

# I. ONLINE GAMING IN INDIA: THE PREDICAMENT OF REGULATION AND TAXATION

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## ABSTRACT

India is a country with a young demographic enchanted and enticed by the digital world. Emerging within this context of increasing digitisation is the online gaming industry. Online games include real money games which may be games of skill or chance. The involvement of real money has become a cause of unease and even consternation for governments struggling to keep pace with the evolving nature of the industry. The Indian Government has also been scrambling to come up with effective models of regulation. Most recent moves include the imposition of GST at the rate of 28% and amendments to the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021. This paper seeks to analyse these initiatives in terms of their structure and consequences, as well as the rationale behind their implementation. The paper begins with a general introduction to the current scenario in India followed by a section distinguishing between online gaming and gambling. There is an in-depth discussion on the social ramifications of the industry and the moral dilemma it poses. The subsequent sections explore in detail the recent measures including the latest MeitY rules and increase in the rate of GST. Lastly, the paper consists of a cross-jurisdictional view on regulating the online gaming industry to compare the characteristics of various regulatory models.

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## I. INTRODUCTION

The online gaming industry in India has been growing rapidly for the past decade. This growth has been fuelled by the expansion of high-speed internet access and affordable gadgets. Moreover, in a country with an ever-increasing young demographic, it harnesses extraordinary potential. With 15 billion installs in FY 2022, India had the highest share of game downloads globally.<sup>1</sup> Having already generated USD 1.5 billion, the industry is projected to exceed revenue figures of USD 5 billion by 2025, according to the BCG Sequoia Report.<sup>2</sup> The lucrative nature and massive revenue streams of this industry coupled with the emergence of new players in the market have brought it into the government's spotlight, which has finally taken cognisance of the need for uniformity in both regulation and taxation. This recognition has culminated in two key developments: the new online gaming rules<sup>3</sup> notified by the Ministry of Electronics and Information Technology (“**MeitY**”), and the implementation of a 28% rate of GST.<sup>4</sup>

For the purpose of this paper, emphasis is on the underlying rationale of morality and social concerns which guided the processes by which these measures came into effect. As online gaming grew popular, various state governments first sought to regulate the industry owing to concerns of

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<sup>1</sup> Farhat Basir Khan, ‘Skill, Not Chance, will be Needed to Differentiate Game of Skill from Chance’ (*The Times Of India*, 18 January 2023) <<https://timesofindia.indiatimes.com/blogs/voices/skill-not-chance-will-be-needed-to-differentiate-game-of-skill-from-game-of-chance/>> accessed 20 September 2023.

<sup>2</sup> ‘Online Gaming In India: Boon for Economy, Employment’ (*India Corporate and Social Responsibility*, 16 November 2022) <<https://indiacr.in/online-gaming-in-india-boon-for-economy-employment/>> accessed 21 September 2023.

<sup>3</sup> The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Amendment Rules 2023.

<sup>4</sup> The Central Goods and Services (Amendment) Bill 2023.

addiction and gambling.<sup>5</sup> Yet the lack of a unified regulatory framework was sorely felt and MeitY thus brought in the new online gaming rules<sup>6</sup> focusing on the roles of intermediaries and self-regulatory bodies (“SRBs”). The discourse surrounding these rules, in turn, also led to a more accelerated discussion on the rate of taxation for online gaming. Thus came the implementation of a 28% rate of GST.

Prior to the final implementation of this rate, the conundrum before lawmakers was the skill versus chance dichotomy. The primary argument from the industry was that these are in fact games of skill and should therefore be regulated accordingly and treated differently from games of chance. The previous GST regime acknowledged the distinction between games of chance and games of skill placing an 18% tax on games of skill but a 28% tax on games of chance.<sup>7</sup> This was primarily because the industry was operating on a much smaller scale at the time and the government, therefore, took a more lenient approach in taxation. Moreover, amidst this debate, the Indian judiciary also dealt with numerous cases<sup>8</sup> to determine the distinctions between games of chance and games of skill. Yet with no definite conclusion to this debate in sight, the urgency for uniform taxation remained.

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<sup>5</sup> The Telangana Gaming (Amendment) Act 2017; The Andhra Pradesh Gaming (Amendment) Act 2020; Tamil Nadu Ordinance No. 4 2022; Karnataka Police (Amendment) Act 2021.

<sup>6</sup> Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021 (IT Rules, 2021).

<sup>7</sup> Avani Maheshwari, ‘The GST Conundrum of Online Gaming’ (2023) 5(2) IJLLR <<https://www.ijllr.com/post/the-gst-conundrum-of-online-gaming>> accessed 21 September 2023.

<sup>8</sup> *Chandresh Sankhla v. The State of Rajasthan & Ors* (2020) SCC OnLine Raj 264; *Gurdeep Singh Sachar v. Union of India & Ors* (2019) SCC OnLine Bom 13059; *State of A.P. v. K. Satyanarayana* AIR (1968) SC 825.

In light of this came the report of the first Group of Ministers (“GoM”) constituted to deal with this issue. This report,<sup>9</sup> which was submitted in the 47th GST Council meeting, outlined a legislative intent which emphasised how the differentiation between games of chance or games of skill is irrelevant considering that the “chance to win” is an inherent feature in all such activities including online gaming. However, it must be noted that this distinction had been acknowledged as far back as the *Chamarbaugwala*<sup>10</sup> case in 1957 and as latest as in the case of *All India Gaming Federation v. State of Tamil Nadu*.<sup>11</sup> The Indian courts, while deciding the question of “skill v. chance”, have adopted the test followed by the US Courts, known as the dominant factor test. As per the test, the primary question is whether skill or chance is the dominating factor in the determination of the outcome of the game.<sup>12</sup> This distinction is crucial in deciding whether or not a game comprises of gambling. It is also important to understand the difference between the kinds of players involved in a game. While games of skill may also be played by individuals sparingly as a recreational activity or to cultivate an additional source of small income,<sup>13</sup> players involved in gambling are almost always susceptible to addiction and debt traps.<sup>14</sup>

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<sup>9</sup> Report of Group of Ministers on Casinos, Race Course and Online Gaming, 2022 (First Report of GoM).

