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# Is India on its way to legalising sports betting and gambling?

On 5 July 2018, the Law Commission of India ('LCI') issued its 276th report<sup>1</sup> ('the Report'), titled 'Legal Framework: Gambling and Sports Betting including in Cricket in India,' recommending that gambling and sports betting should ultimately be legalised in India due to a failure in enforcing a blanket ban on such activities, and stating that regularising sports betting may go some way in tackling issues of corruption in Indian sport, particularly in cricket. Namrata Bhagwatula and Viraj Joshi, of GameChanger Law Advisors, discuss the various aspects considered by the LCI while formulating the Report, and the recommendations the LCI makes therein.

In January 2015, the Supreme Court of India ('the Supreme Court') appointed a committee led by Justice R. M. Lodha, a retired Chief Justice of the Supreme Court, to examine the functioning of the apex body for administration of cricket in India: the Board of Control for Cricket in India ('the BCCI') and to suggest changes to the BCCI organisational framework to increase transparency, efficiency and weed out corruption ('the Lodha Committee Report').

In July 2016, the Supreme Court of India, while discussing the recommendations of the Lodha Committee Report, passed its judgment in the case of *Board of Control for Cricket in India v. Cricket Association of Bihar & Ors.*

The Supreme Court in the BCCI ruling, while remarking on the Lodha Committee Report, observed:

"...[T]he recommendation made by the (Lodha) Committee that betting should be legalised by law, involves the enactment of a Law which is a matter that may be examined by the Law Commission and the Government for such action as it may consider necessary [...]"

The terms of reference for the LCI by the Supreme Court were thus to: (a) conduct

a detailed study on the sphere of betting in India; and (b) evolve a regulatory framework for an Indian betting control legislation based on its findings.

Pursuant to the aforesaid terms of reference, the LCI issued its Report on 5 July 2018.

The Report immediately garnered vast public interest and attention as the LCI in a fresh, yet cautious step, recommended the legalisation and regularisation of betting and gambling upon the grounds that this step remains the sole viable option in the face of failure in enforcement of a blanket ban on betting and gambling in India.

## The Report

The Report begins by introducing the chronology of events leading up to the reference to it by the Supreme Court and the consequent formulation of the Report. The Report, thereafter, discusses the following aspects before arriving at its conclusions and recommendations:

## History

The Report, while purportedly examining the history of betting and gambling in India, primarily makes a reference to various mythological and/or religious texts of the Indian subcontinent<sup>2</sup>. Verses

from these texts have been examined by the LCI in the Report to support at the conclusion that betting and gambling, while prevalent since time immemorial, have always been considered a 'social evil' in the Indian subcontinent. In this respect, we feel that if the LCI had wished to contextualise the current issue *vis-à-vis* the treatment of betting and gambling in the past, the LCI could have focussed its energies on drawing from sources that are more relevant to our modern society.

## Difference between wagering, betting, and gambling

The Report discusses various definitions of, and the differences between, wagering, gambling and betting. After referring to various dictionaries and judgments, the Report concludes that the term 'wagering' includes gambling, betting and gaming. The Report further states that an important distinction between betting and gambling is that in gambling, the stakes or wagers are placed on an event the outcome of which cannot be predicted; whereas, in betting, the stakes are placed on an event, the outcome of which is based on the performance of the players, influenced by their skill. This brings us to the most important distinction sought to be created by the LCI in its Report - games of skill *vis-à-vis* games

continued

of chance. Interestingly, while the LCI concludes in favour of regularisation of gambling, including games of chance, the tone and tenor of the LCI repeatedly portrays non-skill-based gambling as immoral and tainted. This is reflective of the general jurisprudence in India on betting and gambling - while games of skill are permissible to an extent, most states in India ban staking on any games of chance.

#### Constitutionality

The Report thereafter discusses the scope of regulation of betting and gambling in India in light of the Constitution of India. The Report discussed the concept of constitutional morality and reiterates that the most important argument against legalisation of betting and gambling in India today is morality. However, it does acknowledge that 'immorality' *per se*, cannot be a ground to challenge the constitutional validity of any legislation, since morality is a subjective concept. The Report thus leaves the door open to evolving contemporary Indian betting control legislations.

India has a quasi-federal form of governance where certain subjects fall within the purview of the Central Government of India, being the federal Government, and some subjects fall within the purview of the individual states, on which the state governments have the right to legislate.

In India, betting and gambling is a state subject, with the individual states having the powers to formulate their own separate laws on gambling and betting. The States of Sikkim, Goa and Nagaland have legalised betting and gambling in a controlled manner, each with certain restrictions. On the other hand, most other states have toed the line prevalent from colonial times, of allowing games of skill while restricting any staking on games of

chance. Unfortunately, the betting control legislations of most states have not kept up and evolved with the times. Quite startlingly, only two states even mention the word 'online' in their betting control legislations. A comprehensive overhaul of the legislations of most states may be required to keep up with the realities of the contemporary India.

#### Foreign regulatory regimes

The Report summarises, and then discussed in detail, the regulatory regimes governing betting and gambling in some select jurisdictions, including the EU, UK, Australia, South Africa, Spain, Switzerland and France. We feel that the LCI could have better-considered the context when examining foreign laws on betting control without framing the context in which these legislations should have been looked at. We also note that most of the jurisdictions discussed in the Report are prosperous countries with high indicators of human development. Given that most arguments against the legalisation of betting and gambling arise out of socio-economic and moral reasons, we feel that the betting control legislation of countries that are more similar to India in their socio-economic development and levels of human development should have been chosen for scrutiny.

