# Rassegna di diritto ed economia dello sport

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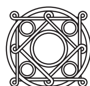

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Indice del 2° numero

Atti del 23° Congresso dell'*International Association of Sports Law* – «*Responsibility in sports activities*», svoltosi a Roma il 4, 5 e 6 ottobre 2017, a cura di Maria Francesca Serra

000 Dimitrios P. Panagiotopolous, *Welcome Message*
000 Maria Francesca Serra, *Un diritto sportivo globale – Global Sports Law*

Sessione I

*Statutes governing and Protecting Athletes: Sport Responsibility and Sport Liability*

000 Dimitrios P. Panagiotopolous, *Meaning and Forms of Liability in Sporting Action*
000 David Selgado Ruano, *Processing of Personal Data in Anti-Doping Policy: Compatibility with EU Data Protection Regulation?*
000 Andràs Nemes, *Hungary's Sports Development Efforts*
000 Balàzs Farkas, *The Professional Program of the Hungarian Coaching Association in 2017*
000 Maurizio Benincasa, *L'infortunio dell'atleta nel prisma della responsabilità civile* – The athlete's injury from the perspective of civil liability
000 James Nafziger, *Spectator and Other Supporter-Induced Violence*: *Albanian and Serbian Football Before the Court of Arbitration for Sport*
000 Kai-Li Wang, *Rights of Games Played by Student-athletes in the Era of 'We-Media'*
000 Taoufik Zahrouni, *Protecting the Sports Organizations Properties*
000 Steve Cornelius, Daniel Badenhorst, *The Regulatory and Disciplinary Authority of International Sports Federations*
000 Alkis Papantoniou, *Training Compensation in System of FIFA*Andreas Prasinos, Katerina Asimakopoulou, Maria Stam-

polidou, *New Legislative Framework of Sports Facilities and Athletic Events in Greece for a) Licensing of conducting Sporting Events; b) Licensing of Sporting Facilities*

Sessione II

*Sport Safety, Integrity and Security*

000 Olga E. Shevchenko, *Efficiency of Sports Current Sanctions*
000 Ni Zhengmao, *DisciplineSelf-discipline and KOTINOS of Sports Safety and Security*
000 Karina Zalcmane, *Criminogenic Manifestations of Football Fans*
000 Kee-Young Yeun, *A Comparative Study on Integrity in Sports Games – Focusing on the Legal Responsibility of 'Match-fixing' in Korea*
000 Anna Di Giandomenico, *Quale diritto per la frode sportiva? Criticità giuridiche* – Which rules for sports fraud? Legal criticalities
000 Xiang Xu, Jinngwen Xu, *Criminal Law Regulation of Age Fraud of Athletes*
000 Anatoly Peskov, *A Doping Scandal in Russia: Politics or Reality?*
000 Valentina Porzia, *La responsabilità del gestore di un impianto sportivo e i casi di esonero di responsabilità* – Liability of Sport Center's Manager and relevant exemptions
000 Huiying Xiang, *CAS Jurisprudence on Match-fixing under the Context of Domestic Criminal Law Intervention*
000 Paolo Garraffa, *A New Instrument in the Fight Against Doping: The Athlete Biological Passport («ABP»). Light and Shade*

Sessione III

*National and International Legislation:*
*Sports regulations and contracts*

000 Katerina Asimakopoulou, Andreas Prasinos, Konstantinos Cholevas, *Refugee Crisis: The Right to Physical Education of Minor Refugees*
000 Magdalena Kedzior, *The European Approach towards Per-*

*sonal Data Protection in Sport as a Response to the Challenges of the 4th Industrial Revolution*
000 Robert Dingli, *Uncertain Brexit Terms Threaten Sports Industry*
000 Alexandru Virgil Voicu, Réka Kis, *Relevant Aspects Concerning the Legal Protection of Sports Creations in the European Union*
000 Gerardo Soricelli, *Il riparto di giurisdizione tra giudice amministrativo e giudice sportivo dopo il nuovo Codice di 'giustizia sportiva': alla ricerca della tutela degli interessi giuridicamente rilevanti* – The division between administrative and sporting jurisdiction after the new Code of 'sporting justice' and the protection of the relevant interests
000 Klaus Vieweg, *Common and Conflicting Interests of Athletes and Sport Organizations from a German Legal Point of View*
000 Dimitrios P. Panagiotopoulos, Zografenia Kallimani, *Appointment of Temporary Administration in theHellenic Footbal Federation Greek Government - FIFA Intervention*
000 Njaramba Gichuki, *Sports Legislation in Africa: Regulation versus Development in Kenya's and Africa's Sports Law*
000 Nader Shokri, *The Principles of Non-Criminal Liability in Sports Concerning Iran Law*
000 Hua-Rong Cheng, *Sports Right: How to Write in PRC Sports Law*
000 Marina Kamenecka-Usova, *Latvian Sports Law: role of Sports Federation Council of Latvia in achieving the objectives of 'Sporta likums'*
000 Benham Naghipour, Sara Keshkar, Habib Honari, Gholamali Kargar, *Obstacles and Legal Strategies of Sports Marketing Development in Iran*

Sessione IV

*Doping and Sports Values fair play violation*

000 Giuseppe Sorgi, *Etica sportiva tra banalizzazione e commercializzazione. Alcune osservazioni critiche* – Sports Ethics between Trivialization and Commercialization. Some Critical Remarks

000 Piero Sandulli, *Il giudizio per la repressione del doping in Italia. Il sistema e le problematiche* – CONI's Sport Code. Some Ethical Remarks
000 Luca Gasbarro, *Tra consuetudini e formalismo: dal* 'ludus' *agli sport. Problemi e prospettive* – Between customs and formalism: from ludus to Sports. Problems and perspectives
000 Marios Papaloukas, *Ethics and Integrity in Sports: Are Measures Tackling Doping and Match-fixing Going Too far?*
000 Mahsa Molarrami, Ali Zare, *Role of Rules and Regulations on Ethics and Sport Integrity*

*Miscellaneous*

000 Luca Di Nella, *Giustizia sportiva nazionale e internazionale e principio di specificità dello sport. Problemi e prospettive* – National and International Sports Justice and Specificity Principle. Problems and Perspectives
000 Michele Colucci, Marc Cavaliero, *Disciplinary Procedures in Football: an International and Comparative Analysis*
000 Xiaoping Wang, *Study on the Penalty Specification of Rule-breaking and Discipline-breaking Behaviors of Sports Competition*
000 Abbas Nazarian Madavani, Hosain Hasan Baigi, *Risk management in sports activities of Iranian*
000 Maryam Mokhtari Dinani, *Prioritizing Factors Affecting on Professional Ethics in Selected Iranian Sports Organizations*
000 Janez Kocijančič, *Some Legal Aspects of Fightening Doping in Sport*
000 Sławomir Fundowicz, *Liability under Anti-doping Law in Public Law Domain*
000 Mehdi Yousefi, K. Batool Asgari, *Civil Liability of Manufacturer and Sellers of Sport Goods in Terms of Iranian Law and Islamic Law*
000 Guo Qiao, *Analysis of the Necessity to Build the Third-Party Professional Game Match Referee Organization for International Competitive Sports*
000 Ahmad Yousefi Sadeqhlou, Zeynab Navabi Moghadam, *The need to observe the conscionability in the sport contracts*

Atti del 23° Congresso svoltosi a Roma il 4, 5 e 6 ottobre 2017,

# INTERNATIONAL ASSOCIATION OF SPORTS LAW «RESPONSIBILITY IN SPORTS ACTIVITIES»

a cura di Maria Francesca Serra

# Welcome message

The international scholarly community, all active people occupied with Sports Law, Lawyers, as well as those who are generally involved in Sports, will have the opportunity to attend the 23rd Congress of the International Association of Sports Law (IASL) with cooperation of Niccolò Cusano University, which will be held in Rome.

It is known that the IASL is active in the sector of Sports Law since 1992, having made 23 consecutive World Congresses. From the first moment of its establishment untiltoday, researching deeply and promoting internationally the scientific field of Sports Law. Moreover, the corresponding 1st International Congress, in which the International Association of Sports Law (IASL) was born, was organized by EKEAD on December 11-13, 1992 in the University of Athens.

The subject of the 23rd Congress of the International Association of Sports Law (IASL) in Rome is entitled: *Responsibility in Sports Activities: Law, Jurisdiction and Ethics.* The subject of this conference is systematically investigated for the first time in all its aspects. Problems might arise in the theory and praxis of sports activities, due to the fact that during performance of their duties all natural and legal entities in sports are subject to liability of sports nature with administrative-disciplinary character, moral and criminal character.

In particular, the association will debate about four major topics, with specific panels, about:

– Statutes Governing and Protecting Athletes.

– Sport Safety, Integrity and Security.

– National and International Legislation.

– Ethics. In this section we will debate about ethics and sporting values.

The International Association of Sports Law beyond its contri-

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bution to development of Sports Law and the successful congresses, also it has contributed to education though this participation in educational programs and Universities courses, as the special e-learning programme in Sports Law at National and Kapodistrian University of Athens, which started in September of 2017!

Therefore it is obvious that our expectations of such a Conference are very high, as well as the participation in this project of scholars and operators of sports life.

It is appropriate at this point to express my thankfulness to the Rector of Niccolò Cusano University, Prof. Fabio Fortuna and the members of the Organising and Scientific Committees of this Congress.

I am sure that the next day of the Congress will be a wiser one. We are looking forward to your participation and we wish you to have a wonderful time in Rome.

The President of IASL
Dimitrios P. Panagiotopoulos

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# Un diritto sportivo globale

Sommario: 1. Premessa. – 2. Le legislazioni nazionali e lo sport. – 3. Rapporti tra stati e ordinamento sportivo. – 4. Globalismo e localismo nello sport. – 5. Post industrializzazione e trasformazione dello sport. – 6. Un diritto globale sportivo?

1. Il ventitreesimo convegno IASL, che si è svolto a Roma nei giorni 4 5 e 6 ottobre e di cui qui si pubblicano gli Atti, ha avuto come tema generale *Responsibility in Sports Activities: Law, Jurisdiction and Ethics*[1]. È stata affrontata una vasta tematica che, come si evince anche dai contributi presentati, ha fornito, grazie ad una molteplicità di approcci, una panoramica mondiale del fenomeno sportivo, della sua realtà e dei suoi problemi.

I contributi ci consentono di operare, proprio attraverso questa molteplicità di approcci, una comparazione tra culture diverse, ma anche di prendere atto che negli ultimi decenni queste culture diverse si sono avvicinate anche grazie allo sport e alla sua organizzazione internazionale. Si sta realizzando, infatti, all'interno del contesto sportivo, ma con ricadute sulle società, una rivisitazione e negoziazione nuova delle forme di stratificazione sociale. Basti pensare all'influenza

[1] Sono intervenuti alla giornata inaugurale il dott. Marco Befera (CONI) e la dott.ssa Svetlana Celli (Council Woman Roma Città metropolitana). Ringrazio l'Unicusano e in particolare il prof. Fabio Fortuna, rettore dell'Università, e il prof. Giovanni Puoti, Preside della Facoltà di Giurisprudenza, per aver accolto il Convegno. Il personale amministrativo della Unicusano, in particolare la dottoressa Laura Pecetta, ha collaborato proficuamente, alla organizzazione del Convegno. Un ringraziamento anche alla prof.ssa Anna Di Giandomenico, all'avvocato Valentina Porzia e al dott. Guglielmo Ciabatti, per il fattivo supporto all'organizzazione. Un ringraziamento anche al prof. Di Nella per ospitare la pubblicazione degli atti nella Rassegna di diritto e economia dello sport.

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che lo sport ha sulla discriminazione di genere, sulle divisioni sociali, sull'educazione dei giovani, ma soprattutto sul tema dei diritti fondamentali e delle disabilità e via dicendo[2].

Quello che è interessante non è solo la comparazione delle varie esperienze sociali e giuridiche nazionali in relazione ad un fenomeno che conserva, comunque, una base comune, quanto soprattutto il fatto che da queste esperienze emergano, da un lato, alcune differenze di approcci connessi alla diversità degli ambiti politici e culturali, ma, dall'altro, anche la consapevolezza che si tratta di un fenomeno che ha anche una sua organizzazione internazionale – all'interno della quale sembra si possa operare una distinzione tra *global sports law* assimilata alla *lex sportiva*, e *international sports law*[3] – da cui non si potrebbe mai prescindere e che in tutto il mondo deve fare i conti con gli stessi problemi: gli investimenti, la sicurezza, la legalità, l'uguaglianza delle opportunità, il doping, le varie forme di frode sportiva, ecc.

Il Convegno ha dato testimonianza che esiste non solo una organizzazione internazionale dello sport, che ha una sua autonomia ed esprime una comunità, ma che esiste anche una comunità internazionale di studiosi del fenomeno sportivo che, oltre a discutere di problemi teorici, si interroga sia sulle esperienze concrete sia sugli strumenti piú utili ai fini del miglioramento dello sport, della realizzazione delle sue finalità molteplici e della possibilità di realizzare – o di continuare a riconoscerne l'esistenza – un diritto sportivo globale che, pur all'interno di un ineludibile rapporto con i singoli stati territoriali, riesca a mantenere una sua organizzazione autonoma sorta, e tuttora basata, sull'associazionismo privato. Il che coinvolge, anche se in maniera differenziata, a seconda degli ambiti politici e culturali, il rapporto tra l'ordinamento giuridico sportivo e gli ordinamenti statali. Un tema che in Italia, ma non solo in Italia, come si può de-

[2] Su questo punto si trovano considerazioni interessanti in A. Markovits, L. Rensmann, *Gaming the World, How Sports are reshaping Global Politics and Culture*, Princeton, New Jersey, 2010.

[3] Cfr. R. Siekmann, J. Soek (eds.), Lex Sportiva: *What is Sports Law?*, The Hague, 2012. Ricordo qui che lo IASL pubblica la rivista *e-lex sportiva Journal* che ha come obiettivo «the development and the promotion of the Sports Law Science worldwide and of *Lex Sportiva* theory».

durre anche dalle relazioni al Convegno, occupa non solo gli studiosi del settore ma anche i legislatori e le Corti di giustizia.

2. Pur nella piena consapevolezza della necessaria autonomia dell'ordinamento sportivo internazionale ci si chiede se la difesa delle istituzioni sportive e la loro incrementazione non abbia bisogno del supporto della legge statale e degli organismi internazionali[4]. Proprio questo aspetto fa riflettere lo studioso italiano che, piú di altri, si trova inserito in un ordinamento sportivo fondato sull'autonomia e che continua a rivendicare questa autonomia. Sembra convincente l'accento che in molte relazioni è stato posto proprio sulla necessità di strumenti legislativi che garantiscano le istituzioni sportive. Il prof. Panagiatopoulos, nella sua relazione introduttiva, ricorda: «The law is necessary for ensuring the sports institution, the smooth and orderly holding of sport actions and events, as well as the complete satisfaction of the right of natural and legal entities to a fair participation in sport activities and issues». Del resto, le discussioni su questo tema, intervenute nei vari contesti culturali, hanno sempre portato alla conclusione che le ragioni per richiedere l'intervento dello stato nello sport siano numerose[5]. Soprattutto, è proprio la crescente commercializzazione del fenomeno a presentare un evidente bisogno di regolamentazione giuridica[6]. D'altra parte, non possono essere lasciati solo ad una regolamentazione endogena i problemi della droga e della violenza, nonché i problemi del lavoro sportivo, visto il peso che nelle società ha acquisito lo sport e dato che si tratta di temi che impattano con le legislazioni nazionali e con il tema dei diritti umani

[4] Si veda J. Kocijančič, *Opening Address,* in R.C.R. Siekmann, J. Soek (eds.), Lex Sportiva*: What is Sports Law?*, cit., p. X: «There is no doubt that sport is subject to the rule of law. But at the same time sport is an area which belongs to the civil society and should, therefore, enjoy large autonomy, including essential self-regulation, which consequently results in the creation of numerous autonomous rules (e.g. rules of the game, organizational rules, etc.)». Vedi, anche, Id., *Some Legal Aspects of Fighting Doping in Sport*, in questa raccolta.

[5] In questo Convegno sugli interventi statali nello sport sono intervenuti vari relatori, tra cui ricordiamo Prasinos et alii, Farkas, Gichuki, Kamenecka-Usova, Kallimani, Voicu.

[6] Si veda S. Gardiner, *Sports Law*, London-Sidney, 2001, p. 101. In questo convegno hanno toccato il tema della commercializzazione nei suoi vari aspetti Dingli, Naghipour *et alii.*

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riconosciuti a livello internazionale. Se tradizionalmente gli enti sportivi erano considerati, ma anche erano, corpi autonomi che si autoregolamentavano attraverso quello che è stato definito mutuo disconoscimento[7], oggi proprio la complessità crescente del fenomeno ha spostato lo scenario facendo sorgere la domanda se questi corpi possano continuare ad essere gli unici custodi del loro mondo o lo sport non abbia bisogno di supporti non solo in termini di investimenti ma anche, per determinati aspetti, in termini di regolamentazione eteronoma. Si tratta di una domanda a cui si può rispondere tuttavia solo tenendo conto della specificità dello sport. Sul fronte nazionale l'autonomia sportiva, che ha dovuto negli ultimi decenni sempre confrontarsi con un intervento continuo da parte dell'ordinamento statale e comunitario, trova una sua legittimazione costituzionale sia a livello ordinamentale che a livello teorico. Sul fronte comunitario il riconoscimento della *sporting exception* porta nella direzione del riconoscimento della peculiarità dell'ordinamento sportivo[8]. L'autonomia dello sport si confronta con l'evoluzione del rapporto pubblico-privato e con il rapporto dicotomico stato-mercato, che lo inquadra in una realtà internazionale nella quale si presenta il problema del rapporto tra *lex mercatoria* e ordinamenti statali.

3. Importanza riveste quindi il rapporto che viene a crearsi tra l'ordinamento sportivo, che ha indubbiamente una dimensione tran-

[7] C'è da ricordare, infatti, che nei rapporti tra stati e ordinamento sportivo facente capo al CIO, dagli anni ottanta in poi si è passati dal «principio tendenziale di mutuo non disconoscimento» – secondo la formula creata da M.S. Giannini, *Prime osservazioni sugli ordinamenti giuridici sportivi*, ora in Id., *Scritti*, III, Milano, 2003, p. 95 – a rapporti interordinamentali che hanno dato vita ad una ampia fenomenologia che va dalla cooperazione al tentativo di subordinazione. Sul fronte nazionale l'autonomia sportiva, che ha dovuto negli ultimi decenni sempre confrontarsi in Italia, ma non solo, con un intervento continuo da parte dell'ordinamento statale, trova una sua legittimazione costituzionale sia a livello ordinamentale che a livello teorico. E si confronta con l'evoluzione del rapporto pubblico-privato e con il rapporto dicotomico stato-mercato, che lo riporta nella realtà internazionale anche per i suoi aspetti amministrativistici. Cfr., a proposito, L. Casini, *Il diritto globale dello sport,* Milano, 2010; Id., *The Making of a* Lex Sportiva*: The Court of Arbitration for Sport «The Provider»,* New York University School of Law, Institute for International Law and Justice, Working Paper, 2010/5. 1. Vedi, anche, G. Gentile, *Ordinamento giuridico sportivo: nuove prospettive,* in *Riv. dir. econ. sport*, 2014.

[8] Sul punto mi sia consentito rinviare a M.F. Serra, *Ordinamenti giuridici a confronto. La* sporting exception *e l'attività del «professionista di fatto»*, Padova, 2017.

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snazionale e trasversale e affonda le sue radici nel privato, e gli ordinamenti statali, quindi tra il regime che fa capo al Comitato Olimpico Internazionale e i singoli stati. Il che fa sorgere la domanda sulle modalità e sui soggetti che governano lo sport. Perché, alla fine, pur quando si voglia porre l'accento sulla dimensione transnazionale non si può negare che vi sia una interrelazione tra gli autonomi processi sociali e i processi giuridici. La prima interrelazione riguarda proprio lo stretto rapporto che l'organizzazione sportiva transnazionale, nata su basi privatistiche, intrattiene con l'ordinamento nazionale nel quale nasce e dal quale è riconosciuta come organizzazione privata. La seconda riguarda il fatto che questa stessa organizzazione, superando i limiti territoriali entro i quali si pone, entra, comunque, in necessario contatto con altri ordinamenti giuridici. E, anche soltanto ad analizzare il linguaggio usato dall'organizzazione sportiva transnazionale, ci si rende conto di come essa risenta delle tradizioni giuridiche nelle quali è nata, vale a dire, nel nostro contesto, la tradizione giuridica dell'occidente continentale che, comunque, incide anche su altri ambiti culturali. È un dato di fatto che anche se si considera, come da molti è stato fatto, il *legal order* dello sport alla stregua di una sorta di costituzione civile non si può non notare un'interconnessione problematica tra processi sociali autonomi e processi giuridici[9].

