great Recession, says IMF*, FORTUNE (Mar. 24, 2020), <https://fortune.com/2020/03/23/coronavirus-economic-impact-predictions-great-recession-2020-markets-imf/>.

² Reuters, *Sports Events around the World hit by Coronavirus Pandemic*, THE NEW YORK TIMES (Mar. 23, 2020), <https://www.nytimes.com/reuters/2020/03/23/sports/skiing/23reuters-health-coronavirus-sport.html>.

³ Press Trust of India, *IPL 2020 cancellation on cards after 21-day lockdown due to COVID-19*, INDIA TODAY (Mar. 24, 2020), <https://www.indiatoday.in/sports/cricket/story/coronavirus-lockdown-covid-19-21-day-lockdown-bcci-ipl-2020-sourav-ganguly-ipl-2020-1659299-2020-03-24>.

⁴ Ashwin A., *IPL 2020 final: Mumbai Indians beats Delhi Capitals to win fifth title*, SPORTSTAR (Nov. 10, 2020), <https://sportstar.thehindu.com/cricket/ipl/ipl-news/ipl-2020-final-mi-vs-dc-mumbai-indians-beat-delhi-capitals-defending-champion-winners-result-score/article33069354.ece>.

For all aforementioned sporting leagues and events, whatever the final course of action was or maybe, going forward, it is abundantly clear that there will be an adverse economic impact of unparalleled proportions. To wit, it had been estimated that the cancellation of IPL 2020 could reduce the value of the entire IPL ecosystem by \$700 million to \$1 billion!⁵ If the IPL had been cancelled, the economic loss would have been felt by all stakeholders involved (some more so than others) – be it the organizers, broadcasters, team/franchise owners, players, coaching staff, or non-playing staff. Such a scenario would have paved the way for a host of contractual issues and disputes between these stakeholders, as each would have indubitably attempted to mitigate their losses to the greatest extent possible. Similarly, it had been suggested that organizers of the English Premier League could have been liable to pay Sky Sports a whopping \$3.5 billion (£3 billion) fine if they failed to finish the 2019-20 season by the end of July, in light of the broadcasting agreement between the two parties.⁶ Crucially, the outcome of such contractual claims hinged on the potential of COVID-19 to qualify as an extenuating circumstance that would have released parties from their contractual obligations during this moratorium. This paper will delve into the intricacies behind this possible defence, primarily through the lens of Indian contracts jurisprudence and the English common law.

2. AN UNAVOIDABLE BREACH OF CONTRACT?

A pandemic of this ilk, with restrictions on social mobility and interaction, is likely to render the performance of any contractual obligations impracticable or extremely difficult, if not impossible altogether. An act or omission that may usually be considered a blatant breach of contract could be possibly justified as an unavoidable consequence of the unforeseen situation that we find ourselves in now. Parties could resort to two possible defences, as per prevailing contract jurisprudence, in this regard. The first is a fundamental tenet of contract law that has found universal acceptance in one form or another, i.e., the English common law doctrine of frustration (certain jurisdictions, such as the United States, have a similar iteration – termed the doctrine of impossibility). The second is the inclusion of ‘*force majeure*’ clauses by parties

⁵ Gaurav Laghate, *Nixing IPL over Coronavirus may erode \$1b value: Duff & Phelps*, THE ECONOMIC TIMES: SPORTS (Mar. 21, 2020), <https://economictimes.indiatimes.com/news/sports/nixing-ipl-over-coronavirus-may-erode-1b-value-duff-phelps/articleshow/74741483.cms>.

⁶ Joe Brophy, *Premier League risk breaching £3bn TV contract with Sky Sports and BT Sport if they don't finish season by end of July*, THE SUN FOOTBALL (Mar. 17, 2020), <https://www.thesun.co.uk/sport/football/11190607/premier-league-risk-breaching-tv-contract-sky-sports-bt-sport/>.

in their contract, through which parties explicitly provide for a release from their contractual obligations in case a certain event or situation arises outside their control.

2.1. DOCTRINE OF FRUSTRATION

The doctrine of frustration is enshrined in Section 56 of the Indian Contract Act, 1872 ('the Act'); specifically, through the following statement:

“A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.”⁷

Essentially, this doctrine comes into play when, subsequent to the execution of a contract, circumstances beyond the control of the parties arise which render further performance of the contract “*impossible or radically different from what had been contemplated in the contract.*”⁸ As per Section 56, the contract would thereby be terminated and the parties will be discharged from the requirement of further performance. As this doctrine releases a party from all the promises it has made in a contract by voiding the contract altogether, courts have to be wary in its application and not invoke it lightly. Accordingly, conditions that warrant the application of the doctrine of frustration has long been a bone of contention before Indian and English courts. The two following tests/theories have been propounded in this respect.

2.2. ‘IMPLIED TERM’

In *Taylor v. Caldwell*,⁹ one of the seminal cases on the doctrine, the plaintiff rented out Surrey Music Hall to put on four extravagant concerts featuring a preeminent English singer as well as a variety of games and a fireworks display. Unfortunately, the music hall burned down before the concerts could take place. Despite the absence of any provision in the contract dealing with such a contingency, Blackburn J. observed that there must be an implied term in the contract that a ‘particular specified thing’ (herein, Surrey Music Hall) would continue to exist during the contract. Hence, the perishing of that specified thing and the resultant

⁷ Indian Contract Act, Section 56 (1872).

⁸ Rajdeep Choudhury, *Coronavirus: The Fallacy of Forcing Force Majeure*, BAR AND BENCH (Mar. 17, 2020), <https://www.barandbench.com/columns/coronavirus-the-fallacy-of-forcing-force-majeure>.

⁹ [1863] EWHC QB J1.

impossibility of performance was deemed a valid reason to excuse the performance of the contract. In reaching this decision, the court gave rise to the ‘implied term’ theory.

The application of this theory under Indian contract law (specifically, Section 56) was refuted by the Supreme Court in *Satyabrata Ghose v. Mugneeram Bangur*¹⁰ however, as it stated that “Section 56 lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties.” The court deemed the ‘implied term’ theory to fall outside the purview of Section 56 and called for its application in cases relating Section 32 of the Act (pertaining to ‘contingent contracts’). Instead, the court held that relief under Section 56 is given by the court where it finds that the whole purpose or basis of a contract was frustrated by a change of circumstances which was beyond what was contemplated by the parties at the time of entering into the contract. Despite these observations, the Madras HC in *Bansilal Fomra v. Thadava Cooperative Agricultural and Industrial Society Ltd.*¹¹ used the ‘implied term’ theory as a basis for frustration, while the Supreme Court in *Union of India v. C. Damani and Co.*¹² also went on to observe that there is an implied condition in ordinary contracts that parties shall be exonerated in case performance became impossible. Thus, a claim for relief under Section 56 premised on the ‘implied term’ theory could still be accepted by Indian courts, though the Supreme Court’s precedent in *Satyabrata* explicitly precludes the application of this theory.

2.3. THE DISAPPEARANCE OF THE BASIS OF THE CONTRACT

The theory of disappearance of the foundation of the contract can be traced back to the landmark case of *Krell v. Henry*.¹³ In this case, Mr Henry had rented rooms from Mr Krell to watch processions during the coronation of King Edward VII. However, the coronation was postponed and the processions called off, as the King had appendicitis. Mr Henry consequentially refused to pay Mr Krell the balance for renting his rooms (as the purpose for which he rented the room had been defeated) and this formed the crux of the dispute between the two parties. Though there was no physical impossibility herein (in *Taylor*’s case, the music hall ceased to physically exist), it was held that there was the frustration of the ‘commercial

¹⁰ [1954] SCR 310, 322.

¹¹ (1976) 1 Mad LJ 39, 48.

¹² AIR 1980 SC 1149, 1154.

¹³ [1903] 2 KB 740.

object’ due to “*cessation or non-existence of an express condition or the state of things going to the root of the contract and essential to its performance.*”

Indian courts have predominantly utilized this theory as the basis for granting relief under Section 56, ever since the Apex Court’s espousal of it in *Satyabrata* and its application in subsequent notable decisions in *Naihati Jute Mills v. Khyaliram Jagannath*¹⁴ and *Sushila Devi v. Hari Singh*.¹⁵ In *Sushila Devi*’s case, the parties entered into an agreement to lease, for land located in a village in Pakistan (before partition). The lease deed could never be executed nor could the lessee-respondents make any use of the land as a partition between India and Pakistan quickly followed, making it virtually impossible for the respondents to even get into Pakistan. The court intriguingly observed that the impossibility contemplated by Section 56 is not confined only to something which is not humanly possible, and rather, impossibility occurs when the performance of a contract becomes “*impracticable or useless having regard to the object and purpose the parties had in view.*” This pragmatic approach towards the interpretation of impossibility vis-à-vis Section 56 has continually developed, and it is now accepted that ‘impossible’ concerning a contract between commercial people must be understood in a commercial sense,¹⁶ and; the test of impossibility is whether it is practically impossible for a party to perform the contract within the specified time.¹⁷

The aforementioned observations are particularly pertinent to numerous stakeholders in sports today. Hypothetically speaking, if the IPL had been cancelled, IPL organizers could have feasibly relied upon the ‘implied term’ theory to argue that the contracts they entered into in preparation for IPL 2020 were implicitly contingent on the availability of players and their ability to travel to/within India for matches. This was rendered impossible by India’s ban on international travel (affecting non-Indian players in the IPL) and the lockdown on domestic travel as well (affecting even the remaining Indian players). Now, even if this argument had been rejected on the grounds that it is (a) not a case of ‘physical impossibility’ (insofar as the stadiums are still intact, the players are still healthy, etc.) or (b) a case to be dealt with under Section 32 of the Act, IPL organizers could still have easily availed Section 56 relief through the theory of disappearance of the foundation of the contract. With India in lockdown for the

¹⁴ AIR 1968 SC 522, 527.

¹⁵ AIR 1971 SC 1756.

¹⁶ POLLOCK & MULLA, THE INDIAN CONTRACT AND SPECIFIC RELIEF ACTS 892 (14th ed. Nilima Bhadbhade, 2012).

¹⁷ *Id.* at 892; accord *D.L. Sooryaprakasalingam Guru v. Shaw Trikamlal*, AIR 1917 Mad 509.

foreseeable future, all aspects of the tournament stood to be drastically affected – from players’ match participation and training to fan viewership at stadiums, etc. Hence, in the prevailing global scenario, it would have been irrefutable that the performance of IPL-related contracts had become impracticable due to cessation of the circumstances that went to the very root of those contracts.

Additionally, the application of Section 56 in the scenario discussed above, and its correlated impact, would not have been restricted only to contracts executed by IPL organizers; rather, it would have created a ripple effect which would have been felt by every stakeholder involved in the sporting event. To elaborate, if IPL organizers had cancelled the 2020 IPL edition, this would have prompted owners/governors of each IPL team into taking action vis-a-vis their contracts with the team's coaching staff, players, stadium staff, etc. After all, why continue to incur expenses in relation to contracts that were essentially rendered incapable of performance? Especially when, in certain players’ cases, these contracts involve monetary outlays to the tune of an annual Rs. 17 crores (under Virat Kohli's contract) or Rs. 15 crores (under Rohit Sharma and Rishabh Pant’s contracts).¹⁸ As explained above, these owners too could have feasibly relied upon the theory of disappearance of the foundation of the contract and rescind contracts whose 'commercial object' has been clearly frustrated. Of course, short-sighted action of this ilk, aimed at ‘recouping current lost profits and expenses’, may not be the ideal solution (since it could damage inter-personal relationships between players/staff and team owners), and one could argue that risk-allocation between the contracting parties with a focus on dispute avoidance and mutually agreed-upon contractual abeyance would be a more pragmatic approach.¹⁹ However, even this approach may not be possible or desirable in all situations (for example, where a player's age or health is a concerning factor)²⁰ and availing contractual relief under the doctrine of frustration of contract cannot thus be disregarded as a probable outcome of the situations forced by COVID-19.