<sup>10</sup> *State of Bombay v. R.M.D. Chamarbaugwala* 1957 SCC OnLine SC 12.

<sup>11</sup> WP.13203/2023.

<sup>12</sup> Precincts of Electronic Sports, Betting and Gambling, 2022 SCC OnLine Blog Exp 59.

<sup>13</sup> Megha Mandavia, ‘Gaming Fearing backlash, India's skill gaming startups ensure users don't get addicted playing’ (*Economic Times*, 27 July 2018) <<https://economictimes.indiatimes.com/tech/internet/fearing-social-backlash-online-companies-go-for-counselling/articleshow/65157620.cms>> accessed 11 January 2024.

<sup>14</sup> Luke Clark and others, ‘Pathological Choice: The Neuroscience of Gambling and Gambling Addiction’ (2013) 33(45) *Journal of Neuroscience* <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3858640/>> accessed 11 January 2024.

Yet, despite the importance attached to this concept by judicial decisions, the distinction between skill and chance was deemed irrelevant by the GST Council and the initial report was followed up by a second report<sup>15</sup> at the 50th GST Council meeting post which a rate of 28% on full value of bets was imposed. This has finally rendered moot the debate on the skill versus chance dichotomy in so far as taxation is concerned. However, this development places online gaming in the same category as casinos, race courses and gambling, giving rise to a greater need to examine the relationship between gambling and online gaming.

## II. ONLINE GAMING VERSUS GAMBLING

Gambling and online gaming have a convoluted relationship which is difficult to disentangle. Gambling refers solely to the act of placing bets in the hope of a favourable outcome dependent entirely on chance.<sup>16</sup> The issue of regulating gambling has existed since time immemorial. A crucial point to note here is the moral concern surrounding gambling ever since the colonial era. Gambling has always been considered to be a major social taboo and there has been little tolerance for it both pre- and post-Independence. The earliest legislations on gambling in India go as far back as the Public Gambling Act

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<sup>15</sup> Second Report of the Group of Ministers on Casinos, Race Courses, and Online Gaming, 2023.

<sup>16</sup> Public Gambling Act 1867 < [https://file-rajshahi.portal.gov.bd/files/bera.pabna.gov.bd/page/3a656455\\_1ab0\\_11e7\\_8120\\_286ed488c766/THE%20PUBLIC%20GAMBLING%20ACT,%201867.pdf](https://file-rajshahi.portal.gov.bd/files/bera.pabna.gov.bd/page/3a656455_1ab0_11e7_8120_286ed488c766/THE%20PUBLIC%20GAMBLING%20ACT,%201867.pdf)> accessed 8 November 2023; Dan Glimne, 'gambling' (2023) Encyclopedia Britannica <<https://www.britannica.com/topic/gambling>> accessed 11 January 2024; 'gambling' (2024) Oxford Advanced Learner's Dictionary <<https://www.oxfordlearnersdictionaries.com/definition/english/gambling?q=gambling+>> accessed 11 January 2024; 'gambling' (2024) Cambridge Dictionary <[https://dictionary.cambridge.org/dictionary/english-hindi/gambling?q=gambling+#google\\_vignette](https://dictionary.cambridge.org/dictionary/english-hindi/gambling?q=gambling+#google_vignette)> accessed 11 January 2024.

of 1867.<sup>17</sup> In contrast, online gaming is an entirely new phenomena which has only gained prominence in the 21st century, and lawmakers across the globe are struggling to keep pace with the volatile nature of this industry. It is imperative to understand the vastly different contexts of both in order to recognise their similarities and dissimilarities.

The online gaming industry has several facets which differentiate it from gambling. In the past courts have even referred to games such as Blue Whale<sup>18</sup> and PUBG<sup>19</sup> as online games. However, this changed with the new IT rules which define an online game as a game that is offered on the Internet and is accessible by a user through a computer resource if he makes a deposit with the expectation of earning winnings.<sup>20</sup> This distinguishes online games from video games which may allow in-app purchases. In accordance with the new definition, online gaming consists of games which rely not only on chance but also on skill. Dream11 is an extremely popular online game in which the players must choose an ideal team based on the performance of a player in a particular cricket match. In the case of *Chandresh Sankhla v. The State of Rajasthan & Ors.*,<sup>21</sup> the High Court of Rajasthan declared that since the game involves the element of skill and judgement while choosing the players, it is a game of skill. A similar finding was also reached by the Bombay High Court in *Gurdeep Singh Sachar v. Union of India & Ors.*,<sup>22</sup> wherein the Court

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<sup>17</sup> Public Gambling Act 1867 <[https://file-rajshahi.portal.gov.bd/files/bera.pabna.gov.bd/page/3a656455\\_1ab0\\_11e7\\_8120\\_286ed488c766/THE%20PUBLIC%20GAMBLING%20ACT,%201867.pdf](https://file-rajshahi.portal.gov.bd/files/bera.pabna.gov.bd/page/3a656455_1ab0_11e7_8120_286ed488c766/THE%20PUBLIC%20GAMBLING%20ACT,%201867.pdf)> accessed 8 November 2023.

<sup>18</sup> *Sneha Kalita v. Union of India* 2018 12 SCC 674.

<sup>19</sup> *Rajesh Kishor Barman v. State of Maharashtra* 2022 SCC OnLine Bom 11328.

<sup>20</sup> IT Rules, 2021 (n 7).

<sup>21</sup> *Chandresh Sankhla v. The State of Rajasthan & Ors.*, (n 9).

