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Satchit Bhogle

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### Repository Citation

Satchit Bhogle, *Amenability of Indian Domestic Sports Governing Bodies to Judicial Review*, 27 Marq. Sports L. Rev. 153 (2016)  
Available at: <http://scholarship.law.marquette.edu/sportslaw/vol27/iss1/6>

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# INTERNATIONAL SPORTS LAW PERSPECTIVE

## AMENABILITY OF INDIAN DOMESTIC SPORTS GOVERNING BODIES TO JUDICIAL REVIEW

SATCHIT BHOGLE\*

### I. INTRODUCTION

Sports governing bodies wield enormous power, not only over the rights and interests of athletes and players, but also over the sports loving public. It is therefore essential that sports governing bodies exercise their power fairly. At the same time, sport demands that its governing bodies be allowed to make decisions autonomously and quickly, while also keeping in mind the particular requirements of each sport. Therefore, it must be asked whether, for the effective governance of sport, which includes the balancing of the interests of all stakeholders, including players, spectators, and investors (including sponsors and commercial rights holders), the decisions of sports bodies should be subject to judicial review. Some authors have begun with the hypothesis that a body, which governs a sport, even as the *de facto* governing body, *ought* to be one against which fundamental rights are enforceable.<sup>1</sup> However, this article does not take such a normative position.

This article will examine first, the source of courts' power over sporting bodies, specifically the courts' justification for holding that sports governing bodies are amenable to writ jurisdiction under Article 226 of the Indian Constitution; second, the scope of judicial review over the decisions of sporting bodies; third, the applicability of judicial review in cases where the sport has more than one sporting body; fourth, the possibility of judicial review of the decisions of private clubs and leagues; and fifth, possible solutions for ensuring a fair yet efficient sports dispute settlement mechanism, namely, the creation of a dedicated arbitral or judicial tribunal and the improvement of the existing system of judicial review.

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1. Aditya Sondhi, *The Legal Status of BCCI: Unwarranted Ad-Hocism, Constitutional Hurdles and the Pressing Need for a Cricket-Legislation*, 22 NAT'L L. SCH. INDIA REV. 111, 113 (2010).

This article will focus primarily on team sports. It will also presume that all disputes are domestic in nature, i.e., the athlete and the sporting body are both Indian entities.

## II. THE SOURCE OF COURTS' POWER OVER SPORTING BODIES

Sporting bodies are usually established as private bodies, whether as societies or as companies, with their relations with individuals and other bodies being contractual in nature. Public remedies such as writs, however, can only be sought against public bodies, and in India, fundamental rights—crucially, the right to freedom of trade and occupation and the right to fair, non-arbitrary, and non-discriminatory application of law—may be enforced only against bodies that qualify as “State” under Article 12 of the Indian Constitution.<sup>2</sup> Hence, if one were seeking public remedies against a sporting body, one would have to convince a court that the sporting body was functionally or structurally an “instrumentality of the State.”

In England, which does not have a constitution that defines what structurally comprises the State, attempts have been made to persuade courts that sporting bodies carry out “public functions.” The prima facie rule, as laid down in *Ex parte Flint Town United Football Club*, is that no writ of certiorari may be issued against domestic tribunals since their authority derives solely from contract.<sup>3</sup> Therefore, public law was sought to be invoked through the application of the public policy doctrine. In *Nagle v. Feilden*, the appellant sought a license from the Jockey Club (Club) to train horses, and thus was not herself a member of the Club.<sup>4</sup> It was contended that in the absence of a contract between the appellant and the Club, restraint of trade as a violation of public policy could not be invoked.<sup>5</sup> However, Lord Denning M.R. agreed that having a duty to act fairly would be the case when dealing with a social club, an association which had a practical monopoly in the field of horse racing, and whose actions affected an individual’s right to work.

The decision of the Court of Appeal (CA) in *Ex parte Aga Khan*,<sup>6</sup> however, seemed to disavow the rationale in *Nagle*. In the absence of an authoritative decision by the House of Lords, the CA held that while the functions of the Club may be described as public, they were not governmental. The CA conceded, like in *Nagle*, that the Club was practically a monopolist, and that a statutory

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2. See M. P. Singh, *Fundamental Rights, State Action and Cricket in India*, 13 ASIA PAC. L. REV. 203, 209 (2005).

3. R v. Football Ass’n of Wales *ex parte* Flint Town United Football Club, [1991] QB 44 (Eng.).

4. *Nagle v. Feilden* [1966] 2 QB 633, 635 (Eng.).

5. *Id.* at 644.

6. R v. Disciplinary Comm. of the Jockey Club *ex parte* Aga Khan [1993] 1 WLR 909, 923 (Eng.).

body in place of the Club would have approximately the same rules, but this did not change the fact that the Club was a private body, against whom only remedies in contract could be sought. The CA, however, did not preclude the possibility of judicial review against the decisions of the Club, and stated that, as in *Nagle*, where a petitioner has no contractual relationship with the Club, the absence of any other remedy could be significant. Hoffman L.J. held that while the Club had considerable power over an important economic activity, and even if it exercised public functions, it was a private body. Citing *Ex parte Datafin*,<sup>7</sup> he recognised the principle that the absence of a formal public source of power was not conclusive. Yet, he decided that the Panel's functions were governmental, while the Club's functions were not. Thus, regulation of sports was not seen as governmental.

However, in India, the courts are not restricted by the rules governing prerogative writs in England.<sup>8</sup> Therefore, while a series of cases, from *Rajasthan Electricity Board v. Mohan Lal*<sup>9</sup> to *Hasia v. Sehravardi*,<sup>10</sup> evolved tests for a body to be considered an "instrumentality of the State," both structural, such as the character of the body as statutory or non-statutory, the degree of control by the State over the body either by funding or by the presence of State agents within the governing structure of the body, etc., and functional, such as the public nature of the functions carried out by the body and the enjoyment of the body of a State-conferred or State-protected monopoly, the Supreme Court (SC) eventually favoured only the structural tests and stated that for a body to be an instrumentality of the State, it must be "financially, functionally and administratively dominated by or under the control of the Government."<sup>11</sup>

However, sporting bodies are not like electricity distribution boards (as in *Mohan Lal*) or like colleges (as in *Hasia*). The market for organisation of team sports is a natural monopoly, because as long as sports governing bodies demand exclusivity from its players, the best players will not compete (and thereby produce the best product) without being brought under a single governing body.<sup>12</sup> This monopoly exists equally at every level of the pyramidal

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7. See, e.g., *R v. Panel on Takeovers & Mergers ex parte Datafin* [1987] QB 815, 820 (Eng.).