¹⁸ Kunal Dhyani, *IPL 2020: Players to lose over Rs. 600 crore if COVID-19 forces cancellation*, INSIDE SPORT (Mar. 20, 2020), <https://www.insidesport.co/ipl-2020-players-to-lose-over-rs-600-crore-covid-19-forces-cancellation/>.

¹⁹ Lakshmikumaran & Sridharan, *COVID 19 & Sporting Events: Impact Analysis*, L&S UPDATE (Apr. 8, 2020), <https://www.lakshmisri.com/Media/Uploads/Documents/COVID-19-Sporting-Events.pdf>.

²⁰ *Id.*

2.4. FORCE MAJEURE CLAUSES

Cognizant of possible supervening hindrances to their contractual performance (and to a certain extent, reluctant to subject their contract to discretionary interpretation by courts), parties have increasingly started including *force majeure* clauses in their agreements. The concept of *force majeure*—meaning ‘superior force’ in French—refers to an unforeseeable and irresistible event that prevents a party from performing a contract.²¹ Unlike the relatively rigid common law doctrine of frustration or a legislative iteration of it (such as Section 56), these clauses afford a great deal of flexibility to the parties involved—right from choosing what events constitute *force majeure* to determining the effect of this event on the contract.

Usually, the list of catastrophic events constituting *force majeure* includes earthquakes, floods, and war etc. However, very few contracts in India include a pandemic as a *force majeure* event.²² This can be extremely problematic, especially if the clause is drafted exhaustively to only account for those events explicitly mentioned thereunder. Alternatively, if a *force majeure* clause is open-ended with words such as ‘any other happening’ or ‘any other such event’, it will be interpreted *ejusdem generis*, to engulf within its fold other man-made happenings or natural catastrophes which are of nature and type illustrated in the clause.²³ The COVID-19 situation is extremely unique, however, insofar as it includes both a ‘naturally occurring component’ (i.e. the virus) and a ‘government action component’ (i.e. quarantines, lockdowns, curfews, etc.).²⁴

Most sports contracts are bound to suffer from the issue discussed above as well, given that ‘epidemic’ or ‘pandemic’ is very rarely included in the boilerplate *force majeure* clause that these contracts include. The National Basketball Association (NBA) sticks out as perhaps the only notable exception here, as Article XXXIX of the Collective Bargaining Agreement (CBA) between the NBA and the National Basketball Players’ Association (NBPA) includes

²¹ Nick De Marco, *Coronavirus, Sport & The Law of Frustration and Force Majeure*, SPORTS LAW BULLETIN (Mar. 13, 2020), <https://www.sportslawbulletin.org/coronavirus-sport-law-frustration-and-force-majeure/>.

²² Sugata Ghosh, *How Coronavirus may cause legal wrangles*, THE ECONOMIC TIMES: POLITICS AND NATION (Mar. 26, 2020), <https://economictimes.indiatimes.com/news/politics-and-nation/how-coronavirus-may-cause-legal-wrangles/articleshow/74815141.cms>.

²³ POLLOCK & MULLA, *supra* note 16, at 921.

²⁴ Vanessa Miller & Nicholas Ellis, *Managing the Commercial Impact of the Coronavirus Outbreak: Force Majeure Declarations*, THE NATIONAL LAW REVIEW (Jan. 30, 2020), <https://www.natlawreview.com/article/managing-commercial-impact-coronavirus-outbreak-force-majeure-declarations>.

epidemics under its purview.²⁵ Given that the World Health Organization had declared COVID-19 to be a pandemic, the NBA was empowered to invoke the *force majeure* clause of the CBA, if it wanted to. Stakeholders in Indian sports will most likely not be able to readily avail such a clause, and instead, any dispute regarding the categorization of COVID-19 as a *force majeure* event will depend greatly on the precise wording of the impugned clause and the apparent intention of the parties. These stakeholders could also possibly rely upon Office Memorandum No. F-18/4/2020 (dated 19 February 2020) issued by the Deputy Secretary to the Govt. of India, Ministry of Finance, Department of Expenditure, Procurement Policy Decision to the Secretaries of all Central Govt. Ministries/Departments, wherein it was stated:

“2. A doubt has arisen if the disruption of the supply chains due to the spread of coronavirus in China or any other country will be covered in the Force Majeure Clause (FMC). In this regard, it is clarified that it should be considered as a case of natural calamity and FMC may be invoked, wherever considered appropriate, following the due procedure as above.”

Though this Clarificatory Order does not directly apply to contracts in the realm of Indian sports, parties with similarly worded clauses (as that put forth in the Office Memorandum) can rely upon this order as an external aid holding high persuasive value in a bid to invoke their *force majeure* clauses. Ultimately though, given the subjectivity involved in the drafting of each contract and their *force majeure* clauses, one cannot predict the classification of this novel virus as a *force majeure* event with absolute certainty and it must invariably come down to individual factual analysis.

Furthermore, even if governing authorities in sport lay down a clear mandate that pandemics, such as COVID-19, qualify as *force majeure* events, it is still possible that activation of the *force majeure* clause could be questioned on account of a lack of good faith. For instance, the Football Players Association of India (FPAI) contended that activation of a *force majeure* clause by a club to terminate its players' contracts should be disallowed in instances where the term of the contract is nearing its end (i.e., 1-2 months left before expiration of the contract) or where a club terminates one player's contract merely to sign another player for the upcoming

²⁵ Collective Bargaining Agreement, Article XXXIX, Section 5 (Jan. 19, 2017), <https://cosmic-s3.imgix.net/3c7a0a50-8e11-11e9-875d-3d44e94ae33f-2017-NBA-NBPA-Collective-Bargaining-Agreement.pdf>.

season.²⁶ Such an argument is seemingly premised on the implicit duty of good faith and fair dealing under contract law, which adds another complex layer to the termination of sports contracts in the unprecedented contractual landscape brought about by COVID-19. However, the Act is conspicuously silent on 'good faith' obligations arising under one's contractual duties and there is a glaring lack of substantive judicial pronouncements on this issue as well,²⁷ with the Delhi High Court's call for "*an implied covenant of good faith and fair dealing*" under Indian contract law, in *Association of Unified Telecom Service Providers of India v. Union of India*,²⁸ being brushed aside as obiter by the Supreme Court in the subsequent appeal.²⁹ Accordingly, it is unlikely that termination of Indian sports contracts via *force majeure* clauses could be reprimanded or disallowed by a judicial authority for lack of good faith or fair dealing.

On an ancillary note, pandemic insurance could also now be viewed as an essential investment for national and international sports organizers. The All-England Lawn Tennis Club (AELTC); organizers of the Wimbledon tennis tournament) bought approximately \$1.9 million per year in pandemic insurance since the SARS outbreak in 2003.³⁰ However, what appeared to be perhaps an exercise in excessive caution, now sticks out as an extremely sensible investment since the AELTC is set to receive an insurance payout of around \$142 million in light of the cancellation of 2020 Wimbledon Championships.³¹ Consequentially, one can expect more sports organizers to take their cue from the AELTC and make pre-emptive disaster management a priority going forward.

3. CONCLUSION: LESSONS LEARNED MOVING FORWARD

The unprecedented impact of COVID-19 has manifested itself in all aspects of our lives, with government lockdowns and social distancing becoming 'necessary inconveniences' that society must acclimatize to for the time being. While work-from-home may be a viable alternative for many businesses and professions during this period, it is not exactly amenable

²⁶ IANS, *Can't terminate contracts prematurely and sign players at same time: FPAI*, DT NEXT (Apr. 27, 2020), <https://www.dtnext.in/News/Sports/2020/04/27174102/1227192/Cant-terminate-contracts-prematurely-and-sign-players-.vpf>.

²⁷ Angad Singh Makkar, *Doctrine of Good Faith and Fair Dealing: Lacuna in Indian Contract Law*, INDIA CORP LAW (Dec. 6, 2018), <https://indiacorplaw.in/2018/12/doctrine-good-faith-fair-dealing-lacuna-indian-contract-law.html>.

²⁸ 207 (2014) DLT 142.

²⁹ *Association of Unified Telecom Service Providers of India v. Union of India*, AIR 2014 SC 1984.

³⁰ *Wimbledon shows how pandemic insurance could become vital for sports, other events*, INSURANCE JOURNAL (Apr. 13, 2020), <https://www.insurancejournal.com/news/international/2020/04/13/564598.html>.

³¹ *Id.*

for the intrinsically distinctive structure of sports industries. Cancellations, lengthy postponements, or indefinite suspensions have ensued across sports globally, which are likely to generate a plethora of future legal disputes. As highlighted above, this could force stakeholders in sports to get creative and prepare legal defences premised on the common law doctrine of frustration. Though the success of such defences would greatly depend on the facts of each case, litigation along these lines will empower courts to dole out decisions exerting momentous influence on the jurisprudence of commercial impossibility and frustration. Alternatively, parties with the foresight to include broadly-worded *force majeure* clauses or clauses which expressly categorize pandemics as *force majeure* events (such as the NBA/NBPA) could be seen as trailblazers of contract drafting, to the point where pandemics/endemics would be automatically included in any standard *force majeure* clause. Similarly, sports events organizers that have availed insurance policies whose coverage extends to pandemic-induced event cancellations, such as the AELTC, will be lauded as trendsetters for a new era of prudent sports governance. Ironically enough then, all the uncertainty and chaos accompanying COVID-19 will certainly shape the legal landscape around sports contracts for years to come.

THE IMPACT OF THE OLYMPICS ON AMBUSH MARKETING LAWS OF A HOST-NATION

Paras Marya

National Law University, Jodhpur

parasmarya57@gmail.com

ABSTRACT

This essay deals with the impact of the Olympics on the framework of ambush marketing laws of a Host Nation. The essay discusses the concept of ambush marketing from a commercial perspective and then analyses the legal structure provided by the International Olympic Committee to tackle it. The legal framework till now has mostly been governed by legal protection afforded to sponsors and marketing partners of the Olympic Games through agreements and the enactment of specific legislation. This essay aims to discuss the objective and nature of such legislation in brief, and analyses the provisions of legal contracts and documents governing the Olympic Games. To conclude, the essay shall discuss how the framework has impacted the commercial aspects of the Olympic Games as well as the legal structure of Host Nations, amongst other things.

KEYWORDS

Olympics, Ambush Marketing, Host Nation, Marketing.