Il necessario riferimento al rapporto tra ordinamento sportivo e singole organizzazioni statali territoriali nasce anche dalla considerazione che, comunque, stante anche la varietà delle strutture politiche mondiali, ognuna di esse assume, pur nel necessario riconoscimento dell'autonomia dell'organizzazione sportiva internazionale, politiche diverse nei confronti di quest'ultima e dello sport in generale. Operando una prima classificazione si presentano due modelli: il primo basato sulla tradizionale *self regulation* e il secondo sulla necessità di una qualche maggiore o minore dipendenza da una regolamentazione eteronoma. Negli ultimi decenni, questo tema si è reso piú complesso a causa di due aspetti tra loro antinomici. Da un lato, la presenza

[9] G. Teubner, *Global Law Without a State*. Dartmouth, 1997; Id., *Idiosyncratic Production Regimes: Co-evolution of Economic and Legal Institutions in the Varieties of Capitalism*, in J. Ziman (ed.), *The Evolution of Cultural Entities: Proceedings of the British Academy*, Oxford, 2002; ma, soprattutto, Id., *Constitutional Fragments. Societal Constitutionalism and Globalization*, Oxford, 2012.

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crescente, in àmbito globalizzato, della regolamentazione su base transnazionale e privatistica di molteplici aspetti della vita sociale. E non si può fare a meno di notare come questa direzione sia stata anticipata dall'organizzazione sportiva internazionale, per cui oggi quando si parla di *lex mercatoria* si fa riferimento anche all'area dello sport[10]. Dall'altro lato con essa si scontra la richiesta che nasce proprio dall'àmbito sportivo del supporto della legge e la considerazione che la *lex mercatoria*, che ha origini trasversali e privatistiche, senza uno stato che garantisca le convenzioni ratificandole in codici non potrebbe avere piena efficacia[11]. Il problema sorge quando la conflittualità nascente all'interno del mondo sportivo impone alle Corti nazionali, o anche alla Unione europea, di riconoscere le regolamentazioni sportive. Proprio questa interazione tra l'ordinamento sportivo e l'ordinamento giuridico porta a costruire, riconoscere, richiedere e stabilire, in relazione alla specificità dello sport, una *lex sportiva*[12].

[10] Si veda S. Gardiner, *Sports Law*, cit., p. 143 s.: «The analogy between *lex mercatoria* and a *lex* sportiva or sports law is germane: both respect a degree of autonomy, both acknowledge cultural specificities, both are part of a pluralistic and complex normative rule structure, and both acknowledge the need for international emphasis in terms of legal regulation. *Lex mercatoria*, or the Law Merchant, was the legal doctrine developed in the Middle Ages by special local courts in Britain and elsewhere. These merchant courts had judges and jury who were merchants themselves and would apply the *lex mercatoria* as opposed to local law. An analogy can be made with the Court of Arbitration for Sport and the view that it is developing a specific doctrine of international sports law». Gardiner cita L. Sealey, R.J.A. Hooley, *Commercial Law: Text, Cases and Materials* (1999): «The *lex mercatoria* was an international law of commerce. It was based on the general customs and practices of merchants which were common throughout Europe and was applied almost uniformly by the merchant courts in different countries (…) [it] derived its authority from the voluntary acceptance by the merchants whose conduct it sought to regulate (…) it was flexible enough to adapt to new mercantile practices (…) it was speedily administered by merchant courts which shunned legal technicalities and often decided cases *ex aequo* yet bono (in equity and good conscience)». Vedi anche Ch. Pamboukis, Lex mercatoria *as Applicable Law in International Obligations,* Atene, 1996, p. 20 s.

[11] Tra gli altri, J. Wiener, *Globalization and the Harmonization of Law*, Londra, 1999, p. 161.

[12] Cfr., ancóra, J. KocijanËiË, O*pening Address*, cit., p. X: «The basic theoretical problem of the legal science in sport is to define the specificity of sport. That means that we have to define what the particular characteristics of sports are, i.e. the typical features which compared to other social substructures (like culture or science) allow a set of specific sports rules, or in other words, which allow even the sport exception or immunity, complete or partially, with many theoretical and practical legal problems involved.

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Troviamo, infatti, un'ampia gamma di rapporti: si può realizzare una sorta di acquiescenza, vale a dire quando in mancanza di atti formali si realizzi un riconoscimento come accade ad esempio nel caso della protezione del simbolo olimpico. Si possono dare influenze reciproche[13], di cooperazione, come avviene, ad esempio, in tema di antidoping, dove gli stati, le istituzioni sportive e la comunità internazionale hanno dato vita alla WADA, World antidoping Agency che, «is emblematic of the emergence of new forms of hybrid public-private governance in the global sphere»[14]. Ma il rapporto può sfociare anche nel conflitto che sorge sia quando gli stati agiscono in violazione della Carta olimpica o quando il mondo sportivo si muove violando norme statali. Si tratta di un conflitto tra le autorità pubbliche e le istituzioni sportive internazionali. La conflittualità piú usuale si ha quando la regolamentazione globale dello sport impatta in campi soggetti alla giurisdizione degli Stati, il che avviene, ad esempio, quando le norme sportive sono poste a confronto con i diritti fondamentali o attività economiche garantite o regolate dalla legge.

Per quanto riguarda le influenze reciproche, le relazioni ci confermano un dato ben noto: negli ultimi decenni lo sport ha avuto un impatto politico e spesso ha influenzato il comportamento degli stati. A cominciare dalla *pingpong diplomacy* tra Stati Uniti e Cina negli anni settanta fino agli eventi che hanno portato all'esclusione del South Africa dai giochi olimpici di Tokyo o alla recentissima esclusione della Russia dai giochi olimpici invernali[15].

In short, we have to examine what is so important in sporting problems and relations that it could command different legal treatment. In addition to the principle of specificity, our special attention should also be given to the autonomy of sport, although this principle is less disputed. It is more than logical and largely accepted that the state and political authorities should not intervene in the organizational structure of sports».

[13] A. Markovits, L. Rensmann, *Gaming the World*, cit., p. 30 s.

[14] S. Gardiner, *Sports Law*, cit. Su questo tema e sul tema della frode sportiva sono stati molti gli interventi in questo Convegno. Ricordiamo Di Giandomenico, Nafziger, Xu Xiang, Cornelius, Huiying Xiang.

[15] A. Markovits, L. Rensmann, *Gaming the World*?, cit., p. 16: «There are many examples of how sports can produce effects on States: the "ping-pong diplomacy" between the USA and China in the 1970s; the fight against the apartheid and the exclusion of South Africa from the Tokyo Olympic Games in 1964; the reciprocal "boycotts" between the USA and the USSR during the Cold War. Moreover, the story of the journey of the Olympic torch to Bejing provides another example of this relationship, albeit one that is

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4. Le relazioni presentate forniscono un'altra indicazione che riguarda non solo le diversità di approcci tra *Sports law* e legislazioni nazionali, ma soprattutto quella parte comune che inserisce il diritto sportivo nella tendenza di un costituzionalismo globale che sposta anche sull'organizzazione sportiva il tema della costituzionalizzazione delle *civil societies*[16]. Gli incontri periodici dello IASL mirano appunto a ricercare se sia possibile o se già non esista una *lex sportiva* che sembra essere un diritto globale sportivo, che fa i conti con le legislazioni nazionali. Che ci sia un evidente globalizzazione nello sport è innegabile, anche se ad essa si accompagna, per altri versi, la rivendicazione di identità diverse[17]. Questo 'paradosso della cultura' si presenta anche nello sport ed esprime bene la crescente differenziazione che si realizza nello sport stesso e che non può che avere impatto sulla sua organizzazione[18].

political rather than legal in character: following European protests against the violent repressive action of the Chinese. Sometimes, however, it is States that influence the sports regimes, and not *vice versa*».

[16] Esiste una letteratura quasi sconfinata su questo punto e lo sport non si sottrae al fenomeno dell'antinomia tra *global* e *local*. Per il problema in generale cfr. sempre G. Teubner, *Constitutional Fragments,* cit. Vedi anche T. Hylland Eriksen, *Globalization: The Key Concepts*, Oxford, 2007. Con riferimento allo sport: L. Allison (ed.), *The global Politics of sport. The Role of Global Institutions in Sport (Sport in the Global Society),* London, 2005; F. Latty, *La* lex sportiva*. Recherche sur le droit transnational*, Boston, 2007; J.A.R. Nafziger, *International Sports Law*, New York, 2004; Id., *The future of International Sports Law*, in *Willamette Law Review*, 2006.; A. Wax, *Internationales Sportsrecht. Unter besonderer Berücksichtigung des Sportvölkerrechts*, Berlino, 2009 (zugl. Diss. Tübingen, 2008).

[17] S. Gardiner, *Sports Law*, cit., p. 190: «There is clearly a globalizing trend in sport. At the same time we notice a growing apart, a polarization of, on the one hand, the ever more commercial top-class sports and, on the other, the revival of local recreational sports and local traditions. The revival of local popular sports, such as folk games or traditional games are examples of this». «A paradox of sport can therefore be identified in terms of "globalization" and "localization". However, it is clear that regional and international sports federations regulate by cutting across traditional boundaries. In effect it is often the case that these global regulators can override domestic sporting regulators, and even State authorities themselves, to effectively regulate activity within their "jurisdiction"».

[18] Sul dibattito «*global–local*» nello sport, cfr. A. Bernstein, A. Blain Bernstein, and N. Blain, *Sport, Media, Culture: Global and Local Dimensions,* Londra, 2003; J. Hoberman, *Sportive nationalism in the age of globalization*,in J. Bale, M. K. Christiansen (eds.), *Post Olympism: Questioning Sport in theTwenty-first Century,* Oxford; J. A. Maguire, *Sport and globalization*, in A Raney, J. Bryant (eds.), *Handbook of Sports and Media 2004*, 2006, p. 435 s; K.B. Wamsley, J.Barney and S.G. Marty, *The*

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5. Il processo della post industrializzazione e della seconda globalizzazione sta trasformando lo sport avviandolo verso un nuovo tipo di internazionalizzazione nel quale le culture si incrociano realizzando anche una sorta di meticciato che, come si è detto anche prima a proposito del *global*, si scontra e incontra col *local*, e, per reazione,spinge al recupero di un'identità, che si caratterizza per il suo dinamismo, quasi a formare quella terza cultura, o cultura globale, caratterizzata da una grande varietà che fa pensare piuttosto all'esistenza di varie culture globali[19]. Le trasformazioni che dagli anni settanta in poi si sono verificate in campo economico hanno modificato sia nelle società capitaliste avanzate occidentali ma anche negli ex paesi in via di sviluppo l'organizzazione delle società sportive. Una delle trasformazioni che discendono dall'industrializzazione è la commercializzazione presente in tutto il mondo che, collegata alle possibilità tecniche, ha posto nuovi problemi tra cui la protezione dei dati sensibili. Inoltre, le performances sportive sono entrate nel novero delle creazioni, da cui anche la possibilità di tutelare diritti di immagine, di autore e via dicendo. Si va verso il cambiamento di alcuni aspetti chiave delle contemporanee culture sportive con ricadute sulle culture nazionali per cui ci si può chiedere fino a che punto gli sport globalizzati possano influenzare società e identità postindustriali. Da cui la domanda: «Which role do sports play in globalization, and to what extent are they an engine of cosmopolitan political and cultural change? At the same time, how have sports successfully maintained traditions in the continuing battles for their very identities? And how have sports reconciled the new challenges that have emerged by

*Global Nexus Engaged. Sixth International Symposium for Olympic Research*, Londra, 2002.

[19] Cfr. M. FEATHERSTONE, *Global Culture. An Introduction*, in ID. (ed.), *Global Culture, Nationality, Globalization and Modernity*, Londra, 1990, p. 1 s., per il quale esistono processi culturali transocietari, che assumono una varietà di forme, e processi che sostengono lo scambio e il flusso di merci, gente, informazione, conoscenze e immagini, che originano processi comunicativi che acquistano una qualche autonomia a livello globale: «Hence there may be emerging sets of "third cultures", which themselves are conduits for all sorts of diverse cultural flows which cannot be merely understood as the product of bilateral exchanges between nation-states…The binary logic which seeks to comprehend culture via the mutually exclusive terms of homogeneity/heterogeneity, integration/disintegration, unity/diversity, must be discarded. At best, these conceptual pairs work on one face only of the complex prism which is culture».

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their becoming globalizing cultural forces with new affiliations and allegiances far beyond local and national venues?»[20]. Ma il cambiamento piú significativo lo si è avuto grazie alle nuove tecnologie di comunicazione che hanno modificato lo stesso modo di vivere e fare sport[21].

6. Il diritto globale sportivo, che rivendica immunità dalle leggi nazionali, è stato definito «as a transnational autonomous legal order created by the private global institutions that govern international sport. Its chief characteristics are first that it is a contractual order, with its binding force coming from agreements to submit to the authority and jurisdiction of international sporting federations, and second that it is not governed by national legal systems (…) It is a sui generis set of principles created from transnational legal norms generated by the rules, and the interpretation thereof, of international sporting federations. This is a separate legal order that is globally autonomous. This implies that international sporting federations cannot be regulated by national courts or governments. They can only be self-regulated by their own internal institutions or by external institutions created or validated by them. Otherwise they enjoy a diplomatic-type immunity from legal regulation»[22].

In questa prospettiva il *legal order* dello sport è espressione di una comunità di soggetti che si pongono come attori sociali che intervengono nel mondo globale e che esprimono non solo capacità normativa, ma anche gestionale e giurisdizionale basata su una sorta di identità non solo culturale, ma anche economica, che si trasforma, at-

[20] A. Markovits, L. Rensmann, *Gaming the World*, cit., p. 16.

[21] Cfr., tra gli altri, K. Lefever, *New Media and Sport. International Legal Aspects*, 2012, p. 1: «During the past decade, the media landscape and the coverage of sports events have changed fundamentally. The emergence of new communication technologies, such as Internet and digital television, the convergence of these technologies, the multiplication of the number of devices through which content can be accessed and the rise of the active "prosumer" have put their stamp on the way fans can consume sports content».

[22] K. Foster, *Is There a Global Sports Law?,* in R. C. R. Siekmann, J. Soek (eds.), Lex Sportiva*: What is Sports Law?*, cit., p. 35 s. Sulla complessità di una definizione di diritto globale cfr. W. Twining, *General Jurisprudence. Understanding Law from a Global Perspective*, Cambridge, 2009. Sia consentito il rinvio a M.F. Serra, *Considerazioni sul global legal pluralism*, in *Nomos. Le attualità nel diritto*, 1, 2018.

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traverso atti di volontà, in identità istituzionale. Da cui anche un'attenzione particolare alla normatività nascente nelle società, anche attraverso circuiti di *policy-making* di tipo negoziale policentrico, a base contrattuale e al di fuori delle sedi legislative ufficiali. È un dato di fatto che parlare di diritto globale implichi la consapevolezza che esso mal si concili con le teorie classiche del diritto tipiche della *civil law*, ma parlare di diritto sportivo globale implica toccare un'esperienza che è ben antecedente alla attuale mondializzazione, frutto di sviluppi storici che derivano da una molteplicità di fattori tra cui una delle matrici è il neoliberalismo degli anni settanta[23]. Quindi, da un lato, occorre chiarire il significato di ordine giuridico e dall'altro «prendere le distanze dal concetto di fonte formale del diritto che collega la regola e il suo senso e il suo campo di applicazione, la sua forza e la sua legittimità all'autorità o all'istituzione che la emana o la pronuncia»[24].

Stranamente negli studi sulla globalizzazione incontriamo solitamente il riferimento a molteplici aspetti della realtà transnazionale, primo fra tutti il mondo dell'economia e della finanza, ma anche internet con il suo universo virtuale, il tema del riscaldamento climatico, la responsabilità sociale d'impresa, il tema dei diritti dell'uomo ecc., ma, anche se si nomina lo sport, raramente si tratta di un rife-

[23] K. Benyekhlef, *Une introduction au droit global*, in Id., *Vers un droit global*, Montréal, 2016, p. 1 s.: «Il importe de se pencher sur le sens à donner à l'expression "droit global". En effet, il est fondé de se demander ce que recouvre cette expression et de s'interroger sur les "réalités normatives" qu'elle propose et arrange. Mais il serait difficile, voire réducteur, de s'en tenir à une simple définition comme si le droit global était aujourd'hui une composante bien établie de la science juridique. D'abord, il faut reconnaître que ce qu'on entend par "droit global" s'intègre malaisément dans les théories classiques du droit (…) Ensuite, le droit étant une "science" hétéronome, on ne saurait faire état de ce concept émergent sans revenir sur le contexte de cette émergence. Les phénomènes révélés et constitués par le droit global s'inscrivent dans une trame historique qu'on ne saurait ignorer. En effet, le droit global est le fruit d'une conjoncture qui explique et justifie son émergence. La mondialisation est bien évidemment la clé d'entrée dans le droit global. Mais la mondialisation elle-même est le fruit de développements historiques qui relèvent d'une multiplicité de facteurs, et dont une des matrices est le néolibéralisme postulé dès les années 1970».

[24] Cfr. B. Frydman, *Comment penser le droit global?*, Working Papers du Centre Perelman de Philosophie du Droit, 2012/01, in *www.philodroit.be*, il quale ricorda bene, nel discutere proprio su come pensare il diritto globale, come sia importante innanzitutto definire cosa si intenda per ordine giuridico.

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rimento dettagliato ad una esperienza complessa e risalente come quella sportiva. Si tratta di un aspetto di cui ben si occupano, invece, gli studiosi del settore i quali sono anche consapevoli che il mondo dello sport ha una sua autonomia e soprattutto un suo *legal order* caratterizzato anche dall'esistenza di fonti formali, che in qualche modo lo rende atipico rispetto a tutti gli altri aspetti della globalizzazione[25].

Il diritto sportivo nel corso dei tempi ha realizzato un sistema, una struttura ordinamentale complessa generalmente autonoma rispetto ai singoli ordinamenti statali. È da questo suo ordine che occorre partire per comprenderne la 'costituzione' atipica e porsi le molteplici domande che si presentano. In questa direzione forse possono aiutarci le riflessioni del *societal constitutionalism* che consentono di pensare il diritto globale «non plus comme un ordre unique, de fait introuvable, mais bien sous la forme des relations et des coordinations, à observer ou à construire, entre les différents ordres juridiques existants»[26].

Non basta piú soffermarsi solo sull'originarietà o meno dell'ordinamento sportivo, ma occorre guardare al tema del pluralismo giuridico in termini aperti al piano internazionale, avvalendosi dell'evoluzione del costituzionalismo con le sue nuove indicazioni relative alle autonomie sociali e alle formazioni di diritto globale, riflettendo sul tema delle autonomie e di un rinnovato rapporto tra ordinamento giuridico e società in considerazione soprattutto dell'importanza dei gruppi sociali a livello trasversale. Il che però non elude il problema della sua natura e dei rapporti tra il diritto sportivo globale e le nor-

[25] J.-L. Chappelet, B. Kübler-Mabbott (eds.), *The International Olympic Committee and the Olympic System. The governance of world sport*, New York, 2008. Nella presentazione al volume si legge: «we offer readers a book that deals with one of the less visible aspects of global governance» e «this book also fills a curious void in political science, where athletics are not a serious topic».

[26] B. Frydman, *Comment penser le droit global*?, cit., p. 7, ritiene che si debba superare il concetto di ordine giuridico «*pour envisager immédiatement les normes et les interactions juridiques entre les acteurs en tant que telles, indépendamment du ou des ordres dans lesquels elles s'inscrivent ou non*». Cfr. anche N. Walker, *The Idea of Constitutional Pluralism*, in *Modern Law Review*, 2002, p. 317 s.; C Walter, *Constitutionalising (Inter)national Governance: Possibilities for and Limits to the Development of an International Constitutional Law*, in *German Yearbook of International Law*, 44, 2001, p. 170 s.

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mative nazionali. Problema che si intreccia con due aspetti tra di loro peraltro connessi: vale a dire come lo sport è vissuto e praticato all'interno dei singoli paesi e quale può essere oggi l'impatto del fenomeno della globalizzazione sulle culture sportive locali, che pure sono legate a forme di organizzazione transnazionale. In altri termini, il fenomeno dello sport, che è regolamentato a livello transnazionale, e che, quindi, si può dire realizzi un diritto globale *ante litteram*, esce rafforzato nel contesto globalizzato, anche se, d'altra parte, è condizionato da pratiche e usi dei principali protagonisti della globalizzazione. La sua crescente commercializzazione e le sue molteplici funzioni sociali, il suo riconoscimento come diritto fondamentale richiedono, infatti, interventi positivi che solo gli stati nazionali possono dare.