<sup>22</sup> *Gurdeep Singh Sachar v. Union of India & Ors.*, (n 9).

observed that the success in Dream 11 fantasy sports depends on the user's ability to exercise his skills based on superior knowledge, judgement, and attention. The Supreme Court in *State of A.P. v. K. Satyanarayana*<sup>23</sup> also held that rummy is preponderantly a game of skill and not of chance. Thus, online gaming, that include games such as fantasy sports, rummy, and poker among others, arguably involve an element of skill. This clearly distinguishes online gaming from gambling.

Nonetheless, moral concerns with respect to gambling also pervade the online gaming discourse as gambling infiltrates the online space, leaving only a thin line of distinction between online gaming and gambling which is drawn only by varied interpretations of “skill” and “chance.” The overlap between the two primarily exist in two major areas: (a) the use of real money; and (b) their addictive nature. The use of real money in both gambling and online gaming obscures the line of differentiation between the two. Moreover, both have an addictive nature<sup>24</sup> as players have the tendency of getting addicted to the game, be it online or offline, or based on skill or chance. Both, the use of real money and their addictive nature, make it hard for lawmakers and jurists to differentiate between the two activities for the purposes of regulation and taxation as these give rise to substantial social concerns. However, whether these social concerns can be grounds for treating online gaming in the same manner as gambling in questions of regulation and taxation is a dilemma which remains.

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<sup>23</sup> *State of A.P. v. K. Satyanarayana*, (n 9).

<sup>24</sup> Daria J Kuss, 'Internet Gaming Addiction: Current Perspectives' (2013) National Library of Medicine (USA) < <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3832462/>> accessed 7 November 2023.

### III. SOCIAL RAMIFICATIONS AND THE MORAL DILEMMA

Law communicates and reinforces social values.<sup>25</sup> While the law may impose some sense of morality, moral concerns cannot be the sole factor guiding formulation and imposition of new laws. This is primarily because morality is neither a stagnant nor a scientifically definable concept. Morality cannot have a scientific definition because it is formed through public dialogue and interaction and affected by factors such as traditional norms which are neither quantifiable nor easily discernible. Moreover, morality is dynamic rather than stagnant, for social values and public morality are subject to changing times. The anomaly here, however, is that in so far as gambling is concerned, its social connotation has remained unchanged. It has always been and continues to be placed under taboo. Gambling remains a socially unacceptable activity and this is reflected in the laws formed to prevent the same. These concerns have translated into the regulation and taxation of the online gaming industry as well because of the overlap between online gaming and gambling outlined in the previous section.

This assertion is exemplified in the deliberations of the Group of Ministers formed to deal with issues concerning taxation related to casinos, horse racing and online gaming. The GoM submitted its first report to the 47th GST Council Meeting.<sup>26</sup> This report contained deliberations of the GoM while considering the issues at hand. One of the primary points highlighted was that “all these activities are to be uniformly taxed and because of their nature and negative externalities, should be levied a higher incidence of tax.”<sup>27</sup> This sums

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<sup>25</sup> Farrar and Dugdale, *Introduction to Legal Method* (first published 1990).

<sup>26</sup> Report of Group of Ministers on Casinos, Race Course and Online Gaming, 2022 (First Report of GoM).

<sup>27</sup> First Report of GoM (n 10).



up the narrative which shrouds the online gaming industry. The debate surrounding regulation, taxation and governance of the online gaming industry is marred by what has been termed by the GoM in its first report<sup>28</sup> as negative externalities. While the very same report acknowledges the sheer monetary scale of the industry, the social concerns substantially overpower the economic considerations.

The moral dilemma posed by the online gaming industry is very real. On one hand is the massive economic potential of the industry while on the other is its increasing social cost. In a country like India with a young demographic, it is hard to overlook the social costs of the industry which possibly include systematic psychological harm to young players. China recognised the threat from online gaming addiction as early as 2019 and issued a Notice on the Prevention of Online Gaming Addiction in Juveniles imposing legal obligations on online gaming service providers.<sup>29</sup> Delamere Health in its report on gaming addiction revealed that 3-4% of gamers worldwide were addicted to video games.<sup>30</sup> WHO has also in its 11<sup>th</sup> revision of the International Classification of Diseases included gaming disorder as a recognised disorder.<sup>31</sup> While addiction to video games is a threat to the mental health of the youth, addiction to online games involving real money can result

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<sup>28</sup> First Report of GoM (n 10).

<sup>29</sup> Leon Y. Xiao, 'People's Republic of China Legal Update: The Notice on the Prevention of Online Gaming Addiction in Juveniles' (*ResearchGate*, October 25, 2019) <[https://www.researchgate.net/publication/337691033\\_People's\\_Republic\\_of\\_China\\_Legal\\_Update\\_-\\_The\\_Notice\\_on\\_the\\_Prevention\\_of\\_Online\\_Gaming\\_Addiction\\_in\\_Juveniles](https://www.researchgate.net/publication/337691033_People's_Republic_of_China_Legal_Update_-_The_Notice_on_the_Prevention_of_Online_Gaming_Addiction_in_Juveniles)> accessed 8 November 2023.

<sup>30</sup> Gaming Addiction Report 2022 (*Delamere Health*, 2022) <<https://delamere.com/blog/gaming-addiction-report-2022>> accessed 7 November 2023.