1. INTRODUCTION

The selection criteria for host cities require several legal guarantees for the efficient delivery of the Olympic Games ('Games'). They fall into several different functional categories, such as financial, environmental, technological, security, and marketing.¹ The Games represent one of the most significant opportunities for companies to increase the exposure of their brands to

¹ Stephen A. Stuart & Teresa Scassa, *Legal Guarantees for Olympic Legacy*, 9(1) THE ENT. & SPORTS L. J. 3, (2011).

consumers on a global scale over a concentrated period. The London 2012 Games, for example, marked a record broadcast audience of 3.6 billion people across 220 countries and territories around the world.²

Companies can market their products or services during the Games by becoming an official sponsor or licensee. Official partners are granted the rights to specific intellectual property and marketing opportunities in exchange for financial support and, goods and services contributions.³ However, becoming a marketing partner of the Games comes at a hefty cost. In an attempt to undercut such fees, some companies seek to exploit the popularity of the Games to market their brands through ambush marketing. Ambush marketing may be defined as an attempt by a company to capitalise on the popularity of a significant event as a ‘free-rider’. It does so, by associating itself or its products or services with the event without having paid the fees to become an official sponsor or partner.⁴ Ambush marketing is said to be of two types; *by association* and *through intrusion*. Ambush marketing by association can be defined as when a company/brand that is not an official marketing-partner of an event/organisation/entity associates itself with such event/organisation/entity either explicitly or implicitly.⁵ Whereas, ambush marketing by intrusion can be defined as when a company/brand places their intellectual property marks (such as logos) in the same physical space as the event organised by an entity of which it is not an official marketing-partner to gain exposure in the media (through broadcasting) or to be seen by the public attending the event itself.⁶ One of the prime reasons for the existence of legal guarantees is the continued protection of the International Olympic Committee’s (IOC) extremely valuable Games-related intellectual property rights against ambush marketing.⁷

² International Olympic Committee, *Marketing Report*, London 2012, https://stillmed.olympic.org/Documents/IOC_Marketing/London_2012/LR_IOC_MarketingReport_medium_res1.pdf

³ *Olympic Marketing Fact File* 2020, https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/Documents/IOC-Marketing-and-Broadcasting-General-Files/Olympic-Marketing-Fact-File.pdf#_ga=2.27957884.1393418787.1584322238-1007037092.1583646203

⁴ *Playing by the rules - Ambush marketing and the Olympic Games*, SMART & BIGGAR, <https://www.lexology.com/library/detail.aspx?g=0c0d8999-abe3-4a39-a55e-7381fd56cb87>

⁵ *Id.*

⁶ *Id.*

⁷ TERESA SCASSA ET AL., INTELLECTUAL PROPERTY FOR THE 21ST CENTURY: INTERDISCIPLINARY APPROACHES 500-520 (B Courtney Doagoo et al. eds. Irwin Law 2014).

2. LEGAL FRAMEWORK PROVIDED BY THE IOC

The host city provides legal guarantees by enacting legislations as well as entering into legally binding agreements. This section will deal with provisions of the Host City Contract (HCC) (2.1), the Olympic Charter (2.2), and specific legislation enacted by Host Nations in pursuance of such agreements (2.3).

2.1.HOST CITY CONTRACTS

The HCC drafted by the IOC for the 2024 Summer Olympics states that:

- i. The Organising Committee of the Olympic Games (OCOG) shall join, and become a full party to, the Joint Marketing Programme Agreement (JMPA) executed between the Host City and the Host National Olympics Committee (Host NOC) before the execution of the HCC and which combines all of the marketing and commercial rights of the OCOG and the Host NOC for the period commencing on 1st January 2019 and ending on 31st December 2024.⁸
- ii. No commercial activity concerning the Games may be commenced by the Host City, the Host NOC or the OCOG before the execution of the JMPA. The Host City, the Host NOC and the OCOG agree not to participate in or allow any marketing or commercial activities relating directly or indirectly to the Games, other than as expressly permitted by the JMPA.⁹
- iii. The Host City, the Host NOC and the OCOG undertake to procure all relevant rights, to assist the IOC Marketing Partners in achieving their goals and commercial objectives in the Host Country. In particular, each of the OCOG, the Host City, and the Host NOC undertakes to satisfy its Games-related requirements for products and services falling into the product/service categories of IOC Marketing Partners from the respective IOC Marketing Partners as more fully detailed in the JMPA.¹⁰

⁸ International Olympic Committee, *2024 Host City Contract* (2017), art. 24.1.

⁹ *Id.*, art. 24.4.

¹⁰ *Id.*, art. 24.7.

2.2. THE OLYMPIC CHARTER

The IOC in the Olympic Charter provides that: competitors, team officials or other team personnel may allow their person, name, and a picture or sports performances to be used for advertising purposes during the Games in accordance with the principles determined by the IOC Executive Board.¹¹ Before 2020, the Olympic Charter required that competitors, team officials, and other personnel take prior consent of the IOC Executive Board to do so.¹²

The IOC established the abovementioned rule to prevent over-commercialisation of the Games and, more importantly, to protect the investment of Olympic sponsors.¹³ Since the Games provide a platform for companies to advertise and market their products, it is crucial to allow exclusivity and restrict free-loaders. Not only must non-sponsors refrain from using the IOC's trademarked words or phrases,¹⁴ but they must also not associate with the Olympics on social media sites such as Twitter, Instagram, Facebook, and Snapchat.¹⁵ Further, non-sponsors may not use any "hashtags" that include Olympic trademarks, cannot feature any Olympic athletes in social media posts, and may not share anything from official Olympics social media accounts, including "retweets".¹⁶

Companies have often used athletes' social media presence to market their products during the Games without being official sponsors. Although, the previous version of Rule 40 restricted athletes from posting content on social media featuring unofficial sponsors during the "blackout" period (lasting from nine days before and three days after the Games), it was not followed in practice.¹⁷ A study on one hundred randomly selected US Olympic athletes' social media posts during the "blackout" period for the 2016 Rio Games showed that over 19% of all

¹¹ International Olympic Committee, *Olympic Charter*, rule 40.3 (2020).

¹² International Olympic Committee, *Olympic Charter*, rule 40.3 (2015).

¹³ Chris Chavez, *What is Rule 40? The IOC's rule on non-Olympic sponsors, explained*, SPORTS ILLUSTRATED (July 25, 2016), <https://www.si.com/olympics/2016/07/27/rule-40-explained-2016-olympic-sponsorship-blackout-controversy> as cited in Bryce M. Nakamura, *Is Olympic Ambush Marketing here to stay? Examining the issues surrounding Ambush Marketing as they relate to Olympic sponsors, athletes, and other stakeholders*, 35 ARIZ. J. INT'L & COMP. L. 500, 500-530 (2018).

¹⁴ Christine Birkner, *Here Are the Many, Many Ways Your Business Can Get in Trouble for Tweeting the Olympics*, ADWEEK (July 29, 2016), <http://www.adweek.com/brand-marketing/here-are-many-many-ways-your-business-can-get-trouble-tweeting-olympics-172699/> as cited in Bryce M. Nakamura, *Is Olympic Ambush Marketing here to stay? Examining the issues surrounding Ambush Marketing as they relate to Olympic sponsors, athletes, and other stakeholders*, 35 ARIZ. J. INT'L & COMP. L. 500, 500-530 (2018).

¹⁵ CHAVEZ, *supra* note 13.

¹⁶ BIRKNER, *supra* note 14.

¹⁷ Andrea N. Geurin & Erin L. McNary, *Athletes as ambush marketers? An examination of Rule 40 and athletes' social media use during the 2016 Rio Olympic Games*, EUR. SPORT MGMT. Q., 2 (2020).

relevant posts violated Rule 40.¹⁸ Apart from exemplifying that ambush marketing via athletes is a prevalent practice, this study also points towards the loopholes in enforcing Rule 40.

In 2020, the IOC significantly amended Rule 40 of the Olympic Charter.¹⁹ It now states that competitors, team officials and other team personnel may be allowed to use their performance, picture and identity for advertising purposes in “accordance with principles of determined by the IOC Executive Board”.²⁰ The recent amendment is different from the previous version wherein a complete prohibition was imposed unless an exception was made by submitting to the IOC Executive Board.²¹

According to the IOC, the amendment is said to be more flexible and open and shall be looked at positively.²² This change could benefit Olympic athletes, especially those savvy with social media, which has allowed athletes to build their brands and expand their commercial opportunities.²³ However, its impact cannot be entirely determined until the IOC Executive Board clarifies the scope of the principles which form the basis of the new provision.²⁴ Currently, the IOC Athletes’ Commission intends to conduct consultations with the IOC Executive Board to determine the scope of the new Rule 40.²⁵ Till then, the question regarding Athletes’ ability to advertise their brands during the Games, hangs in the balance.

2.3.LEGISLATIONS ENACTED BY HOST NATIONS

The IOC requires that host nations implement a system safeguarding the interests of sponsors and marketing partners. Since this requires protection against the misuse or infringement of its intellectual property rights, the IOC requires that host nations enact comprehensive legislation that provides appropriate and timely protection against ambush marketing, unauthorised ticket

¹⁸ *Id.*, 11.

¹⁹ International Olympic Committee, *Olympic Charter*, rule 40.3 (2020).

²⁰ International Olympic Committee, *Olympic Charter*, rule 40.3 (2020).

²¹ International Olympic Committee, *Olympic Charter*, rule 40.3 (2015).

²² Kunal Dhyani, *IOC reforms commercial opportunities for athletes, bidding process*, INSIDE-SPORT (June 27, 2019), <https://www.insidesport.co/ioc-reforms-commercial-opportunities-for-athletes-bidding-process/>.

²³ John Grady & Steve McKelvey, *The IOC’s Rule 40 changes and the forecast for Rio 2016*, SPORTS BUSINESS JOURNAL (May 18, 2015), <http://www.sportsbusinessdaily.com/Journal/Issues/2015/05/18/Opinion/Grady-McKelvey.aspx?hl=grady20and20mckelvey&sc=0>.

²⁴ Christopher Chase, *And the gold goes to...the amendment to Rule 40!*, LEXOLOGY (July 2, 2019), <https://www.lexology.com/library/detail.aspx?g=25066583-7daa-4ce1-8e44-afb5346cef76>.

²⁵ *IOC Athletes’ Commission to conduct consultation on Rule 40*, OLYMPIC (Feb. 27, 2020), <https://www.olympic.org/athlete365/voice/ioc-ac-consult-rule-40/>.

sales, and marketing rights offences.²⁶ In furtherance of this requirement, host nations in the past have enacted legislation against ambush marketing. This sub-section will discuss the legislations enacted in South Korea, Japan and Brazil.

2.3.1. SOUTH KOREA

In 2012, South Korea enacted the Special Act on Support for the 2018 PyeongChang Olympic and Paralympic Winter Games ('Special Act').²⁷ The Special Act states that only the Organizing Committee, i.e. the OCOG shall use the title of the Olympics and that any entity that intends to use Games-related symbols, logos, mascots, insignias, etc. shall obtain approval from the OCOG in advance.²⁸ Anyone violating this provision is subject to imprisonment or an administrative fine up to fifty-two million won.²⁹

2.3.2. JAPAN

For the upcoming 2020 Tokyo Summer Olympic Games, the Tokyo OCOG states that ambush marketing is the unauthorised use, abuse, or misappropriation of marks associated with the Olympic Games and other intellectual property.³⁰ The Tokyo OCOG relies on Japan's Unfair Competition Prevention Act (UPCA) to protect brands and the IOC against ambush marketing.³¹ Article 17, of the UPCA, prohibits the commercial use of markings of international organisations.³² Since the IOC is an international organisation, brands may not use any protected Olympic Games marks without authorisation from the IOC.³³ A person who violates such law may be punished by imprisonment with work for not more than five years or a fine of not more than five million yen, or both.³⁴ Further, the UCPA also provides that one

²⁶ International Olympic Committee, Host City Contract: Operational Requirements, *Chapter 29 – Rights Protection* (2018), at 134, <https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/Games/Host-City-Contract/HCC-Operational-Requirements.pdf>.