MARIA FRANCESCA SERRA

*Abstract*

Partendo dai problemi suscitati dalle relazioni si mettono in rilievo le principali problematiche relative all'organizzazione dello sport a livello globale e locale. Emerge un sottofondo comune oltre che la preoccupazione generalizzata della importanza di mantenere una *lex sportiva* indipendente dalla politica pur nella consapevolezza della necessità che lo sport debba essere supportato, sia per gli investimenti, sia per la repressione della frode sportiva, da atti concreti, anche legislativi. Se lo sport, fenomeno in continua crescita e trasformazione, è caratterizzato da una organizzazione che richiede sempre piú la cooperazione tra organizzazioni politiche e ordinamenti sportivi, è anche vero che esso deve poter conservare la sua autonomia e la sua capacità di *governance* a livello mondiale.

Starting from the reports, the main problems related to the organization of sport at a global and local level are highlighted. Several common points emerge among which the need to maintain a sporting law independent from politics, despite the need for support for sport, both for investments and for the repression of sports fraud, by concrete acts, including legislative ones. Sport must be able to preserve its autonomy and its capacity of governance globally.

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Sessione I

# STATUTES GOVERNING AND PROTECTING ATHLETES SPORT RESPONSIBILITY AND SPORT LIABILITY

# Meaning and forms of liability in sporting action

SUMMARY: 1. Forms of liability. - 1.1. Tort and liability distinctions. - 1.2. Tort in sports - sports liability. - 1.3. Cases of tort in sports action. – 2. Athletically unlawful acts. – 3. Unlawful acts in sports according to the common law. – 4. Disencumbering the unlawful character of sport acts issue. – 5. Conclusion.

1. Sports define a wide area of human activity with a maximized financial interest aspect, which oftentimes decides on sport actions and the outcome of sport events. The law is necessary for ensuring the sports institution, the smooth and orderly holding of sport actions and events, as well as the complete satisfaction of the right of natural and legal entities to a fair participation in sport activities and issues.

As it happens in everyday life, tort occurs in sports life as well[1]. Law and especially Sports Law should govern any form of liability no matter if it derives from tort, contract or is a combination of both liability forms.

Some fundamental questions which may be posed in this respect are: Which are the forms of tort in sports and sport activity? Which is the form of liability in sport tort? In what does the liability of who committed the tort consists in and how should liability be searched for? For instance, we examine what form of liability may carry – and on which extent – the sports authorities (referees, judges,

[1] D. PANAGIOTOPOULOS, *Types of Injustices in Sports Activities and Search for Liability*, in *Findings of 6th IASL Gongress in Tehran*, May 6-8, 1999, Iran. Cfr. also, *IASL Bulletin,* II, 1999, *Liability in Sports Activity, Findings,* mentioning «the nature of liability in sports activity is an issue defined by applicable law».

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observers, etc), during performance of their duties, and what is the criterion of their culpable behaviour[2].

1.1. An act is a voluntary, external human behaviour, exercised as well by omission[3]. Tort and offence, according to the predominant view in civil law science, are not two identical notions. The term *tort* denotes any unlawful act regardless of whether it contains the element of culpability (tort *lato sensu*) or not, while the term *offence* denotes any act which is illegal and culpable at the same time, an act which causes damage to another person's legitimate property, thus giving rise to an obligation to pay damages (tort *stricto sensu*)[4].

Basic forms of liability are the one deriving from a lawful act, also called contractual liability, and the one deriving from tort, also called non-contractual liability. Contractual liability differs from the tort-founded liability with respect to:

a) its extent;
b) the degree of culpability;
c) the burden of proof; and
d) prescription[5].

It should be examined whether such tort-founded liability may be somehow applicable to sport activities[6].

In civil law tort-founded liability is based on the principle of culpability, which implies that, in principle, culpability (wilfulness, recklessness, fraudulence or negligence) is required; hence its characterization as subjective liability[7]. It is an original liability, since the obligation to pay damages is directly founded on law, regardless of the

[2] At a later stage it will be examined who bears the burden of proving such behaviour.

[3] G. Tousis, *Penal code* (ΠΚ), 3rd ed., vol. I, p. 59, fn. 1, ΠλΓυθ (Gytheion Criminal Court of First Instance) 15/1964, *Ποινικά Χρονικά, (Poinika Chronika Journal),* XIV (14th issue), p. 175; ΠλΘ (Thessaloniki Criminal Court of First Instance) 622/1984, Αρμ, in *Armenopoulos Journal,* 1985, p. 237.

[4] A. Georgiades, M. Stathopoulos, *Αστικός Κώδιξ (Civil Code)*, vol. IV, Introductory remarks Article 914-938, under 1, Athens, p. 679.

[5] *Ibidem*, p. 680.

[6] G. Auneau, *Le Regime Juridique de la responsabilité civile appliqueé au Secteur du Sport*, *6thn IASL Congres* - Tehran - Mai 1999; also in *Proceedings of the 1st Sports Law Conference with International Participation*, Trikala, Greece, June 4-6, 1999.

[7] A. Georgiades, M. Stathopoulos, *Αστικός Κώδιξ (Civil Code)*, cit., p. 684.

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existence of a contractual relation between debtor and beneficiary. A legitimate cause of liability is for the most part the offence (unlawful and culpable act), although a simple tort, i.e. an unlawful act[8] may also be included.

The concept of tort in criminal law is narrower; there the term denotes a *crime* attracting a punishment in case of its being committed. A criminal offence is an unlawful act or omission which can be ascribed to the doer and is punishable by the law. An unlawful act is one that contravenes prohibitory or authoritative rule of law as long as for that case no reasons occur which could raise its unlawful nature[9]. Otherwise, the unlawful act discards its criminal nature provided that the conditions set forth by the law for its being labelled as criminal offence are not met. Criminal liability always presupposes culpability in contrast to civil liability which usually also requires culpability but in some cases objective liability occurs even without the debtor's[10] culpability.

1.2. Liability resulting from tort in sports activity[11] derives both from contracts and tort, in form of liability with administrative-disciplinary, moral and criminal aspects.

During sports activity it is not rare for relations and issues to arise which fall under common law rather than directly under Sports Law, and vice versa. The law does not contain separate rules governing tort in sports activity. Consequently, it is necessary for this concept to be defined on the basis of the provisions of common law, taking into account the particular nature of sports institutions, relations and special rules of Sports Law[12].

[8] *Ibidem*, p. 680.

[9] N. Chorafas, *Criminal Procedure*, vol. I, 9th ed., p. 126; A. Bouropoulos, ΕρμΠΚ (*Penal code Interpretation*), vol. I, p. 33; Ch. Dedes, in *Ποινικά Χρονικά*, (*Poinika Chronika Journal),* IC, p. 337 s.

[10] *Civil Code*, Article 914, Article 918, 922, 924, § 1, 925 C, cfr. A. Georgiades, M. Stathopoulos, *Αστικός Κώδιξ (Civil Code),* cit., p. 682.

[11] D. P. Panagiotopoulos, *Categories of Tort in Sports and Search for Liability*, in *Νομικό Βήμα (Nomiko Vima Journal)*, 48, 2000, p. 1377 s.

[12] According to Auneau, the very nature of sports is the cause and the social framework in which the latter develops, which results in the search for sports liability. G. Auneau, *Le Régime Juridique de la Responsabilité Civile Appliquée au Secteur du Sport*, cit., p. 53 s.

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During sports activity damage is likely to be caused either to the athletes themselves or to those directly or indirectly participating in a sports event; in the framework of the national legal order, such damage is connected with provisions governing non-contractual, *alias* tort-founded liability[13]. In international sports meetings, because of international elements[14], the applicable law is determined on the basis of the rule of private international law *stricto sensu*, namely of the area where the issue was raised[15]. A basic element of tort in the states of common law is the care due[16].

'Tort in sports activity' could be defined as an unlawful and illegal act or omission of persons involved in sports, either during sport events and games in the sports field, or outside sport games in any other place and time within the scope of the sports institution.

Subjects of tort in sport activity who may be held liable are e.g. athletes, coaches and trainers, administrative employees of sports as-

[13] On the issue of civil liability, cfr. M. Avgoustianakis, *Issues of Civil Liability in Organizing Sport Events*, in *Olympic Games and Law*, 2005, p. 363 s. An issue which has not been thoroughly examined yet is whether an injured soccer player could sue his Club on the grounds that he was forced to play although. Cfr. also M. James, *Sports Torts and the Development of Negligence in England*, in *International Sports Law Journal,* 17, 19, 2003, p. 2.

[14] Instead of others, cfr. Ch. Pamboukis, Lex mercatoria *and Applicable Law in International Contractual Relations,* 1996, p. 20 s.

[15] E. Moustairas, *Sports Legal Order and Civil Liability. Comparative Law Remarks*, in *Sports Law. Implementation and the Olympic Games*, 2005; D. Panagiotopoulos ed., Athens, as in *Lex Sportiva*, 2005, according to which a widely applicable rule all over the world is that the applicable law governing tort is *lex loci delicti*, i.e., the law of the place where the damaging event occurred. According to the viewpoint accepted by most legal systems – also adopted by the ECJ –, i.e. that law could be either that of the place where the damaging action occurred, or that of the area where the results of the act first emerged.

[16] J.T. Gray, *Sports Officials and the Law*, in *International Sports Law Journal,* 2002, p. 3 s., where the author argues that violation of the care duty owed by a sports official to the participants of a sports game is an issue of common care based on the «ratio» in relation to the aim pursued. In South Africa due care is defined and established on the basis of the Roman Law principle *lex Aquiliana* on *culpa* rather than by the «criterion of proximity» of the cause (*Proximity Test*), as is the case in *common law legal systems*; cfr. A.P. Agbonjinmi, *Legal Basis for Coaches Liability in Sport and Recreation*, in *Sports Law (*Lex Sportiva*) in the world,* 2004; D. Panagiotopoulos ed., cit., p. 187 s.; cfr. E. Moustairas, *Comparative Law. University Lectures*, cit., p. 84 s. Further information on the rights of non-contractual liability in sport acts in E. Moustairas, *Sports Legal Order and Civil liability*, cit.

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sociations, unions or federations, authorities of sport games (referees, judges, observers), even the associations, federations themselves, i.e. natural or legal entities directly or indirectly involved in sports action and athletic issues.

A person's sports and athletic behaviour is connected to his/her personal freedom, and any punishment aiming at restricting that freedom during searching for liability in sports actions[17] should not come to abolish it[18]. A person culpable of tort in sports activity is usually identical with the person to which sports liability as well as administrative, criminal or other sanctions are ascribed in connection with sportsmanship[19].

Nevertheless, in some cases the person liable is different from the one who committed tort. Typical examples are cases of violence and riots (use of fire-crackers, disorder among fans, smashing seats, etc.), torts which, although committed by fans or persons unrelated to the Clubs, always result in some disciplinary sanctions by the competent sports authority at the expense of one of the Clubs or Associations. Consequently, in this case the law imputes liability on the competing club without own culpability of the latter's[20]; this is called ob-

[17] According to the case-law in the matter, a person's characterization as a «non-sports fan» is not merely a restriction of his/her freedom, but a complete abolishment thereof and as a punishment it can only be imposed by a court of justice rather than by the administration authorities. ΣτΕ (State Council) 1724/1965, ΕπιθΑθλΔικ (*Epitheorisi Athlitikou Dikaiou, Review of Sports Law*), 1995, p. 241. The fact that the «Regulation on the Quality of Sports fan» does not define specific offences and sanctions is not a violation of the Constitution (Article 7), since the aforementioned Article refers but to criminal offences, ΣτΕ (State Council) 3657/1987, ΕπιθΑθλΔικ, cit., p. 358.

[18] ΣτΕ (State Council) 1724/65, as well as ΣτΕ (State Council) 2480/1993, *ISLR* II:3/4, 1995, p. 33 on the constitutional principle of equality, according to which all local sport clubs may freely use sport facilities with no unjustified distinctions. Similarly ΣτΕ (State Council) 4914/1988, in *International ΕπιθΑθλΔικ, Epitheorisi Athlitikou Dikaiou, Review of Sports Law,* ISLR, I, 1, 1992, p. 96. Imposing restrictions on a minor athlete's transfer is not proportional and contrary to the free development of his/her personality.

[19] A Board's order to an athlete's coach to cease coaching her because of personal issues with her parents, is contrary to the principles of sportsmanship, ΣτΕ (State Council) 2417/1993, *ΕπιθΑθλΔικ,* cit., 1995, p. 361, Opinion of TAS 86/01, 10.11.1986; also the relevant Chapter on doping, infra.

[20] Culpability of the team fans is enough to hold the Club liable and the sanction is subtraction of 2 points, ΜΔΟ (One-member Jurisdictional Body) 39/1991, cfr. I. Voultsis, *ΗΑντικειμενική Ευθύνηστο Πειθαρχικό Αθλητικό Δίκαιο*, in *Proceedings of the 1st*

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jective liability, although doers of the tort are persons different from those culpable of it – and many times unidentified[21].

The rules that govern any sport require for the game authorities (referees, judges, etc.) keep the game under reasonable control and supervision. A referee has the power to decide directly and in the framework of sportsmanship on any case not explicitly and specifically governed by the game rules as well as to establish any abnormal conditions of the holding of the game. This means that the game authorities should ensure that the game is played according to the rules, and that harsh and unfair game will be punished accordingly. Recurring fouls which go unnoticed by the referee could result in culpability, which will occur after players and other persons engage in quarrels because of the referee's omission to notice the fouls[22].

The game authorities' duty and responsibility is to ensure that safety regulations are kept for the physical integrity and mental health of the players[23]. If the referee fails to implement safety regulations and a player gets injured, liability should be imputed on the referee. Similarly, the referee is held liable in case of injury because of inadequacy of the field[24].

*International Congress on Sports Law*, (D. Panagiotopoulos ed.), Telethrion, Athens, 1993, p. 384.

[21] ΟΔΠΕ (Football Referees' Federation of Greece) objective liability due to members' behaviour which is defamatory to the sport. ΟΔΠΕ (Football Referees' Federation of Greece) is an idiosyncratic member of the proper sports Federation and its organs are subject to the Federation's disciplinary authority ΔΕΕ/ΕΠΟ (Appeal Committee of the Greek Football Federation) 342/1994, *ISLR* II:3/4, 1995, p. 361.

[22] M. Narol, J. A. Martin, *A new defense to the old defenses? The EEOC equal pay act guidelines*, in *Marquette Sports Law Journal*, 9, 1998; on the legal liability, M. Narol, *Recent Liability Lawsuits against Referees*, Ch. 10, in *Resource Manual. Legal Responsibilities and Risk Management for Sports Officials* (*Australian Sports Commission*), 1995.

[23] For instance, a referee is responsible for the players' basic (or not) equipment, since otherwise an injury may occur (abrasions, bone fractures etc). Little-league baseball regulations in the US provide for that the catcher shall wear a helmet, a face mask, knee-savers and throat protectors, and the batter shall also wear a helmet, cfr. M. Narol, *Recent Liability*, cit.

[24] Cfr. related regulations also in any game's rules. Pericles and Protagoras were the first to pose the issue on sports liability. As cited in Plutarch's *Pericles' Life*, the two men kept discussing for a whole day the question of legal liability in a sports accident, «(...) *πότεροντο ακόντιον ή τον βαλόντα μάλλον ή τους αγωνοθέτας κατάορθώτατον λόγον αιτίουςχρήτου πάθουςηγείσθαι*» (= (...) which one should most reasonably be held li-

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Besides, the team coach and the holding authority officials may be held liable for not testing and validating the equipment used and the field safety for the physical integrity of the athletes. Such liability involves also culpability for light or gross negligence.

1.3. Within the scope of sports activity and for the sake of any further scientific study and the assessment of liability as a means of attributing justice in sports, cases of tort[25] may be distinguished, for example, according to the following criteria:

a) the nature of the legal regulation governing sports acts;

b) the nature of the act itself;

c) the one affected by the action: person, object or function;

d) the existence of culpable or non-culpable behaviour or intention of the person who committed the act;

On the base of the above criteria, sports torts may be distinguished in two categories:

a) Torts which are unlawful from a purely athletical point of view; tort-founded sports liability falls within the limits of sports action punished with a respective sports punishment (disciplinary or moral sanction), but such punishment may also be specially criminal;

b) Unlawful acts occurring during a sports activity, but characterized as unlawful at any event by criminal law and being likely to occur in any other context of social life. *Some indicative cases of tort in sports activity which outline this distinction are:*

a. Actions athletically unlawful:

– infringement on law or articles of association – deviation of a sports association from its objectives;

– illegal deprivation of personality development;

– public criticism on sport events;

– illegal financial transactions;

– bribery, promise of fraudulent and illegal benefits;

able? The spear, the one who threw it or the game authorities?), Antiphon, *Tetralogiae II*; also M.N. Skouteropoulos, *Η αρχαία Σοφιστική*, Athens, 1998, p. 59; cfr. J. de Romilly, *Great Sophists in Pericles' Athens,* Greek version by Kardamitsas Publ., Athens, 1994, p. 12 s.

[25] D. Panagiotopoulos, *Categories of Tort in Sports*, cit., p. 1378 s.

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– use/administration of doping substances and racehorse electric excitation;

– illegal participation to a game (false impersonation, illegal participation of an athlete) – false health certificate issued to an athlete;

– improper behaviour and misconduct – Personality offence.

b. Actions unlawful under common law:

– physical and moral impairment;

– b.a) revilement, defamation;

– b.b) physical and mental suffering;

– b.c) deceit, extortion etc;

– damage of alien property, and special damage;

– simple and slanderous defamation;

– infringement on the Narcotics Act and the Law on Mediators;

– assault, disruption of the play;

– blackmarketing tickets;

– sale of duty-free sport equipment to a Sports Club;

– riots in sports facilities: assault and battery, casting objects, use of firecrackers etc;

– doping.

2. Cases of infringement on the law or the articles of the association as well as cases of deviation of a sports club from its objectives are athletically unlawful acts[26]. According to the case-law in the matter, deviation of a sports association to a profit business leads to Association's dissolution[27]. Moreover, allocation of State funds by a sports association or club for purposes other than their initial purpose constitutes a sports offence of criminal nature, and the club president, the secretary general and the treasurer of the association are punished in accordance with the (Greek) Penal code regulations on malversation[28]. Similarly, athletically unlawful acts comprise cases of administrative or agential anomalies in sports clubs, associations or federations[29]. The presiding sports authority, at the moment of

[26] Law 2725/199, Articles 3, 7 and 18, 28 and 130 and Law 75/1975 Article 11 § 1.

[27] ΕφΑθ (Athens Court of Appeal), 1888/1988.

[28] Law 2725/199, Articles 50-52; cfr. Law 75/1975 Article 24 § 1.

[29] ΣτΕ (State Council) 1444/1996, *Επετηρίδα Αθλητικού Δικαίου* IV, Athens, 2000. The vice-minister for sports introduced an amendment (5th September 2000) on derogation of a Board member.

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submission of the year's statement of accounts, shall conduct a regular audit about allocation of State funds granted during the respective financial year. Besides, if financial maladministration is speculated, the authority is empowered to investigate liabilities of administrative officers by unscheduled audit concerning previous years. An excessed expenditure budget of a sports association, club or federation without the Secretariat General of Sports' consent constitutes a sports offence exclusively on the part of the members of the association Board, who are unlimitedly, jointly and severely liable[30].

A player's judgment against the referee's person through the Press or other Media before or after the game is considered to be a sports offence and the disciplinary sanction applicable is the player's suspension. To an offending coach a fine is imposed, and to a member of the club Board his/her derogation of this capacity[31]. Moreover, commenting on a decision delivered by the sports jurisdictional authority via the Press is an offence punishable accordingly[32]. Passive bribery in sports (namely acceptance of a bribe) is not a common crime of the Penal code, but a genuine special crime in sports[33] and athletically unlawful, as it aims at directly offending the sports institution, its values and the sport ideals, hence denaturing both the sports event and its outcome. This is also an offence of antiathletic nature punishable with life-long suspension of sports capacity by the

[30] Law. 2725/199, Articles 25, 50 52, and Law 75/1975, Article 12 § 7.

[31] According to the case-law in the matter, the right of free expression and diffusion of opinion on any issue orally, in writing or via the Press under Articles 14 § 1 and 25 § 3 of the Greek Constitution, a personal right fundamental to the concept of Democracy is not unlimited, but it is thought of as existing and functioning within the limits provided for by the laws in force which allow the establishment of limitations on exercising such right. Such limitations may be generally imposed on any citizen, but may also be more specific, concerning a special category of individuals, provided that limitations are justified by reasons of general social or public interest or reasons of public order and security; such limitations may not annullate the aforementioned right which should remain unaffected, its exercise may not become excessively difficult, and all sanctions provided for must be of judicial nature. D. Panagiotopoulos (1997-2000), *(Sports Code)*, Athens, p. 123; cfr. the former status Act. 75/1975, rticle 36.

[32] ΣτΕ (State Council) 2289/1986; such judgment is contrary to the principle of sports capacity.