<sup>31</sup> World Health Organisation, 'Addictive Behaviors: Gaming Disorder' (*WHO*, 2020) <<https://www.who.int/news-room/questions-and-answers/item/addictive-behaviours-gaming-disorder>> accessed 8 November 2023.

in severe financial stress as well. The best example of the same is found amongst those addicted to online fantasy gaming. Online fantasy gaming is hugely popular amongst the youth comprising of teenagers, college going graduates and work professionals too.<sup>32</sup> In India, fantasy gaming addiction poses great challenges. Young students receiving money for tuition and sustenance often find themselves in tricky situations having spent all their resources on fantasy gaming apps such as Dream11, My11Circle and MPL.<sup>33</sup>

Online gaming is a preferred form of entertainment for the newer tech-savvy generations. However, when this entertainment becomes an addiction, it causes immense psychological harm to the youth, beginning with social detachment issues. Moreover, when real money gets involved, this problem is exacerbated. There is a tendency for young players to get trapped in monetary debts as they often have no sources of income other than from their families. Moreover, unethical advertising (including advertisements of offshore gambling and betting websites targeting Indian users on these platforms) can lead players further down the rabbit hole, to even illegal websites, and in this context, cyber security and data privacy concerns become all the more tangible.

In the past few years, the negative social ramifications of online gaming have even led to bans in a few states. The power of the state governments to make laws on gambling is vested in Entry 34 of List II of the

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<sup>32</sup> Kayomard Irani & Samveda Hatwalkar, 'An Overview of Fantasy Sports: A Road to Entertainment or Addiction?' (2021) 3 IJLLR < <https://www.ijllr.com/post/an-overview-of-fantasy-sports-a-road-to-entertainment-or-addiction> > accessed 7 November 2023.

<sup>33</sup> Anil Kumar Tiwari, 'In India, fantasy gaming is causing addiction and financial ruin' (*Al Jazeera*, 2023) < <https://www.aljazeera.com/economy/2023/7/20/in-india-fantasy-gaming-is-causing-addiction-and-financial-ruin> > accessed 8 November 2023.

Seventh Schedule of the Indian Constitution.<sup>34</sup> Thus, the states have exclusive power to make laws on this subject including the power to prohibit or regulate gambling in their respective territorial jurisdiction. In 2017, Telangana banned all forms of online gaming and gambling through an amendment to the Telangana Gaming Act.<sup>35</sup> Further, the Karnataka government had banned all online games, both of skill and chance, by amending the Karnataka Police Act, 1963<sup>36</sup>, in 2021. However, this was overturned by the Karnataka High Court in February 2022. The Court struck down sections 2, 3, 6, 8 and 9 of the Karnataka Police (Amendment) Act 2021 declaring these as ultra vires of the Constitution of India.<sup>37</sup> In this amendment, under sections 2 and 3, the differentiation between games of skill and chance had been set aside and the punishment for online gaming had also been increased. The Court, in line with the ongoing discourse where the distinction between skill and chance had been acknowledged, set aside these sections of the amendment. The Andhra Pradesh Legislative Assembly in 2020 passed by voice vote the AP Gaming (Amendment) Bill 2020<sup>38</sup> banning online gaming in the state after some youngsters committed suicide in the aftermath of being pushed into debts due to online games. Tamil Nadu went a step further in imposing a prison term that may extend to three months or a fine up to ₹5,000 or both on persons indulging in online games.<sup>39</sup> This decision of the Tamil Nadu government came in response to the report of the Justice Chandru Committee<sup>40</sup> which

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<sup>34</sup> Constitution of India, 1950, Schedule VII, List II (State List), Entry 34.

<sup>35</sup> The Telangana Gaming (Amendment) Act 2017.

<sup>36</sup> The Karnataka Police (Amendment) Act 2021.

<sup>37</sup> W.P No. 18703/21.

<sup>38</sup> The Andhra Pradesh Gaming (Amendment) Act 2020.

<sup>39</sup> 'Tamil Nadu bans online gaming, imposes fine up to 10 lakh, 3 year jail term' (*Livemint*, 2023) < <https://www.livemint.com/news/india/tamil-nadu-bans-online-gaming-imposes-fine-up-to-rs-10-lakh-or-3-year-jail-11681195033226.html> > accessed 28 September 2023.

<sup>40</sup> Tamil Nadu Ordinance No. 4 2022.

recommended that the state “bring in a legislation for a total ban on online card games, including the game of rummy, immediately.” The committee further stated that at least 17 suicides had been reported in Tamil Nadu on account of people losing money in games like online rummy.

Several of these state legislations came prior to the decision of the GST Council and therefore shaped the discourse which led to the council imposing a 28% tax. These states have taken a particularly negative stance on online gaming keeping in mind its social impact. As a result, online gaming has been viewed in the same light as casinos, horse racing and offline betting or gambling. However, this is an erroneous categorisation on the part of legislators. Online gaming cannot be treated the same way because there are certain key factors which differentiate it. Firstly, online gaming is an industry which in India is still at a nascent stage.<sup>41</sup> It has the potential to be a major source of revenue for the country’s economy<sup>42</sup>, and a hostile stance will only alienate the stakeholders of the industry which include not only companies but also players<sup>43</sup>. Secondly, the online gaming industry has a multitude of facets which need to be dealt with via more individualised regulations as opposed to a blanket ban or a uniformly high rate of taxation. While the negative social effects of casinos, gambling and horse racing extend as far as their addictive

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<sup>41</sup> Japneet, ‘Gaming for the future: The growth potential of India’s iGaming industry and how it can drive India’s \$5 trillion vision’ (*Times of India*, 2023) <<https://timesofindia.indiatimes.com/blogs/voices/gaming-for-the-future-the-growth-potential-of-indias-igaming-industry-and-how-it-can-drive-indias-5-trillion-vision/>> accessed 12 January 2024.

<sup>42</sup> ‘Big bang growth of India’s gaming industry’ (*The Economic Times*, 2022) <<https://economictimes.indiatimes.com/news/international/business/big-bang-growth-of-indias-gaming-industry/articleshow/92053190.cms?from=mdr>> accessed 12 January 2024.