²⁷ Special Act on Support for the 2018 Pyeongchang Olympic and Paralympic Winter Games, Act No. 11226, Jan. 26, 2012 amended by Act No. 14198, May 29, 2016, art. 1 (S. Kor.), translated in Korea Legislation Research Institute online database, https://elaw.klri.re.kr/eng_mobile/viewer.do?hseq=38905&type=part&key=16.

²⁸ *Id.*, art. 25.

²⁹ *Id.*, arts. 89 & 92.

³⁰ The Tokyo Organising Committee of the Olympic and Paralympic Games, Brand Protection: Tokyo 2020 Games 11 (2017), <https://tokyo2020.org/en/copyright/data/brand-protection-EN.pdf>.

³¹ Bryce M. Nakamura, *Is Olympic Ambush Marketing here to stay? Examining the issues surrounding Ambush Marketing as they relate to Olympic sponsors, athletes, and other stakeholders*, 35 ARIZ. J. INT'L & COMP. L. 500, 500-530 (2018).

³² Fusei Kyōshū Bōshi Hō (Japan Unfair Competition Prevention Act), Act No. 47 of 1993, as amended up to Act No. 54 of 2015 (Ministry of Economy, Trade and Industry), art. 17, translated in (Japanese Law Translation ULT DSI), <http://www.japaneselawtranslation.go.jp/law/detail/?id=2803&vm=02&re=02> (Japan).

³³ NAKAMURA, *supra* note 31.

³⁴ FUSEI, *supra* note 32, Article 21(2).

may be liable for infringement if one creates confusion with another person's goods or business by using an indication of goods or business that is identical or similar to the other person's indication of goods or business that is well-known among consumers.³⁵

2.3.3. Brazil

On 10th May 2016, Brazil enacted Law No. 13,284³⁶ which provides for measures related to the 2016 Olympic and Paralympic Games and related events, to be held in Brazil. The law prohibits ambush marketing *by association*³⁷ and *by the intrusion*.³⁸ Further, unauthorised use of official symbols including the reproduction of, copying of, falsifying of, or modifying improperly any official symbols that belong to the entities organising the games.³⁹ This law subjects offenders to imprisonment ranging from three months to one year in both cases. Interestingly, however, these provisions of the law remained in effect only till 31st December 2016.⁴⁰ Therefore, it served a particular purpose, i.e., to protect the investors/sponsors from other companies unjustly using the Games to gain an economic or advertising advantage.

3. CONCLUSION: ANALYSING THE IMPACT OF THE LEGAL FRAMEWORK

As seen above, the IOC facilitates the enactment of new legislation in the Host Nations to protect the IOC and the Olympic brand from any ambush marketing. Today, the Olympic brand is undoubtedly the most recognisable and valuable brands in international sport. It cannot be denied that the value associated with the Olympic brand is credited to the legal framework, which protects sponsors.

As more attention and scrutiny is provided to this framework, amendments also take place. The IOC's Rule 40 of the Olympic Charter was revised in 2015 and subsequently in 2020, to become slightly lenient. The 2015 amendment allowed for generic and non-Olympic advertising during the Games.⁴¹ This has been permitted by allowing companies to submit waivers to IOC six months before the IOC begins imposing restrictions on advertisements,

³⁵ *Id.* at Article 2(1) (i).

³⁶ Lei No. 13.284, de 10 de Maio de 2016, COL. LEIS REP. FED. BRAZIL, http://www.planalto.gov.br/ccivil_03/_Ato2015-2018/2016/Lei/L13284.htm (Brazil).

³⁷ *Id.*, art. 19.

³⁸ *Id.*, art. 20.

³⁹ *Id.*, art. 6, section 7.

⁴⁰ *Id.*, art. 23.

⁴¹ CHAVEZ, *supra* note 13.

known as the ‘blackout period’. While some companies have benefitted from the amendment, smaller companies and brands continue to view the current framework as restrictive. Nonetheless, over the years, companies have ingeniously found loopholes in the framework to promote their brand, primarily through social media platforms. The recent 2020 amendment to the Olympic Charter similarly aims at liberalising Rule 40 to make it easier for athletes to advertise their brands; however, the IOC is yet to disclose the scope of the new rule and its powers of discretion regarding it.

While due credit must be given to the legal framework, several problems can be identified with it as well. The multiple legislations mentioned above, create a new form of intellectual property, i.e. the right of association.⁴² This right is, of course, subjective and can be interpreted in varying degrees. Most often, the IOC benefits from a broad interpretation that allows for maximum benefit to its limited marketing-partners. However, such interpretation raises issues relating to the freedom of expression and often prevents small businesses from realising any benefit from significant international events that take place in their community. Therefore, while governments across the world bid for the Games by stating an increase in development, tourism and “soft-power”, the legal framework discussed in this article attempts to merely benefit large corporations that pay hefty sums to be associated with the IOC. As such the “Unfair Competition” legislations seem counterproductive to their objective or perhaps misleading with their titles at least.

⁴² SCASSA, *supra* note 7.

CHALLENGES TO THE ANTI-DOPING REGULATIONS IN ESPORTS

Pranav Bafna

Jindal Global Law School, O.P. Jindal Global University

16jgls-pbafna@jgu.edu.in

ABSTRACT

The paper shall explore the various challenges posed to the effective implementation of the Esports Integrity Commission's Anti-Doping Regulations (Regulations). The Esports Integrity Commission (ESIC) acquires a special position in the domain of esports regulation due to its reach and impact across various tournaments and leagues held across the world. Thus, the Regulation has a considerable impact on the regulation of doping in esports. A critique of the Regulations can serve as grounds not just for the better implementation of the said Regulations but also as essential factors to be considered for future regulations. The paper shall first establish the groundwork by defining esports and its structure, post which it shall consider the need for regulation and why the ESIC is central to the discussion when it comes to integrity concerns in esports. After this, the article shall critically analyse the Regulation by pointing out two substantive problems in the Regulations itself namely, the status of adjudicatory authority and the concerns over privacy and reputational harm. The third criticism shall focus on the position of players in the esports industry to emphasise that the Regulations and the esports industry in general needs serious institutional change to not alienate the athletes by drowning out their voice.

KEYWORDS

Anti-Doping, Esports, Regulations, ESIC.

1. INTRODUCTION

The esports industry has grown by leaps and bounds over the years. Though it had humble beginnings with small prize pools and player base, it has now become a huge industry with teams from all over the world participating for large amounts of prize money. It has also

witnessed a consistent rise in viewership. From 335 million viewers in 2016, the numbers grew up to 380 million in 2018¹ and by 2021 the total viewership is predicted to be around 557 million.²

Esports can be defined as “*the application of competition [rules and] tournament structures to participation in computer games*”.³ While it shares certain characteristics similar to traditional off-line sports,⁴ its structural organisation places it in a unique position.

Generally, traditional off-line sports tournaments see various stakeholders banded together to form a league.⁵ Teams are formed with their respective owners who follow the norms and rules set and enforced by the governing body/league which oversees the operation of the league. Furthermore, the league is also responsible for dealing with various stakeholders such as players, media companies, etc.⁶ Examples of such leagues are the National Basketball Association (NBA), National Hockey League (NHL). The stakeholders generally consist of the league itself, the players, the team owners, broadcasting and media companies, and sponsors.

But in esports, there is an introduction of another important stakeholder i.e., the game developer. As the game developers have the Intellectual Property Rights (IPR) to the video game, their presence is fundamental for the organisation of leagues and tournaments. No off-line sport shares this characteristic as no person or entity can claim ownership over a sport.⁷ Game developers have not gone for the joint venture-based organisation but rather have preferred privately sponsored leagues.⁸ This allows the game developer to decide how much control they will exercise over the league. For example, Blizzard Game and Riot Games are two huge game developers who express divergent views on league development. While

¹ *People are Spending More Time Watching eSports, the Incredible Growth of Esports*, INFLUENCER MARKETING HUB (Jan. 6, 2019), <https://influencermarketinghub.com/growth-of-Esports-in-2019-stats/>.

² *2018 Global eSports Market Report*, NEWZOO (2018), https://resources.newzoo.com/hubfs/Reports/Newzoo_2018_Global_Esports_Market_Report_Excerpt.pdf.

³ Stephen Ketteley, *Esports: When a Bandwagon Collides with a Regulator*, IGAMING BUSINESS (July/Aug. 2015), at 56–57.

⁴ The use of the term ‘traditional offline sports’ is meant to refer to the sports which have existed for a significant duration of time and where the predominant activity is physical. E.g. Football, Soccer, Cricket, Basketball, Baseball, to name a few.

⁵ Stephen F. Ross & Stefan Szymanski, *Antitrust and Inefficient Joint Ventures: Why Sports Leagues Should Look More Like McDonald’s and Less Like the United Nations*, 16 MARQ. SPORTS L. REV. 2 (2006).

⁶ *Id.*

⁷ Atish Ghoshal, *Ethics in eSports*, 23 GLR 5 (2019).

⁸ Laura L. Chao, “*You Must Construct Additional Pylons*”: *Building a Better Framework for eSports Governance*, 86 FORDHAM L. REV. 737 (2017).

Blizzard Games has a hands-off approach, Riot Games exercises a great degree of control over the competition structure and governance.⁹

The rules and norms of the game are set by the game developers. Over and above these rules, the tournament or league organisers can impose a separate set of rules and guidelines, which often embody the notion of sportsmanship and fair play.¹⁰ These rules and guidelines are places where integrity issues can be combated. One such integrity issue, which forms the basis of discussion of this paper is doping.

2. DOPING IN ESPORTS

At this point, it is important to distinguish between the term e-doping and doping. E-doping means using hacks and cheats to gain an unfair advantage in the game over other players.¹¹ On the other hand, doping refers to taking prohibited substances to improve the attention span and physical reaction of the players while competing. Either of the two is not desirable but the focus of this article is on the latter. To ensure the continued confidence of the audience and to provide a fair base for the players to compete, it is essential to manage these concerns effectively and efficiently. In this background, the Regulations shall be analysed.

The ESIC is one of the leading regulatory bodies whose object is to work with various stakeholders to protect the integrity of the esports competitions. As such, they assist organisers, game developers and esports leagues in “*prevention, investigation and prosecution of all forms of cheating in esports, including, but not limited to, match manipulation and doping*”.¹² ESIC’s guidelines only apply to those leagues or tournaments which subscribe to its regulatory service. Currently, two of the biggest league and tournament organisers- Electronic Sports League (ESL) and Dreamhack, act as its partners. ESL is the world’s largest esports company, with 8.4 million registered players and 109,000 tournaments conducted.¹³ ESL is an organiser that hosts some of the most coveted leagues and tournaments for major video games such as CS: GO,

⁹ *Id.*

¹⁰ Dan L. Burk, *Owning eSports: Proprietary Rights in Professional Computer Gaming*, 161 U. PA. L. REV. 1535 (2013).

¹¹ Ian Smith, *Match-fixing and e-Doping in ESport, The Continued Rise of Esport – Efforts to Combat Match Fixing and Improve Integrity*, LAWINSPO (Sept. 2, 2016), <https://www.lawinsport.com/content/features/item/the-continued-rise-of-Esport-efforts-to-combat-match-fixing-and-improve-integrity>.