[33] Law 2725/1999, Article 132, in ΑθλΚ (Sports Code, 2009), p. 260, cfr. Law 75/1975, Article 60 § 1; cfr. A. Charalambakis, *Financial Crimes in Sports*, in Proceedings of the 2nd Law Conference, *Law and Sports*, 4/18-19/1997, Athens, 1997, p. 49.

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appropriate authority[34]. Active bribery (giving bribes)[35] is similarly addressed, including referee bribing[36].

Extraordinary benefits to athletes aiming at attaining a favourable outcome are prohibited by Greek law[37]. Promise or provision of benefits aiming at stimulating the athletes' physical or mental powers to achieve a favourable outcome at the expense of the opponents is a sports offence of criminal, disciplinary and sports nature[38].

However, it is highly questionable whether it is an unlawful act in sports an act aiming at the (anyway legitimate) stimulation of the athlete's pursue for a better outcome by intensifying his/her power and will for success, a fact completely different from offering benefits for his/her lowered performance. Consequently, there is an essential difference between sports bribery in that sense and common bribery aiming at instilling to the athlete a mental attitude contrary to the one expected.

[34] According to A. Charalambakis, *Financial Crimes in Sports*, cit., there is an issue whether suspension of sports capacity is a subsidiary punishment or an administrative sanction. The thesis that it is rather an administrative sanction is corroborated by the fact that it is imposed by the ΕΦΙΠ (Committee for Sports Fan Spirit) and not by the ruling Court.

[35] Law 2725/1999, Article 132 and Law 75/1975 Article 60 § 2. According to the case-law in the matter, bribing a football player by an association member is contrary to the sports capacity principles, ΣτΕ (State Council) 3651/1978, ΕπιθΑθλΔικ, cit.,1995, p. 352. Attempted bribery of a football player is contrary to the principles of sports capacity, ΣτΕ (State Council) 1691/1981, ΕπιθΑθλΔικ, cit., 1995, p. 355. Bribery of officials of a football club by another club's officials is contrary to the principles of sports capacity, ΣτΕ (State Council) 1359/1982, ΕπιθΑθλΔικ, cit., 1995, p. 356. Mediation in football-player bribery is also contrary to the principles of sports capacity, ΣτΕ (State Council) 1843/1981, ΕπιθΑθλΔικ, cit., 1995, p. 356.

[36] A referee's acceptance of a gift promise in order to change the outcome of a football game is contrary to the sports capacity principles, ΣτΕ (State Council) 816/1993, ΕπιθΑθλΔικ, cit., 1995, p. 361. According to the ruling 369/1987 of the Piraeus Assembly of Appellate Justices, in *ISLR* 1 1992, p. 106.

[37] Law 2725/1999, Article 132; also Law 75/1975 art. 60 § 4. Consequently, regular monthly benefits to amateur athletes by their Association in order for travel expenditures to be covered are not a violation of the law. ΑΠ (High Court) 921/1998, in ΕλΔνη, *Hellenike Dikaiosyne Journal*, 39, p. 1550.

[38] Following an athlete's final conviction, his/her expulsion from the club and the suspension of his/her sports capacity by the appropriate authority is also provided for, cfr. A. Charalambakis, *Financial Crimes in Sports,* cit., p. 51 and D. Panagiotopou-

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Promise or offer of special benefits of any kind made by a sports association Board members to athletes or contract players other than those included in the initial contract is a sports unlawful act with criminal content[39].

Use of performance-enhancing drugs (doping)[40] under the form of blood transfusion before the game as well as administration of any substance which may alter the athlete's physical abilities and use of any means of external physical or mental stimulation constitute a sports unlawful act of administrative, moral and criminal nature. By using doping substances maximization of the athlete's performance is pursued as well as fraudulent win at any cost, in other words win not by natural means, i.e. training. Doping as an act falls under the notion of tort, and not only is it criminally punishable, but it is athletically unlawful as well, as it is antiathletic by spoiling the outcome. It is also an antiathletic behaviour attracting disciplinary sanctions[41]

los, *The Legal Aspects of Sports Ethics and the Protection of Fair Play*, in *International Journal of Physical Education,* 35, 3, 1998, p. 99.

[39] Cfr. Section 2 of the Article 132, Law 2725/1999 in ΑθλΚ (Sports Code, 2009), p. 260.

[40] Articles 128-128 ΙΔ Act 2725/99 as currently in force, in ΑθλΚ (Sports Code, 2009), p. 233; cfr. Law 1646/1986, Articles 7 and 8 in combination with the European Anti-Doping Convention, validated in Greece by Law 2371/1996 in D. Panagiotopoulos, ΑθλΚ (*Sports Code*), Athens, 1997, p. 250 and 370 s.

[41] D. Panagiotopoulos, *Doping: Legal Regulation,* Athens, 1991, p. 26 s., Id., *The Doping Issue - Preventive and Repressive Measures,* in *Sports Science*, Athens, 1992, p. 9 s.; Id., *El Problema Del Dopale - Medidas De Prevención Y Presión En Grecia,* in Proceedings of the Congreso Científico Olímpico, 1992 (Teresa González Ajía, ed., Derecho), 24, II, 1995, p. 213 s.; *Liaros;* Id.,*Doping: Antiathletic Behaviour - The Disciplinary and Criminal Aspects of the Issue,* in Επετηρίδα Αθλητικού Δικαίου I, *Sports Law Yearbook*, I, *The right to sports*, Athens, 1994, p. 173 s.; G. Agioutantis, G. Kampouroglou and N. Tzartzanos, *Doping, (public debate – Sports Medicine Association Symposium*), in *Sports Medicine*, 5, 7, 1968, p. 7 s.; A. Koutselinis, *Doping: A Concise Presentation of the Issue*, Athens, 1986; cfr. K. Vieweg, *Doping und Verbandsrecht*, in *Neue Juristische Wochenschrift (NJW*), 24, 1991, p. 1511 s.; Id., *Doping und Verbandsrecht - Zum Beschluss des DLV - Rechtsausschusses im Fall Breuer, Krambe, Moller,* in *Neue Juristische Wochenschrift (NJW),* 1992, p. 2539 s.; cfr. T. Lemmens, *Sports, Doping and Clashing Values*, in *Pandektis International ΕπιθΑθλΔικ,* cit., II, 1, 1994, p. 3 s. Doping concerns sports even nowadays. Cfr. World Conference on Doping in Sport, Lausanne, 2-4 Feb. 1999, in *Olympic Review,* XXVI, 25, 1999, p. 4 s. Besides, analyzing criminal sanction of doping as a Sports Law problem, which is the case already since 1990, is ineffective, cfr. D. Panagiotopoulos, *Sports Law Theory,* cit., p. 222. As confirmed by a research of the University of Athens, out of 462 athletes questioned on the sanction that

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and suspension of sports capacity[42]. The same applies for avoiding doping control, which may damage sports, the athletic ideal and sportsmanship[43] and sports and criminal liability is also investigated.

Performace-enhacing drug use and electrical excitation on race-horses, used in horse racing, and also an athlete's denial for doping control may attract criminal and disciplinary sanctions and penalties as well as sanctions related to sports capacity[44].

False impersonation aiming at an athlete's entering a game discloses an intention of using any illegitimate means for changing the outcome of the game[45]. This violation is not only connected to the conventional terms of holding a game, which should be a priori and unconditionally accepted by the associations, but constitutes a basic athletically unlawful act with disciplinary, moral and accordingly criminal aspects, since sports are thus directly damaged and sports ideals devastated[46]. Failing to comply with the regulations of the sports fa-

should be imposed on drug-enhanced athletes, 58% answered that a sanction of long suspension should be imposed. Doping is or should be a purely unlawful act within the limits of sports activity attracting the respective sanctions, namely life-long expulsion of drug-enhanced athletes and their providers, rather than constituting a criminal offence, cfr. K.W. Souri, *The Behaviour of Punished Team Sports Athletes* (doctoral dissertation), National University of Athens, Athens, 1998, p. 55 s.

[42] ΣτE (State Council) 3530/1988, ΕπιθΑθλΔικ, cit., 1995, p. 358.

[43] ΕΦΙ 12/1989. According to the law, secondary sanctions are provided for the violating athlete, such as banning from entering sport events and games for a specific period under the ruling of the appropriate sports authority (Article 8 § 2 and 3, Act. 1646/1986), suspension of the work permit for the violating coach (Article 8 § 4 Act 1646/1986), and suspension of sports capacity for any other natural entity, ΣτE (State Council) 3530/1988, Ευρετήριο Νομολογίας ΣτΕ (Index of Case-Law of the State Council) 1988, p. 14.

[44] Article 128 ΙΔ Sports Law, p. 310, cfr. 1646/1986, Article 10 § 1, § 2 and Article 11.

[45] Apart from other sanctions, also suspension of sports capacity is imposed, cfr. ΑΣΕΑΔ (High Council for the Resolution of Sports Disputes) 39/2003, 107/2002.

[46] D. Panagiotopoulos, *Participation of a Female Athlete of an Amateur Sports Association in B-League Basket Championship Games by Violation of the Proclamation Rules of the Respective Federation Rules*, in *Διοικητική Δίκη (Dioikitiki Diki Journal)*, 9, 1, 1997, p. 64 s.; D. Panagiotopoulos, *The Right to Sports and its Protection under Greek Constitution*, in *Επετηρίδα Αθλητικού Δικαίου,* in *Sports Law Yearbook* I, Athens - Komotini, 1994, p. 51 s.; D. Panagiotopoulos, *Participation in Sports Activity and Sports Customs*, in Επτρ.Αθ.Δ, *Sports Law Yearbook*, cit., p. 70 s. A ruling decision which may disqualify high school students from the National Gymnastics Games because of the sport's nature, which according to common sense is more suitable for minor athletes,

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cilities, which is improper behaviour punishable by Sports Law regulations[47] as well as false health certificates, resulting in an athlete's irregular entry to a game[48] by infringing the rules of holding the game are athletically unlawful acts, as is also inappropriate conduct of fans[49].

3. Many cases of tort and unlawful acts in general may concern sports activity. More specifically and as an example, cases may be cited of personality offence and moral harm of the person offended directly or indirectly, i.e. by tort, as well as of illegal and culpable cause of damage[50].

Types of moral harm are:

a) physical pain (in case of injury);

b) psychological pain or suffering (in case of a close person's death);

c) depreciation of a person's social value[51].

without any reason of public or social interest justifying their disqualification is contrary to the regulations of the Articles 16 § 9, 4 and 1 and 5 § 1 of the Constitution, ΣτΕ (State Council) 3699/1998, ΕΔ 99, p. 145; cfr. Act 2725/1999, Article 131, according to which a game proclamation consists a σύμβαση προσχωρήσεως.

[47] In cases like those described in the Presidential Decrees (ΠΔ) 456/1988, Article 3, 423/1976, Article 8, § 3 on banning admission in sports facilities due to inappropriate behaviour, the offender should be previously summoned to give explanations, otherwise there is a substantive omission, cfr. relevant regulations in any game's rules.

[48] Falsification of the date figuring on health certificates in order for some athletes' entering a game not only is a criminal offence (Article 242 of the Penal code), but it is contrary as well with the sports capacity principle; ΣτΕ (State Council) 589/1979, ΕπιθΑθλΔικ, cit., p. 353. Illegal entry in a game by circumvention of the game rules, which affects the terms of equality of football players, is subject to sanctions according to the Football Games Rules, Article 21, §4. Cfr. decision 162/27.5.1998 ΔΕΕ/ΕΠΟ (Appeal Committee of the Greek Football Federation).

[49] ΑΣΕΑΔ, 21, 83, 88, 89, 125/2003.

[50] Article 932 of the Greek *Civil Code* (AK) governs satisfaction for moral harm of the person injured by the tort. The same Article includes also a simply unlawful act that may not be wilful, such as unauthorized assumption of a right (Article 281 AK). Pecuniary satisfaction due to moral harm does not depend on the property damage, in other words the person offended may demand either one or both cumulatively, cfr. A. Georgiadis, M. Stathopoulos, *Αστικός Κώδικας* (*Civil Code*), vol. IV, Article 932 under 4, p. 815.

[51] *Civil Code*, Article 59, cfr. A. Georgiadis, M. Stathopoulos, *Αστικός Κώδικας* (*Civil Code*), vol. I, Article 59 under 2, Athens, p. 114. Exercising psychological pressure on an athlete by members of the Club Board and weighing him/her without clothes

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In all the aforementioned cases there is an obligation to compensation or financial reimbursement of the damaged part[52].

Criminal Law provides for offences which can be committed in sports matters in general. Such offences include offensive statements or acts[53], bodily harm inflicted carelessly[54] or wilfully[55], damage of alien property, special damage[56] etc. Among the criminal offences usually committed in sports outside games are fraud[57], without exclusion of its being committed during the game, offences against morality[58], simple and slanderous defamation[59], infringement on the Law

constitute antiathletic actions contrary to sportsmanship and the rules on sports capacity. Suspension of the sports capacity may be imposed from one to five years, according to the case. ΕΦΙ 102/1988, D. Panagiotopoulos, *Sports Jurisdiction,* cit., p. 100.

[52] *Civil Code*, Article 914; this Article is also applicable in case of a null work contract, cfr. A. Georgiadis, M. Stathopoulos, *Αστικός Κώδικας* (*Civil Code*), cit., Article 662 point 2, p. 511.

[53] Article 361 of the Greek Penal code (ΠΚ), based on the provisions of Act 3148/1955 and Royal Decree (ΒΔ) 26-9/7-10-1955 according to the aforementioned administrative procedure, suspension of sports capacity constitutes an administrative sanction clearly different from the secondary sanctions imposed by the criminal court in case of conviction for a punishable act. Sportsmanship and sports traditions require increased self-control from the Football Public Company members because of their capacity, even in cases of offensive or abusive treatment by others. The provision of Articles 25 and 308, § 3 of the Greek Penal code (ΠΚ) find no application as far as assessment, administrative procedure and exercise of administrative competence are concerned, of the conciliator of a sports-fan behaviour to the principles of sportsmanship and sporting traditions. Contrary to sportsmanship is also the offensive treatment of a reporter by a Football Club President in the field and during the game, cfr. ΣτΕ (State Council) 3288/1992, ΕλΔνη in *Hellenike Dikaiosyne Journal*, 34, p. 841, and also *Επιθ. Νομολ., Case-Law Review*, I, 1993, p. 69. Revilement of a football game coordinator by a coach constitutes a behaviour that does not abide by the sports spirit, is contrary to sportsmanship and to the rules of sports capacity, ΕΦΙ (Committee for the Sports Fan Capacity) decision 123/1988, D. Panagiotopoulos, *Sports Jurisdiction,* cit., p. 101. Recurring revilement of the refferees by the game physician is an antiathletic behaviour contrary to. A 6 months suspension of sports capacity is imposed, ΕΦΙ (Committee for the Sports Fan Capacity) 21/1989, D. Panagiotopoulos, *Sports Jurisdiction*, cit., p. 102.

[54] *Penal Code*, Article 314.

[55] *Ibidem*, 308-312.

[56] *Ibidem*, 381 and Article 382.

[57] *Ibidem*, Article 386.

[58] *Ibidem*, Article 336-353.

[59] *Ibidem*, Articles 362, 363.

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on Narcotic Substances, infringement on the Law on Mediation, issuance of a rubber cheque, and so forth[60].

Several sports offences governed by common law are regarded as special criminal offences, e.g. throwing objects in the field, unauthorized access to the field aiming at obstructing the game, assault and/or battery[61], revilement[62], carrying potentially harmful objects (e.g. firecrackers, fireworks, smoke bombs, etc), as well as public statements or other acts made by athletes, coaches or other officials, which could disturb the orderly holding of the game[63].

Persons selling overpriced tickets for sport events commit an unlawful act considered to be a special criminal offence, in order for black marketing in sports to be eliminated[64]. Also, selling duty-free

[60] Law 5960/1933.

[61] Article 41, VI of Act 2725/99, in ΑθλΚ (Sports Code, 2009), p. 74, cfr. Act 1646/1986 Articles 1-6. Abetment to riots against a referee by a football club board member is contrary to sportsmanship, ΣτΕ (State Council) 1250/1978, ΕπιθΑθλΔικ, cit., 1995, p. 351. Assault against a referee by a football-player, ΣτΕ (State Council) 3417/1978, ΣτΕ (State Council) 3418/1978, ΣτΕ (State Council) 3419/1978 ΕπιθΑθλΔικ, cit., 1995, p. 351 s., ΣτΕ (State Council) 3026/1989, ΕπιΑθλΔικ, cit., 1995, p. 359, Assault and/or battery against a referee by a club official, ΣτΕ (State Council) 3718/1980, ΕπιθΑθλΔικ, cit., 1995, p. 354, and assault against a referee by a team coach, ΣτΕ (State Council) 1089/1979, ΕπιθΑθλΔικ, cit., 1995, p. 353. Assault against a TV cameraman by a Club President during a football game is against. Suspension of sports capacity for two years is imposed, ΕΟΑ (Greek Olympic Committee, in Full Assembly) 21/1990, D. Panagiotopoulos, *Sports Jurisdiction*, cit., p. 99, and *ISLR* 1, 2, 1992, p. 309. Assault and/or battery against a referee by a football-player constitute violation of the principles of sportsmanship and sport traditions. Suspension of sports capacity for ten years is imposed on the grounds of aggravated battery. ΕΦΙ 56/1987, D. Panagiotopoulos, *Sports Jurisdiction*, cit., p. 100.

[62] Revilement in sports consists in belittling the other person's honour and reputation as well as causing moral harm whenever the claimant is also a games authority, while the time and place of the revilement's having taken place raises the issue of satisfaction for said moral harm and pecuniary satisfaction, ΜονΠρτ (Single Justice Court of First Instance) 813/1994, in *Επιθεώρηση Νομολογίας, Case-Law Review*, 1994, vol. I, 8. 1007

[63] Instigation to riots in a basketball game by a member of the Board is contrary to the principles of sportsmanship ΣτΕ (State Council) 3657/1987, in *Sport Law Review*, 1995, p. 358. For the influence of the European Community Law on negative phenomena: violence, doping, antiathletic actions, S. Yiakoumelos, (1998), *The influence of the European Community Law specifically on negative phenomen*a, in 5th IASL Congress Proceedings, Nafplio 10-12 July 1997, Athens, 1998, p.118 s.

[64] § 4 of Article 54 Act 2725/1999; cfr. Act 75/1975, Article 61 §. 5. It should be pointed out that the most significant financial crimes are not governed by the sport law

equipment to a sports club was an unlawful act according to the law previously in force, and liable persons would attract criminal sanctions according to the relevant provisions[65].

4. The unlawful character of an act explicitly labelled by law as such may be disencumbered whenever a general or special reason exists in this respect. At the event of non-existence of a reason for disencumbering the unlawful character of an act, it is examined whether the action or omission may be attributed to the specific doer, in other words whether the specific doer may be considered to be worth blaming and become personally liable for his/her action as far as law is concerned[66].

Such reasons could be founded on law and also on other law sources, like customs or even case-law[67].

Disencumbering the athletically unlawful character of an act in

provision, but mainly by legislative provisions of general law, cfr. A. Charalambakis, *Financial Crimes in Sports*, cit., p.55. According to the High Court case-law 1399/1989, such a case (Greek Penal code 386.3), is the President of a football Club who issued lottery tickets with tempting pictures of a car which did not belong to the Club, so that the Club would benefit from the value of the tickets.

[65] Law 75/1975, Article 46 § 1. This provision was amended by Article 55 Law 2725/1999, and in case of infringement on this Article, the subsidy will be cut down.

[66] I. Papakonstantinou, *Punishable Acts during a Sports Game*, in *Proceedings of the 2nd Law Convention, Justice and Sports*, 18-19 April 1997, Athens, 1998, p. 67.

[67] Reasons for disencumber in unlawfulness of an act result not only from the Penal code (Articles 20, 21, 22, 304 § 4, 308 § 2, Cfr. Code etc.), but from any other field of positive law, whether common or statutory, cfr. N. Chorafas, *General Principles of Criminal Law*, 1956, § 39, p. 132, ΑΠ (High Court) 28/1980, in ΠοινΧρον Λ', *Poinika Chronika Journal*, XXX, p. 399, because customs are acknowledged a limited significance by the Greek Criminal Law (Ch. Dedes, ΠοινΧρον ΚΑ', *PoinikaChronika Journal*, XXI, p. 285), provided that the custom can neither abolish a criminal law (Article 2 § 2 Legislative Decree (ΝΔ) 710.5.1946; Tousis-Georgiou, *Penal code*, 3rd ed., vol. I, p. 4; N. Chorafas, *General Principles of Criminal Law*. Under Article 20, Article 2, ΑΠ (High Court) 914/1980 ΠοινΧρον ΛΑ', pp. 51-52, ΑΠ (High Court) 27/1981, ΠοινΧρον ΛΑ', *Poinika Chronika Journal*, XXXI, p. 429, ΕφΑθ (Athens Court of Appeals) 671/1910 Θ ΚΒ, p. 312), nor constitute a source of law to establish or increase the punishable character (N. Chorafas, *Criminal Law*, vol I No ΒΡ (1955), p. 85 and on.), but it could influence directly the criminal regulations, by creating εθιμικώς reasons to exclude the άδικο nature of a αξιόποινης action (*Ibidem*, p. 59, ΕφΠειρ (Piraeus Court of Appeals) 159/1982, in ΠοινΧρον ΛΒ', *Poinika Chronika Journal*, XXXII, p. 957, Trikala Criminal Court of First Instance 130/1-65 ΠοινΧρον ΙΕ', *Poinika Chronika Journal*, XIV, 311, p. 627.