8. See, e.g., *Shyam v. Nath*, (2015) 5 SCC 423, ¶ 10 (India); *Nath v. Income-Tax Officer*, (1965) 3 SCR 536, ¶ 6 (India); *Mehra v. Union of India*, (2004) DLT 114 (Del. HC) 323, ¶ 13.

9. (1967) 3 SCR 377 (India).

10. (1981) 2 SCR 79 (India).

11. *Biswas v. Indian Inst. of Chem. Biology*, (2002) 5 SCC 111, ¶ 40 (India).

12. The problems of audiences not being able see the best players compete with another as a result of there not being a single board may be seen in boxing, where four major associations, the World Boxing Association, the International Boxing Federation, the World Boxing Council, and the World Boxing Organization, compete to sanction professional bouts, and where there is a schism between

structure of sports, and even at the state or district level, it is desirable that there be only one sports governing body. However, as the sole buyer of athletes' and players' services and the sole supplier of sporting products (for professional matches), sports governing bodies have tremendous power to affect the rights and interests of both athletes and the viewing public. In *Zee Telefilms Ltd. v. Union of India*, the SC had the opportunity to seriously examine the question of whether a sports governing body was "the State," in the context of the Board of Control for Cricket in India (B.C.C.I.).<sup>13</sup> The B.C.C.I. is a private body established as a society, but has historically selected a team that plays as and is universally recognised as the Indian cricket team. Its members are various bodies for the organisation of cricket at the state level as well as certain clubs and regional associations—all private—and between them, they contract with all the recognised top level players in the country. The SC observed that the B.C.C.I. enjoyed monopolist status in the market for the organisation of professional cricket matches even though the State did not confer or protect such status.<sup>14</sup> Nevertheless, the SC held that the B.C.C.I. did not meet the structural tests to be considered State.

However, the SC did not close the door on judicial review of the decisions of sports governing bodies. In the same year as *Zee Telefilms Ltd.*, the Queen's Bench Division in *R v. Appeal Board of the Jockey Club* upheld the decision in *Aga Khan*.<sup>15</sup> The court denied that the increase in the popularity and importance of sport in the years between the decisions, as claimed by the petitioner, had any impact on the nature of the functions carried out by the body.<sup>16</sup> The court likened sport to religion, in that the government encouraged it, but did not actively interfere in it. The court also rejected the notion that government funding was the deciding factor in determining whether a body's functions were public.<sup>17</sup> However, in India, when sport (generally cricket) has been compared to religion, it has very different implications. Sport, like religion, is a sphere which the State is formally absent from, and yet one in which the State takes enormous interest. Keeping this in mind, the SC concluded that while the B.C.C.I. is not State, and therefore fundamental rights are not enforceable under Article 32 against it, it nevertheless carried out public functions (as opposed to the term "governmental functions" used in *Aga Khan*), and hence, could be

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professional and amateur boxing, though it may be argued there that the two are actually different sports.

13. AIR 2005 SC 2677 (India).

14. *Id.*

15. [2005] EWHC (Admin) 2197, ¶¶ 44–45 (Eng.).

16. *Id.* at ¶ 31.

17. *Id.* at ¶ 35.

made subject to judicial review under Article 226.<sup>18</sup>

### III. THE SCOPE OF JUDICIAL REVIEW OVER THE DECISIONS OF SPORTING BODIES

Article 226 empowers High Courts to issue writs “in the nature of” the prerogative writs of habeas corpus, *mandamus*, prohibition, *quo warranto*, and certiorari not only against the State, but to “any person or authority” for the enforcement of fundamental rights and for “any other purpose.” In *Shri Anandi Mukata Satguru (S.J.M.S. Trust) v. Rudani*, it was held that “any person or authority” under Article 226 is not confined only to statutory authorities and instrumentalities of the State, but may cover any other person or body performing public duties.<sup>19</sup> Further, the court need not only issue a writ, but may also make an order or direct a person or authority as it considers appropriate.<sup>20</sup> Article 226 therefore gives the courts enormous power over sporting bodies. Article 32 of the Indian Constitution similarly empowers the SC to issue the same writs, though only for the enforcement of fundamental rights.

Generally, the courts have professed to maintain a deferential approach to specialised bodies. The SC has held that the courts should refrain from interfering in the decision of an expert body, tribunal, or a specially constituted body.<sup>21</sup> The SC lacks the competence to make decisions in specialised areas, as well as in such specialised bodies. These could also be in the nature of a sporting body,<sup>22</sup> whether in the making of decisions purely related to sport, such as team selection, or the making of business decisions related to the operations of the sport. However, it has been held that any authority that “decides” anything has a duty to act fairly.<sup>23</sup> To decide fairly is to consider rational factors, avoid irrational factors, and act in a non-discriminatory and non-arbitrary fashion.

If we turn once again to the B.C.C.I., we can see that the procedure for conducting enquiries into an alleged breach of the B.C.C.I. Rules and

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18. *See* Bd. of Control for Cricket in India v. Cricket Ass’n of Bihar, (2015) 3 SCC 251 (India); *Zee Telefilms Ltd.*, AIR 2005 SC at ¶ 34. *See also* Bd. of Control for Cricket in India v. Netaji Cricket Club, (2005) 4 SCC 741, ¶¶ 80–81 (India).

19. *Shri Anandi Mukata Satguru (S.J.M.S. Trust) v. Rudani*, (1989) 2 SCR 697 (India).