<sup>43</sup> Naini Thaker, ‘Will 28 percent GST kill the online gaming industry?’ (*Forbes India*, 2023) <<https://www.forbesindia.com/article/take-one-big-story-of-the-day/will-28-percent-gst-kill-the-online-gaming-industry/86565/1>> accessed 12 January 2024.

nature is concerned, online gaming poses other challenges which include unethical content, sexual harassment<sup>44</sup>, and cyber frauds<sup>45</sup> among others. A deeper analysis of the nature of the online gaming industry is required to bring in effective regulation of the industry. The MeitY's latest rules<sup>46</sup> citing the role of SRBs are a step in the right direction, but this is undercut by the GST Council's considerations on online gaming and the imposition of such a high rate of tax.

#### **IV. REGULATION AND THE ROLE OF SELF-REGULATORY BODIES**

In April 2023, MeitY notified amendments to the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021. These rules came in light of the fact that comprehensive, centralised rules specific to the industry were conspicuously absent from legal framework. Although separate state legislations did exist, there were no regulatory frameworks applicable nationwide. The newly amended rules have various aspects and most prominent among them is the emphasis on the role of intermediaries and self-regulatory bodies. Section 4 of the IT Rules 2021 now reads “additional due diligence to be observed by significant social media intermediary and online gaming intermediary.”<sup>47</sup> This recognises the existence

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<sup>44</sup> Anuradha Gandhi and Isha Sharma, ‘India: Sexual harassment in online games’ (*Mondaq*, 2023) <<https://www.mondaq.com/india/discrimination-disability--sexual-harassment/1347248/sexual-harassment-in-online-games>> accessed 12 January 2024.

<sup>45</sup> Bhavin Vadera, ‘Cybersecurity threats from online gaming’ (*Observer Research Foundation*, 2023) < [<sup>46</sup> IT Rules, 2021 \(n 7\).](https://www.orfonline.org/expert-speak/cybersecurity-threats-from-online-gaming#:~:text=There%20has%20been%20a%20surge.percent%20of%20all%20such%20at tacks.> accessed 12 January 2024.</a></p></div><div data-bbox=)

<sup>47</sup> IT Rules, 2021 (n 7).

and role of intermediaries in the facilitation of availability of online games to consumers. Intermediaries, which include social media platforms and app stores, are required to restrict surrogate advertising of online games not deemed permissible by online gaming self-regulatory body. Secondly, the intermediaries may not host, share, publish or make available to consumers an online game which has not been recognised as permissible.

An online gaming self-regulatory body or SRB, as required under Section 4B of the IT Act, must be a company incorporated under Companies Act 2013 or a society registered under the Societies Registration Act 1860. Most importantly, the Board of Directors of such a body must include an independent person from the field of online gaming or other relevant field; an individual who represents online gaming players; an individual from the field of psychology, medicine, or consumer education; an individual with practical experience in the field of public policy; and an individual from the field of information communication technology.<sup>48</sup>

A permissible online game must not involve ‘wagering on any outcome,’<sup>49</sup> and must adhere to a framework developed by the SRB. The prerequisites of such a framework are to be mandatorily published on the SRB’s respective website and are to include at least four measures already specified in the rules. Firstly, the online game cannot be against the interests of sovereignty and integrity of India, security of the State, friendly relations with foreign States and public order.<sup>50</sup> Secondly, there must exist additional

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<sup>48</sup> IT Rules, 2021 (n 7).

<sup>49</sup> ‘Government ushers in new era of responsible online gaming through strict guidelines for ensuring safety of digital nagriks and accountability of online gaming industry’ (*PIB*, 2023) <<https://pib.gov.in/PressReleasePage.aspx?PRID=1918383>> accessed 5 October 2023.

<sup>50</sup> IT Rules, 2021 (n 7).

safeguards for the prevention of self-harm and psychological harm. This is a noteworthy requirement but exceedingly difficult to implement. This is because there have not been sufficient empirical studies in India to indicate the particular causes of psychological harm in online gaming, and problems that are unique to the Indian context. Relying on foreign or international case studies cannot help in solving the problems of online gaming addiction in India primarily because fantasy sports addiction is also fuelled by tournaments such as the Indian Premier League, which is a phenomenon unique to India. In the absence of a detailed analysis of specific causes, targeted solutions cannot be implemented. Therefore, there exists a pressing need to first determine the causes to start formulating solutions. Thirdly, there must exist age-rating mechanisms and parental controls to protect children in particular against the adverse impacts of online gaming. This is most significant as online gaming mostly attracts a younger consumer base and children are therefore greatly susceptible to potential harms. Lastly, the framework envisages protection against risks of gaming addiction through warning messages in long gaming sessions. While these are the primary requirements to be adhered to by all SRBs, additional safeguards may be listed by SRBs individually on their sites. The framework therefore consists of two essential categories of measures: (i) mandated by the online gaming rules; and (ii) created by the SRB. It is important to draw this distinction to observe that the government has in fact retained a commanding voice over the formulation of such a framework whilst simultaneously empowering the SRBs to tweak the system as they deem fit.

This also raises the question of role and functioning of SRBs, for under the new rules,<sup>51</sup> the SRBs will effectively be dictating the actions of

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<sup>51</sup> IT Rules, 2021 (n 7).

intermediaries as well, by recognising a game to be permissible or not permissible. Section 4A<sup>52</sup> deals with the verification of online real money game. The emphasis here lies on the phrase “real money” which means that the SRBs ideally may only regulate online games involving transactions of monetary value. However, a provision has been inserted here to state that any non-real money online game if considered to have the potential to harm users, then such a game too could be regulated under these rules. This provision has inherent ambiguity as there are no measures defined against which a non-real money online game may be deemed harmful. Therefore, the SRBs will be playing a pivotal role in shaping the industry, with powers to regulate not only real-money games, but possibly also non-real money games.