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sports is based on the classical Greek thought, according to which the causal connection is the basis of all existing things which legally and necessarily result from it, as we already stated in the respective chapter[68]. Consequently, and because of the sporting event, which is the sports game[69], in this case the unlawful character of the act is disencumbered and therefore it remains unpunished. It is also based on the principle of 'proximate cause', accordingly applied in sports activity. Thus, it is only in the context of the sport and for the sport event – and not just in the context of a game, as usually thought because of a simplistic interpretation –, that an unlawful act does not always attract the legal consequences that would otherwise be attracted, because it is the sports event which is legally defined[70] rather than the game.

The victim's consent in physical damage[71] under the condition that the inflicted damage is not grave, dangerous or lethal, hence it is not contrary to morality, is customarily viewed as a reason for raising the unlawful character of an act. In case of a simple bodily harm, whenever it concerns sport games, the injured person's consent inheres tacitly in the athlete's consent to enter the event, both for team sports (football, basketball, hockey, etc.) and personal sports, especially in 'energetic' or violent sports (boxing, karate, sword play etc.). In the last case the rule is the highly probable bodily harm, since the opponents aim at diminishing each other's sporting ability by using aggressive moves and strikes[72]. Indeed, if the aforementioned sports (boxing, etc.) were seen from the criminal point of view, all injuries occurring during the game would consist a punishable criminal act, while in a sports activity context they are not considered as such, as they occur only for the sport's sake and the injured athlete, according to the principles of consenting and assuming all permissible risk is considered to having given his/her consent and assumed the risk

[68] Aristotle, *Post Naturalia,* Chapt. V, VII και XXX, πρβλ. Philo of Alexandria, *Nom n All goria* (= Allegory of Laws), ch. 3, § 7; *On Dreams,* ch. 1, § 182; *On Moses' Life*, ch. 1, § 283; and *On Cherubs*, § 125.

[69] More on the sports game, Chapter *Sports Rules and Common Law Rules*, *Ibidem*.

[70] D. Panagiotopoulos, *Sports Law Theory,* cit., p. 20, and analysis in the proper chapter on game rules and common law rules.

[71] *Penal code*, Article 308, 2.

[72] I. Papakonstantinou, *Punishable Acts during a Sports Game*, cit., p. 73.

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of his/her own injury[73] and, this notwithstanding, participates acknowledging the imminent risk of injury.

Characterization of an act as 'socially conducive'[74] is a special reason for raising an act's unlawful character. A criterion for applying this principle to sports is whether the general principles, rules and regulations of the sport were observed by the athletes during performing their acts, even with slight deviations justifiable by the sport nature[75]. In this case there is no unlawful character in afflicting bodily harm during a game[76]. If lawfulness or raising of the unlawful character of an act is established, there is no reason for investigating the existence of culpability in the doer's behaviour, which presupposes the unlawful character of the act. Under this notion, major game rule offences cannot be thought of as socially conducive and sports or other liability considering the culpable and unlawful behaviour of the party involved should be examined.

The legal link and the culpable behaviour between the athletic action, the sports event and the natural and legal entities of the sports action, on one hand, and the third parties, on the other hand, are applied differently, because of the special conditions and various causations of human behaviour's manifestation within sport acts and athletic events.

During performance of their duties all natural and legal entities in sports are subject to liability of sports nature with administrative-disciplinary character, moral and criminal character, on the basis of common law rules or special sport offences.

In cases of tort within sports activity, liability is sought in care-

[73] D. Panagiotopoulos, *Sports Law Theory*, cit., p. 222.

[74] This term was coined by the German criminal lawyer Hans Welzel, cfr. ΣυμβΠλΚοζ (Assembly of Justices of Kozani Criminal Court of First Instance), 110/1993 in *Defence* 1994, 910, Επιθ. Νομολ., *Case-Law Review*, 1994, *Bodily Harm: Raise of Unlawful Character* p. 1892, 13. Raise of the unlawful character of an act is justified by the circumstances and the conditions under which the action took place, Πλ.Ηλει. (Ileia Criminal Court of First Instance) 119/1993, *Επιθεώρηση Νομολογίας, Case-Law Review,* I, 8, 1994, p.1006

[75] According to New Hampshire High Court (1982), *Judicial bench may not be united with the playground bench*, M. Narol, *Recent Liability*, cit.

[76] ΣυμβΠλημΧαλκ (Assembly of Justices of Chalkida Criminal Court of First Instance) 188/1987, in NoB, *NomikoVima Journal*, 35, p. 1685, on a football player's injury by an opponent during a game.

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lessness or wilfulness for the protection of the athletic ideals and principles as well as sports in general, because it constitutes a public benefit serving a public objective. On seeking liability within sport activity, the first to be examined are the circumstances, the conditions and the reasons for raising the unlawful character of the act.

5. The legal link and the culpable behaviour between the athletic action, the sports event and the natural and legal entities of the sports action, on one hand, and the third parties, on the other hand, are applied differently, because of the special conditions and various causations of human behaviour's manifestation within sport acts and athletic events.

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Dimitri P. Panagiotopoulos

*Abstract*

The aim of this study is to determine the issue of liability in sports. Sports define a wide area of human activity with a maximized financial interest aspect, which oftentimes decides on sport actions and the outcome of sport events. The law is necessary for ensuring the sports institution, the smooth and orderly holding of sport actions and events, as well as the complete satisfaction of the right of natural and legal entities to a fair participation in sport activities and issues.

As it happens in everyday life, tort occurs in sports life as well. Law and especially Sports Law should govern any form of liability no matter if it derives from tort, contract or is a combination of both liability forms.

Some fundamental questions which may be posed in this respect are: Which are the forms of tort in sports and sport activity? Which is the form of liability in sport tort? In what does the liability of who committed the tort consists in and how should liability be searched for? For instance, we

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examine what form of liability may carry – and on which extent – the sports authorities (referees, judges, observers, etc.), during performance of their duties, and what is the criterion of their culpable behaviour.

The legal link and the culpable behaviour between the athletic action, the sports event and the natural and legal entities of the sports action, on one hand, and the third parties, on the other hand, are applied differently, because of the special conditions and various causations of human behaviour's manifestation within sport acts and athletic events.

During performance of their duties all natural and legal entities in sports are subject to liability of sports nature with administrative-disciplinary character, moral and criminal character, on the basis of common law rules or special sport offences, the content of which, based on the jurisprudence and the bibliography, will be presented in this study.

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# Processing of personal data in anti-doping policy: Compatibility with EU Data Protection Regulation?

SUMMARY: 1. Introduction. – 2. The scope of the provisions on doping of the EU Regulation 2016/679: The specific problem of international data transfers. – 3. Conclusions.

1. The processing of athlete´s personal data, in particular those that are especially sensitive, such as obtained through biological simple analysis or personal health data, has been known as one of the most controversial aspects of the anti-doping policy. This circumstance is aggravated by data transfers to States which are not members of the European Union. In this context, it should be recalled that World Anti-Doping Agency (WADA) is responsible for processing that concern us, in addition to be located in Canada.

Given the situation, the recent adoption by European Union of General Data Protection Regulation[1] (hereafter, the 'Regulation') will force us to raise the legality of such processing with respect to what is established in the Regulation, as well as analyse the terms of its possible compatibility with the consequent legal regime that, with regard to guarantee this specific fundamental right, will be implemented by EU Members States.

On the basis of a study of the provisions of the Regulation which may affect anti-doping rules, we will analyse the scope of both the data subject´s consent and the declaration of the objective of reduce or eliminate doping from sport as an important public interest rea-

[1] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27th April 2016, on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ, L119, 4 May 2016, p. 1 s.).

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son. All of the above with the aim to demonstrate if those reasons can be considered as exceptions for legitimate a transfer made without European Commission adequacy decision or in the absence of appropriate safeguards.

From this one derives a potential legality of the processing concerned. However, this compatibility will depend on the final judgment of the Court of Justice, based on the principles of necessity and proportionality.

The Regulation could thus contribute to legitimate the current anti-doping instruments, from the fundamental rights perspective. To this end, the new EU law will establish a coherent system concerning data processing control, although limited by its scope of application.

2. The right to the protection of personal data is one of the rights that are affected by the current instruments for combating doping in sport. In this regard, the EU Court of Justice should have a major role (from a European perspective and ultimately) to declare the legality of international data transfers (i.e. to third countries or international organizations) in accordance with the provisions of the new EU General Data Protection Regulation, which will be applied as of 25 May 2018.

In spite of the above, it must be recalled that the doctrine has already worked about this issue previously[2], and the European Court of Justice of Luxembourg has established the terms under which the adequate protection of personal data should be evaluated in the context of transfers to third countries or international organizations, as well as in respect their final processing in the country of destination[3].

[2] Cfr., to that effect, R. Morte, *Problemas de protección de datos de deportistas españoles en la actividad de la Agencia Mundial Antidopaje*, in *Revista Española de Derecho Deportivo*, 2, 26, 2010, p. 57 s.

[3] European Court of Justice, 6th October 2015, c. 362/14, Maximillian Schrems c. Data Protection Commissioner. On this judgment, cfr. L. Azoulai, M. van der Sluis, *Institutionalizing Personal Data Protection in Times of Global Institutional Distrust: Schrems*, in *Common Market Law Review*, 53, 5, 2016, p. 1343 s.; or F. Le Divelec, *Commentaire de Jurisprudence: Charte des droits fondamentaux – Protection des données personnelles – Safe Harbor (Sphère de sécurité) Arrêt Schrems*, in *Revue du Droit de l'UE*, 4, 2015, p. 673 s.

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However, even considering those precedents (which must be as obligatory reference to understand this question), we will focus now on identifying dispositions that, contained in the new European Regulation, are concerned with the issue of anti-doping policy and its fit with the system of human rights protection, at least within the scope of European Union law. This with a view to defining the room of manoeuvre of EU Court of Justice for the purpose of:

– recognize a hypothetical 'horizontal' application of the fundamental right concerned.

– declare the legality or illegality of the international data transfer within the framework of anti-doping present policy and consequently the compatibility, or not, with the European Union legal system.

Well, the first thing that I would like to stress is that the Regulation, following the evaluation criteria established by the EU Court of Justice (and confirmed in its latest judgment about it, referred to in footnote 3) in order to declare an international personal data transfer according to the law, provides expressly such criteria, giving them legislative force in its Article 45.2. As a result, the European Commission shall be obligated to follow them when deciding if a third country, a territory or one or more specified sectors within that third country, or the international organization in question, ensures an adequate level of personal data protection.

In particular, such safeguards are based on an assessment of the following elements; these should not be interpreted as *numerus clausus* system:

a) the rule of law, respect for human rights and fundamental freedoms, relevant legislation, both general and sectoral, including concerning public security, defence, national security and criminal law and the access of public authorities to personal data, as well as the implementation of such legislation, data protection rules, professional rules and security measures, including rules for the onward transfer of personal data to another third country or international organization which are complied with in that country or international organization, case-law, as well as effective and enforceable data subject rights and effective administrative and judicial redress for the data subjects whose personal data are being transferred;

b) the existence and effective functioning of one or more inde-

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pendent supervisory authorities in the third country or to which an international organization is subject, with responsibility for ensuring and enforcing compliance with the data protection rules, including adequate enforcement powers, for assisting and advising the data subjects in exercising their rights and for cooperation with the supervisory authorities of the Member States;

c) the international commitments the third country or international organization concerned has entered into, or other obligations arising from legally binding conventions or instruments as well as from its participation in multilateral or regional systems, in particular in relation to the protection of personal data.

However, the international transfer or a set of transfers of personal data can be executed in the absence not only of the European Commission´s adequacy decision, but also of the appropriate safeguards mentioned in Article 46 of the Regulation[4], including the binding corporate rules[5]. All this according to Article 49 of the Regulation, establishing a number of exceptions for specific situations.

Well, one such situation calling for an exception in this regard is the context where the transfer is necessary for important reasons of public interest, as stipulated in the point (d) of the first paragraph of the Article 49. In this way, it should be note that the recital number 112 of the Regulation expressly declares the objective of reducing and/or eliminating doping in sport as exception for that purpose. A provision that cannot be exempted of the next and opportune study.

Thus, its scope should be checked from two perspectives: first,

[4] In practice, the safeguards could lead to: *i)* a legally binding and enforceable instrument between public authorities or bodies; *ii)* binding corporate rules in accordance with Article 47 of the Regulation; *iii)* standard data protection clauses adopted by the Commission in accordance with the examination procedure referred to in Article 93.2; *iv)* standard data protection clauses adopted by a supervisory authority and approved by the Commission pursuant to the examination procedure referred to in Article 93.2; *v)* an approved code of conduct pursuant to Article 40 together with binding and enforceable commitments of the controller or processor in the third country to apply the appropriate safeguards, including as regards data subjects´ rights; or *vi)* an approved certification mechanism pursuant to Article 42 together with binding and enforceable commitments of the controller or processor in the third country to apply the appropriate safeguards, including as regards data subjects´ rights.

[5] These are regulated in Article 47 of the Regulation.

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regarding its location in the Regulation, and second based upon the strict material scope where to make transfer founded on the reason explained.

As a result of the first appreciation, the fact that the reason of reducing and/or eliminating doping in sport is reflected in the recitals of the Regulation, leads to the conclusion that isn´t in the legislative part and, therefore, has no the necessary binding legal force for it to be directly invoked.

This could lead to future decision of EU Court of Justice to the effect to declare it as derogation from the requirements for authorizing international transfers of personal data to third countries or international organizations. A decision which, ultimately, will be motivated by a predictable absence of unification of criteria between the control authorities in each Member State, or by the knowledge of the problem by the domestic courts, entailing the activation of the preliminary ruling mechanism, under Article 267 TFEU. Furthermore, the EU Court of Justice should weigh the principles of necessity and proportionality to that effect.

On the other hand, from the analysis of the second question, a negative consequence could derive for interest or objectives pursued by responsible for world anti-doping policy. That´s because the aim relating to reduce and/or eliminate doping in sport must also apply (under recital 112) between services competent for social security matters or for public health. Thus, World Anti-Doping Agency does not have that legal nature. It is therefore questionable the legality of those transfers with destination WADA.

With regard to the above, support an international transfer of personal data to third countries – or international organizations – such as those subjects to being considered medical data or being related to health of athletes and, hence, be subject to special protection[6], may

[6] In this way, Article 9, first paragraph, of the Regulation prohibits – among others – the processing of genetic data and the data concerning health, except that, according its second paragraph, and for present purposes: *i)* the data subject has given explicit consent to the processing of those personal data for one or more specified purposes, except where Union or Member State law provide that the prohibition referred to in first paragraph may not be lifted by the data subject; *ii)* processing is necessary for reasons of substantial public interest, on the basis of Union or Member State law which shall be

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be unfounded in light of the above explanation on exception concerning important reason of public interest.

A problem that, *a priori*, could be solved through other derogation established in the same Article 49.1 of the Regulation and, specifically, in its point (a). This is, in particular, that the person concerned (i.e. the owner of the data) has given his explicit consent for the proposed transfer, after having been informed of the possible risks of such transfers for the data subject due to the absence of an adequacy decision and appropriate safeguards.

Accordingly, either because a transfer is performed without the corresponding adequacy decision and/or without the appropriate safeguards, according to one of reasons of the Article 49.1 of the Regulation, or because such reason – under point (a) of this rule – lacks the explicit consent of the owner of the data and/or this person has not been informed of the possible risks of such transfers, we would be before a legal reality where proceed the horizontal effectiveness of the Charter of Fundamental Rights of the European Union and, particularly, of its Article 8, which it recognizes the right to data protection[7].

3. In the light of the foregoing, I must defend a contrary position to the legality of international transfers of personal data to World Anti-Doping Agency, according to the new EU Data Protection Regulation.

proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject; and *iii)* processing is necessary for reasons of public interest in the area of public health, such as protecting against serious cross-border threats to health or ensuring high standards of quality and safety of health care and of medicinal products or medical devices, on the basis of Union or Member State law which provides for suitable and specific measures to safeguard the rights and freedoms of the data subject, in particular professional secrecy. These three derogations correspond to the points (a), (g) and (i), of second paragraph mentioned, respectively.

[7] Article 8 CFREU: «1. Everyone has the right to the protection of personal data concerning him or her. 2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified. 3. Compliance with these rules shall be subject to control by an independent authority».

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In the context of the current world anti-doping policy, the consideration – by the Regulation – of the objective to reducing and/or eliminating doping in sport as important reason of public interest which justifies derogation for an international transfer without Commission´s adequacy decision, or without appropriate safeguards, cannot be accepted by two reasons:

a) In these exceptional cases, under Article 49 of the Regulation, the recipient of the data shall be a third country or an international organization. It follows that other forms of organization, i.e. foundation governed by private law, will be excluded of its scope of application.

b) Because the consideration mentioned of important reason of public interest is contained in the part of recitals of the Regulation (specifically, number 112), and thus lack legally binding. In addition, the illegality should also be corroborated, in the context of this recital, by the fact that the exchange of data for this purpose must be made between services competent for social security matters, or for public health. In short, on areas of competence foreign to World Anti-Doping Agency.

Despite the above, a possible legality of the derogation could be considered from the point of view of the consent. In other words, the transfer would be valid on the condition that the athlete gives his/her free and express consent for it, and after having been informed of the possible risks of such transfers for the data subject due to the absence of an adequacy decision and appropriate safeguards.

Further, it shall be up to the EU Court of Justice to evaluate (at the time of declare the legality or not) the compatibility with the principles of necessity and proportionality, not forgetting the controversial issue of WADA´s legal nature.

David Selgado Ruano

*Abstract*

One controversial factor that has always been of interest in the anti-doping context is the international transfers of personal data, which are necessary to combat doping in sport. However, European Union norms on personal data protection have become a challenge for the anti-doping organi-

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zations located in EU Member States. In this sense, it must be interpreted the scope of the provisions concerning doping of the new EU General Data Protection Regulation, in order to determine the compatibility of the current international transfers to World Anti-Doping Agency (WADA) with the consolidated privacy EU legal order.

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# Hungary's sports development efforts (Particularly in view of the current Coaching programmes)

Summary: 1. Historical Background. – 2. List of important sporting events in Hungary in 2017. – 3. Development of traditionally successful Hungarian sports. – 4. Financial support of other significant sports. – 5. Cohesion fund to aid the development of sports. – 6. The Featured Coaching Programme (FCP). – 7. The Youth Coaches Walk of Life Programme (YCLP). – 8. The 'I believe in you' Programme.

1. The International Olympic Committee developed its Agenda 2020 reform program in December 2014, marking a fundamental departure in the bidding process. The goal of the program is to ensure that hosting the games is no longer the privilege of the 20 largest cities in the world. The Hungarian application to host the 2024 Olympic Games differs greatly from the other ones. Budapest outlines game-changing plans for more accessible, more affordable, low-risk Olympic Games in mid-sized cities, bringing sport and festival back to the heart of the host city. Hungary is a founding member of the IOC. Outstanding Olympic traditions and results, six previous – unsuccessful – Olympic bids, unfortunately this seventh bid failed again.

2. Nevertheless in the coming years a number of important international events will be held in Hungary, like the FINA World Championship, Finn Dinghy Olympic Ship Class World Cup, Men's Judo World Championship and Congress, Summer European Youth Olympic Festival (Gyır), Kick-boxing World Championship in 2017.

The Wrestling World Championship, the Canoe Sprint (WUC) Szeged and the Modern Pentathlon (WUC) in 2018.

The Qualifying Kayak-Canoe World Championship, and the Qual-

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ifying Modern Pentathlon World Championship, the Qualifying Fencing World Championship and the Maccabi European Games in 2019, finally.

The Swimming, Open-water, Diving, Synchronized-Swimming and Platform Diving European Championship, the Water-polo European Championship and the UEFA European Championship (group matches and a round-of-16 game) in 2020.

3. Hungarian Government has accepted the development concepts of sport in which Hungary traditionally is successful (table tennis, track and field, wrestling, rowing, judo, kayak-canoe, cycling, skating, boxing, pentathlon, volleyball, shooting sport, tennis, gymnastics, swimming, fencing).