20. *See* Irani v. State of Madras, (1962) 2 SCR 169 (India); *Kochunni v. State of Madras*, AIR 1959 SC 725 (India).

21. *See* Verma v. Union of India, (1994) 1 SCR 700 (India); *Clariant Int’l Ltd. v. Sec. & Exch. Bd. of India*, AIR 2004 SC 4236 (India).

22. JUSTICE MUKUL MUDGAL, LAW & SPORTS IN INDIA: DEVELOPMENTS, ISSUES AND CHALLENGES 309 (2011).

23. *Kraipak v. Union of India*, (1969) 2 SCC 262 (India).

Regulations meets the principles of natural justice by providing parties with a reasonable opportunity to be heard and to be represented by a lawyer.<sup>24</sup> Nevertheless, the Court in *Board of Control for Cricket in India v. Cricket Ass'n of Bihar (B.C.C.I. v. C.A.B.)* heard petitions for the investigation into allegations of illegal betting and spot fixing<sup>25</sup> in the Indian Premier League (I.P.L.) (organised by the B.C.C.I.) and appointed its own panel over the independent panel constituted by the B.C.C.I., comprised of retired judges of the Madras High Court.<sup>26</sup> Fixing of cricket matches or any part thereof is not an offence under any law in India. Legally speaking, spot fixing, notwithstanding that it hurt sports fans and the game generally, amounted only to a breach of the B.C.C.I. Anti-Corruption Code, the Code of Conduct for Players and Team Officials, the I.P.L. Operational Rules, and the franchise agreement between the I.P.L. and team owners—all private contracts between the B.C.C.I. and other private parties. The SC thus usurped the power of the B.C.C.I. to investigate alleged violations and to impose penalties against persons who had breached obligations under these contracts. Though one of the team owners investigated was the son-in-law of the B.C.C.I. President, who was also a director of the company that owned the team, the said President had stepped aside voluntarily and could not exercise his powers by court order.<sup>27</sup> Further, members of the panel created by the B.C.C.I. were independent of the B.C.C.I. and were respected former judges of a High Court (as a disciplinary proceeding, and as per agreement between the parties,<sup>28</sup> the B.C.C.I. was entitled to appoint the members of the panel). The panelists were paid by the B.C.C.I., but did not stand to gain from any recommendations made; the members of the SC's own panel were also paid by the B.C.C.I. Finally, neither panel was governed by formal rules of evidence and criminal procedure, but only by the principles of natural justice. It is difficult to see then what permitted the SC to sit in review

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24. See *BD. OF CONTROL FOR CRICKET IN INDIA, MEMORANDUM AND RULES AND REGULATIONS* 48–49 (2012) <https://relaunch-live.s3.amazonaws.com/cms/documents/BCCI%20Rules%20and%20Regulations.pdf> [hereinafter *B.C.C.I. RULES AND REGULATIONS*].

25. Spot fixing involves the prearranging of a specific part of a match, rather than the outcome of the match itself. In the game of cricket, successful and unsuccessful attempts have been made to fix the outcome of a single ball, e.g., that the bowler will bowl a “wide” or a “no ball”—essentially an invalid delivery—or to fix the number of runs scored off a single over, i.e. a set of six balls which a single bowler may bowl consecutively.

26. *Petition for Special Leave to Appeal, Cricket Ass'n of Bihar v. Bd. of Control for Cricket in India*, No. 26633/2013, (Oct. 8, 2013) (India).

27. *Petition for Special Leave, Cricket Ass'n of Bihar v. Bd. of Control for Cricket in India*, No. 26633/2013, (Sept. 27, 2013) (India).

28. *Indian Premier League, Anti Corruption Policy*, IPLT20, <http://www.iplt20.com/about/2016/anti-corruption-policy> (last visited Dec. 15, 2016); *Indian Premier League, Code of Conduct for Players and Team Officials*, IPLT20, <http://www.iplt20.com/about/2016/code-of-conduct-for-players-and-team-officials/> (last visited Dec. 15, 2016).

of the proceedings. The SC's panel thereafter exceeded its terms of reference to make observations drawing attention to a clandestine amendment to the B.C.C.I. Rules, allowing B.C.C.I. administrators to own teams in the league and thereby create a conflict of interest. The SC, while it refused to hold the amendment *per se* illegal, struck it down on grounds that the B.C.C.I. was performing public functions, which could be performed only in accordance with the principles of natural justice. Natural justice is a component of Article 14 of the Indian Constitution, but the SC in *B.C.C.I. v. C.A.B.* held that Article 14 was not the sole repository of natural justice in the Indian Constitution. In this manner, the SC surreptitiously made a fundamental right enforceable against the B.C.C.I. It also constituted a committee to make recommendations on amendments to the B.C.C.I. Rules, whose expenses are borne by the B.C.C.I. These have included sweeping changes such as the ineligibility of ministers and government servants from holding positions on the Apex Council of the B.C.C.I., never mind their experience in public administration.<sup>29</sup> Despite being recommendations, the SC has strongly hinted that it will enforce them against the BCCI.<sup>30</sup> Even if they are not made mandatory, given the enormous influence that even the SC's recommendations have, such rulings could act as coercion against sporting bodies by legitimising public outcry.

The SC in *B.C.C.I. v. C.A.B.* also assayed the amendment on the anvil of public policy. It held that any deviation from or abrogation of the principles of "justice, fairness, good conscience, equity and objectivity," i.e., the "fundamental principles of law,"<sup>31</sup> would be opposed to public policy.<sup>32</sup> However, while it appears that public policy is the same as natural justice, natural justice cannot be abrogated by the legislature, while public policy is a

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29. SUPREME COURT COMM., PART TWO: REPORT ON CRICKET REFORMS – SUPREME COURT COMMITTEE ON REFORMS IN CRICKET 81 (2016), <https://lodhacommittee.wordpress.com/2016/01/04/report-on-cricket-reforms/> (follow "FINAL REPORT – VOLUME 1"). The Committee has expressed a preference for former players running the administration of sport, which is a preference shared by judges. During a period when the President of the B.C.C.I. was under investigation, the Court appointed a retired former captain of the Indian cricket team as the interim commissioner of the IPL. The appointee's experience and qualifications in sports administration, if they were considered, were not recorded. *See* Petition for Special Leave, Bd. of Control for Cricket v. Cricket Ass'n of Bihar, No. 26633/2013, (Mar. 28, 2014) (India).

