

GAME, SET AND MATCHLESS...

A READER ON SPORTS & LAW



धर्मो रक्षति रक्षितः

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CONTENTS

<i>Foreword</i>	v
<i>Preface</i>	vi
<i>Contributors Profile</i>	viii

PART I: GOVERNANCE ASPECT OF SPORTS

1. OVERVIEW OF SPORTS LAW <i>Justice Mukul Mudgal</i>	3
2. GOOD GOVERNANCE IN INDIAN SPORTS <i>Mr. Vidushpat Singhania</i>	17
3. LEGAL AND POLICY DIMENSIONS IN INDIA FOR PUBLIC-PRIVATE PARTNERSHIPS IN SPORTS <i>Dr. Sairam Bhat and Ms. Pankhuri Agrawal</i>	33
4. PLAYING IN THE CORRIDOR OF UNCERTAINTY: THE IMPACT OF THE JUSTICE R.M. LODHA COMMITTEE REPORT ON SPORTS GOVERNANCE IN INDIA <i>Mr. Sheshank Shekar and Mr. Anirban Saikia</i>	56
5. SELECTION OF ATHLETES IN INDIA <i>Ms. Aahna Mebrotra</i>	84

PART II: COMMERCIAL LAW ASPECT OF SPORTS

6. SPORTS AND INSURANCE LAW : A NOTE ON INTERFACE <i>Dr. S. V. Joga Rao</i>	101
7. INTERSECTION BETWEEN SPORTS LAW AND COMPETITION ACT IN INDIA <i>Mr. Hitesh Jain and Ms. Ankita Singh</i>	108
8. SPORT & COMPETITION LAW <i>Mr. Abhishek Malhotra</i>	121
9. SPORTS BROADCASTING: FRESH CHALLENGES <i>Mr. Abhishek Malhotra</i>	134

10. SPORTS & CORPORATE SOCIAL RESPONSIBILITY: COMMON ROADS & PERSPECTIVES
Ms. Priya Misra 154

PART III: CRIMINAL LAW ASPECT OF SPORTS

11. SPORTS AND CRIMINAL LAW
Mr. Kunal Ambasta 167

12. MY LORDS AND SPORTING DEMI-GODS: AN EXAMINATION OF SENSATIONALISM IN SPORTS DISPUTE RESOLUTION CASES
Mr. Shivam Singh 177

13. ANIMAL DOPING IN SPORTS
Ms. Aahna Mehrotra 186

INTERSECTION BETWEEN SPORTS LAW AND COMPETITION ACT IN INDIA

Mr. Hitesh Jain & Ms. Ankita Singh

"Regulation is a must, not to curb but to encourage playing"

– Justice Patnaik¹

"Given the specificities of sport, the competition law must be applied with sufficient flexibility to take account of the unique features inherent in sports that distinguish it from other sectors"²

There exists a travesty in the notion of competition being existent in the commercial sectors only but in the recent past, sports diaspora has widened and it cannot shroud itself from the commandments of competition statutes existing in India. Considering the multitude of parallel developments augmenting the sports activity in India, it has become vital to regulate the sector. We have come across various news cast in this decade which engenders the interest towards the exploration of the nuances that trace the convergence of competition and sports law and their clashes. The continuous success and commercial viability of the franchisee league events in India has enticed the issue of divergence of competition in the sports periphery. While expounding the impugned facets, the review in this paper inertly highlights the extent of immunity that the legal corridors have allowed against the rapidly changing commercial scenario in the realm of sports.

Unlike other industries that thrive for competition, sports industry is unique as it is based on a model of monopoly to preserve and maintain the integrity of sports. Sports activity worldwide is governed by a pyramid structure i.e. an International Federation of which a National Sports Federation has a member affiliation to maintain integrity, uniformity and strict control over regulations

1 At launch of Book titled Law and Sports in India - Development, Issues and Challenges, 2nd Edition' by Justice Mukul Mudgal & Vidushpat Singhania at India Habitat Centre on February 19, 2016.