4. Hungarian Government decided on further financial support which are not included to the first group of high-priority sports but could be described as significant from the professional perspective. These are: scuba-diving, curling, golf, field-hockey, archery, karate, kick-box, equestrian sports, diving, rugby, ski, snowboard, weightlifting, synchronised-swimming, surf, taekwondo, dance sports, badminton, triathlon and sailing.

5. The Government has created a cohesion fund in order to aid the development of these sports. There was created 4 different categories of salary. This is a financial reason of the featured coaching Program. The government supporting these coaches from the central budget:

– in the first category for the gold, silver and bronz medalist coaches receive 600.000-1.000.000 Ft (1.940- 3.226 €) monthly compensation;

– in the second category for the IV-VI olympic position coaches receive 400.000-600.000 Ft (1.290-1.940 €) monthly compensation;

– in the third category for the VII-VIII. Olympic position coaches receive 300.000-400.000 Ft (950-1.290 €) monthly compensation;

– in the fourth category from 2014-tıl no olympic placement coaches recive 200.000-400.000 Ft (645-1.290 €) total compensation.

This chart representing the four year coach support statistics.

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| 2014 | 2015 | 2016 | 2017 |
|---|---|---|---|
| 161 fő<br>1.512.912.33<br>4 HUF<br>(4. 880.363 €) | 172 fő<br>1.557.970.12<br>8 HUF<br>(5.025.710 €) | 176 fő<br>1.084.365.29<br>9 HUF<br>(3.497.953 €) | 201 fő<br>1.763.037.168<br>HUF<br>(5.687.217 €) |

6. This program provides the background for the government will do its utmost to ensure that talented coaches can live in Hungary and do not have to go abroad. Such an appropriate tool is the Featured Coaching Program (FCP). This program provides the background for the employment of high-priority coaches. (The sport associations should able to cover the costs associated with the employment of special coaches by the FCP. The central budget grant makes it possible, to employ, to keep and to provide further training to the most successful coaches in the country. There is an appropriate tool is the Featured Coaching Program (FCP). This program provides the background for the employment of high-priority coaches. (The sport associations should able to cover the costs associated with the employment of special coaches by the FCP. The central budget grant makes it possible, to employ, to keep and to provide further training to the most successful coaches in the country. The Ministry of Human Capacity joined the Hungarian Olympic Committee to start an advance coach training to help developing the featured sport programs.

7. Another Programme is the so called Youth coaches walk of life program. (YCLP) The goal of the project, launching in 2017, is to support those coaches, who are working in sports that are not being effected by corporate taxation. The aim is to support coaches in sports, which are lacking the number of experts they would need, and have produced significant international results recently, and are, or have a realistic chance to be, on the Olympic programme (curling, badminton, squash, karate etc.). You can see 26 different sport branches on the axe X the number of coaches, on the axe Y. You can see on the screen the apportionment of the participants sport branches by sport branches.

The Ministry of Human Capacities and the Hungarian Associa-

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tion of sports organizations put a plan together to introduce a leisure type of sports program to the public. The program is named 'I believe in you'. The government sending a message with a positive reinforcement to the communities to continue participating in sport activities at the same time help developing future hungarian talent. Hungary want to be part of the winning circle in future Olympic and World sport events.

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*Abstract*

Our Paper aims to present Hungary's sports development efforts. To ensure the development of sports and to sustain the talented coaches Hungarian Government provides financial supports for sport by some programmes (Cohesion fund to aid the development of sports, The Featured Coaching Programme, The Youth Coaches Walk of Life Programme and the 'I believe in you' Programme).

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# The professional program of the Hungarian Coaching Association in 2017

SUMMARY: 1. Historical background of the Hungarian Coaching Association. – 2. Tasks of the Hungarian Coaching Association (HCA). – 3. Protection of interest. – 4. Upgrade the material and moral reputation of coaches. – 5. The enrichment of the professional knowledge of coaches. – 6. Publish the newspaper called Hungarian Coach and the website of the HCA. – 7. National Sports Information System. – 8. Performance Director Program. – 9. Employment of federational youth training coordinators. – 10. Keep contact with the sports state and civil sports organizations. – 11. Coach Learn Project. – 12. Coach Kids Project.

1. The Hungarian Coaching Association (HCA) was founded in 1993. Its role and gravity will change in 2017. Besides its traditional tasks it will have other sports administrative and sports development tasks in 2017. In the last 24 years the HCA preserved and increased the reputation of the coaching work and it emphasized that the role of the coaches in the results in every kind of sport is very determinative. That's why the State Secretariat for Sport of the Ministry of Human Capacities brought the Featured Coaching Program (FCP) to the competence of the HCA from the 1st January 2017. This year HCA will help for more than 200 coaches and contributes to elaborate the National Sports Information System and to prepare the 'Performance Director' Program in cooperation with the University of Physical Education. Beyond that the HCA will be the employer of federal youth training coordinators as well. So there will be a professional influence for the youth-training of FCP sports.

2. The most important goals and tasks of its by laws – which are still in force now – will be broadened by the tasks listed in the followings.

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3. The active coaches in Hungary – around 12-15 thousand coaches – just 10 % is the member of the HCA and just half of them pay regularly the membership fee. They are those, about whom we have some knowledge and data and those who we can talk with. The broadening of the membership base is our plan for years. In the lack of central registration sports federations have no information about the coaches. The HCA tries to administer the protection of interests of coaches, it helps the training and further training of coaches and the observation of their employment.

4. Measures that were taken by the sports management upgraded the financial acknowledgement of coaches. The FCP belongs to here, of which execution the HCA has a direct role. The goal of the MET is to give a reasonable financial allowance for more and more youth training coaches by his work from the expanded sources. The HCA also takes care of the Master Coach Prize and presented the Coach Life Work Prize.

5. It will be essential to enrich the professional knowledge of coaches. It involves giving lots of information for the coaches and to organize their training and further training as well in the field of leisure sport, sport of the disabled, to organize school and student sporting events, youth and senior sporting events, practical presentations and meetings without standingly successful coaches. These tasks will be realized in cooperation with the State Secretariat for Sport, the Hungarian Olympic Committee, the University of Physical Education and the Hungarian Society of Sports Science.

6. In 2017 we also plan to publish the newspaper called Hungarian Coach in written format. Its new format and content in 2015 won the discretion of the membership and the sports public opinion. The society also operates a website called www.edzokepzesek.hu, which was developed in 2015 December, where coaches can find the latest news about sporting events, further trainings and conferences.

7. The development of the National Sports Information System (NSIR) is an essential task as well. As the cooperative partner of the National Infocommunication Provider Ltd. the HCA contributes the

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determination of sports professional development and operational tasks related to the building of the system, in connection with the development and operation of the NSIR.

8. A new task will be the establishment of the Performance Director Program, which was established by the British Sports Council when London won the right to organize the 2012 London Olympic Games. Their aim was to put a sports expert to the lead of every olympic sport, who can coordinate professionally and organizationally the work of the federation and who is liable for the execution of the sports development program. The same structure will be realized in Hungary, which guarantees the professionally grounded and effective use of states upport of the federations.

The HCA, in cooperation with the University of Physical Education:

– it keeps contact with the professional organizations of the sports branches, measures the needs and coordinates the scientifical work related to its task;

– it participates in the establishment of directives and strategic goals for the formation of the position of the Performance Director;

– it participates in the professional conciliation determining the selection principle of sports experts;

– it cooperates the training of the selected sports experts needed to fill the Performancer Director position;

– it cooperates in the establishment of the quality assurance system of the coaching work and in the legal protection of sports experts.

In 2017 the professional and organizational preparation of the program is the main task: the tender based selection of the prospective sports experts, their preparation to carry out their duties.

9. Federational youth training coordinators will be employed by the HCA from the 1st February 2017. Their task is the direct, up-to-date cooperation with the sports federations on every professional fields, particularly in the field of youth training. The program incorporates the cooperation with the strategically preferred 17 sports branches. An important task of youth coordinators will be to elaborate an evaluating system, which evaluates not the momentary suc-

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cess, but the long-term activity striving to reach the professionally grounded goals.

10. Another important task of the HCA is to keep contact with the sport state and civil sports organizations, e.g. with the State Secretariat for Sport of the Ministry of Human Capacities, the University of Physical Education, the Hungarian Olympic Committee, the Hungarian Society of Sports Science, the National Federation of Sports Clubs, the Hungarian Paralympic Committee and with the national professional sports federations.

The HCA participates in international projects as well. It is very important, because it gives more and more knowledge and development possibilities for the coaches and the chance to obtain international experiences and professional acknowledgements within the framework of crossborder cooperation. There are two tenders running in 2017.

11. 2014-2017: The goal of this project is to elaborate a European Sports Coaching Framework (ESCF), which is based on the earlier work of the European Coaching Council and the ICCE. The ESCF would provide ideas and guidances for European partners in order to elaborate the leading system of own fields (sports branches).

12. 2016-2018: The goal of this project – in which besides the HCA the Irish Sports Council, the Belgian Football Federation and the Dutch Olympic Committee also participate – is to provide the special training and further training of coaches who work in the field of the child and youth sport.

Balázs Farkas

*Abstract*

The Hungarian Coaching Association (HCA) was founded in 1993. Its role and gravity will change in 2017. Besides its traditional tasks it will have other sports administrative and sports development tasks in 2017. In the last 24 years the HCA preserved and increased the reputation of the coaching work and it emphasized that the role of the coaches in the results in every kind of sport is very determinative. That is why the State Secretariat for

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# L'infortunio dell'atleta nel prisma della responsabilità civile

Sommario: 1. Premessa. – 2. L'accettazione del 'rischio normale'. – 3. Il collegamento funzionale tra gioco ed evento lesivo. – 4. Conclusioni.

1. Il tema della responsabilità civile nell'àmbito sportivo evoca obiettivamente una casistica tanto ampia che se ne potrebbe agevolmente comporre un commentario.

Gli interpreti hanno svolto un'opportuna classificazione delle ipotesi di danno, essenzialmente operando la distinzione delle fattispecie in base alla qualità degli autori della condotta illecita: sportivi, dirigenti e allenatori, organizzatori, proprietari o gestori delle strutture, medici sportivi, spettatori, terzi e così via.

Le sottocasistiche, invece, si concentrano sul soggetto passivo della condotta illecita. Cosí, per esempio, si considereranno le ipotesi nelle quali lo sportivo incorra in responsabilità nei confronti di altri sportivi, del datore di lavoro, dell'organizzatore della manifestazione, degli spettatori etc.

In questo vasto mare, il titolo di questo intervento è in qualche modo rassicurante, perché circoscrive l'analisi alle ipotesi di responsabilità civile per infortunio dell'atleta.

Eppure, è ugualmente un taglio che può nascondere delle insidie e merita qualche riflessione.

Intanto, si allude all'infortunio dell'atleta. Il lemma 'infortunio', però, non è neutro rispetto al contenuto della relazione, perché pare riferirsi al fatto obiettivo della menomazione fisica del soggetto e non alla condotta che lo determina o all'atteggiamento psicologico del responsabile. L'origine latina della parola ci riporta al significato di «evento determinato dalla fortuna», intesa nella sua *vox media*. Come tale, il danno non è visto come connesso con la volontà dei soggetti

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implicati nell'evento, ma come ineluttabile destino. Insomma, l'infortunio è l'evento obiettivo di danno.

Ancóra, il titolo della relazione allude all'infortunio non di qualsiasi sportivo, ossia di un soggetto che stia praticando attività fisica a fini ludici, bensí all'atleta, ossia di un soggetto che si dedichi ad attività sportiva di tipo agonistico. Infatti, la parola 'atleta' deriva dal greco αθλητὴς, lottatore, da ἀθλον, lotta.

Quasi tutti coloro che giocano e praticano sport desiderano superare dei limiti (alle volte rappresentati da un avversario) e quindi in senso lato 'vincere', ma quel particolare atteggiamento psicologico che chiamiamo 'agonismo sportivo' colloca talune attività sportive in un àmbito differente, che ne consente l'inquadramento nel sistema sportivo nazionale del CONI, che per l'appunto organizza e soprintende alla dimensione sportiva agonistica.

Il che autorizza a circoscrivere il tema nell'àmbito della responsabilità civile per i danni obiettivi patiti da sportivi tesserati per una federazione sportiva, che sono i soli 'agonisti' in senso tecnico, ovvero per quelli che comunque partecipano ad attività organizzate da Federazioni sportive affiliate al CONI.

Numerose sono le ipotesi di responsabilità civile per infortunio dell'atleta. Tra queste si fermerà l'attenzione sulla responsabilità extracontrattuale dell'atleta per infortunio di altro atleta.

2. L'ipotesi dell'infortunio causato dall'atleta è, forse, la piú complessa dal punto di vista scientifico. Eppure, è stata talmente esplorata dagli interpreti, che appare persino agevole offrire un rapido resoconto dei principali orientamenti interpretativi ormai sedimentati nel diritto italiano.

Innanzi tutto, secondo l'impostazione che appare preferibile, la responsabilità extracontrattuale per il danno provocato dall'atleta ad altro atleta dovrebbe seguire le regole generali dettate dal codice civile. Dunque, sebbene siano encomiabili gli sforzi ricostruttivi della dottrina, ci muoviamo pur sempre nel prisma del codice civile e, quindi, devono necessariamente venire in evidenza, nella sussunzione dei casi concreti alla fattispecie tipica, i momenti logici delineati dall'art. 2043 codice civile, ossia:

i) valutazione dell'imputabilità della condotta che si assume lesiva; ii) qualificazione dell'atteggiamento psicologico dell'autore della con-

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dotta lesiva; iii) individuazione del nesso di causalità adeguata tra condotta e danno; iv) valutazione dell'antigiuridicità del danno; v) accertamento della risarcibilità del danno ingiusto e sua quantificazione.

Ora, l'orientamento tradizionale individua nell'attività sportiva l'emersione di una scriminante della condotta lesiva, individuata nel consenso dell'avente diritto ovvero nell'accettazione del rischio normale.

Ciò significa che la condotta lesiva sarebbe antigiuridica, ma non potrebbe essere punita e, dunque, non darebbe luogo a risarcimento.

La punibilità della condotta potrebbe derivare solo dalla violazione dolosa o gravemente colposa delle regole tecniche sportive. Infatti, gli atleti accetterebbero implicitamente i rischi derivanti dall'attività sportiva agonistica, esonerandosi reciprocamente dalla responsabilità extracontrattuale, a condizione che le condotte rientrino in quelle consentite dalle regole sportive applicabili alla specifica disciplina.

Questo orientamento è rimasto piuttosto saldo, sia in dottrina che in giurisprudenza, fino all'ultimo decennio del secolo scorso, quando è stato osservato da diversi autori e, soprattutto, dalla Corte di Cassazione, che non vi potrebbe essere consenso dell'avente diritto idoneo a scriminare condotte lesive di diritti indisponibili quali quelli alla vita e all'integrità fisica.

Eppure, il tentativo di circoscrivere le ipotesi di responsabilità civile in àmbito sportivo risponde a un'intuizione istintiva e comune, quella di reputare che non sempre il danno, per quanto grave, inflitto da uno sportivo a un altro sia sanzionabile in àmbito civile. Di piú, le condotte rispondenti ai principi delle discipline sportive non sono avvertite come antigiuridiche e, quindi, l'ordinamento statale non intende né può disincentivarne la commissione.

Muovendo per via induttiva da tale intuizione, parte della dottrina ha sostenuto che lo sportivo, pur ledendo una posizione altrui, potrebbe trovarsi a esercitare un diritto proprio. Se questo diritto proprio fosse configurato come prevalente sugli altri interessi in conflitto, la condotta dannosa non sarebbe comunque punibile.

La fonte normativa dalla quale scaturirebbe questo diritto sarebbe essenzialmente la Legge 16 febbraio 1942, n. 426, che ha istituito il Comitato Olimpico Nazionale Italiano.

La legge non solo autorizza la pratica sportiva agonistica, ma la incoraggia, scorgendovi una finalità benefica sia a livello individuale che sociale.

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In tal modo, è accettata anche la violenza dalla quale potrebbero scaturire dei danni per gli sportivi, purché non ecceda la vivacità, l'audacia e lo spirito agonistico propri della singola manifestazione sportiva, sfociando in manifestazioni di irruenza, aggressività o violenza incompatibili con la natura, lo spirito e la disciplina del gioco.

Questa tesi è stata sostenuta da voci autorevoli, a cavallo di secolo, e sicuramente ha il pregio di aver scorto nell'attività sportiva non una attività tollerata dall'ordinamento, bensí una dimensione culturale umana da coltivare e proteggere.

Si deve, tuttavia, rilevare che, a seguire fino in fondo il ragionamento, sarebbero non punibili e anzi non antigiuridiche – nei limiti appena indicati – solo le condotte realizzate nell'àmbito di competizioni svolte sotto l'egida del CONI.

Ciò non ha impedito alla giurisprudenza, soprattutto penale, di sostenere per alcuni anni che, proprio in virtú della portata sociale e culturale dello sport, la responsabilità sussisterebbe solo nel caso di superamento del rischio consentito dalla disciplina sportiva, in applicazione di una scriminante atipica che si fonderebbe su una interpretazione analogica *in bonam partem* delle scriminanti penali tipizzate.

Questa tesi sconta, innanzi tutto, il limite ricostruttivo dovuto all'orizzonte penale nel quale si è originata. Dunque, in primo luogo, resta individuata esclusivamente una responsabilità a titolo di dolo, per il consapevole superamento dei limiti dettati dalle regole sportive. Inoltre, dalle ultime parole impiegate emerge con evidenza il secondo limite, che pare il punto di maggior rilievo. Questa ricostruzione attribuisce un rilievo in campo civile (e penale) alle norme regolamentari sportive, che assurgono a metro di giudizio della correttezza della condotta dello sportivo.

Tuttavia, non sembra sia consentito attribuire una portata normativa nell'ordinamento giuridico italiano a norme che appartengono all'ordinamento giuridico sportivo, in ossequio prima di tutto al principio della pluralità degli ordinamenti giuridici. Anche perché ci sono condotte consentite dalle regole sportive che ciò nonostante appaiono ugualmente ingiustificabili; mentre altre condotte, pur poste in violazione delle norme sportive, potrebbero generare solo una responsabilità sportiva e non una responsabilità civile.

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3. Nel 2002 la giurisprudenza civile di legittimità ha inaugurato un indirizzo che pare resistere alle obiezioni e, allo stato, costituisce *ius receptum*, salva qualche escursione fuori strada di giudici territoriali minori.

Il criterio adottato dai Giudici di Cassazione non ha fatto perno sul momento psicologico della condotta o sulla coerenza – intesa in sé e per sé – della condotta stessa con le regole di gioco, bensí sul collegamento funzionale tra gioco ed evento lesivo.

Le condotte che sono strettamente e funzionalmente collegate con il gioco sportivo non possono ricevere sanzione civile, seppure costituiscano una violazione delle regole sportive. Infatti, in ogni attività sportiva i partecipanti devono immettere un'energia morale e fisica spesso non compatibile con il mantenimento della massima incolumità altrui (o propria) e con il rispetto stesso delle regole sportive.

Alla ricerca della massima prestazione, lo sportivo tenta sempre di rimanere vicino al limite, ma proprio mentre lo cerca, può superarlo e quindi infrangere la regola sportiva. Se, tuttavia, l'attività che cagiona il danno è funzionale al gioco, essa non sarà foriera di responsabilità civile. Infatti, a condizione che le condotte rispondano solo alla logica del gioco, le parti accettano il rischio di danni, che sono convinti di poter evitare proprio rispettando la regola sportiva e il principio generale del *fair play*.

Come si vede, per la valutazione del collegamento funzionale tra condotta e gioco, sarà comunque indispensabile valutare il contenuto delle regole sportive, ma solo al fine di individuare gli obiettivi consentiti dalla singola attività sportiva. Qui la funzione delle norme sportive non è piú, come in altre ipotesi, di individuazione di norme giuridiche applicabili in campo civile, bensí quella di metro interpretativo della rispondenza delle singole condotte al grado di intensità e aggressività connaturato all'attività stessa.

In questa prospettiva, da una parte, la violazione delle regole sportive non integra di per sé sola la responsabilità civile, perché è necessario che la violenza esercitata sia stata tale da violare lo spirito del gioco, muovendo verso un obiettivo non consentito: la sopraffazione dell'avversario con mezzi scorretti, quali ad esempio una violenza non compatibile con le caratteristiche proprie del gioco, nel contesto in cui si svolge.

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Dall'altra parte, il mero rispetto delle regole sportive potrebbe non essere sufficiente, di per sé, a escludere una responsabilità civile, laddove la condotta realizzata non sia comunque volta a raggiungere gli obiettivi propri del gioco, nel suo contesto, bensí sia dolosamente rivolta o colposamente realizzata in modo da danneggiare l'avversario.