¹² *Who We Are*, ESPORTS INTEGRITY COALITION, <https://esic.gg/about/>.

¹³ *About Us*, ESL GAMING, <https://about.eslgaming.com/about-us/>.

Dota 2 and Starcraft II. ESIC also assists Dreamhack which hosts leagues and tournaments on various games such as Rocket League, League of Legends, Halo and Fortnite. This places ESIC in a position where it has not only enforced its guidelines across some of the biggest tournaments but also various video games. Furthermore, ESIC is currently the primary regulator on esports as it is the only body with an esports-specific ethics code, tournament regulations, anti-doping policy, and list of prohibited substances, as well as a disciplinary panel.¹⁴ Thus, ESIC acquires a unique position in the regulatory world of esports.

Though there exist other esports regulators as well, such as International Esports Federation (IeSF) or World Esports Association (WESA), neither of them serves as an ideal example of integrity regulation in esports. Unlike ESIC, whose only goal is to ensure integrity in esports, IeSF is an organisation with multiple goals ranging from establishing national esports associations to training and education of referees and managers. WESA on the other hand is a body that seeks to regulate the conduct between various stakeholders. As such, it does not emphasize integrity considerations. Esports regulators also exist at the national levels in various countries across the world, however, none of them have reached a level close to that of ESIC. Thus, ESIC being the only regulator that (a) has a global reach and (b) deals expressly with integrity concerns forms the basis of analysis for this paper.

The Regulations were introduced immediately after professional CS: GO player Kory Friesen, in April 2015 admitted that his team used psychostimulant Adderall during ESL One Katowice, 2015.¹⁵ This, expectedly, sparked controversy and debate. Some of the players admitted that while drugs were used by players, they were mostly recreational (such as marijuana) and at the top tier, most players did not use such performance-enhancing drugs (PED).¹⁶ However, as is the case with traditional sport, the use of PEDs, even if by a handful of players, severely impacts the integrity of the game. To develop and implement such regulation, ESL partnered with Germany's anti-doping agency i.e. Nationale Anti-Doping Agentur¹⁷ (NADA) and

¹⁴ GHOSHAL, *supra* note 7.

¹⁵ Matt Kamen, *Pro-Gamer Admits to Doping in eSports*, WIRED (July 16, 2017), <https://www.wired.co.uk/article/Esports-doping-admission>.

¹⁶ Richard Lewis, *Why you should Take eSports' New Drug Tests with a Pinch of Bath Salts*, DOT ESPORTS (July 28, 2015), <https://dotEsports.com/general/news/Esports-drug-testing-perspective-2095>.

¹⁷ Bryan A. Graham, *Anti-doping in eSports: World's Largest Gaming Organization Will Test for PEDs*, THE GUARDIAN (July 23, 2015), <https://www.theguardian.com/technology/2015/jul/23/anti-doping-in-e-sports-worlds-largest-gaming-organization-will-test-for-peds>.

ESIC.¹⁸ Thus, the Regulation was created. However, due to the reactionary nature of the implementation of the Regulation, the policy had and continues to have various shortcomings.

Three shortcomings that significantly hamper the implementation of the Regulations are:

- i. The lack of a proper adjudicatory authority (and therefore the enforceability of the Regulations);
- ii. Privacy concerns and reputational harm; and
- iii. The subservient position of athletes caused in part by the lack of an athlete's committee/union.

While the first two issues deal with the substantive problem in the Regulations itself, the third issue puts into context the problems faced by athletes who are in a vulnerable position.

3. PROBLEMS WITH ESIC REGULATIONS

3.1.LACK OF PROPER ADJUDICATORY AUTHORITY

Doping in esports involves drugs which boost concentration and reduce reaction time. Due to the novelty of the drugs and the shortfalls of the testing mechanism, which shall briefly be discussed below, it is imperative to have a robust adjudicatory authority that can deal with the nuances of doping in esports.

One essential requirement for an adjudicatory body is to be comprised of experts who are not associated with the organisation establishing the same. This requirement is essential as it ensures one of the fundamental principles of natural justice i.e., freedom from bias. However, that is not the case with ESIC.

As per the ESIC Guidelines, the Disciplinary Panel which hears and determines the charges brought in an anti-doping dispute consists of three members, all three of which are appointed by the Chairman of ESIC.¹⁹ While the definition clause also provides for an ESIC Panel which

¹⁸ Aaron Swerdlow, *4 eSports Regulations to Watch for in 2018*, VENTURE BEAT (May 8, 2018) <https://venturebeat.com/2018/05/08/4-esports-regulations-to-watch-for-in-2018/>.

¹⁹ *Definitions Clause*, ESPORTS INTEGRITY COALITION GUIDELINES, <https://esic.gg/codes/definitions/>.

is comprised of experts independent of ESIC, the appointment of members is done by the ESIC Executive Board and the jurisdiction of the matters which the ESIC Panel can hear are also determined by ESIC.²⁰ Thus, the bodies which undertake adjudication are comprised by and their jurisdiction is determined by ESIC which forms the rules and brings forward the cases against professional players. This institutional structure, therefore, operates against the players from the very beginning of disciplinary hearing against them.

Further problems exist with the adjudicatory mechanism. Under Article 13 of the Regulations, ESIC and all its employees are ‘released’ from any/all liabilities which may arise in law or equity for any decisions, actions or omissions which may arise under the Regulations. This provision exonerates the adjudicatory body from any liability which it may potentially face as a result of wrongly harming an athlete’s reputation and career. While it may be argued that this provision is essential for fair and proper adjudication, it has to be borne in mind that ESIC continues to be a private adjudicatory body and not a state adjudicatory body that can enjoy such exception due to the exercise of sovereign function. The question of judicial review of the actions of Sports Governing Bodies (SGBs) (whose contracts with players exist in private law domain) is a subject of great contention, with various jurisdictions having different takes on it. In French law, sports disciplinary actions are classified as administrative actions that can be reviewed by administrative courts.²¹ While in the UK the SGBs’ actions are not subject to judicial review.²² In common law jurisdictions such as Australia,²³ the regulation of sport is considered to be a public activity, as is the case with New Zealand,²⁴ Canada²⁵ and the USA.²⁶

It is argued that disciplinary decisions taken by ESIC serve a public function or can be classified as an administrative action. As such it should be amenable to review and any clause which seeks to waive, limit or release it from liability ought to be considered bad in law.

Furthermore, Article 12 of the Regulations provides that ESIC shall use reasonable efforts to maintain the confidentiality of the players in all anti-doping related aspects. If Article 13 is read conjointly with Article 12, it can raise serious concerns. If the confidential personal

²⁰ *Id.*

²¹ Rosmarijn van Kleef, *Reviewing Disciplinary Sanctions in Sports*, 4 C.A.M.B. J. INT. COMP. LAW 1 (2015).

²² Ben Cisneros, *Challenging the Call: Should Sports Governing Bodies be Subject to Judicial Review?*, INT. SPORTS LAW J. 20 (2020).

²³ *Forbes v NSW Trotting Club*, HCA 27 (1979).

²⁴ *Finnigan v New Zealand Rugby Football Union*; 2 NZLR 159 (1985); *Le Roux v NZRFU*, unreported (1995); *Loe v NZRFU*, unreported (1993).

²⁵ *Vancouver Hockey Club Ltd v Hockey Ventures Inc.*, 18 BCLR 2d 372 (1987).

²⁶ *Finley v Kuhn*, 439 US 876 (1978).

information of an athlete is leaked, it would result in harassment and bullying for the athlete and the athlete would have no recourse against ESIC which was meant to do its due diligence in safeguarding his/her personal information.

Lastly, there also does not exist an appeal process against an adverse finding of the Disciplinary Panel.²⁷ Article 10 provides for appeal as per the Disciplinary Procedure and the Disciplinary Procedure detailed in Article 7 does not contain any provision for an appeal. Theoretically, a final appeal can lie to the Court of Arbitration for Sport (CAS), which has over time developed an expertise in handling doping cases. However, this final appeal also faces two major challenges. Firstly, the nature of anti-doping in esports is fundamentally different from doping in traditional off-line sports. While in traditional sports doping involves drugs which enhance physical attributes such as strength or endurance, doping in esports enhances mental focus and reaction time.²⁸ E.g. the most common focus enhancing drug consumed is Adderall, which is a combination of salts of amphetamines. None of these salts is listed in the Prohibited List of WADA (as of January 2020). Thus, even an experienced body such as CAS could face new challenges in dealing with such cases. Secondly, the purpose of CAS is to hear cases involving ‘sports’ law violations, as is evident from its name. Considering how contentious the topic of whether esports can be considered a sport is, the question of whether CAS would entertain such cases remains to be tested in practice. Thirdly, even if CAS were to consider esports as a sport, many athletes might not be able to afford the litigation.

Hence, there is a need to delineate a proper and adept appeal mechanism wherein the adjudicatory body is comprised of experts who should be selected by ESIC and a potential union of players. This would ensure fairness and transparency. And considering how ESIC considers doping to be the third greatest threat, after software cheats and match-fixing,²⁹ the need for a specialised body to deal with it specifically is vital.

3.2.PRIVACY CONCERNS AND REPUTATIONAL HARM

While the regulation of doping is essential to ensure fair competition, it is also equally essential to ensure that the privacy of the players is not compromised. The right to privacy stems from

²⁷ G League, *Darshan on Getting Randomly Drug Tested at Iem San Jose And CLG's Second Place Finish*, YOUTUBE (Nov. 28, 2015), <https://www.youtube.com/watch?v=znqSHrZF1AY>.

²⁸ James Gatto and Mark Patrick, *Overview of Select Legal Issues with Esports*, 6 Ariz. St. U. Sports & Ent. L. J. 427 (2017).

²⁹ JT Holden, et al., *Virtue (Al) Games- Real Drugs*, 13 SPORTS, ETHICS AND PHILOSOPHY 1 (2019).

the concept of dignity i.e., right to one's image, name and reputation.³⁰ Considering how fundamental dignity is to an individual, the maintenance of the right to privacy (as an extension of human dignity) does not only imply a negative duty but also a positive duty to maintain the privacy of the professional players subjected to such drug tests.

A drug test is not a simple checkbox to be ticked or crossed, there is an exchange of a significant amount of medical history and personal data of the professional player. The question arises if the various regulators can keep this data protected. For instance, ESL had a briefing for its players, informing them about drug testing. The players were also randomly tested and were asked not to post about it on social media. But unfortunately, information got leaked about who was tested and what prescriptions and medical conditions they had.³¹

The tests that are employed for drug testing are skin-patch tests where false positives are found to occur in 7-40% of the cases.³² Apart from skin patch tests, oral fluid tests are also employed.³³ However, the efficacy of the oral fluid test is also highly contested with some studies pointing out that the scope of this type of test is highly limited and can lead to a large number of false negatives.³⁴ Thus, in such situations, it is imperative to have a proper appeal process as well. Until the final decision is taken, the athlete's personal information has to be protected.

Considering that most of these players also derive a significant portion of their revenue from online streaming on various platforms such as Twitch, they are also under the continuous watch of their viewers most of whom remain anonymous. This allows their audience to remain completely unaccountable allowing them to say and do as they please. If the personal information of a player gets leaked, the player could face severe harassment and online bullying.³⁵

³⁰ James Q. Whitman, *The Two Western Cultures of Privacy: Dignity versus Liberty*, 113 YALE L.J., 1161 (2004).