2 Dhanraj Pillay & Ors v. M/s Hockey India, Case No. 73/2011, (Competition Commission of India, 31/05/2013).

in order to ensure that non-discriminatory regulations apply worldwide. Few examples being directions of the Delhi High Court to the Competition Commission of India (“CCI”) to undertake enquiry against the All India Chess Federation for preventing its players from taking part in a tournament outside its aegis, the BCCI sanctions on the ICL and the curbs of the Indian Hockey Federation falls within the ambit of the International Federations and the National Sports Federation trying to curb the breakaway leagues through their rules. The rules restricting rival tournaments and release of players for these tournaments have come under the scanner of competition law/ antitrust laws. This paper centres around its analysis and review of the current scenario in the cricket realm based on the cases of *Sh. Surinder Singh Barmi v. BCCI*³ and *BCCI v. Sh. Surinder Singh Barmi & Ors.*⁴

THE CONCEPT OF SPECIFICITY OF SPORTS

In the sport industry, monopoly is an exception in order to maintain integrity, uniformity and strict control over regulations for ensuring non-discrimination. While competition law authorities in the European Union and the United States have recognized the concept of a “*sporting exception*” in the 20th century in order to appreciate the distinctive characteristics of sports, the ambit of such an exception is seen to be shrinking given the increasing commercialization of sports in India. However, there is sufficient rationale to support the sporting exception premised on the notion that sports should be treated differently from other “ordinary” industries/sectors given its special characteristics and its significant social, cultural, and recreational features.

The *reconnoitre* of the nuances that trace the convergence of competition and sports law, and their subsequent clashes, constitutes the bedrock of various cases in the recent past as that of *Dhanraj Pillay v. Hockey India*⁵, *Surinder Singh Barmi v.*

3 *Sh. Surinder Singh Barmi v. BCCI*, Case No. 61/2010, (Competition Commission of India, 08/02/2013).

4 *BCCI v. Sh. Surinder Singh Barmi*, Appeal No.17 of 2013, (Competition Commission of India, 25/02/2015).

5 *Supra* note 2.

BCCI⁶ and others. The reasoning gives birth to a concept of “Specificity of Sport” i.e. certain sporting activity are excluded from the purview of competition and the other being the activities generating commercial gain will be within the ambit and the scope of the competition statute.

While as state subject, sports development comes within the purview of the States at the national and international level, (including meeting international treaty obligations), it falls within the realm of the Union Government under its residuary powers and within the ambit of Entries 10 and 13 of the Union List in the Seventh Schedule of the Constitution of India. It is for this reason that even though national sports bodies are autonomous in nature, both the Supreme Court of India and several High Courts have, in various judgments, maintained that although national sports bodies are not State within the meaning of Article 12 of the Constitution of India, they come within the writ jurisdiction of High Courts under Article 226 of the Constitution of India because they perform state-like functions such as the selection of national teams and representing the country in international sports events and forums. Presently, sports are governed by National Sports Development Code of India 2011⁷, which was formed because of various suits in court of law. However, in this Code there is no specific rule or any guideline for anti-competitive agreements and abusing of dominant position, which attracts the provisions of Competition Act, 2002 (“Act”).

THE PYRAMID STRUCTURE OF SPORTS

Major sports are invariably organised within a pyramidal structure. Pyramid structure means a single national sport association per sport and Member State, which operates under the umbrella of a single continental/ national federation and a single worldwide federation. Cricket, which is the subject matter of the case, also follows the well-established “pyramid structure” of sport governance. At the top of pyramid is the International Cricket Council (ICC), which is incorporated as a company limited by guarantee and not having share capital. It has three categories of members *viz.* Full Members, Associate

6 *Supra* note 3.

7 Available at : <http://yas.nic.in/sites/default/files/File918.compressed.pdf> (Last accessed on April 20, 2016).

Members and Affiliate Members.

BCCI is a full member of ICC and is thus recognized as the 'custodian' of cricket in India vested with the requisite powers of framing rules, organising events, selections of teams etc. owing to its affiliation to ICC. All state cricket associations in India in turn are the members of BCCI and in turn various cricket clubs are affiliated to their respective State Federations. The pyramid structure is considered important for ensuring the freedom of internal organization of sports associations and indispensable to the performance of essential regulatory task of sports associations which includes, setting the rules of the game, uniformity in application of rules of the sport, maintaining the integrity of the game, orderly promotion of the game and maintaining the fairness of the game (anti-doping regulations) etc. In this structure, three kinds of sports rules can be identified: the "rules of the game"; "club rules" and "competition rules".