Questa ultima considerazione non è generalmente condivisa. Si può evocare, con alcune semplificazioni, una immagine che appartiene all'àmbito sportivo del tennis. Immaginiamo un tennista professionista – quindi tecnicamente abile – che trovandosi a rete per compiere un comodo *smash*, pur avendo tutto il campo a disposizione per appoggiare il colpo, indirizzi la palla verso il corpo dell'avversario pure a rete, colpendolo in pieno viso. Nell'esempio, il gesto tecnico, pur di per sé consentito dal regolamento, non è volto a conseguire il punto, bensí è direttamente o indirettamente volto – mentre si consegue il punto – a ferire, umiliare o condizionare l'avversario.

Naturalmente, che la condotta sia in qualche modo dolosa o quantomeno gravemente colposa si desume dalla possibilità tecnica del giocatore di realizzare il punto in altro modo.

Ciò consente di reputare che l'atleta abbia cercato di raggiungere un fine non consentito dalla regola sportiva e, certamente, foriero di responsabilità civili in caso di danno cagionato all'avversario.

In effetti, come si vede anche dall'esempio, l'analisi del nesso funzionale tra gioco ed evento lesivo consente di selezionare gli interessi giuridicamente tutelati nell'attività sportiva, da quelli che si ammantano di sportività ma sono solo gesti violenti.

Il rispetto della regola sportiva, quindi, provoca esclusivamente una presunzione *iuris tantum* – dunque superabile – di non imputabilità della condotta.

In questa analisi delle condotte e del loro collegamento funzionale con il gioco, che empiricamente potrebbe non rivelarsi semplice, possono tornare utili le ripartizioni tracciate tradizionalmente dalla dottrina tra attività agonistica e attività non agonistica o addirittura mero allenamento. Tra sport a violenza necessaria, sport a violenza eventuale e sport sostanzialmente non violenti.

Infatti, a seconda del tipo di sport e, dunque, delle norme sportive che ne regolano lo svolgimento, è possibile valutare con obiettività se vi sia stata adesione ai principi propri dell'àmbito sportivo, al

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fine di evitare la lesione della sfera fisica (o morale) dell'avversario. Lesione, quest'ultima, che sarebbe non consentita in quanto non rientrerebbe tra le posizioni protette del danneggiante, che consentono il sacrificio – accettato da tutti gli sportivi come eventualità non remota – della posizione del danneggiato.

4. Malgrado gli sforzi della dottrina, le ipotesi di responsabilità civile per l'infortunio dell'atleta resistono a rigorose classificazioni. Quantomeno per il fatto che la realtà supera spesso l'immaginazione e sempre nuovi casi cercano la loro giusta collocazione.

Il lavoro dei giuristi è, insomma, ancóra lungo.

Per di piú, a quanto risulta dagli studi di etologia, l'uomo è forse l'unico animale a mantenere per tutta la vita l'istinto al gioco, nel quale continua ad apprendere nuove modalità di relazione e di uso delle proprie facoltà. Al contrario, quasi tutti i mammiferi superiori cessano di giocare al raggiungimento della maturità sessuale e nessuno continua a giocare anche in vecchiaia.

Nell'uomo, come in tutte le creature, l'istinto di gioco non è che una forma di aggressività re-diretta e, dunque, tendenzialmente implicherà sempre una sopraffazione dell'avversario, per quanto ritualizzata.

Inoltre, l'istinto di superare costantemente il limite produrrà continue generazioni di agonisti delle singole pratiche sportive.

Ciò significa che, con ogni probabilità, non solo gli sport attuali si evolveranno ancóra, ma vi saranno nuovi sport, nei quali impiegheremo nuovi materiali, nuove attrezzature e nuovi ambienti di gioco.

In questo scenario continuamente mutevole, i giuristi dovranno costantemente riflettere sulle ipotesi di risarcibilità del danno occorso all'atleta. Ciò risponde all'esigenza che il diritto sia comunque la cornice nella quale si modifichi quello scenario, continuando comunque a raffigurarsi una umanità sana. Soprattutto nel settore dell'agonismo sportivo, che in qualche modo è un paradigma dell'umanità e, anzi, ne dovrebbe essere l'idea in senso platonico.

MAURIZIO BENINCASA

*Abstract*

L'ampia casistica relativa alla Responsabilità civile impone di circoscrivere l'analisi all'infortunio dell'atleta, vale a dire a chi si dedica agonistica-

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mente all'attività sportiva, con attenzione specifica alla responsabilità extracontrattuale dell'atleta per infortunio dell'altro atleta. La recente giurisprudenza civile opera un collegamento funzionale tra gioco ed evento lesivo per cui in questo caso le norme sportive fungono da metro interpretativo della rispondenza delle singole condotte al grado di intensità e aggressività connaturato all'attività stessa.

The essay focuses on the athlete's responsibility for the injury of the other athlete. Recent Court jurisprudence establishes a link between the sporting activity and injurious events, using sports rules as an interpretative criterion of the correspondence of individual conduct to the degree of intensity and aggressiveness inherent in the activity itself.

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# Spectator and other supporter-induced violence albanian and serbian football before the court of arbitration for sport

Summary: 1. Introduction: the problem of violence. – 2. The European conventions on spectator violence (1985) and safety, security and service (2016). – 3. The CAS Cases Arising Out of the 2014 qualifying match between Albania and Serbia for the 2016 European championships. - 3.1. Albania v. Serbia. - 3.2. The UEFA proceedings. - 3.3. The CAS awards. - 3.4. The key issues. - 3.4.1. The attribution of fan behavior. - 3.4.2. The evidence of violence. – 4. Conclusion.

1. Violence in sports events is nothing new. Leaving aside the long history of unacceptable clashes among players on the playing field itself as well as the fundamentally violent nature of some sports such as rugby, ice hockey, and North American football[1], its incidence among spectators and other supporters can be chronicled as early as the Sydney Riot of 1879[2]. In that instance, a controversial call by an English umpire during a cricket match between English and Aus-

[1] Interestingly, these three sports rank, in the order listed, as the sports that have resulted in the largest number of brain concussions. Rugby players are by far the most prone to suffer concussions (four times the incidence in ice hockey), quite likely because of a lack of protective equipment. Closely behind American football, the next sports in this ranking are two sports not ordinarily considered violent: football/soccer and basketball. It is unclear why boxing is not in this ranking, but headgear and strict rules do protect boxers. Cfr. *Schools and Hard Knocks*, in *Economist*, 5th March 2016, p. 14. One study of violence in Canadian hockey suggested root causes of a violent code of behavior but also lower rates among experienced players and a declining record of violence in that sport. For a summary, cfr. P. Restrepo, *Canadian Violence From the Prairie to the N.H.L.*, in *N.Y. Times*, Oct. 11, 2015, p. 10.

[2] Cfr., generally, J. Pollard, *The Formative Years of Australian Cricket 1803-93*, Sidney, 1987, p. 224 s.

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tralian teams prompted some 2,000 irate Australian fans to invade the pitch, thereby suspending play and leading to several arrests.

Since then, European football/soccer matches have been by far the predominant venue for acts of violence. English spectators, in particular, have been notorious. But the problem of violence induced by spectators and other supporters of clubs and teams is universal. For example, football/soccer matches between China and Japan have been marred by violent threats from spectators[3]. A notorious war in 1969 between El Salvador and neighboring Honduras evolved from a melée following a disputed match between national teams[4]. The 2016 UEFA European Championship hosted by France began with a brawl between Russian and English spectators after a match ended in a draw between their national teams[5].

Violence is not limited to football/soccer matches, of course, as occasional brawls during North American events in other sports attest. It might also be recalled that rugby's status as an Olympic sport was suspended between 1924 and 2016 because of spectator violence. The 1924 Olympics, which took place in Paris, featured a championship game between a heavily-favored French team against a United States squad. After two French players were injured, the French fans booed and hissed the U.S. team for the rest of the match. After the

[3] Cfr., e.g., J. Pomfret, *Chinese Lessons*, 2007, 267 (describing competition between the two national teams during which the Chinese spectators booed the Japanese national anthem, pelted Japanese fans with garbage, raised threatening signs such as «Death to the Japanese», and chanted «kill, kill, kill»).

[4] Contemporary news coverage included N.Y. *Times*, June 29, 1969, §5, at 15; *N.Y. Times*, June 28, 1996, at 1.

[5] Cfr., e.g., *20 Russians are Deported by France for Fighting*, in *N.Y. Times*, June 19, 2016, at SP11 (reporting that besides the deportations for spectator involvement in hooliganism, three Russians were convicted of criminal offenses and sentenced to prison terms of one to three years); S. Borden, *A Flare in the Stands Could Signal Russian's Exit*, in *N.Y. Times*, June 16, 2016, p. B10 (describing an incident after UEFA had given the Russian national team a «suspended disqualification» for the violent behavior of its fans in which a Russian-originated flare in the stands, prohibited under UEFA rules, threatened to end the Russian team's participation in the European Championships); S. Borden, *A Day After Alarming Melée, a Fight Keeps the Focus off the Field*, in *N.Y. Times*, June 13, 2016, at D5 (reporting details of the brawl in Marseille after the England-Russia match, but also noting confrontations among fans on the streets, outside the stadiums elsewhere in France, and the arrest of English fans in the city center of Marseille prior to the England-Russian match).

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U.S. team surprisingly and easily won 17-3, fighting erupted in the stands, leading to inevitable physical injuries – and a 92-year injury to rugby itself as an Olympic sport[6]. Of course, in addressing the problem of violence in sports, we should also keep in mind a long history of threatening behavior in cultural venues other than sports, such as theaters and mass outdoor music events.

The factors that specifically contribute to violence by spectators and other supporters of sports clubs and teams fall into three categories: psychological, environmental and political[7]. Among the psychological factors are a strong identity with a club or team, the frustration of fans who realize their lack of control over disappointing performances on the playing field, the projections into the stands of hostility based on playing-field violence, hypermasculinity and related gang mentality, mob mentality among fans, and often most important, alcohol-induced behavior. Environmental factors include the density of a spectator crowd, the role of social media in fostering violent interconnectedness, inadequate or ineffective security and inadequate surveillance of venues provided by host clubs or teams, a lack of reminders by event organizers about good sportsmanship, and sometimes the sheer importance of a particular event. Political factors may include, within a single country, an identity between a team and a particular political faction; and externally, a chauvinistic or nationalistic impulse or, more significantly, ongoing hostility between nationalities. Whatever the instigating factor, the prevailing theory of aggressive behavior posits a combination of group frustration and socially learned cues that favor aggression.

The antidotes to violent behavior are compelling. They include deliberate and continuous public education in good sportsmanship, widespread acceptance of codes of acceptable conduct, adequate surveillance of spectators and ample security to respond quickly to threatening misbehavior, incident tracking and data collection over time,

[6] C. Brown, *The Ultimate Scrum,* in *N.Y. Times Magazine*, June 19, 2016, p. 32, 35. Cfr. also The National Center for Spectator Safety and Security, *How to Prevent Fan Violence at Sporting Events*, Gameday Security, Feb. 2015.

[7] What follows is drawn from a variety of sources, one of the most succinct of which is T. D. Madensen, J. E. Eck, *Spectator Violence in Stadiums*, in *Problem-Oriented Guides for Police, Problem-Specific Guides Series*, No. 54 (Center for Problem-Oriented Policing 2008).

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limitations on the sale and distribution of alcoholic beverages in stadiums, ritualized courtesy between competing teams, immediate ejection of disruptive fans, effective sanctions for acts of violence, exclusion of recidivist perpetrators of unscriptable conduct, cooperation among clubs and teams (also national federations, and governments) to avoid and respond to acts of violence, and collaboration between event organizers and the media to generate a wholesome attitude towards competition among the public[8].

2. In 1984 and early 1985 a series of deadly and severely damaging acts of violence by spectators, mostly English nationals, culminated in the Heysel Stadium disaster in Brussels, Belgium[9]. An hour before the 1985European Cup Final between Italy's Juventus and England's defending champions from Liverpool, the latter's supporters breached a fence that had been deliberately erected to separate them from a neutral area beyond which were Juventus fans. When the Liverpool fans attacked them, they sought to escape by running toward a concrete retaining wall, crushing many people and resulting in a collapse of the wall. Some 39 fans were killed and 600 injured. The Heysel Stadium disaster involved all of the psychological, environmental and political factors that were identified earlier in this essay.

In the aftermath of this disaster, UEFA, governed by its own body of authority[10], banned all English football clubs from European competition. The ban was only lifted after five years, with an additional three-year suspension imposed on the Liverpool club that was later reduced to one year. Several Liverpool fans were imprisoned after convictions for manslaughter, initially for three years but later for four to five years after a successful appeal by Belgian prosecutors[11].

[8] Cfr., e.g., *Australian Institute of Criminology, Spectator Violence*, Part I: *ProfessionalSporting Events, Research in Practice*, 12, 2010; D. Madensen, J. E. Eck, *Spectator Violence in Stadiums*, cit.

[9] Cfr. *N.Y. Times*, May 30, 1985, p. 1.

[10] Today this body of authority includes the Regulations of the UEFA European Football Championship, the UEFA Disciplinary Regulations, the UEFA Organisational Regulations, and the UEFA Statutes. Also pertinent are the Laws of the Game of the International Federation of Football Associations (FIFA).

[11] J. Jackson, *The Witnesses*, in *Observer*, 3rd April 2015.

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A variety of responsive measures followed, in addition to the club suspensions and criminal penalties[12]. But something more at the international level needed to be done. That something took the form of immediate action by the Council of Europe to draft and open for signature a Convention on Spectator Violence and Misbehaviour at Sports Events and in particular at Football Matches[13]. This agreement, which was completed quickly in 1985, is binding on 41 European states today.

In 2016 the Council of Europe opened for signature a Convention on an Integrated Safety, Security and Service Approach at Football Matches and Other Sports Events[14]. This agreement, with 14 initial signatories, is intended eventually to replace the convention on spectator violence and misbehavior. It focuses more on preventing violations before they develop or escalate and on close coordination and cooperation between local, national and international bodies, both public and private, to ensure overall safety, security and service in and around sports venues. The convention therefore aims to promote the hospitality and safety of spectators inside and outside stadiums; improve dialogue between the police, local authorities, football clubs and supporters; strengthen international police cooperation; and prevent and punish hooliganism through effective measures.

Ironically, the 2016 convention emerged just after violence broke out in France at the time of the 2016 UEFA European Championships in football/soccer. It was therefore acknowledged that the problem of violence must remain the focus of efforts in Europe to ensure safety, security and service to spectators in sports events. The 1985 convention itself has three main themes: cooperation, prevention and repression. The regional cooperation includes transferring proceedings to countries of residence of apprehended persons, extraditing persons suspected of violence or other criminal activity at sports events, and transferring convicted persons to 'the relevant country'. Other provisions in the treaty provide for enforcement of security

[12] These measures, largely in England, included a requirement of all-seater stadiums; the installation of closed-circuit cameras, stadium black-listing of troublemakers, and extended bans of English clubs from European competition.

[13] ETS No. 120, Aug. 19, 1985, reproduced in 24 I.L.M. 1566 (1985) (hereinafter European Convention on Spectator Violence).

[14] CETS No. 218, 7th July 2016 (herein after 2016 Convention).

measures at stadia; consultations in advance of potentially troublesome matches; control of ticket sales and (non) availability of alcoholic beverages; and information sharing, particularly among police.

The 1985 convention met with several early responses. For example, in 1987, two years after the treaty entered into force, the British House of Lords granted extradition of 26 English soccer fans to stand trial in Belgium for their alleged incitement of the Heysel Stadium tragedy[15]. The willingness of the British to extradite their own nationals (not a common practice) was an early measure of the seriousness with which state parties to the convention have responded to the problem of spectator violence as an offense against human rights.

The 1985 convention also establishes a Standing Committee to monitor its implementation and to address fundamental issues such as racism, racial intolerance and xenophobia in sports. It meets annually at either the Council of Europe headquarters in Strasbourg or in a host country before the opening of an event. The Standing Committee's numerous recommendations, resolutions, declarations, and instructive publications have ranged from pronouncements against racism, xenophobia and racial intolerance in sport to the role of local and regional authorities in combatting hooliganism at sports events. During major international competition an ad hoc working group is set up within the Standing Committee to evaluate the efficacy of security provisions and, after the competition, to evaluate lessons learned[16].

In 2015 the Standing Committee adopted a comprehensive Recommendation on safety, security and service at football matches and other sports events[17]. Taking an integrated approach to a wide array of safety, security and services concerns, as later articulated in the 2016 Convention[18], it replaces all recommendations, resolutions and statements adopted by the Standing Committee since its establishment. As in the 1985 and 2016 conventions, the specific references

[15] *Int'l Herald Trib.*, 14th July 1987, at 2. Cfr. also text at notes 11-13.

[16] Cfr. *European Convention on Spectator Violence*, *supra* note 15.

[17] Council of Europe, Standing Committee (T-RV), European Convention on Spectator Violence and Misbehaviour at Sports Events and in Particular at Football Matches, Recommendation Rec. (2015) I of the Standing Committee on Safety, Security and Service at Football Matches and Other Sports Events, 18 June 2016.

[18] 2016 Convention, *supra* note 16.

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to football in the title and text of the Recommendation highlight the dominant role of that sport in Europe and its centrality in addressing concerns about threats to the safety and integrity of all European sports competition.

The Standing Committee has also taken specific action to assist in preventing and responding to spectator events in both national and international spheres. For example, in 2008 and 2009 the committee organized a consultative visit by representatives of the Council of Europe to Serbia. That country and its soccer clubs and national teams had suffered from incidents of violence at and near sports venues, and its government had expressed an interest in preventing further violence and in making sports facilities family-friendly. The visit resulted in a substantial report[19], including 22 recommendations to the Serbian government that ranged from enacting specific legislation on stadium-control rooms, CCTV, safety officers and stewarding of events to investing in a social-educational action plan to socialize youth in best practices.

3.1. The Serbian authorities appear to have been still in the process of implementing the recommendations resulting from the Council of Europe's consultative visit at the time, six years later, of a qualifying match for the UEFA 2016 European Championship. That match took place on October 14, 2014 in Belgrade's Partizan Stadium between the Serbian and Albanian national teams. Even though these neighboring countries were political adversaries, their respective national teams each had been assigned to Group I in the qualifier. The focus of their mutual animosity was of course the status of Kosovo, the predominantly Albanian ethnic province of Serbia that broke away and declared its independence during the first decade of the twenty-first century[20].

UEFA, as the organizing body, had been sensitive to such geopolitical tensions by deliberately assigning such adversaries as Armenia and Azerbaijan and Gibraltar and Spain to different groups in ear-

[19] Council of Europe, Serbia Advisor Team, *Report of the Consultative Visit to Serbia on the Implementation of the Convention 19-21 November 2008*, T-RV (2009) 3.

[20] For a succinct legal summary of the exercise of self-determination by the Kosovars, cfr. A. Kaczorowska, *Ireland, Public International Law 602-07* (5th ed. 2015).

lier qualifiers. But neither the Albanian nor Serbian national football associations (the FAA and FAS, respectively) protested their inclusion in the same group. The usual plans for a qualifying match therefore generally went ahead although both national associations agreed with UEFA to prohibit Albanian fans from attending the games. Despite this precaution, the game erupted in violence instigated by Serbian spectators and a supporter of the Albanian team who was located outside the stadium[21].

The violence all began early on game day when the FAA informed the UEFA match delegate that its president had been hit by a piece of concrete, that the team's bus had been pelted with stones, and, later, that their athletes were targeted with small coins, lighters and other objects. Within the stadium Serbian fans greeted the Albanian team with chants of «kill the Albanians», whistled and chanted during the Albanian national anthem, and, in the opening moments of the game itself, burned the flag of NATO, of which Albania is a member and which had been instrumental in the Kosovar insurrection against Serbia. As the game continued, flares and bottles were hurled from the stands toward Albanian players. Consequently, in the 42nd minute with a 0-0 score, the English referee temporarily suspended the game for the second time.

During the pause, a small, remote-controlled quadcopter drone appeared over the stadium. It bore an elaborate flag of Albanian patriots and patriotic symbolism as well as a map of Greater Albania, including Kosovo. After a Serbian defender snatched the flag, a brawl ensued that engaged players from both teams, as well as Serbian fans, Serbian stewards of the competition and other sports personnel. After a 30-minute delay the game was finally abandoned.

3.2. The following day UEFA started disciplinary proceedings against both national football associations[22]. Under UEFA Disciplinary Regulations (DR), UEFA officials prevailed in their claim that the FAA had violated UEFA rules by refusing to return to the play-

[21] What follows is drawn from Football Ass'n of Albania v. UEFA & Football Ass'n of Serbia, CAS 2015/A/3874 (Court of Arbitration for Sport) 7-31 (hereinafter CAS 2015/A/3874).

[22] CAS 2015/A/3874, *supra* note 23, 38.