30. *See Supreme Court Tells BCCI: Fall in Line, Lodha Panel Report Deserves Respect*, INDIAN EXPRESS, [indianexpress.com/article/sports/cricket/supreme-court-gets-stern-with-bcci-asks-it-to-implement-lodha-panel-recommendations](http://indianexpress.com/article/sports/cricket/supreme-court-gets-stern-with-bcci-asks-it-to-implement-lodha-panel-recommendations) (last updated Feb. 5, 2016) (quoting the Court as saying, "The best thing is to fall in line and follow the suggestions to save the trouble"); Utkarsh Anand, *Supreme Court 'Inclined to Implement' All Recommendations by Lodha Panel*, INDIAN EXPRESS, <http://indianexpress.com/article/sports/cricket/sc-pulls-up-bcci-again-says-it-is-practically-corrupting-its-units> (last updated Apr. 6, 2016) (quoting the Court as saying that it will be "inclined to implement all its recommendations").

31. *See, e.g., Oil & Nat. Gas Corp. v. Saw Pipes Ltd.*, (2003) 5 SCC 705 (India).

32. *Bd. of Control for Cricket in India v. Cricket Ass'n of Bihar*, (2015) ¶ 90 (India).

creature of the legislature and executive.<sup>33</sup> The Arbitration and Conciliation (Amendment) Act, 2015 has been passed and has sought to implement the recommendations of the 246th Law Commission Report (Law Commission) with the scope of “public policy” as a ground for setting aside an arbitral award under Section 34.<sup>34</sup> In *Renusagar Power Plant Co. Ltd. v. General Electric Co.*, the SC held that an award would be contrary to public policy if such enforcement would be contrary to “(i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality.”<sup>35</sup> The Law Commission recommended that these be restricted to “[i] fundamental policy of Indian law; or . . . [(ii)] most basic notions of morality or justice.”<sup>36</sup> Since the courts regard the decisions of sporting bodies with a similar deference as they do arbitral awards, it needs to be asked whether such a restriction on the scope would affect the scope of judicial review of the decisions of sporting bodies. This is an especially difficult question, given that the SC did not clarify the distinction between “fundamental policy of Indian law” (which will remain unamended following the passing of the amendment) and “morality and justice” (which will be amended). It does not seem that the manner in which the B.C.C.I. acted was contrary to the “fundamental policy of Indian law” or the “most basic notions of morality or justice.”

The natural question that arises is whether matters of team selection would be subject to judicial review. It was argued that such inclusion would not allow selectors the discretion to choose players on admittedly subjective criteria,<sup>37</sup> and that allowing such challenges would open the floodgates of litigation and not allow sporting bodies to function. However, from the decisions of the courts, no question appears to be beyond scrutiny. In *Mehra v. Union of India*, it was held that the actions of the B.C.C.I. in the sphere of public law would be subject to judicial review.<sup>38</sup> However, in *B.C.C.I. v. C.A.B.*, it was held that the selection of the national team was a public function.<sup>39</sup> Though the SC in *Zee Telefilms Ltd.* refused to answer whether “for entering into a contract with the players or for their induction in a team,” Articles 14 and 16 had to be complied

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33. *Premium Granites v. State of Tamil Nadu*, (1994) 1 SCR 579, ¶ 54 (India); *Balco Emps. Union v. Union of India*, (2001) 2 SCC 333, ¶ 46 (India) (quoting *Premium Granites*, 1 SCR 579, at ¶ 54).

34. LAW COMM’N OF INDIA, AMENDMENTS TO THE ARBITRATION AND CONCILIATION ACT 1996, at 22 (2014), <http://lawcommissionofindia.nic.in/reports/Report246.pdf>.

35. AIR 1994 SC 860, ¶ 66 (India).

36. LAW COMM’N OF INDIA, *supra* note 34, at 54–55.

37. See Subhajt Banerji, *Has the Supreme Court’s Recent Judgement Rendered the BCCI’s Selection Process More Transparent?*, CARAVAN (Mar. 16, 2015), <http://www.caravanmagazine.in/vantage/supreme-court-recent-judgement-bcci-selection-process-transparent>; See also *Mehra v. Union of India*, (2004) DLT 114 (Del. HC) 323, ¶ 14 (India).

38. *Id.* at ¶ 15.

39. *Bd. of Control for Cricket in India v. Cricket Ass’n of Bihar*, (2015) 3 SCC 251, ¶ 30 (India).

with.<sup>40</sup> In light of the decision in *B.C.C.I. v. C.A.B.*, it must be said that at least the principles of natural justice must be followed. At least guidelines that appear to be arbitrary or discriminatory on their face, such as that players from a particular state or community that are ineligible for selection, may be struck down.<sup>41</sup> In *Kirandeep v. Chandigarh Rowing Ass'n*, though it was decided before either of the above cases, questions of selection for the Senior National Rowing Championship were heard.<sup>42</sup>

Thus, the scope of judicial review possessed (or perhaps claimed) by the courts is almost unlimited in respect to the public functions exercised by the sporting body. The ordinary relationships of the sporting body governed by contract or its internal rules and regulations should remain unaffected,<sup>43</sup> though this may depend on the nature of the sporting body, as demonstrated in the following chapters.