Additional requirements such as the inclusion of an expert on psychology in the Board of Directors reflect the social concerns underlying the formulation of these rules. The government felt the need for supplementary frameworks of safeguards to protect the interests of consumers, mostly young and impressionable. While there was cognisance of social concerns in the formulation of these rules, it did not become an authoritative rationale dictating the entire consideration. There was adequate acknowledgement of the fact that members from within the industry would be in a better position to assist with regulation owing to their nuanced understanding of online gaming; something which the government agencies may not have been able to effectively implement on their own. A deeper understanding of the nature of the industry on the part of the SRBs will facilitate more effective measures to mitigate the social costs of online gaming. In the case of regulation of online gaming, some level of autonomy and representation has thus been granted to

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<sup>52</sup> IT Rules, 2021 (n 7).



the industry in the form of SRBs. The glaring pitfalls of overregulation were also avoided here. The innovative role, constitution and functioning envisaged for SRBs exemplifies an adequate balance between social concerns and economic considerations of the industry.

## V. TAXATION AS MEANS OF REGULATION

The rationale behind an increased rate of taxation was based on veritable social concerns yet it serves another imperative practical purpose as well. While MeitY's rules grant a degree of autonomy to the industry by encouraging self-regulation, the inadvertently high rate of tax also serves as a means of regulation absolutely within the ambit and prerogative of the government.

Taxation of any industry serves twin functions for the government- the primary being revenue-generation and the secondary being regulation. Taxation has a substantive regulatory aspect,<sup>53</sup> and this is particularly in the case of growing industries such as that of online gaming in India. The industry is growing at a breakneck pace and poses challenges that go beyond the online sphere resulting in tangible effects. In addition to the social concerns regarding the youth, there are larger threats for the government to counter, which include concerns relating to cyber security and fraudulent transactions through online gaming. It is difficult for the government to navigate the regulation of third-party servers used in online gaming as they may or may not be physically present in the territory of India, thereby making regulation extremely

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<sup>53</sup> Reuven S. Avi-Yonah, 'Taxation as Regulation: Carbon Tax, Healthcare Tax, Bank Tax and Other Regulatory Taxes' *Acct. Econ.* (1)1 (2011) <<https://repository.law.umich.edu/cgi/viewcontent.cgi?article=2643&context=articles#:~:text=In%20general.%20the%20choice%20between.achieve%20a%20specific%20regulatory%20goal.>> accessed 4 October 2023.

complicated. Moreover, unlike casinos where offline betting can be regulated physically, online gaming is extremely individualistic. Online games are mostly played in the privacy, safety, and comfort of one's home. Regulating the actions of individuals playing from remote locations is practically impossible despite the existence of SRBs as mandated by MeitY's rules.<sup>54</sup> Therefore, the government's purpose in imposing such a high rate of tax is to regulate an industry which has been growing hitherto unchecked. Increased taxation places an immediate tangible burden on the stakeholders of the industry and checks the unprecedented growth of revenue by bringing a greater amount under the ambit of taxes.

While earlier an 18% tax was imposed on the gross gaming revenue, now a 28% tax is imposed on the full value of bets placed. Gross gaming revenue refers to the difference between the amount of money wagered by a player and the amount that they win. The new rate of 28 percent will be applicable not on this differentiated rate, but on the full value of a bet. This significantly increases the tax burden. Moreover, winnings from betting in online game are categorised under 'income from other sources' under the Income Tax Act.<sup>55</sup> Therefore, the winnings are subject to tax deducted at source under the Act at a rate of 30%.<sup>56</sup> While the previous threshold for the applicability of TDS was Rs. 10,000, this has now been removed as per notification of the CBDT.<sup>57</sup> Only net winnings below Rs.100 in a month are exempted from TDS under the new rule. It has been clarified that all bonuses

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<sup>54</sup> IT Rules, 2021 (n 7).

<sup>55</sup> Income Tax Act 1961, s. 115B.

<sup>56</sup> Income Tax Act 1961, s. 194BA.

<sup>57</sup> Income Tax Notification (22 May 2023) Central Board of Direct Taxes.

or incentives provided by gaming intermediaries to users are considered taxable.

Hence, there is a considerable tax burden which has been added under the new regime. Even winnings below Rs. 10,000 have become taxable and this substantially reduces the gains for regular players but also creates a barrier for irregular players to become regular. This is because even a one-time player with meagre winnings will have to pay TDS applicable on the winnings. This is the effect of the TDS change. This reduces gains for the player and also revenue for the company. Thus, while the incentive is reduced for the player, the expansion capacity is reduced for the company. This serves to regulate the exponential growth of an industry which has a substantive negative social cost. However, high rate of taxation cannot be an adequate means of regulation but only an intervening measure, especially considering that an inadvertently high rate of tax could push players towards illegal betting sites in search of greater returns. Further effects of the higher rate of GST are discussed in detail in the following section.

## **VI. DISCORD BETWEEN INTENT AND OUTCOME**

The intent of a uniform regulatory framework or a higher rate of taxation is to put checks on the online gaming industry. This intent stems from deep-rooted moral concerns. Therefore, instead of merely regulating an industry that has grown hitherto unchecked, the new measures put together threaten to altogether choke the industry's revenue generating capacity. The increased rate of tax has been met with much opposition from the industry's major stakeholders for it will greatly increase the operating cost for gaming companies. This is a growing industry in which smaller profit margins cannot

withstand the blow of a 28% GST. Currently, most online gaming platforms charge a 10-15% commission which post the increased rate of taxation will not suffice to sustain these platforms. Companies looking to stay afloat under the new tax regime will have to increase their user base, which in turn will prove difficult because of the negative publicity surrounding the industry in light of MeitY's rules<sup>58</sup> and news of higher taxation. This therefore traps gaming platforms in a losing vortex.