#### Current legal perspective on gambling

After an analysis of various judgments of the Supreme Court, the Report concludes that gambling and casino activities, having deemed to be designated businesses/professions, ought to enjoy protection under Article 19(1)(g) of the Constitution of India 1949, which provides a fundamental right to Indian citizens to carry out any trade, profession or occupation. The Report further discusses the validity of wagering agreements and argues that while restrictions on the validity of wagering agreements has

prevented the enforcement of such agreements, it hasn't prevented the parties from entering into such agreements. We believe that such an argument is impractical as it completely disregards the necessity of enforceability of a contract.

The Report then goes on to list the existing central and state laws which either expressly prohibit or permit betting and gambling. As mentioned earlier, while there are certain states, such as Sikkim, Goa and Nagaland which have legalised betting and gambling in a regulated and restricted manner, states such as Orissa, Assam and Telangana have expressly prohibited betting and gambling in their jurisdictions.

#### Public response and need for regulation

While discussing the responses received from various stakeholders, including lawyers, students, and gaming companies, the LCI does make some convincing points on the need for regulation of betting and gambling in India. The Report rightly states that the major consequence of illegal and unregularised gambling in India are illegal trade and commerce and corrupt sports practices, particularly in cricket. On the other hand, recognising the benefits of legalising betting and gambling, the LCI states that regulation of the gambling and betting industry will generate revenue and employment and protect vulnerable sections of society.

#### Recommendations of the LCI

On the basis of the considerations listed above, the LCI made the following recommendations in the Report for regulation of betting and gambling in India:

- (a) Since online betting and gambling are offered and played over 'media' (telephones, wireless, broadcasting and other like forms

1. <http://lawcommissionofindia.nic.in/reports/Report276.pdf>
2. Including the *Ramayana*, *Mahabharata*, *Vedas* and the *Smritis*.

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of communication), which is a subject that the Parliament has the legislative competence to legislate upon, the Parliament should enact a law governing online betting and gambling. The LCI further recommends that the Parliament enact a model law for regulating gambling that may be adopted by the individual states.

- (b) As horse-racing, as a consequence of being considered a game of skill, has been exempted from the ambit of blanket prohibition on 'gambling,' other skill-centric games should also be afforded this exemption.
- (c) Gambling and betting, if any, should be offered only by licenced Indian operators possessing valid licences granted by the relevant authority. It has also been recommended that the operators have the obligation to focus on the safety and protection of players indulging in the defined skill-centric games.
- (d) There should be a cap on the number of gambling and betting transactions an individual can indulge in a specific period, i.e., monthly, half-yearly. The nature of stakes should be restricted to a specific amount prescribed by law, along with compulsory linkage to a unique state-issued identification such as an Aadhar Card or PAN Card.
- (e) Gambling should be classified into two categories: 'proper gambling' and 'small gambling,' with 'proper gambling' being characterised by higher stakes. Accordingly, only individuals belonging to higher income groups may be permitted to indulge in this form of gambling, and individuals belonging to lower income groups will have to confine themselves to 'small gambling,' not being permitted to stake high amounts. Further, in order to prevent

vulnerable groups in society, the LCI recommends that such individuals who receive government subsidies, are below the age of majority or have income below the taxable range be restricted from participating in betting and gambling activities.

- (f) Websites which advertise gambling should ensure that there is no pornographic or objectionable content on their websites. Further, all gambling websites and portals must display information regarding the risks of gambling and betting, along with information on how to play responsibly.
- (g) All transactions made in relation to betting and gambling must mandatorily be cashless and usage of cash in such transactions should be penalised.
- (h) The income earned from betting and gambling should be taxable and foreign direct investment should be encouraged in the online gaming industry. However, it also recommends that the laws are adequately geared up to prevent any money laundering.
- (i) All existing laws which create an impediment to regulation of betting and gambling should be amended to permit regulated gambling and betting.
- (j) Match-fixing and sports fraud should specifically be deemed criminal offences with severe punishments.

### What could the betting and gambling scenario in India look like?

While the Report has made some interesting recommendations and has strongly, yet guardedly, recommended the controlled and regulated legalisation of betting and gambling in India, whether the Government

accepts the Report and takes such recommendations into consideration is yet to be seen at the time of publication.

While the illegal status of betting and gambling has done precious little to curb the inescapable existence of, and the resultant ill-effects of betting and gambling in India, its legalisation would definitely have a positive impact on the economy and attract foreign investment into India. The recommendations in the Report, hence, are a step in the right direction.

Having said that, the Report, as it stands today, has many *lacunae* and shortcomings which will make its implementation a practical challenge. The Report has failed to capture an in-depth analysis of the socio-economic consequences of legalising online betting and gambling in states such as Sikkim and Nagaland, that have already legalised betting and gambling. The LCI has also failed to provide an indicative draft legislation, or evolve a regulatory framework incorporating its recommendations, as required by the terms of reference made to it by the Supreme Court.

Further, should the Government choose to accept the recommendations of the LCI, and betting on games of skill is legalised, the currently illegal, yet widespread sports betting industry in India, particularly in cricket, would see an instant boom and some well-deserved light.

Should it choose to legislate on the basis of the LCI recommendations, it will be interesting to note how the Indian Parliament implements a stringent and effective law to regularise something as contentious yet all-pervasive as betting and gambling in India.