#### IV. THE DIFFERENCE BETWEEN MONOPOLISTIC SPORTING BODIES AND COMPETING SPORTING BODIES

In 2008, the Indian Olympic Association (I.O.A.) suspended the Indian Hockey Federation (I.H.F.) for corruption on the part of its officials, and established an ad hoc committee to run Indian hockey. A year later, the Fédération Internationale de Hockey sur Gazon (International Hockey Federation or F.I.H.) threatened to take away the right to host the 2010 Men's Hockey World Cup and the right to participate in international events from India over the existence of separate federations for men and women in the country, which was contrary to the F.I.H. Statutes.<sup>44</sup> Subsequently, the I.O.A. established a rival federation called Hockey India (H.I.). Under the rules of the F.I.H., only one sporting body in a country can gain F.I.H. affiliation.<sup>45</sup> The F.I.H. recognised H.I. and therefore, events organised by the I.H.F. became un sanctioned events. The F.I.H. threatened to ban players who participated in the I.H.F.-run World Series Hockey (W.S.H.), jeopardising their chances to participate in F.I.H. events, including the World Cup. The ban was to apply prospectively. The question in such a case, therefore, is whether both bodies can be considered to perform public functions and therefore be subject to the

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40. *Zee Telefilms Ltd. v. Union of India*, AIR 2005 SC 2677 (India).

41. *Mehra*, (2004) DLT 114 at ¶ 14; *Batra v. Union of India*, ILR 4 (Del.) 280, ¶ 276.

42. 2004 AIR (P&H) 278 (India).

43. *E.g.*, *Varma v. Union of India*, 2015 KLJ 3 (Kerala HC) 630, ¶ 50 (India); *Motin v. Assam Cricket Ass'n*, 2006 GLT 2 (Gauhati HC) 156, ¶ 17 (India).

44. *See* INT'L HOCKEY FED'N: STATUTES art. 2.3(b) (2015), <http://www.fih.ch/media/813163/statutes-passed-by-fih-congress-01-11-14.pdf>.

45. *Id.* at art. 2.1.

writ jurisdiction of the courts under Article 226.

Some of the major reasons for the *Zee Telefilms Ltd.* court's finding that the B.C.C.I. performed public functions was that it selects the national team and exclusively regulates and controls the game of cricket.<sup>46</sup> In other words, a public functionary is one which controls the national dimension of the sport and acts as a gatekeeper to the market for the service of playing sport. However, that is not the case in club sports or in the case of a sporting body that does not select the national team. Section 20(2) of the Draft National Sports Development Bill, 2013 provides that there shall be only one National Sports Federation for each sport.<sup>47</sup> Hence, prior to the recognition of H.I. by the F.I.H., the I.H.F. could be said to have exercised public functions (though possibly not during the period of its suspension by the I.O.A.), and following the recognition of H.I., H.I. can be said to exercise public functions.

Thus, in the case of competing sports governing bodies, the body which selects the national team or receives official recognition from an international body such as the I.O.C. may be considered to be the one exercising public functions, and when another body gets to select the national team or receives exclusive recognition, this status may shift.

#### V. THE DIFFERENCE BETWEEN SPORTS GOVERNING BODIES AND PRIVATE CLUBS OR LEAGUES

As mentioned in the previous section, the fact that the B.C.C.I. selected the national team was a crucial factor in it being held to be exercising public functions. This is similar to the conclusion reached in the New Zealand case of *Finnigan v. New Zealand Rugby Football Union Inc.*,<sup>48</sup> where it was held that a decision by the Rugby Union "affects the New Zealand community as a whole and so relations between the community and those, like the plaintiffs, specifically and legally associated with the sport."<sup>49</sup> The court went on to say that while the Rugby Union was technically a private and voluntary association, as a body assuming national importance, its decisions fell in the intersection between private and public law.<sup>50</sup> A club, on the other hand, could not be said to exercise such functions, no matter its popularity and reach, because it could not be said to affect the relations between the community at the national level and the persons specifically associated with the sport.

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46. *Zee Telefilms Ltd. v. Union of India*, AIR 2005 SC 2677 (India).

47. The National Sports Development Bill, 2013, 64th Parliament (India 2013), <http://yas.nic.in/sites/default/files/File921.pdf> (draft).

48. [1985] 2 NZLR 159 (CA).

49. *Id.* at ¶ 4.

50. *Id.* at ¶ 5.

That is not to say, however, that there can be no legal remedies against professional clubs. Remedies can be pursued against clubs within the rules of the governing body, and such decisions made by the governing body are subject to judicial review.

Truly private professional leagues can be distinguished from sports governing bodies. In *Secretary, Ministry of Information & Broadcasting v. Cricket Ass'n of Bengal*,<sup>51</sup> the SC differentiated between organisers of matches with a mandate to promote the sport, like the B.C.C.I. or the Cricket Association of Bengal, and business organisations, with the sole intention of maximising profits through the telecast of games.<sup>52</sup> Though private leagues would find it difficult to operate without the oversight or support of the governing body for the sport in question, nevertheless, such a body would be akin to a competing sporting body and, as shown in the previous section, its decisions would be outside the scope of judicial review.

The Indian Premier League (I.P.L.) is an interesting exception to this rule. Being financially sustained by the B.C.C.I. and with its Governing Council, a committee under the B.C.C.I., it is essentially a venture of the B.C.C.I., and is within the control of the B.C.C.I. The Operational Rules of the I.P.L. can be assailed where there is a potential conflict of interest, as in *B.C.C.I. v. C.A.B.*<sup>53</sup> Where the clubs are members of the Governing Council, such a process will always be vitiated, as per *Kraipak v. Union of India*.<sup>54</sup> This is not the case with the I.P.L., but it is with the B.C.C.I. For instance, disputes between the B.C.C.I. and the Himachal Pradesh Cricket Association (H.P.C.A.) would have been suspect not long ago, because Mr. Anurag Thakur was then simultaneously B.C.C.I. Secretary and H.P.C.A. President. In respect to the I.P.L., it was sought to be argued that a conflict of interest could not arise where an office bearer of the B.C.C.I. was also the owner of an I.P.L. franchise because the I.P.L. was a purely commercial venture without the public trappings of the B.C.C.I.<sup>55</sup> However, this contention was rejected, and it was held that the B.C.C.I.'s duty was to prevent sporting fraud and maintain the public's faith in the values of the sport, which would include conflict of interest situations.<sup>56</sup> This shows that the public nature of functions apply no matter the format or the formality of the event. This has a serious impact on smaller governing bodies, such as the Amateur Kabaddi Federation of India (Federation), which may be called upon to

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51. AIR 1995 SC 1236 (India).