³¹ Thiemo Bräutigam, *Players' Rights are in Question, Sports can't Handle Drug Tests, How can Esports?*, THE ESPORTS OBSERVER (Sept. 18, 2015), <https://Esportsobserver.com/sports-cant-handle-drug-tests-how-can-Esports/>.

³² Colby Stivers, *The First Competitive Video Gaming Anti-Doping Policy and its Deficiencies Under European Union Law*, 18 SAN DIEGO INTL. L.J. 263 (2017).

³³ G LEAGUE, *supra* note 27.

³⁴ See L Lo Muzio, et al., *Saliva as a Diagnostic Matrix for Drug Abuse*, 18(3) INT. J. IMMUNOPATHOL PHARMACOL 567-573 (2005).

³⁵ LEWIS, *supra* note 16.

Considering the same, it is imperative to devise proper procedure and testing mechanisms which are better suited for the esports industry. Benefits should be given to the players in the adjudication of their cases and a greater burden should be placed on the leagues.

3.3.PLAYER’S POSITION AND LACK OF UNIONISATION

The esports competitive platform has various stakeholders whose interests have to be borne in mind while enforcing the Regulations. These stakeholders are professional players, team organizations, leagues and regulatory bodies, and game developers. But amongst all of these stakeholders, the professional players are the ones who are most affected by the Regulations.

While teams are comprised of players, the players do not have any decision-making powers. The team owners take decisions as per what is good for business and not according to what might be in the best interest of the players. The existence of the Regulations allows the team owners to avoid public relations blow-up by citing that the players are disciplined by the league’s Regulations.³⁶ The Regulations do not serve to protect the interest of the players but rather focuses on assisting game developers and league organisers. While regulatory bodies in other sports try to secure some benefits for the athletes, such as FIFA which takes active steps to protect the interests of not only minor players³⁷ but also major players,³⁸ no Regulations of ESIC serves the same intent.

Unlike traditional off-line sports where the athletes are subservient to league organisers and team owners, in esports, the athletes are also subservient to the game developers. This position gets aggravated as esports players do not have the power to unionize, due to various legal obstructions which shall be discussed below. As there exists no esports player union which can advocate and negotiate on their behalf, the organisers have free reign in drafting and enforcing regulations in whatever manner they deem fit. In traditional off-line sports, player unions exist to protect players and help them in securing better working conditions through collective bargaining. Various player unions and associations such as Fédération Internationale des Associations de Footballeurs Professionnels (FIFPro), the Professional Footballers’

³⁶ Hugh Langley, *Sex, Drugs and Counter-Strike: eSports is Fighting its Demons*, TECH RADAR (Apr. 1, 2016), <https://www.techradar.com/in/news/gaming/sex-drugs-and-counter-strike-Esports-is-fighting-its-demons-1318109>.

³⁷ See, *Protection of Minors FAQ*, FIFA (Sept. 2016), <https://img.fifa.com/image/upload/xbnooh14lcaxzadstknx.pdf>.

³⁸ See Li Xiang, *FIFA has New Policies to Protect Unpaid Players*, CGTN (Apr. 5, 2018), https://news.cgtn.com/news/3d3d774d7a636a4d77457a6333566d54/share_p.html.

Association (PFA), Major League Baseball Players Association (MLBPA), National Football League Players Association (NFLPA), to name a few, have served to further the overall interests of the athletes in their respective sports and it has given the athletes a platform to raise their voice. For example, FIFPro raised various concerns over the ban imposed on Peru's football captain Paolo Guerrero due to doping,³⁹ the MLBPA players, on the other hand, made demands for the imposition of more stringent anti-doping rules.⁴⁰ These associations/unions have enabled the athletes to have greater representation in the sport's regulation and have subsequently empowered them to have a meaningful impact on the sport itself. But this inclusiveness is missing in esports.

Unionisation also faces certain legal issues. For example, in the USA, Riot Games (the developers and the league organiser of League of Legends competitions) treats the players as independent contractors and not as its employees since under the National Labour Relations Act⁴¹ only employees have the legal right to unionize.⁴² Thus, the players are also legally ineligible to unionize. To make matters worse, it is only considered an "unfair labour practice" under the Act when the organisation refuses to engage in collective bargaining with employees. So even if a large number of players come together and go on strike, Riot and the league teams would not be under an obligation to negotiate with them.⁴³ While the laws with regards to unionisation may differ from country to country, what can be inferred from the Riot Games example above, is that considering the hegemony which game developers and league organisers hold over the players, these organisations can easily draft contracts in such a manner that it bypasses the unionisation law of the country. Furthermore, as there is no overseer or a central regulator, as there exists in traditional off-line sports, the game developers and league organisers are free to impose whatever conditions they deem fit upon the players. To add to the disparity, the contract of the players with the leagues are also not disclosed to the public.⁴⁴

While athletes have not been able to form Unions, players and some game developers have sought to establish associations that give some voice to the players. In 2018, a small number

³⁹ Brian Homewood, *Soccer: Players' Union says Guerrero Doping Ban Defies Common Sense*, REUTERS (May 15, 2018), <https://in.reuters.com/article/soccer-worldcup-per-fifpro/soccer-players-union-says-guerrero-doping-ban-defies-common-sense-idINKCN1IG20C>.

⁴⁰ AFP, *Major League Baseball, Players Union Toughen up Doping Rules*, BANGKOK POST (March 29, 2014) <https://www.bangkokpost.com/sports/402371/major-league-baseball-players-union-toughen-up-doping-rules>.

⁴¹ National Labour Relations Act 29 U.S.C. § 151–169 (1935).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Katherine E. Hollist, *Time to be Grown-Ups about Video Gaming: The Rising esports Industry and the Need for Regulation*, 57 ARIZ. L. REV., 834 (2015).

of CS:GO players established Counter-Strike Professional Players Association to provide collective representation and contract negotiation services for professional CS:GO players.⁴⁵ In May 2016, ESL established WESA which served to mediate a conversation between various stakeholders in esports league. WESA provides players with a seat at the table by providing for a Player Council.⁴⁶ Riot Games took similar steps in 2017 in North America.⁴⁷ However, these player representative bodies have not accomplished anything to date as they remain in their nascent stages of development.

To correct this requires the implementation of various institutional changes that give power to the players. Considering that the career of most of the professional players starts dipping after 24 years due to cognitive decline,⁴⁸ active players might not serve as the best representatives for the union due to their young age and inexperience. Thus, if organisations such as ESIC could themselves establish a union comprised of ex-pro players and lawyers who would be elected by the players themselves to represent their interests, it could allow for collective bargaining and better protection for the players in the various disciplinary cases against them.

4. CONCLUSION

Even though the esports industry is still relatively nascent, it has come a long way. The responsiveness of regulatory bodies in managing integrity concerns quickly is a healthy sign in any sports industry. Such a response bolsters the trust of the audience and provides a level playing field to the professionals. However, effective regulations are not introduced overnight and take time to acquire legitimacy. But to acquire the same, the officials need to have not just a top-down approach wherein the participation and the voice of its most important stakeholders i.e., the players are drowned out by the commercial interests of other stakeholders, but there needs to be a horizontal approach where the players are at the same pedestal as everyone else. The interests of the players should be given greater weightage than what is given now.

⁴⁵ Adam Fitch, *Counter-Strike Professional Players' Association Announced*, ESPORTS INSIDER (June 29, 2018), <https://esportsinsider.com/2018/06/counter-strike-professional-players-association-announced/>.

⁴⁶ *World Esports Association Introduces Player Council*, WESA (Sept. 14, 2016), <http://www.wesa.gg/2016/09/14/world-esports-association-introduces-player-council/>.

⁴⁷ Kieran Darcy, *Riot's Players' Association Lays Groundwork for Unionization*, ESPN (June 13, 2017) https://www.espn.in/esports/story/_/id/19617991/riot-players-association-lays-groundwork-unionization.

⁴⁸ See, Joseph J. Thompson, et al., *Over the Hill at 24: Persistent Age-Related Cognitive-Motor Decline in Reaction Times in an Ecologically Valid Video Game Task Begins in Early Adulthood*, PLOS ONE 9(4):e94215 (2014).

There needs to be an active engagement with and empowerment of the player base. Most of the audience is attracted to esports leagues because of their favourite player's participation. The viewership is primarily determined by the teams and the players playing. Recently, EPIC Games, the developers of Fortnite, had organised a tournament in which one of the biggest Twitch Fortnite streamer 'Tfue' was playing. His presence in the tournament itself created a buzz and drew thousands to watch the tournament. One of the commentators for ESPN noted: *"although Tfue doesn't necessarily need competitive Fortnite, competitive Fortnite might need him"*.⁴⁹

While the future of esports is bright, the only thing holding it back is its myopic view towards its players.

⁴⁹ Tyler Erzberger, *After the \$30 Million Fortnite World Cup, Esports Celebs, Influencers Could Push Prize Pools Higher*, ESPN (July 29, 2019), https://www.espn.in/Esports/story/_/page/FortWC_0428c/after-30-million-fortnite-world-cup-Esports-celebs-influencers-push-prize-pools-higher.

GENDER VERIFICATION TEST: ANALYZING THE LEGAL RAMIFICATIONS ON WOMEN ATHLETES

Adeeti Singh

Jindal Global Law School, O.P. Jindal Global University

adeetisingh96@gmail.com

ABSTRACT

Gender Verification Test as the name suggests essentially means to determine an athlete's gender, i.e., whether they are male or female since both males and females have been competing separately in competitive sports. The purpose of this research paper is to trace the history behind the need to indulge in such tests, the various methods by which it has been done over the years, the criteria and the studies the CAS (Court of Arbitration for Sport) has placed its dependence on, the impact all this has on an athlete's career and how it ends up violating human rights of female athletes by using a few topical examples. The paper would begin by analyzing the different methods that have been used to identify an athlete's gender and the reason behind starting such a test in the field of sports. Further, the paper will glance over the policies followed by IAAF (the International Association of Athletics Federations), which are flawed and based on restrictive research (for example, just relying on scientific statistics and studies that are not always accurate), and which are enforced by CAS as well, giving rise to problematic precedents. The paper will also cover the cases of Caster Semanya and Dutee Chand very briefly, touching upon the important contents in the CAS judgments concerning their eligibility to participate in sports internationally. Lastly, the author intends to develop an argument as to how this verification tests could be humiliating (because only females are subjected to these), could lead to a tarnished reputation globally and how it is unfair because certain legal policies could determine how much female-ness is enough to be considered a female. The paper aims to conclude by showing an interplay between the Indian constitutional protections offered by Article 14 (equality before law) and Article 21 (right to life and personal liberty) and gender testing that violates the said fundamental rights of female athletes.

KEYWORDS

Sex Verification Test, IAAF, CAS, Fundamental Rights.

1. INTRODUCTION

Sports play a very crucial role in a person's overall development and growth. Being involved in any kind of sport teaches an individual the value of a disciplined life, helps them to focus, hones their analytical and logical skills, and ripens their personalities. But often, in the process of being a source of entertainment, it can also cause a series of controversies in any sports personality's life, posing a serious threat of public scandals. An instance of this could be the gender testing of an athlete. The suspicion of one's appropriate gender, the manner in which it is questioned and how it is conducted can be demeaning for any human being especially when you are in the public eye with no iota of privacy. This paper aims to look at what the gender verification test entails, what standards and methods are set by The International Association of Athletics Federation (IAAF), and how female athletes have suffered on unequal and discriminatory grounds violating their basic human rights.