- a) The "rules of the game" are the technical rules according to which a game is played.
- b) The "club rules or statutes" are those adopted by each sports organisation to regulate its own functioning.
- c) The "competition rules" are all the rules that govern competitive events organised for a given sport over a given period.

COMMERCIAL CONFLICT OF INTEREST CONCERNING ORGANIZATION AND REGULATION

The Commission is concerned about the business generated through sports and not the rule of the sports applied for organization of the sports or its competition. Commission's focus is on the underlying economic activities which are ancillary for organizing the sports events. The Act prohibits:

- a. Abuse of dominant position
- b. Collusion in business activities,
- c. Price fixing and distortion of the bidding process which may distort or has distorted the competition in any relevant market appreciably thereby foreclosing competition for any new competitor
- d. Fairly competing in the market through restrictions in the output or dividing the market.

The Act engraves within itself the concept of an “Enterprise”. According to the Act, “Enterprise”⁸ means,

a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relating to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space.

In *Sh. Surinder Singh Barmi v. BCCI*,⁹ BCCI, during the course of investigation, has stated that it is a ‘not for profit’ organisation and the objectives of BCCI as clearly stated in their Memorandum of Association (MoA) are for encouraging and promoting the game of cricket. The DG however contended that BCCI although a “not-for-profit” registered society, its activities fall in the commercial sphere (Section 2(h)) The Act focuses on the functional aspects of an entity rather than institutional aspects. The scope of the definition on the institutional front has been kept broad enough to include virtually all the entities as it includes ‘person’ as well as departments of the government. The specific exception has been provided only to the activities related to the sovereign functions of the government. It is in substance the nature of activity that would decide whether the entity is an enterprise for the purpose of the Act or not. Thus, from the discussion, it suffices that the ‘not-for-profit’ society form as claimed by the BCCI does not take it out of the definition of the enterprise and the activities of BCCI would be tested for its status as an enterprise.

The activities of BCCI centre both on ‘custodian and ‘organiser’ role, as already detailed. As a custodian role being, BCCI is involved in selection of Team India

8 The Competition Act, 2002 § 2(h).

9 *Supra* note 3.

to represent India in international events, to work for development of cricket by arranging training camps etc. as well as organizing the game. However, the aspect of 'organization' brings in activities contributing to the revenues of BCCI such as grant of media rights, sale of tickets etc.

The activities of 'organising events' are definitely economic activities as there is revenue dimension to them. In India, in a recent decision, Delhi High Court held All India Chess Federation (which performs similar functions as BCCI for the game of Chess) to be an enterprise for the purpose of the Act¹⁰.

ABUSE OF DOMINANCE

Certain sport authorities dominate the country with regard to their sports, but this dominance comes with great responsibility of promoting and encouraging that sport within country. The authority enjoyed by the sports authorities could at times lead to the abuse by the governing authorities like BCCI, Hockey India, IOA etc. As per explanation to Section 4¹¹ of the Act, "dominant position means a position of strength, enjoyed by an enterprise in the relevant market..." Therefore, assessment of dominance is to be preceded by delineation of the correct relevant market in which dominance of the enterprise under consideration is to be assessed.

There are three components that make a market, *viz.*

- a. the producer on the supply side,
- b. the consumer on the demand side and
- c. the underlying product or service.

The Act considers relevant market as the market of various goods or services which are regarded interchangeable by a consumer with reference to product characteristics, intended use and price. The objective of this definition is for precise understanding of the competitive constraints the market forces are

10 Hemant Sharma & Others v. Union of India, Delhi High Court, WP(C) 5770/2011(Date of decision 04/11/2011).

11 The Competition Act, 2002 §4.

subjected to. The Act emphasises that definition of relevant market needs to be viewed from the demand perspective and should be based on characteristics of the product, price and intended use. The Commission considered the definition in accordance with the parameters laid down under the Act.