52. *Id.* at ¶ 17.

53. *Bd. of Control for Cricket in India v. Cricket Ass'n of Bihar*, (2015) 3 SCC 251, ¶ 81 (India).

54. (1969) 2 SCC 262 (India). *See Mohapatra & Co. v. Orissa*, (1984) 4 SCC 103 (India).

55. *Bd. of Control for Cricket in India*, (2015) 3 SCC, at ¶ 91.

56. *Id.* at ¶¶ 90–92.

oversee the Pro Kabaddi League, which was floated and is managed by a private company, but which the Federation has sanctioned.

## VI. SOLUTIONS

The judicial review of the decisions of sporting bodies has the disadvantage of the usual delays that accompany the Indian judicial system. This can be observed in cases like *Kirandeep v. Chandigarh Rowing Ass'n*,<sup>57</sup> where, even though the courts ruled in favour of the petitioners, the judgement was delivered too late for the athletes to receive any real relief.<sup>58</sup>

This section therefore discusses two solutions to balance the priorities of ensuring fairness in the decisions of sports governing bodies and allowing for efficient dispute resolution that meets the needs of sports: the creation of a dedicated sports arbitral or judicial tribunal, and the improvement of the existing system of judicial review through the evolution or adoption by the courts of principles applicable to sporting disputes.

### A. *Dedicated Sports Arbitral or Judicial Tribunal*

Sports events require extremely timely delivery of decisions. When a competition is ongoing, a dispute may need to be resolved within a time frame of as little as twenty-four hours. Given the seriousness of the consequences of such decisions, such a short time period may not allow for the parties to exercise several basic procedural rights, including the right to prepare an adequate defence, the right to produce evidence in one's defence, and the substantial realisation of the right to be heard. Andrew Goldstone has criticised the system of 'provisional suspension' under the World Anti-Doping Agency (W.A.D.A.) Code, under which the athlete who tests positive for doping is first suspended and then given a hearing as contrary to the right to a fair hearing.<sup>59</sup> A result of such a system is that the athlete may be found innocent of a doping offence following the hearing, yet he or she loses his or her chance to participate in the event or match. In such types of disputes, the only alternative to provisional suspension may be adjudication in under twenty-four hours, which will necessitate some sacrifice of the substantial realisation of the right to be heard in order for the athlete to be able to get any relief at all.

The ideal form of dispute resolution mechanism for sports disputes is thus

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57. *Kirandeep v. Chandigarh Rowing Ass'n*, 2004 AIR (P&H) 278 (India).

58. See Writ Petition, *Dhankhar v. Union of India*, No. 3914/2014, (Del. HC) (July 3, 2014) (India); Writ Petition, *Kerala Cycle Polo Ass'n v. Cycle Polo Fed'n of India*, No. 186/2014, (Kerala HC) (Feb. 13, 2015) (India).

59. Andrew Goldstone, Note, *Obstruction of Justice: The Arbitration Process for Anti-doping Violations During the Olympic Games*, 7 CARDOZO J. CONFLICT RESOL. 361, 370 (2006).

arbitration that is reasonably insulated from the interference of the courts.<sup>60</sup> Arbitration is generally considered to be speedier than litigation, and can ensure arbitrators having expertise in the field and being sensitive to the requirements of the subject matter.<sup>61</sup> Moreover, a small pool of specialist arbitrators may deliver consistent outcomes while non-specialist judges may not. Even though the process of arbitration excludes the jurisdiction of the courts, it is argued that it offers protections similar to those offered by the judicial process.<sup>62</sup>

By joining a sporting club or by entering a sports competition, an athlete or player consents to the rules of the governing body,<sup>63</sup> which may include the exclusive jurisdiction of private dispute resolution fora, but it may be argued that such consent is illusory in light of the fact that he or she has no choice but to do so if he or she wants to participate in the given sporting event.<sup>64</sup> In such a case, the independence of bodies adjudicating on disciplinary measures enacted by sporting bodies becomes very important. In the case of *Gundel v. Fédération Équestre Internationale* (International Equestrian Federation or F.E.I.),<sup>65</sup> the Swiss Federal Tribunal, while dismissing Gundel's appeal against the decision of the Court of Arbitration for Sport (C.A.S.), noted that if it had a similar action brought in respect of the I.O.C., it would be likely to find that the C.A.S. was not sufficiently independent, given the significant control that the I.O.C. had over it.<sup>66</sup> The C.A.S. was directly funded by the I.O.C. and in smaller amounts by international sports federations and had arbitrators appointed to the panel by the F.E.I.. Subsequently, however, the I.O.C. created the International Council of Arbitration for Sport (I.C.A.S.) to act as an administrative barrier between itself and the C.A.S. and diversified the C.A.S.'s sources of funds, thereby reducing the I.O.C.'s share of funding. The IOC also created separate divisions for hearing original disputes (generally being of a commercial nature) and for hearing appeals from the decisions of federations.

Dispute resolution mechanisms under the rules of the various governing bodies of team sports in India generally do not display a great deal of independence. For instance, the All India Football Federation (A.I.F.F.) provides for a Disciplinary Committee,<sup>67</sup> whose decision may be appealed

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60. See MUDGAL, *supra* note 22, at 310.