2. WHAT IS GENDER VERIFICATION TEST? WHAT IS THIS TEST BASED ON?

The reason why gender as a concept comes up in the arena of sports is that both men and women have been competing in sports separately.¹ This test was considered important to ensure that only females took part in events hosted for females, and not males, who could use their 'superior' physical attributes over females to win.² Women have been subjected to various deplorable methods to prove their sex after being allowed to participate in sports at the international level. Sex verification in the 1950s and 1960s was entirely based on the physical examination of the female body, to an extent of expecting the female athletes to indulge in a "naked parade", where they were asked to strip entirely and parade before a panel of female doctors, for instance, at the European Track and Field Championship (1966), to determine whether or not a sex fraud has taken place.³ Over time, while concluding that laboratory testing is insufficient, the testosterone levels of female athletes became the premise on which athletes were expected to defend their sex identity.⁴ In the 1960s, chromosome testing became a predominant method of testing too. Scientifically, chromosome pairing of XX from a male and

¹ Claudia Wiesemann, *Is there a right not to know one's sex? The ethics of 'Gender Verification' in women's sports competition*, 37 JOURNAL OF MEDICAL ETHICS 217 (2011).

² *Id.*

³ Alice Dreger, *Where's the rulebook for sex verification?*, THE NEW YORK TIMES (August 21, 2009), Essay - Where's the Rulebook for Sex Verification? - NYTimes.com (archive.org).

⁴ *Id.*

a female lead to the birth of a girl child, whereas an XY pairing will always create a male.⁵ Many geneticists and endocrinologists disagreed with the data that IAAF relied on to detect an individual's sex because other genetic, hormonal, functional and physical factors are crucial to this study too.⁶ All these factors determining one's sex is very different from gender, which essentially means how one identifies themselves – a male, a female or a separate category altogether who are beyond the two sets of pairing and identify as an intersex or DSD (difference of sexual development), whose hormones or reproductive organs do not develop as they classically should.⁷ Ewa Klobukowska was one of the earliest sprinters to have been affected by this test as she was discovered to possess both sets of chromosomes.⁸ This is harrowing for any woman who has grown up thinking that she most definitely is a female, but is told otherwise via inaccurate and misguided theories.

Men and women both produce a certain level of testosterone, and this is exactly where the IAAF makes the error of linking high levels of testosterone automatically with higher levels of athletic performance.⁹ The human body is way more complex than that. High levels of androgen and testosterone are seen as red flags for females to compete in female events because the IAAF and the International Olympic Committee rely on studies that regard these hormones to be associated with male characteristics that presumptuously give females an added advantage when competing against other females.¹⁰ Testosterone helps build muscle mass, but that is not the only criteria that contribute to an athlete's better performance. An athlete's performance is based on other factors like the amount of work put in by them, the nutrition levels, the quality of coaching they receive and the kinds of equipment they can work on to enhance their performance.¹¹ Scientifically, there is no conclusive evidence but many studies have shown different results and perspectives. Katrina Karkazis, a research fellow with Global Health Justice Partnership at Yale University and author of the book on the same subject believes that studies that show women using testosterone cream increasing the time to fatigue do give one an athletic edge but this is irrelevant to the discussion of naturally occurring

⁵ Ruth Padawer, *The Humiliating practice of sex testing female athletes*, THE NEW YORK TIMES (June 28, 2016), <https://www.nytimes.com/2016/07/03/magazine/the-humiliating-practice-of-sex-testing-female-athletes.html>.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ Kathryn Henne, *The Science of Fair Play in Sport: Gender and the Politics of Testing*, 39 THE UNIVERSITY OF CHICAGO PRESS 790 (2014).

¹⁰ *Id.*

¹¹ Martin F. Huber, *The IAAF'S new Gender Rule is a disaster*, OUTSIDE (July 20, 2018), <https://www.outsideonline.com/2328971/iaaf-gender-rule-update-caster-semenya>.

hormones in a body.¹² Pumping extra hormones into a sportsperson's body essentially means doping which does enhance your performance.¹³ It renders the entire study meaningless. So, if testosterone added to the body cannot be studied, the next logical step is to study the naturally occurring hormones in the body.¹⁴ Joanna Harper, a physicist at Loughborough University says that even though the conventional mindset prompts at testosterone being this powerful hormone that helps you build muscle mass, is the driver of red blood cell that carries oxygen to your muscles which all help a person's aerobic capacity, there is no established study that proves the correlation between a hormone and enhanced performance.¹⁵ Richard Holt, an endocrinologist suggests that a male range of testosterone is from 10 to 25 nanomoles *per liter* but nobody can prove that a man at a level of 25 will outperform a man at a level 10 and the same stands true for women.¹⁶ A study done on weightlifting teenage boys and girls concluded that there was no relation between boys' performance and testosterone whereas for girls performed better when their testosterone levels were low.¹⁷

The discrimination against female athletes becomes manifest at this point. For instance, in *Mokgadi Caster Semenya v. International Association of Athletics Federation*, Caster Semenya, the South African runner, was penalized by the Court of Arbitration for Sports (CAS) for having high levels of naturally occurring testosterone in her body, whereas Michael Phelps, one of the most successful American Olympians has never been subject to any discernment owing to his large feet and torso, features that could put Phelps in an advantageous position over other male athletes in a competition.¹⁸ These should be accepted as biological differences. Why question a woman for the things that can naturally be a part of her physical being but celebrate a man with the same characteristics?

¹² Katrina K., *Stop Talking about Testosterone- there's no such thing as True Sex*, THE GUARDIAN (March 6, 2019), <https://www.theguardian.com/commentisfree/2019/mar/06/testosterone-biological-sex-sports-bodies>.

¹³ *Id.*

¹⁴ KATRINA K., *supra* note 12.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Kathryn Henne, *The Science of Fair Play in Sport: Gender and the Politics of Testing*, 39 THE UNIVERSITY OF CHICAGO PRESS 790 (2014).

2.1. DUTEE CHAND'S JOURNEY

In 2014, the testosterone limit for female athletes had been set at 10 nanomoles *per liter* by the IAAF, which they considered was the lower range for normal male hormone levels.¹⁹ Indian Sprinter Dutee Chand failed this test because her body produces a high level of testosterone, and she was compelled to appeal the decision to ban her for failing the gender test she was subjected to, in the case of *Dutee Chand v. Athletic Federation of India and International Association of Athletics Federation* before CAS.²⁰ CAS was established in 1984 as an institution to resolve sports disputes and a dispute can be referred to CAS only when both parties have an arbitration agreement. However, according to the Olympic Charter, any issue pertaining to the Olympic Games comes under CAS' jurisdiction. (Rule 61).²¹ In matters of appeal to CAS, the arbitrators' rule based on regulations and procedures followed by the body affected by the appeal and also the law of the country where the body is based.²² Since athletics is an Olympic sport, she could appeal her decision at CAS with AFI and IAAF involved. According to *Procedural Rule 47 of the CAS Code*, appeal against any federation/association/sport-related body's decision can be entertained by CAS if the body in question's regulations allows for it or if the parties have finished arbitration agreement and the appellant has exhausted all domestic legal remedies.²³ In Dutee Chand's case, IAAF and AFI were the bodies in question. According to Article 7.2 of the Hyperandrogenism Regulation of the IAAF, decisions regarding an athlete's ineligibility can be appealed to CAS.²⁴ Article 1 of the AFI states that it recognizes, applies, and accepts the Constitution including IAAF's rules and regulations especially in matters of anti-doping, disputes and relationship with athletic representatives.²⁵ Although the hyperandrogenism regulation allows appeal against IAAF's decision and Dutee was asked to disengage from all competitions by the AFI, the issue about CAS jurisdiction did arise. But the CAS panel was satisfied that AFI has submitted to its jurisdiction since it did not explicitly question its jurisdiction, participated in the process of nominating an arbitrator for hearing, requested IAAF to pay on its behalf for all expenses and had no objection in filing answer brief by the IAAF hinting that they were comfortable with

¹⁹ Kenan Malik, *Caster Semenya is a victim of rules that are confusing and unfair*, THE GUARDIAN (May 5, 2019) <https://www.theguardian.com/commentisfree/2019/may/05/caster-semenya-is-a-victim-of-rules-that-are-confusing-and-unfair>.

²⁰ Dutee Chand v. AFI and IAAF, CAS 2014/A/3759.

²¹ OLYMPIC CHARTER, art. 61 (2017).

²² *Id.*

²³ Tribunal Arbitral du Sport/CAS 47 R (2004).

²⁴ Dutee Chand v. AFI and IAAF, CAS 2014/A/3759.

²⁵ Memorandum of Association of AFI art 1 (2020).

the athlete's option to go ahead and arbitrate.²⁶ The applicable law in Dutee Chand's case was laid down by Rule 60.25 of the IAAF Competition Rules that states that any appeal to CAS against IAAF's decision shall be bound by IAAF's Constitution, Rules and Regulations.²⁷

She claimed that the IAAF lacked scientific data and material to affirm this connection between high testosterone levels and better athletic performance, and the CAS lifted her ban, claiming that the IAAF has to mandatorily establish this link to prove such advantage that the female athletes with higher testosterone levels enjoy.²⁸ Even though this ruling aided athletes like Semenya and Dutee Chand to participate in the 2016 Rio Olympics, the IAAF, in 2018, bounced back with new level requirements of 5 nanomoles *per liter*, with evidence.²⁹ The IAAF managed to establish that women with higher free/functional testosterone levels have a crucial competitive advantage over females who have low free testosterone levels in 400-800 meter races, pole vault and hammer throw by analyzing around two thousand track competition performances of both men and women.³⁰

After lowering the threshold level of testosterone permitted in a female athlete's body, the CAS ruled that to avoid a blanket ban on an athlete's career, females should take medications to reduce their natural testosterone levels.³¹ This landmark ruling defeats the right of Caster Semenya, amongst many other athletes, to compete, which has been highly criticized by scientists and people of the medical fraternity. This aspect goes against the fair-play and encourages the use of steroids to prevent something that occurs naturally.³² This also violates a female athlete's human rights, because they are subject to such tests and suspicion based on their physical characteristics which could not fit into the narrow purview of stereotypical views that females are supposed to be less muscular or bulky than males. This is a skewed notion because no authority should ideally have the power to decide the appropriate amount of testosterone for an individual to biologically qualify as a 'female athlete'. Putting women under the scanner impacts their dignity and the various accolades attached to their sporting careers. Pumping drugs into someone's body alters their natural characteristics, in addition to attacking

²⁶ Dutee Chand v. AFI and IAAF, CAS 2014/A/3759.

²⁷ *Id.*

²⁸ *Id.*

²⁹ Stephane Bermon, *Serum androgen levels and their relation to performance in track and field: mass spectrometry results from 2127 observations in male and female elite athletes* 51 BRITISH JOURNAL OF SPORTS MEDICINE 1310 (2017).

³⁰ *Id.*

³¹ *Id.*

³² KATHRYN HENNEN, *supra* note 18.

the female's identity, who is being administered such drugs. This is ethically problematic, too. This issue is not only limited to Semenya, but athletes like *Francine Niyonsaba* (Silver Medalist) and *Margaret Wambui* (Bronze Wambui) have also been pulled into this ambit via this discriminatory ruling that does not take into account the talent, dedication and hard work that goes into making a career in professional athletics.³³ If sportswomen are asked to regulate their hormone levels through reluctantly consuming drugs, it violates the *fundamental principle of agency* one has over her own body.