Every sports event is unique in itself and commands its own fan following. Cricket also has its own characteristics that differentiate it from other sporting events or other entertainment events. A cricket match cannot be perceived as substitutable by any other sport/entertainment event based on characteristics. It can also be argued that the intention of the ultimate viewer is entertainment and therefore, there is a case for broadening the definition and including other sports and entertainment forms. This argument however does not hold if we consider the demand substitutability of the various forms of entertainment.

In *Sh. Surinder Singh Barmi v. BCCI*,¹² the informant stated that the IPL has abused its dominant position as it was the only agency for organizing Twenty-20 cricket matches in the relevant market of franchisee of teams, transportation, sponsorship, sporting equipments, uniforms, catering, event management etc. The IPL has abused its dominant position by favouring few and foreclosing the market for other competitors thus violating Section 4 of the Act. The Commission after examination considered that there is fair possibility that competition in the relevant market of various/ ancillary products has been restricted. As the Competition Act mandates the Commission to prevent practices having adverse effect on competition and to promote and sustain competition in the market, Commission was of the opinion that there exists a *prima facie* case of violation of the 4 Competition Act, and directs Director General (DG) to investigate and submit its report within 60 days of the receipt of the order. Looking to the economic activities being carried out for organizing the IPL cricket tournament, the conduct and behaviour of the BCCI falls within the purview of Competition Act as an enterprise as defined in the provisions of Section 2(h) of the Act.¹³ This has been discussed later of this article. Also

12 *Supra* note 3.

13 The Competition Act, 2002 §2(h).

supported by investigation and analysis of the facts and materials of this case, it is found that the BCCI-IPL is in the dominant position within the meaning of the provisions of Section 4, read with Section 19(4) of the Act. BCCI-IPL enjoys monopoly status for the Twenty-20 format of cricket and thereby has monopoly for the economic activities related to organizing such events also in the relevant market.

Although the Competition Appellate Tribunal¹⁴ set aside the Order of the Competition Commission of India on the grounds of unsatisfactory production of evidence before the Court, the Order has demarcated the concerns that are required to be addressed.

ANTI-BIDDING AGREEMENTS

The remaining and most promising option for constraining monopsony power would be to subject agreements among the dominant league's clubs to a standard of reasonableness. This standard requires that agreements, which appear to have anti-competitive effects, must be justified as reasonably necessary to achieve some legitimate welfare- or consumer-enhancing goal.¹⁵ This is the basic principle of common law.

As per the media, the Chief of the IPL was also instrumental in favoring his near and dear for the bid and his favored ones worked as his proxy for cornering the proceeds. Support provided by the official of the IPL significantly distorts competition in the relevant market. It is also alleged that the IPL conducted bids for the television rights website, sponsorship, catering services, transportation, event management, etc. without adhering to the norms of fair tendering and restricting the market for the new entrants and foreclosing the market for the existing competitors.

14 *Supra* note 4.

15 Stephen F. Ross, *Player Restraints and Competition Law throughout the World*, 15 MARQ. SPORTS L. REV. 49 (2004).

Section 3 of the Act deals with the anti-competition an agreement which plays an important part in sports law.¹⁶ Rigging is done by collusion of bidders which falls directly under Competition Act which states that “*an act which directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition*”¹⁷

In *Sh. Surinder Singh Barmi v. BCCI*,¹⁸ it was alleged that there were irregularities in the process of grant of franchise rights for teams such as agreement between the IPL and bidders and bidders were advised about the amount of bid for a particular team. This lack of transparency was alleged as an act of bid rigging leading to creation of entry barriers to new entrants in the market. It was held that:

- (i) The decisions were not taken in the capacity of Chairman and Commissioner, IPL, impliedly with the consent and approval of IPL Committee. This was being reported to BCCI on regular basis and ratified by the Governing Council. Therefore, for all acts of commission and omission, BCCI cannot be absolved from its responsibility in the process of tendering.
- (ii) Another contravention was found by DG in respect of rights of franchise teams been given till the IPL continues. According to DG, the agreement so made will have the effect infinitum, thus violative in nature.