61. See *id.*

62. SIMON GARDINER ET AL., *SPORTS LAW* 142 (4th ed. 2012).

63. See *Modahl v. British Athletic Fed'n* [2001] EWCA (Civ) 1447 (Eng.).

64. Philip Morris & Gavin Little, *Challenging Sports Bodies' Determinations*, 17 CIV. JUST. Q. 128, 145 (1998).

65. Tribunal fédérale [ATF] 1993, 119 II 271 (Switz.).

66. See GARDINER ET AL., *supra* note 62, at 139.

67. ALL INDIA FOOTBALL FEDERATION CONSTITUTION arts. 49.1, 50, (2004), <https://www.the-aiff.com/downloaddocumentlibrary.php?id=58> [hereinafter AIFF CONSTITUTION].

before an Appeal Committee.<sup>68</sup> Decisions and sanctions of the A.I.F.F. (not including suspensions of up to four matches or up to three months) may be subjected to arbitration after exhaustion of all previous stages of appeal at the club, state association, and A.I.F.F. level. All the arbitrators are nominated by the A.I.F.F. itself, though it provides that they shall be “independent.”<sup>69</sup> Though the A.I.F.F. Constitution and Disciplinary Code are not clear on this point, the fees of arbitrators have been paid by the A.I.F.F. on at least one occasion.<sup>70</sup> The Memorandum and Rules and Regulations of Hockey India meanwhile provide that an Enquiry Committee can be appointed by H.I. itself subject to an appeal to its own Executive Board and then to its General Council.<sup>71</sup> Similarly, the Rules and Regulations of the B.C.C.I. for a Disciplinary Committee of B.C.C.I. officials (including the President) makes decisions on the preliminary inquiry of a commissioner appointed by the B.C.C.I. President with no appeal.<sup>72</sup> Arbitration is reserved for select disputes relating to elections or between members of the B.C.C.I. and the arbitrator, or arbitrators are appointed by the B.C.C.I. President himself, or, where the dispute concerns the election of a President, by the Working Committee of the B.C.C.I.<sup>73</sup> Other disputes have been litigated in the courts.

Fairness and independence in the dispute resolution mechanisms of sports governing bodies will help minimise litigation. The adoption of an arbitral mechanism will further decrease judicial oversight, as the courts do not interfere with the decisions of arbitrators, and then to set them aside in very limited cases.<sup>74</sup> Nevertheless, the courts shall and ought to remain as an avenue of last resort for ensuring that arbitration processes remain fair and independent, while also ensuring they adhere to the principles of natural justice.<sup>75</sup>

Justice Mukul Mudgal has stated that there are discrepancies in the decisions of internal dispute resolution bodies as well as a need to ensure consistency and uniformity in the principles of sports law by following precedent.<sup>76</sup> The rules and regulations of the concerned sporting bodies

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68. *Id.* at art. 51.

69. *Id.* at art. 52.1.

70. Rahul Bali, *The AIFF Hasn't Followed It's [sic] Own Constitution – Mohun Bagan*, GOAL.COM (Sept. 23, 2009), <http://www.goal.com/en-india/news/136/india/2009/09/23/1517630/the-aiff-hasnt-followed-its-own-constitution-mohun-bagan>.

71. HOCKEY INDIA, MEMORANDUM AND RULES AND REGULATIONS OF HOCKEY INDIA art. 18 (2013), <http://hockeyindia.org/images/stories/2012/09/Hi-Constitution.pdf>.

72. B.C.C.I. RULES AND REGULATIONS, *supra* note 24, at r. 32.

73. *Id.* at r. 37.

74. *See* Arbitration and Conciliation Act, No. 26 § 34(2), Acts of Parliament, 1996 (India).

75. Morris & Little, *supra* note 64, at 129.

76. MUDGAL, *supra* note 22, at 309.

constitute the substantive law governing disputes, but there must be a body of substantive law to fall back on when the rules and regulations fail to address an issue, or else uniformity and predictability may not be achieved.<sup>77</sup> The C.A.S. can be said to harmonise global sports law,<sup>78</sup> but this will only apply to sports governing bodies whose constitutions provide for an ultimate appeal to the C.A.S.. Moreover, the C.A.S. arbitration is expensive with its seat in Lausanne, Switzerland and the nearest venue to India is in Abu Dhabi, U.A.E. Hence, providing for an appeal to the C.A.S. is unrealistic as a solution. Domestic sports arbitration is necessary which can provide timely dispute resolution while offering an adequate level of expertise in the field of sports.

The Indian Ministry of Youth Affairs and Sports first circulated a National Sports Development Bill (Bill) for public comment in 2011. The 2013 version of that Bill provides for the creation of a Sports Appellate Tribunal (Tribunal).<sup>79</sup> It is not explicitly stated what disputes the Tribunal shall be empowered to hear, but it is specified that they will not include disputes related to doping<sup>80</sup> and disputes arising during the Olympic Games, Commonwealth Games, or Asian Games.<sup>81</sup> Moreover, the Bill provides for the transfer of all civil disputes in which a National Sports Federation (N.S.F.) or the I.O.A. is a party pending before any court or authority (other than a High Court or the SC),<sup>82</sup> though this would likely not include arbitration.<sup>83</sup> Finally, the Bill places a bar on civil courts from hearing any dispute over which the Tribunal shall have jurisdiction,<sup>84</sup> which would include a High Court having original civil jurisdiction.

In light of the negative definition of the jurisdiction of the Tribunal under the Bill, it is unclear what disputes will actually be heard by the Tribunal, apart from appeals from certain decisions of bodies named in the Bill, such as appeals from decisions of the Ethics Commission or disputes arising out of accreditation

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77. Michael Straubel, *Enhancing the Performance of the Doping Court: How the Court of Arbitration for Sport Can Do Its Job Better*, 36 LOY. U. CHI. L.J. 1203, 1223 (2005).

78. Lorenzo Casini, *The Making of a Lex Sportiva: The Court of Arbitration for Sport "The Provider"* 16 (Inst. Int'l Law & Justice, Working Paper No. 2010/5).

79. The National Sports Development Bill, 2013, 64th Parliament, § 27(1) (India 2013), <http://yas.nic.in/sites/default/files/File921.pdf> (draft).

80. *Id.* § 29(b).

81. *Id.* § 29(a).

82. *Id.* § 31.

83. *S.B.P. & Co. v. Patel Eng'g Ltd.*, (2005) 8 SCC 618, ¶ 45 (India) (holding that Art. 227 of the Constitution, which provides the High Courts with supervisory jurisdiction over all "courts and tribunals" within their territorial jurisdiction, could not be invoked against the orders of an arbitral tribunal.).