The online gaming industry being a latest experiment in technology, does not enjoy much backing from institutional investors. The backbone of the industry is formed by venture capital funds<sup>59</sup> which evaluate a gaming platform's revenue-generating and growth potential to ascertain whether or not to invest. Ever since the first group of ministers was formed to deliberate on the issue of taxation of online gaming, the investments flowing into the industry have substantially reduced.<sup>60</sup> Prior to the decision, investments were reduced owing to ambiguity in regulations and fear of a higher rate of taxation, and post the decision, the revenue potential of the industry would diminish and therefore investments will also stand reduced. Thus, there are three major foreseeable outcomes of this higher rate of GST:

1. Diminishing profit margins

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<sup>58</sup> IT Rules, 2021 (n 7).

<sup>59</sup> Shivam Bajaj, 'Gaming Industry is Winning the Battle of VC Funding' (*Times of India*, 2022) < <https://timesofindia.indiatimes.com/blogs/voices/gaming-industry-is-winning-the-battle-of-vc-funding/>> accessed 8 November 2023.

<sup>60</sup> Arushi Mishra, 'Investments in gaming start-ups nosedives amid tax worry, rising competition' (*Business Line The Hindu*, 2023) <<https://www.thehindubusinessline.com/news/investment-in-gaming-start-ups-nosedives-amid-tax-worry-rising-competition/article67402534.ece#>> accessed 7 November 2023.

2. Reduced user base
3. Limited capital investment

These three events threaten to altogether dismantle the industry in the long run. The distinction between games of skill and games of chance was not a sustainable measure as nature of individual games defined on ad hoc basis by courts was becoming an unnecessarily complex and long-drawn exercise. The discarding of such a system was therefore inevitable. However, the dilemma of taxation then continues to persist. According to the industry apex body (All India Gaming Federation), there are currently over 900 gaming (online) companies in India, a vast majority of which fall within the MSME sector.<sup>61</sup> These smaller companies will be disproportionately impacted by the new rules and taxation regime. Whereas key players within the industry will manage to stay afloat, the smaller start-ups may die out. This is likely to also exacerbate monopolisation tendencies within the industry. Regulation of online gaming is desirable, but it cannot be at the cost of choking the industry in its entirety. Moreover, this also hurts the government's vision of a Digital India and reduces ease of doing business. In conclusion, online gaming needs to be seen and treated differently from other forms of gambling, both in regulation and taxation, for the industry to survive.

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<sup>61</sup> Mini Tejasvi, 'Indian Gaming Landscape Caught under Pressure, May Face an Early Shakeout Hints AIGF' (*The Hindu*, 2023) <<https://www.thehindu.com/business/indian-gaming-landscape-caught-under-pressure-may-face-an-early-shakeout-hints-aigf/article67231642.ece#>> accessed 10 October 2023.

## VII. A CROSS-JURISDICTIONAL VIEW ON REGULATING ONLINE GAMING

Regulating the online gaming industry is a problem not unique to India but in fact a global concern. The United States has in the last two decades increased monitoring and regulation of the industry. It passed the Unlawful Internet Gambling Enforcement Act<sup>62</sup> in 2006 which prohibits any person engaged in the business of betting, as defined, from knowingly accepting credit, electronic fund transfers, checks, or any other payment involving a financial institution to settle unlawful internet gambling debts. Moreover, under the Wire Wager Act<sup>63</sup>, interstate online gambling is deemed illegal. There are also other federal laws applicable to certain online gambling activities, such as the Wagering Paraphernalia Act<sup>64</sup>. However, their applicability depends substantially on the type of gaming activity, as well as the state law where the activity is occurring.<sup>65</sup> Individual states have their own laws pertaining to online gambling. This creates a highly complex system which is cumbersome to monitor at a large-scale systematic level. This is far from ideal as online gaming poses challenges even for country-specific regulations because it is an industry without borders. When the Gaming Treaty in Germany obligated state parliaments to ban commercial online gambling, German players' demand was satisfied by providers operating from offshore locations where they could not be monitored or even prosecuted by German

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<sup>62</sup> Unlawful Internet Gambling Enforcement Act 2006.

<sup>63</sup> Interstate Wire Act 1961.

<sup>64</sup> Wagering Paraphernalia Act 1961.

<sup>65</sup> 'Online Gaming Overview: Basic information Regarding Online Gaming Law' (*Walters Law Group*, 2018) <<https://www.firstamendment.com/online-gambling-information/>> accessed 14 January 2024.

authorities.<sup>66</sup> This example clearly shows that an outright ban could never be the solution for online gambling. The need then is to effectively regulate the industry. While the regulatory framework under the new IT rules in India seeks to monitor both real money and non-real money games, most countries consider only the real-money online games for regulation. Therefore, these countries have exclusive “online gambling laws” (such as Finland and Netherlands which follow the “alibi model” and “risk model” for gambling regulation respectively)<sup>67</sup> as opposed to India which has “online gaming laws.”

Online gambling laws in jurisdictions such as Macau are exceedingly lenient for they aim to become international hotspots for the industry.<sup>68</sup> However, these are exceptional cases and most countries, in fact, seek to regulate and tax this growing industry. In India it is clear that the legal frameworks are guided by addiction concerns in a young demographic, but this is not the case for countries in the west for whom the primary concerns are data privacy and money laundering. This shows the fundamental difference underlying the formulation of legal frameworks in Western countries and India. However, this difference does not mean that there is nothing to be imbibed from their legal frameworks for online gambling. While online gaming has become a major concern for India only in the last five years,

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<sup>66</sup> Joachim, ‘Taxation of Online Gambling in Germany’ (2013) 17 *Gaming Law Review* <<https://www.liebertpub.com/doi/10.1089/glr.2012.1714>> accessed 14 January 2024.

<sup>67</sup> Alan Littler & Johanna Jarvinen-Tassopoulos, 'Online Gambling, Regulation, and Risks: A Comparison of Gambling Policies in Finland and the Netherlands' (2018) 30 *JLSP* <<https://digitalcommons.osgoode.yorku.ca/jlsp/vol30/iss1/6/>> accessed 14 January 2024.