GRANT OF BROADCASTING RIGHTS ¹⁹

This is an important issue regarding the sports law, which strongly attracts the provisions of the Act. Basically, sport governing authorities have power to sell the broadcasting right of particular sport. Trouble starts when they try to sell these rights to their exclusive partners for long time. However, the problem is not to give rights to their exclusive partners, but how they choose these “exclusive partners”. The compliance with the Act is now mandatory for selection of any exclusive ‘agent’ or partner for any business purpose, i.e., it has to be done by competitive bidding process in a fair and transparent manner.

16 The Competition Act, 2002 §3.

17 The Competition Act, 2002 §3(3)(d).

18 *Supra* note 3.

19 OECD, POLICY ROUNDTABLES (COMPETITION ISSUE ON TV AND BROADCASTING, 2013). Available at <http://www.oecd.org/daf/competition/TV-and-broadcasting2013.pdf> (Last accessed on 06/06/2016).

In the case *Surinder Singh Bermi v. BCCI*,²⁰ BCCI was held liable under S.4(2) (a) and S.4(2)(b) of the Competition Act for selling media right without any proper procedure for a period of 10 years which is long enough to restrict the market. The BCCI's grant of exclusive rights can lead to anti-competitive consequences such as:

- Creation of barriers for new entrants,
- Driving out existing competitors, and
- Foreclosure of competition by hindering entry into the market.

RESTRAIN ON PLAYERS

In most professional sports leagues around the world, participating clubs compete among themselves to sign players, subject to rules imposed by the league or agreed to among themselves.²¹ Rules imposed by leagues often significantly restrain competition for players. These can include a reserve list, whereby clubs will not bid for reserved players at the expiration of a contract; the player must either re-sign with his prior employer or seek employment elsewhere. Some players are on a restricted list, so that any club desiring their services agrees to provide compensation to the former employer, or to allow the former employer to match the best offer. But restraints were lawful if reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public.²²

The best example of unlawful restrains is *Dhanraj Pillay case*²³ in which Hockey India – India's officially sanctioned hockey body was allegedly discriminating against a few former players who had wanted to participate in the World Series

20 *Supra* note 3.

21 *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47 (1st Cir. 2002), or the Women's National Basketball Association (clubs indirectly control league with central labor control). See, Larry Lebowitz, *Leagues are Forming as 'Single Entities' Where Decision and Profits are Shared by All Owners*, FT. LAUDERDALE SUN-SENTINEL, (Apr. 20, 1997) at IF.

22 *Nordenfelt v. Maxim Nordenfelt Gun & Ammunition Co.*, [1894] A.C. 535, 565, [1891-4] All E.R. 1 (H.L.).

23 *Sh. Dhanraj Pillay and Others v. M/S Hockey India*, Case No. 73/2011, (Competition Commission of India, 31/05/2013).

Hockey (WSH) tournament, run on the lines of the now disbanded Indian Cricket League. The players, including former hockey captain Dhanraj Pillay, had approached the CCI in 2011 alleging abuse of dominance by Hockey India, which had warned players against participating in the WSH, terming it an “unsanctioned” event. Allegedly, players who had signed up to play in various franchisees of the WSH – which is organised by the rival Indian Hockey Federation (FIH) – were deliberately not selected for the Indian national hockey team. In its order, the CCI barred the two bodies from placing any restriction on players to play in sanctioned or unsanctioned events.

Three justifications are often asserted for player restraints:

1. Enhancing competitive balance;
2. Recovering club investment in player development; and
3. Achieving “cost certainty” for clubs.

Most labour restraints are unnecessary to the first two goals, and the third is not a legitimate one. Competition law, which bars unnecessary restraints, can be employed more vigorously to protect consumers and players against unnecessary labour restraints.²⁴

SPONSORSHIP AGREEMENT

Sponsorship is the support for sports, sports event, sports organisation or competitor by an outside body or person for mutual benefit for both parties.²⁵ Sponsor can be linked to athlete, team or organisation and have their logo on their kit, transport and advertisement. Company chooses particular sport, which is popular among the people so that it can advertise its products through athlete or particular team. Consumer will be able to link the product with the sports personalities name and hence exclusive rights to one manufacturer and excluding competitors leads to competition concerns. Sponsorship right are sold by the governing authority of that particular sport.