84. The National Sports Development Bill, 2013, 64th Parliament, § 32 (India 2013), <http://yas.nic.in/sites/default/files/File921.pdf> (draft).

of National Sports Federations.<sup>85</sup> However, the name of the Tribunal suggests that the Tribunal will not have original jurisdiction, and will allow disciplinary action against athletes to be taken by the sporting bodies. This suggests that, similar to the existing system of judicial review, the role of the Tribunal would be to ensure that the body having original jurisdiction to hear the dispute has followed the principles of procedural fairness. The influence of the creation of the Tribunal on the internal appeals and arbitral processes of sporting bodies remains unclear. However, the members of the Tribunal will be appointed by the central government on the recommendation of the Chief Justice of India, Secretary of the Department of Sports, and the President of the National Olympic Committee or his nominee. This appears to be a body quite independent of sporting bodies, and the appointment of regular members should create some manner of jurisprudence or precedent to govern sports related disputes generally.

The exclusion of the jurisdiction of the High Courts would appear to foreclose public law remedies against sporting bodies. However, it has been held by the SC on multiple occasions, notably in *Chandra Kumar v. Union of India*, that the writ jurisdiction of the courts cannot be barred by statute.<sup>86</sup> However, the High Courts may be reluctant to exercise their powers in light of the existence of the Tribunal.<sup>87</sup>

#### B. *Operating Within the Existing System of Judicial Review*

In light of the fact that the Draft National Sports Development Bill, 2013 has not been passed into law, and the difficulties in creating a pool of arbitrators with sufficient expertise to constitute a standing tribunal, possible solutions within the existing structure of judicial review must be examined.

The courts have responded to sports disputes in an ad hoc fashion. Certain trends can be observed, even while the decisions of the courts have been passed without reference to precedents in sports related disputes. The courts have disapproved of disputes in sports administration being litigated upon,<sup>88</sup> and have placed the interests of athletes and the sports-viewing public in the efficient

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85. *Id.* §§ 17, 23(2).

86. (1997) 3 SCC 261 (India).

87. *Id.* at ¶ 100. In *Bihar v. Jain Plastics and Chemicals*, (2002) 1 SCC 216 (India), the Supreme Court held that while the Court has jurisdiction to issue a writ even in matters of contractual breach, the existence of an “alternative and equally efficacious remedy” is a good ground for refusing to exercise such discretion. An independent appellate tribunal like the SAT would constitute such an alternative efficacious remedy. On the other hand, the Supreme Court in *Wadia v. Board of Trustees, Port of Mumbai*, (2004) 3 SCC 214 (India), held that judicial review may be permissible where there is a public law element involved. Ultimately, each case must be determined on its facts.

88. *Madhya Pradesh Triathlon Ass’n. v. Indian Triathlon Fed’n*, (1996) 11 SCC 593, ¶ 1 (India).

running of sports over the formal rights and obligations provided for in the agreements entered into by sporting bodies. In *Murugon v. Fencing Ass'n of India*,<sup>89</sup> the SC, rather than sift through the myriad claims in a matter relating to allegations of rigged elections, called for fresh elections within two months and appointed an observer.<sup>90</sup> Similarly, in *Indian Hockey Federation v. Union of India*, in a dispute relating to whether the I.H.F. or H.I. was the recognised body for hockey in India, the Delhi High Court provisionally accepted the contention of H.I. that it was a purely private body, and allowed elections to be held without a government observer while the dispute was being heard.<sup>91</sup> The courts have also performed a role similar to that of mediators. In *Carvalho v. Union of India*, the Delhi High Court heard a Public Interest Litigation seeking to permit hockey players to participate in the W.S.H. without the risk of being banned.<sup>92</sup> The Delhi High Court, relying on interim orders of the SC recognising H.I. as the legitimate authority to select the national team (and therefore to implicitly enforce the rules of the F.I.H. and bar players from participating in unsanctioned events), nevertheless took note of the fact that the ban imposed operated prospectively from a date after a number of players had signed agreements with the W.S.H., and allowed the players who had already signed with the W.S.H. to participate in it, subject to their availability at national camps. The justification for such a judgement was the interests of players to earn a living.<sup>93</sup> It did not direct, but rather recommended to H.I. that it persuade the F.I.H., which was beyond the jurisdiction of the court, to agree to sanction the W.S.H. so long as it did not clash with international events organised by the F.I.H.<sup>94</sup>

Hence, though the body of case law is small, it can be seen that some judges are sensitive to the requirements of sports dispute resolution. However, these decisions must be seen as precedent and studied by courts hearing sports disputes. Until then, there can be no guarantee for uniformity of decisions.

## VII. CONCLUSION

Sports governing bodies have not been found to be “State” under Article 12 of the Indian Constitution, but have been made amenable to the writ jurisdiction of the High Courts under Article 226. This is because while they are not controlled by the State, they nevertheless exercise public functions by selecting a national team and exclusively regulating their respective sports. The scope of

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89. (1991) 1 SCR 658 (India).

90. *Id.* at ¶¶ 12–13.

91. Writ for Petition, No. 4978/2010, (Del. HC) (July 27, 2010) (India).

92. 2012 DLT 187 (Del.) 524 (India).

93. *Id.* at ¶ 23.

94. *Id.* at ¶ 30.

judicial review is almost boundless; it extends to all public functions carried out by the sporting body, including team selection, and has, in *B.C.C.I. v. C.A.B.*, included the supplanting of the internal processes of the body. However, a distinction must be made between monopolistic sporting bodies and competing sporting bodies, and between sports governing bodies and private clubs and leagues. While the decisions of the former in each case are subject to judicial review, the decisions of the latter are unlikely to be.

The judicial process is slow and may not be suited for the demands of sport. Arbitration is the ideal alternative, though the independence of the arbitrators must be ensured. However, there is also a need for uniformity in the decisions of sporting bodies, which can be realised through the creation of a standing arbitral or judicial tribunal. However, as the National Sports Development Bill, 2013, which proposes such a tribunal, not been enacted into law, the existing system of judicial review must be improved, with judges being made cognisant of the requirements of sport.