Sport is a combination of skill and athletic capacity.³⁴ No one thing can determine success. Isolating the testosterone level in one's body does not help. Speed, flexibility, endurance, strategy, communication, use of a particular body part, the type of sport are all important factors. So, neither is an only factor nor it is a necessary factor in this debate.

3. THE AFTERMATH

This entire process of gender verification testing leads to serious problems regarding naturalization, and which authority should be allowed to determine who is female enough to compete with females. Flat chest, muscular arms and legs are not particularly associated with women. It violates a sportswoman's basic human right to privacy by vociferously leaking intimate details of her genitals and reproductive organs to the press and the media industry to print as scandalous stories with demeaning headlines for increased viewership. It is unfair to women who win medals for their country, only to be stripped of the same for reasons like not fitting some organization's and the public's perception of being female enough.

Taking the Indian example of Dutee Chand, it is a clear case of violation of Article 21 of the Constitution of India that enshrines the right to life.³⁵ She was subjected to a ruthless routine of submitting her urine and blood samples without being provided with legitimate reasons, and an ultrasound was also ordered, which, on inquiry by her, was informed to be the *modus operandi* in athletics, and an alleged response to her complaint regarding abdominal pain.³⁶ Her

³³ Sarah Knapton, *Intersex Athletes to learn if they will be forced to take drugs to suppress testosterone*, THE TELEGRAPH (August 11, 2017), <https://www.telegraph.co.uk/science/2017/08/11/intersex-athletes-learn-will-forced-take-drugs-suppress-testosterone/>.

³⁴ Doriane Lambelet Coleman, *A victory for female athletes everywhere*, QUILLETTE (May 3, 2019), <https://quillette.com/2019/05/03/a-victory-for-female-athletes-everywhere/>.

³⁵ INDIA'S CONST., art. 21 (2018).

³⁶ RUTH PADAWER, *supra* note 5.

prominent muscles and longer stride for a relatively short person prompted the Federation to make her undergo the verification test.³⁷ The right to life includes a life of freedom and personal liberty, which was something that Chand was deprived of, by virtue of such mortifying tests. It is important to understand the background that Chand hails from. This ordeal must have made her feel unquestionably exposed to the ignominious limelight for reasons beyond her comprehension due to her lack of education. The IAAF also includes measurement and examination of the vagina and the clitoris, and evaluation of personal body parts, like the breast size (on a five-grade scale) for clarity.³⁸ These tests are dreadful and demeaning for sportswomen like Chand, who have undergone agonizing revelations on this subject.

3.1. THE CASE OF SANTHI SOUNDARAJAN

The unfortunate incident in the Indian athlete Santhi Soundarajan's life is a testament to the grave violation of her rights, which drove her to the point of attempting suicide.³⁹ During the 2006 Asian Games in Doha, Qatar, she attracted the media's attention because of her flat chest and deep male voice.⁴⁰ Soon after winning a silver medal in an 800-meter race, she was stripped of her medal after failing a sex test conducted by the Athletics Federation of India (AFI), and the incessant examination and scrutiny harassed her to such an extent that she ingested poison.⁴¹ Her complaint to the National Human Rights Commission (NHRC) for human rights violations against the AFI and Indian Olympic Association was rejected on grounds of maintainability under Section 36(2) of the Protection of Human Rights Act, 1993, which claimed that State Commissions could not look into matters after a year of its occurrence.⁴² A year had already passed since the gender test was conducted, and, thus, she did not receive any remedy from the NHRC. In 2016, she was presented with some respite by being provided with a permanent government job, but this cannot compensate for the ban imposed on her for participating in sports and the ramifications of such displeasing accusations on her life and sports career.⁴³ Her fundamental right to privacy was infringed when she was made to stand naked for half a day in 2006 while getting tested, massacring the little dignity she could cling

³⁷ *Id.*

³⁸ *Id.*

³⁹ Sonam Joshi, *A Decade After Being Banned For Failing A Controversial Gender Test, Athlete Shanthi Soundarajan Gets A Government Job*, HUFFPOST (October 19, 2016), https://www.huffingtonpost.in/2016/10/19/a-decade-after-being-banned-for-failing-a-controversial-gender-t_a_21586711/.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² The Protection of Human Rights Act Section 36(2) (1993).

⁴³ SONAM JOSHI, *supra* note 35.

on to.⁴⁴ But to distinguish Santhi's case from Caster Semenya, South Africa did file a human rights complaint with the United Nations when she was publicly defamed by the press and put under heavy scrutiny for her physique, alleged baritone, unshaved armpits, and decision to wear a pair of shorts instead of a bikini while competing in the sexist IAAF ruling.⁴⁵

These violations also attract the *offence of defamation*, where other sports opponents and newspapers take to social media and other avenues to pass nasty comments against sportswomen, without there being a shred of truth to such allegations. Publishing headlines that raise suspicions in people, for instance, she could be a female but maybe not in entirety, or claim by the competitors that a certain athlete does not have the right to run with them for looking different from the other females is a categorical violation of a female's personal liberty.⁴⁶ The right to equality embodied in the Indian Constitution under Article 14 is also violated in this process, where female athletes are subjected to such humiliation and tarnishing of reputation, whereas male athletes have never been subjected to such careful examination.⁴⁷ Even though gender testing was developed to prevent males from masquerading as females in sports events, there has been no documentation of such an incident ever taking place.⁴⁸ Thus, the United Nations Human Rights Council has claimed that these IAAF regulations contravene a female's bodily integrity and autonomy.⁴⁹

There is unprecedented misogyny in the field of sports, where female participation has always been a bone of contention, and they also do not receive the high appreciation or admiration like their male counterparts do.⁵⁰ This segregation between males and females was intentional to come up with a level playing field for everyone and to develop fairness in sports, but this has led to controversial procedures where women are targeted for unambiguous gender identity, which is unjust. They are not deceiving the public deliberately, unlike sportspersons who take

⁴⁴ *Id.*

⁴⁵ RUTH PADAWER, *supra* note 5.

⁴⁶ *Id.*

⁴⁷ INDIA'S CONST., art. 14 (2018).

⁴⁸ Laxmi Murthy, *A sporting chance for gender*, 47 ECONOMIC AND POLITICAL WEEKLY 18 (2019).

⁴⁹ Julian Savulescu, *Ten Ethical flaws in Caster Semenya decision on intersex in sport*, THE CONVERSATION (May 10, 2019), <https://theconversation.com/ten-ethical-flaws-in-the-caster-semenya-decision-on-intersex-in-sport-116448>.

⁵⁰ LAXMI MURTHY, *supra* note 48.

performance-enhancing drugs.⁵¹ These rules are disproportionate as it intervenes with the body of a normal functioning female, with dubious results.⁵²

3.2. THE CASE OF PINKI PRAMANIK

Public imagination is just limited to two gender identities and that is when such issues arise. A long torturous process was inflicted on Pinky Pramanik after her partner accused her of rape. She was forced to spend 26 days in a male cell of a West Bengal jail before making bail, underwent several sex verification tests which were leaked online, received a suspension from the Railways, was drugged and tied while being subject to more inconclusive tests in custody and lost every shred of dignity she tried to cling on to. After two long years in 2014, the West Bengal Court acquitted her on grounds of being intersex. Medically speaking this category is called DSD (Disorder of Sexual Development) under which Pinki' exclusion from being a woman did not mean she was a man. Her case did stir up the suppressed emotions of ethics, privacy, identity and consent. Her prime years as an athlete were spent in jails, hospitals and courts instead of the tracks. Although she returned to her natural habitat of sports, atonement for the lost honour is difficult.

4. CONCLUSION

It is high time that such policies and requirements of sexual segregation are looked into, and there is no point in drawing such distinctions, which even nature does not allow. Talking about a fair balance, it is necessary to have rules in place to prevent certain sportspersons of taking advantage of their physical attributes, but this should bring males under its ambit too. Introducing drugs into their bodies to alter the natural hormone levels is discriminatory, and above all, the IAAF has failed to prove that a high level of testosterone does lead to a higher level of performance.⁵³ The Court of Arbitration for Sports did realize the inadequate and inconclusive scientific study IAAF relied on while lifting the ban on Dutee Chand, stating that there is no mathematical precision in identifying whether higher levels of testosterone drives an athlete to victory, or other factors like nutrition, training and biological factors.⁵⁴ However, there is also an ongoing debate about how unjust it is to permit self-identified females to

⁵¹ *Id.*

⁵² JULIAN SAVULESCU, *supra* note 49.

⁵³ KENAN MALIK, *supra* note 19.

⁵⁴ *Id.*

compete with other females when they have masculine features, and critics claim that it is not reasonable to allow any person who has lived through male puberty but transitioned into a female to compete as a woman after taking suppressing hormone drugs for a year.⁵⁵ On the other hand, an absolute ban on transgender women in women sports is inequitable too.⁵⁶ The regulatory bodies need to be conscious of the value they are trying to promote. There is an established dilemma on whether *Trans*' athletes' decision to identify as a woman is the only factor to consider or other biological aspects are significant too in the scheme of affairs. Every single individual has different traits and characteristics, if German women are identified as stout, Indonesians have an average height of 5 feet. The purpose of sports should be inclusionary.

The primary focus of this paper is to highlight that the practices of sending notices to female athletes, forcing them to undergo ultrasounds, ambushing them into a medical room and inquiring about personal body parts, and taking measurements and conducting an examination of their private parts are humiliating. More so is leaking this information to the press, and openly debating whether a female is less of a female and more of a male, which lacks sensitization and sensitivity. It infringes an athlete's right to privacy because sports organizations often fail to keep this information confidential. It also defames the female athletes and breaches their right to peacefully participate in sports after being affixed with a certain reputation, post fighting numerous stereotypes and sexist perceptions.

Taking more responsibility and informing women about the various tests and rights could serve as a saving grace. This does not make the practice right but having no respect for the athlete will create further problems. Since there are so many studies hinting at varied factors assisting athletes to perform better, all gender verification testing policies should be done away with till a conclusive study is not set as a precedent. These tests should also act as deterrents for the right reasons and to make sure that if a woman tries to compete with unfair advantages, she will have to face a penalty of a harsh nature that may even go up to a life ban. The same should apply to males who attempt to compete with women too. Until the result is not final, every

⁵⁵ Joanna Harper, *Sports Transgender debate needs compromise not conflict*, THE GUARDIAN (April 1, 2019), <https://www.theguardian.com/sport/blog/2019/apr/01/sports-transgender-debate-compromise-not-conflict>.

⁵⁶ *Id.*

athlete's privacy must be maintained and not speculated over news channels and papers because it can cause irreparable damage to an athlete's already short career.



**CENTRE FOR SPORTS LAW
BUSINESS & GOVERNANCE**

JOURNAL FOR SPORTS LAW, POLICY AND GOVERNANCE,

ISSN (O): 2584 - 1122

**JOURNAL FOR SPORTS LAW, POLICY AND GOVERNANCE,
CENTRE FOR SPORTS LAW, BUSINESS AND GOVERNANCE
JINDAL GLOBAL LAW SCHOOL, OP JINDAL GLOBAL
UNIVERSITY,
SONIPAT NARELA ROAD, NEAR JAGDISHPUR VILLAGE,
SONIPAT,
HARYANA 131001.**