The sale of sponsorship rights to Sahara India and DLF brings BCCI within the ambit of Competition Law. Sahara India has sponsorship rights of Indian

24 *Supra* note 2.

25 *See generally*, NEIL WELSON, THE SPORTS BUSINESS, (Piatkus,1988).

Cricket Team since 2001. Now Star India bought the sponsorship right starting from January 1, 2014, and ending March 31, 2017. Similarly, Indian Olympic Association (IOA) sold sponsorship right to Edelweiss Group and this might lead to exclusivity issues which are governed by Competition Act.

FRANCHISEE RIGHTS

Franchisee right is to own a team in any sport league like IPL, Pro Kabaddi League, Hockey India League etc. These rights are also sanctioned by the particular sport authority. Granting of franchisee rights attracts S.3 of the Competition Act which deals with the anti-competition agreement. Allocation of franchisee rights should be done in such way so that it has no adverse affect on competition within India.²⁶ The franchise agreements entered into between the BCCI and franchise winners are for perpetuity. According to the agreements, the franchisees have been given licence till the IPL tournament continues. Therefore, the agreements so made will have the effect infinitum, until and unless a breach of terms of the contract takes place. This exclusion of all other potential entrants is visible in agreements entered into by the BCCI with its business partners, selected either through competitive bidding or otherwise. Therefore, franchise agreements for perpetuity promote exclusion and are in violation of Section 3(1) of Competition Act, 2002, and cause appreciable adverse effect on competition.²⁷

EXCLUSIVITY ISSUES: FORECLOSURE

The grant of exclusivity for such a long duration will lead to the foreclosure at the time of renegotiation at the end of the contract. The sponsor or broadcaster who had exclusive right for past 5-10 years will be in advantageous position as it would have earned massive revenue during that long time. Therefore, it does not allow the real allocation of rights. The broadcasting rights given by BCCI to Sony for 10 years may restrict the competition in the market. CCI also has concerns on this issue, mentioning that the period of media rights i.e 10 years is very long, and creates foreclosure of market.

26 The Competition Act, 2002 § 3(1).

27 *Supra* note 1.

CONCLUSION

Competition Law promotes competition advocacy, forbids abuse of dominance and anti-competitive agreements. But a comprehensive law on Sports must aim at a broader idea and vision. The law makers should provide and disseminate the idea and information on various issues related to sports and encourage the exchange of a variety of perspectives through conferences before embarking on the mission. As the saying goes, '*Power corrupts; absolute power corrupts absolutely*', similarly the powers of BCCI should be subjected to restrictions to prevent them from thwarting competition by favouring events that it organises. The Commission however, strongly holds the view that competition is essentially for benefits to be widespread. The game of cricket and the monetary benefits of playing professional league matches must be spread out and not concentrated in a few hands, in a few franchisees. In a country of large young population, more private professional leagues opens up more avenues for youngsters to play cricket, to earn livelihood and to find champions where least expected. BCCI in its dual role of custodian of cricket and organizer of events has on account of role overlap, restricted competition and the benefits of competition. The objective of BCCI to promote and develop the game of cricket has been compromised. The role and functioning of BCCI have already been examined in detail earlier in the above-mentioned Orders. An analysis of the position clearly brings out that there is an overlap between the way BCCI is discharging its regulatory and commercial roles respectively, and the *modus operandi*/ decision making process does not clearly separate the two roles.

As the commercial value of Sports through broadcasting, merchandising, ticketing, etc. is increasing, a Sports Tribunal along with an independent regulatory authority could help in delineating economic functions of governing bodies from their pure sports' related functions. The need of the hour is to draw a clear demarcation between the governing body's governance function and commercial activities. This demarcation can only be achieved by assigning various roles to different bodies and committees that shall ensure feasibility of open tenders for any commercial contract.

ABOUT THE BOOK

Game, Set and Matchless...A Reader on Sports and Law is a small step in the jurisprudential development of Sports and Law. This volume makes an attempt to draw the convergence of law in sports with respect to three broad themes viz. Governance, Commercial Law and Criminal Law. Large part of this volume has been drawn from the rich personal and professional experiences of the authors. Broadly, the articles in this volume deliberate on the application of 'set of laws' on sports to develop 'a system of laws' for sports.

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