<sup>68</sup> Matthew Tingchi Liu and others, ‘Macau gambling industry’s quick V-shaped rebound from 2014 to 2019’ (2020) *Asia Pacific Journal of Marketing and Logistics* <<https://www.emerald.com/insight/content/doi/10.1108/APJML-08-2019-0489/full/html>> accessed 12 January 2024.

EU adopted the Communication “Towards a Comprehensive European Framework on Online Gambling” as early as October 2012.<sup>69</sup> From this it is evident that there may be much for us to learn.

EU does not have a uniform legal framework for regulation of online gambling but proposes a comprehensive set of actions and common principles on protection. When Germany sought to differentiate from the trend of liberal regulation in EU through the “Gaming Treaty,” it came under pressure from some judgements of the European Court of Justice.<sup>70</sup> Gambling laws in Germany then underwent reforms and the Interstate Treaty 2021 came into force on 1 July 2021 with provisions for the licensing of virtual slot machines and online poker with limited stakes and winnings.<sup>71</sup> Germany, under scrutiny from the EU, was compelled to adopt a more lenient approach to online gambling but established a strict licensing regime nonetheless to ensure that it can filter acceptable games. France also adopted a licensing regime for the online gambling sector. The sector is regulated by the French Gambling Act 2010 which has three types of licences for online gambling activities: (i) online sports betting; (ii) online horse race betting; and (iii) online poker games.<sup>72</sup> Netherlands also has a licensing system and seeks to channel 80 percent of demand to locally licensed online operators.<sup>73</sup> Thus, licensing is an important aspect of the various regulatory frameworks for online gambling in European

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<sup>69</sup> Sue Schneider, ‘Towards a Comprehensive European Framework on Online Gaming’ (2013) 17 *Gaming Law Review*.

<sup>70</sup> Case C-46/08, *Carmen Media 2010* E.C.R. I-8149; Case C-316/07, *Markus Stoß 2010* E.C.R. I-8069; Case C-409/06, *Winner Wetten 2010* E.C.R. I-8015.

<sup>71</sup> Melchers Rechtsanwälte, ‘A General Introduction to Gambling Law in Germany’ (*Lexology*, 2023) < <https://www.lexology.com/library/detail.aspx?g=a586d86a-41bc-443a-af92-099351ffd1af> > accessed 9 November 2023.

<sup>72</sup> Sue Schneider, ‘Online Gaming in France’ (2013) 17 *Gaming L Rev & Econ*.

<sup>73</sup> Littler & Jarvinen (n 68).



countries. It also shifts the industry narrative away from government monopolies to private competitive markets.

Private competitive market is the norm in the Indian online gaming industry as well. And these policies of licensing can be seen to some extent as being analogous to the new IT rules which allow for games to be deemed as permissible subject to certain conditions. However, the key difference is that while licensing in the aforementioned European countries is undertaken by central or state government authorities, the IT rules delegate this prerogative to the SRBs thereby establishing a two-step system. It is a two-step system because first the SRB is approved by the government, and it is then the SRB which approves the online game. The SRBs will thus almost act as a mediating element wherein they have an understanding of the regulatory framework as well as working knowledge of the industry. While the SRBs are a significant addition, the guidelines established are merely to recognise a game as permissible or impermissible. Our framework may also benefit from categorisation following from the French example. Online gaming is a sphere which consists of several games of various types. Fantasy sports games in particular are distinct from other forms of online gaming because they are affected greatly by real time tangible factors such as sports tournaments. Once these distinctions are acknowledged and incorporated into an approval system, it will be easier to discern which type of game is permissible and which is not. As the skill versus chance delineation has been set aside by MeitY's current rules, this may be the right time to experiment with other forms of categorisation for online games to make regulation and control easier.

## VIII. CONCLUSION

The line between online gaming and gambling may be murky but they are vastly different activities and need to be treated as such in laws relating to regulation and taxation. It is also evident that the social costs of this industry cannot be ignored. The Delhi High Court recently dismissed a petition seeking ban on multiple online gambling sites and directed the IT ministry to treat the petition as representation and settle the issue.<sup>74</sup> Moreover, the very fact that MeitY has recently deemed fit to ban nearly 22 apps for illegal betting<sup>75</sup> shows that there is much to be concerned about in regulation of the online gaming industry. Yet these social concerns cannot, in the present scenario, be reason enough to dismantle the industry altogether. The new GST policy heavily influenced by this moral dilemma uses taxation itself as a means of regulation, and ultimately threatens the existence of a veritable online gaming market in India. In contrast, the SRBs may be an ideal way forward. The rationale behind the creation of SRBs shows a completely divergent perspective from that causing an increase in the GST rate. While the former acknowledges the modern and dynamic nature of the industry, the latter is reducing it to the same category as casinos, horse racing and gambling. There is, therefore, still much confusion as to what may be the right path in dealing with online gaming and its social concerns. In formulating newer policies, it may help lawmakers in the country to take a page out of the handbook of other jurisdictions where online gaming laws were being formulated since much before. Online gaming

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<sup>74</sup> *Shaik Raheem v. Union of India and Ors.* W.P.(C) 16206/2023.

<sup>75</sup> PIB, 'MEITY issues blocking orders against 22 illegal betting apps and websites, including Mahadev Book Online on request from Enforcement Directorate', (2023) PIB <<https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1974901#:~:text=Ministry%20of%20Electronics%20and%20Information,incl%20Mahadev%20Book%20and%20Reddyanaprestopro.>> accessed 9 November 2023.

essentially being an industry without borders, policymakers across the globe may benefit from coordinating, cooperating, and learning from one another in regulating this dynamic, complex, and rapidly growing industry