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ing field after the second suspension[23] of the game and for the attribution of the provocative banner to it[24]. UEFA's claim against the FAS involved the attribution to it, consistent with UEFA rules, of the offenses committed by ostensibly local, presumably Serbian, spectators. These offenses included crowd disturbances, the projection of flares and other objects onto the playing field, invasion of it by the spectators, assaults by them of Albanian players and inadequate organization and supervision of stadium security[25].

After hearing arguments by representatives of both the FAA and the FAS, the UEFA Control, Ethics and Disciplinary Body (CEDB) ruled the next day as follows: that Albania had abandoned and therefore forfeited the match, resulting in a prescribed 3-0 loss[26] and a fine of € 100,000 for the drone and illicit banner[27],and that Serbia would lose three points in the Group qualifying round, would have to play its next two home games behind closed doors, and would also be fined € 100,000[28].

Both national associations appealed the decision to the UEFA Appeals Body, which, however, upheld the CEDB's decision[29]. Again, both national associations appealed the Appeals Body's decision to the CAS, which bifurcated the proceedings but allowed the FAS also to intervene in the FAA's appeal of the EUFA Appellate Body's decision.

3.3. In the main award[30] by CAS the FAA prevailed in its claim that the chants by Serbian spectators were racist and discriminatory and therefore particularly serious offenses under UEFA's disciplinary regulations[31]. That determination by the CAS panel overturned UEFA's

[23] *Ibidem*, p. 58 (*quoting* UEFA, *Control, Ethics and Disciplinary Body* (CEDB), *Albania Decision*, Oct. 23, 2014) (hereinafter CEDB Decision).

[24] *Ibidem*, p. 60 (*quoting* CEDB Decision, *supra* note 25).

[25] Football Ass'n of Serbia v. UEFA, CAS 2015/A/3875 (Court of Arbitration for Sport) 36 (*summarizing* CEDB Decision, *supra* note 25).

[26] CAS 2015/A/3874, *supra* note 23, 59.

[27] *Ibidem*, p. 62.

[28] *Ibidem*, p. 64.

[29] *Ibidem*, p. 65 s.

[30] CAS 2015/A/3874, *supra* note 23.

[31] *Ibidem*, p. 172.

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conclusion that the chants and other objectionable behavior had a political rather than discriminatory xenophobic character. But, unfortunately for the FAA, the CAS panel also ruled that the issue was moot because the FAA lacked standing to assert the claim against the FAS insofar as it had not been 'directly affected'[32] by the UEFA decision.

The CAS panel did, however, rule that the chants bore on the issue of responsibility for cessation of the match[33]. Regarding the extent of the FAA's responsibility in the face of the hostility of Serbian fans, the CAS panel concluded that, although the Albanian players had clearly stated during the second suspension of the match that they would refuse to return to the playing field, the legal effect of the apparent refusal was contingent on a determination by the match referee that it was safe to resume play[34]. Because that determination was never made and in view of the ambiguity of communications to the Albanian team by match officials, the CAS panel found to its comfortable satisfaction that the match referee had not «clearly, directly and unconditionally»[35] ordered the players to return to the field and continue the play.

As to the sanctions against the FAA related to the drone incident, the panel ruled that it was «objectively reasonable»[36] to proceed on the presumption that an Albanian supporter had operated the drone. Even though the presumed supporter who launched the drone had not been observed or conclusively identified (despite his self-confessed notoriety) and in the absence of any evidence implicating Serbian supporters in the incident, the panel was comfortably satisfied that the drone was controlled by one or more Albanian supporters, thereby giving rise to the FAA's responsibility[37]. In reaching this con-

[32] *Ibidem*, p. 178 s.
[33] *Ibidem*, p. 186.
[34] *Ibidem*, p. 217.
[35] *Ibidem*, p. 219, 222, 224, 226.
[36] *Ibidem*, p. 197.
[37] *Ibidem*, p.198, 199. That presumption was later confirmed. Cfr. J. MONTAGUE, *Ending a Game and Inciting a Riot, with a Joystick*, in *N.Y. Times*, Oct. 8, 2015, at B22 (featuring Ismail Morina, an Albanian crane operator and «patriot», who apparently singlehandedly engineered the drone incident by remote control from a tower of the Church of the Holy Archangel Gabriel near the Partizan Stadium).

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clusion, the panel drew guidance from an earlier decision[38] in which flares had been launched from outside a stadium and parachuted onto the field of play. The bottom line in the instant case was therefore that the fine of € 100,000 against the FAA had been appropriate and, though severe, not out of line with lighter sanctions that the UEFA Appellate Body had imposed[39].

The CAS panel then turned to the question of the Albanian team's responsibility, stemming from the drone incident, for termination of the match, notwithstanding that the CAS panel had determined, as noted above, that the Albanian team's refusal to return to the playing field did not in itself constitute an abandonment of the match sufficient to justify sanctions against the team. In examining the question of whether the FAA was nevertheless responsible for termination of the match, given that the drone incident was attributable to a supporter or supporters of the Albanian team, the panel emphasized the totality of the circumstances involving racist, discriminatory and, the panel added, menacing chants as well as assaults by supporters of the Serbian team[40]. In the panel's words, «(t)he drone incident certainly did not assist in calming matters down, but in all of the circumstances it is these other appalling acts of behaviour [by the Serbian supporters] which are the significant factors in causing the match to be abandoned»[41]. The panel also emphasized the 'lackadaisical'[42] response by Serbian match officials, noting that a Serbian security steward had himself attacked an Albanian player.

The CAS panel concluded therefore that the FAS bore the «exclusive responsibility»[43] for the match stoppage and eventual abandonment by the match referee. Citing substantial precedent to support its power to review *de novo* the facts and the law and to issue a new decision[44], the panel thus overturned the decision of the UEFA Appellate Body regarding responsibility for the match forfeiture, thereby shifting the liability from the FAA to the FAS and reas-

[38] *Viz*. CAS 2013/A/3139.
[39] CAS 2015/A/3874, *supra* note 23, 205.
[40] *Ibidem*, p. 239.
[41] *Ibidem*, p. 248.
[42] *Ibidem*, p. 245.
[43] *Ibidem*, p. 248.
[44] *Ibidem*, p. 250.

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signing a 3-0 loss from the Albanian to the Serbian team[45]. This reassignment of the loss proved to be definitive in contributing to the Serbian team's failure to qualify for the UEFA 2016 European Championship and the Albanian team's participation in them. There, against a Romanian team, Albania achieved its first-ever victory in a major tournament[46]. The panel also assessed the FAS and UEFA for the amount of the FAA's legal fees and other expenses. (International disciplinary cases of this sort are free of costs except for a court-office fee, which the FAA had already paid.)[47]

In the companion case[48], another CAS panel dismissed the separate appeal by the FAS of the UEFA Appeals Body's decision and assessed the FAS for the expenses incurred by UEFA in connection with the proceedings. The panel emphasized that the FAS had failed to overcome a presumption of negligence in organizing and supervising such a «high-risk match in light of the historical hostility between Albanians and Serbians, particularly exacerbated by the notorious political events concerning Kosovo»[49]. Even the training of the match stewards had been inadequate, the panel concluded[50]. Rejecting several past cases as guidance, the panel held that UEFA's sanctions against the FAS had therefore not been disproportionate[51].

3.4. These CAS decisions are rich in procedural and substantive jurisprudence. For purposes of this essay, the most interesting issues relate, first, to the behavior of 'supporters'[52] and the attribution of

[45] *Ibidem*, p. 251, 253.

[46] Cfr. S. Borden, *Their Group Stage is Over. Their Fate? Uncertain*, in *N.Y. Times*, June 22, 2016, p. B13.

[47] *Ibidem*, p. 254.

[48] *Ibidem*, CAS 2015/A/3875, *supra* note 27.

[49] *Ibidem*, p. 102.

[50] *Ibidem*.

[51] *Ibidem*, p. 128.

[52] The panel quoted an earlier CAS Award, CAS 2007/A/1217, as follows: The term «supporter» is not defined. In particular, the Panel notes that it is not linked to race, nationality or the place of residence of the individual, nor is it linked to a contract which an individual has concluded with a national association or a club in purchasing a match ticket. The Panel has no doubt that it is UEFA's deliberate, and wise, policy not to attempt to provide a definition for «supporter». There is no UEFA provision that makes a distinction between «official» and «unofficial» supporters of a team. Nor could such a

responsibility for their actions to a national association. A second set of issues involves the application of evidentiary rules and standards, particularly as applied to claims of violence and other misconduct that are sufficient to justify the imposition of burdensome sanctions on an association.

3.4.1. Regarding the behavior of supporters, the CAS panel took a 'presumptive approach'[53] based on reasonable and objective criteria that was rebuttable by the opposing party. The panel maintained that such an approach was consistent with Swiss law and earlier CAS Awards[54]. Citing UEFA disciplinary regulations, the panel confirmed a rule of strict liability that was binding on all national associations and clubs for the misbehavior of their supporters[55]. The panel described this rule as a «fundamental element of the current football regulatory framework»[56] that CAS jurisprudence had already determined was consistent with Swiss law.

As to the definition of a 'supporter'[57] the panel confirmed that the term «is an open concept that is intentionally undefined. It must be assessed from the perspective of a reasonable and objective observer»[58]. As noted earlier, and in the case itself, there was no conclusive evidence «in order to attribute the use of the drone to any identified Albanian supporter»[59]. However, the panel concluded that

provision easily be drafted. UEFA could not be satisfied that its Disciplinary Regulations would ensure the responsibility of clubs for their supporters if such a distinction were made. The only way to ensure that responsibility is to leave the word «supporters» undefined so that clubs know that the Disciplinary Regulations apply to, and they are responsible for, any individual whose behavior would lead a reasonable and objective observer to conclude that he or she was a supporter of that club. The behaviour of individuals and their location in the stadium and its vicinity are important criteria for determining which team or club they support.

[53] CAS 2015/A/3874, *supra* note 23, 196.

[54] *Ibidem.* By default, Swiss law, as the law of UEFA's domicile, applies in CAS proceedings absent any other governing law. CAS, Special Provisions Applicable to the Appeal Arbitration Proceedings, Rule 58.

[55] *Ibidem*, p. 187.

[56] *Ibidem.*

[57] Regarding the lack of a definition of «supporter», cfr. the quotation from CAS 2007/A/1217, *supra* note 54.

[58] CAS 2015/A/3874, *supra* note 23, 189.

[59] *Ibidem*, p. 194.

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the drone carrying a nationalistic banner was «highly likely»[60] to have originated among Albanian supporters, and it didn't matter whether they were inside or outside the stadium. The panel was therefore comfortably satisfied that the drone had been controlled by one or more Albanian supporters[61]. This finding of a «high likelihood» of the drone's source is a significant interpretation of «comfortable satisfaction» as that evidentiary standard continues to evolve.

3.4.2. A threshold issue before the CAS panel was the standard for reviewing what was characterized as a field-of-play decision by the match referee to terminate the match. The panel first confirmed the traditional non-interference rule protecting field-of-play decisions as reflected in long-established CAS jurisprudence. Consequently, the panel would not review such a decision unless it resulted from arbitrariness or bad faith even if the decision had been recognized as wrong with the benefit of hindsight[62]. Noting the lack of clarity as to the division of powers between the match referee, the UEFA match delegate and the UEFA Security Offices, the panel was unable to ascertain to its comfortable satisfaction that the match referee, vested with the ultimate authority to make a decision, had given a «direct, clear and unconditional»[63] order that safety had been assured so that the game should resume. A second issue of evidence was whether the totality of the circumstances nevertheless justified the sanctions of a 3-0 loss against the FAA because of the refusal of the Albanian team to resume play after the temporary suspension of the game. As noted earlier, the evidence of those circumstances impelled a reversal of the UEFA decision, thereby reassigning the prescribed 3-0 loss to the FAS.

Finally, we might ask objectively whether the actions of the Serbian spectators and the presumably Albanian off-field supporter(s) were, perhaps taken together, sufficiently violent to impair the security of the game. Social scientists have identified six forms of spectator aggression:[64] verbal (singing, chanting, and yelling taunts or ob-

[60] *Ibidem*, p. 195.
[61] *Ibidem*, p. 199.
[62] *Ibidem*, p. 213.
[63] *Ibidem.*
[64] D. Madensen, J. E. Eck, *Spectator Violence in Stadiums*, *supra* note 9.

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scenities); gesturing (signaling to others threatening or obscene motions); 'missile' throwing (hurling hard objects or rushing an exit); swarming (invading the field); destroying property; and physically assaulting others. The Serbian spectators exhibited all six of these forms of spectator aggression. The Albanian off-field supporter(s)' intrusion onto the playing field by a drone is more difficult to classify within this typology of spectator aggression. Its role, which led to the imposition of a substantial fine on the FAA, seems to have been either as a provocative gesture sufficient to constitute an initiation of violence in itself or at least an invitation to it.

4. The CAS awards arising out of the 2014 soccer match between Albania and Serbia addressed all three categories of factors – psychological, environmental and political – that contribute to violence by spectators and other supporters of sports clubs and teams during competition. The awards are more specifically instructive for several reasons.

First, the awards may be seen as iconic insofar as the violent actions of spectators and supporters continue to be identified with European football/soccer. In 2016 that characteristic recurred in the brawls that broke out among fans, particularly of English and Russian nationality, in and outside of football/soccer stadiums before and during the EUFA 2016 European Championship in France,[65] rightly or wrongly. Second, the European Convention on Spectator Violence, now in its fourth decade, seems to have had only a limited impact in deterring spectator and supporter violence. Third, it is apparent, however, that CAS has been instrumental in protecting the integrity of sports competition by virtue of its institutional distance from UEFA and other organizers of controverted events. The CAS has also been an indispensable source of *lex sportiva*[66] to advance the cause of fairness. Fourth, the CAS decisions endorse such rules of *lex sportiva* as the non-interference rule,

[65] Cfr. *supra* note 7.

[66] Although the scope of *lex sportiva* has been variously defined, the original and still most widely accepted meaning of the term refers to a body of rules and principles derived from awards made by CAS, primarily, and other pronouncements of the general practice shaped by CAS.

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the evidentiary standard of comfortable satisfaction, the 'direct affect' requirement for appellate standing, and zero tolerance for threats or acts of violence.

Of fundamental importance in combatting violence by spectators and other supporters of clubs and teams is the rule, engrained in the *lex sportiva*, of attribution. It imputes responsibility to clubs and teams for the actions of their fans and for proper security and safety by host clubs and teams. The rule of attribution may be questioned on the basis of fairness to implicated clubs and teams, but it is difficult to think of better leverage against the all-too-common risk of injurious misbehavior by individual fans and, worse yet, mobs. Perhaps that is the most important consideration. In this regard, the CAS decisions arising out of the misbegotten match between the Albanian and Serbian national teams in 2014 have contributed to the jurisprudence of attribution by taking a presumptive approach that led to the liability of the Albanian football federation for the act of an unknown, off-field supporter. Finally, in imposing debilitating sanctions against the Serbian football federation for the acts of Serbian spectators, the CAS decisions confirmed the zero tolerance of international sports law for crowd disturbance and violence[67].

In a perfect world, all stakeholders in sports competition, including spectators and supporters, would comply with Article 29 of the Universal Declaration of Human Rights, which establishes that «(e)veryone has duties to the community in which alone the free and full development of his personality is possible»[68]. In the imperfect world of sports, however, the integrity of sports competition will continue to need international sports federations, CAS and other authoritative bodies to help ensure the duty of responsible behavior among spectators and other supporters of competition.

JAMES A.R. NAFZIGER

[67] In 2016 the quick and no-nonsense responses by EUFA and French authorities to the brawls before and during the EUFA championship competition underscored both nongovernmental and governmental commitments to zero tolerance.

[68] G.A. Res. 217A, U.N. GAOR, 3rd Ses. Pt. 1, Resolutions, at 71, U.N. Doc. A/810 (1948).

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*Abstract*

The serious problem of violence by spectators and other supporters of athletic clubs and teams during competition is sometimes overlooked or minimized in the consideration of legal issues that beset sports. That is unfortunate. After all, such violence is common. Moreover, it is obvious that most competition would hardly occur without spectators although the alternative disciplinary measures in football/soccer of playing subsequent matches behind closed doors, or sometimes in neutral territory[69], call into question the necessity of spectators at all events. This essay will first address the general problem of violence during sports competition other than strictly among the athletes themselves before focusing on two interrelated cases that arose during a match between the national teams of Albania and Serbia. These cases were ultimately resolved by the Court of Arbitration for Sport (CAS)[70].

[69] *E.g.*, Regulations of the Union of European Football Associations (UEFA) European Football Championship 2014-2016 art. 27.01, 27.02. Normally, the sanction of matches behind closed doors is of very limited duration. Cfr., e.g., *Croatia Beats Iceland Before a Crowd of Zero*, in *N.Y. Times*, Nov. 13, 2016, at B6. Sometimes, however, the sanction may be more extended when violence and related security threats are protracted, as, for example, in Egypt because of the explosive politicization of football/soccer in that country. Cfr., e.g., *Red Cards for the Ultras*, in *Economist*, 23th May 2015, p. 38.

[70] For a definitive treatise on CAS, cfr. D. Mavromati, M. Reeb, *The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials (*2015). For a shorter but comprehensive commentary, cfr. R. H. McLaren, *The Court of Arbitration for Sport*, in *Handbook on International Sports Law*, 32, 2011 (J. A.R. Nafziger. S. F. Ross eds.).

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# Broadcasting rights of games played by student-athletes in the era of 'We-Media'

SUMMARY: 1. Case. – 2. Copyright. – 3. Broadcasting rights (houeiken). – 4. Conclusion.

1. Let's start off by supposing there is a free-of-charge ballgame, where a non-official broadcaster filmed the game and uploaded it to an online platform. Will this violate the rights of the game's organizer? If so, based upon what exclusivity rights should the organizer stop others from illegal broadcasting? What is the legal basis on which the organizer can do so?

2. a) Are sports games to be protected by copyright laws?

According to Article 3 of the Copyright Act, «Work means a creation that is within a literary, scientific, artistic, or other intellectual domain». However, it does not tell what a 'creation' is. We can tell from court rulings and literature review[1-2] that a copyrighted work is limited to (1) expression, (2) features originality (which means it should reveal the author's personality), (3) is literary, scientific, artistic or academic, and (4) does not fall within the objects that cannot be copyrighted as set forth in Article 9 of the Copyright Act. Sports games, for their part, are a fact, rather than a process of manmade creation, so these games are not protected by the Copyright Act.

b) Are sports games that are broadcast to be protected by copyright laws?

[1] M.C. TSAI, *Study on elements of origin and creativity for copyrights*, in *National Taiwan University Law Journal, 26, 1,* 1996, p. 171 s.

[2] M.T. LUO, *Study on concept of origin for copyrights*, in *Journal of Intellectual Property,* 11, 1999, p. 35 s.

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Take the US for example. Sports games are not copyrighted, but this is not the case for sportscasting. When a game is being broadcast, we have an analyst, an anchor, and reporter and camera crew that offers different viewing angles, slow motions, etc. This explains that sportscasting is something that involves creativity. It is not only about sending images of the game being played. It should be an audio-visual object protected by copyright laws.

Here's a look at two famous rulings in the US about the scope of copyright laws protecting games that are broadcast.

| case | Baltimore Orioles |
| --- | --- |
| facts | Certain players sent a mail to the Baltimore Orioles, and television networks that had signed with the Major League Baseball (MLB), claiming that the broadcasting of baseball games they played had not been consented by them, which means that the broadcasting would result in an unauthorized act of taking the players' performances. |
| content | According to the Seventh Circuit, it was ruled that the performances given by the players may be of originality; even if this was not true, copyright laws may still apply as the efforts by camera crew and the director can mean originality to some extent. This means sportscasting can be copyrighted. As for the ownership of the due copyrights, the court ruled that the broadcasting rights belonged to the club (the Orioles) because the performances given by the players are governed by the employment contracts signed by both parties. |

| Case | Motorola |
| --- | --- |
| facts | The National Basketball Association (NBA) purported that Motorola infringed the NBA's copyright on the broadcast of games. |
| content | The court ruled that the sport itself cannot be offered copyright-based protection, and a sport, when copyrighted, may result in a controversy over the number of joint authors (copyright owners). They include the league, club, players, judges, court staff and even fans, all of whom contribute to the broadcasting of a game. Secondly, the Second Circuit decided that the NBA owns the copyright of its games, which was based on the ruling in the aforesaid Baltimore Orioles case, where the Seventh Circuit held that |

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players delivered originality to a minimal extent for the games they played. But the Second Circuit thought that the originality (as determined by the Seventh Circuit) applied only to the broadcasting of games, rather than to games themselves.

c) Ownership of copyrights of sport broadcasting:

Zhang, commissioner of the mediation committee under the Intellectual Property Office, said that in the first meeting in 2008: «the ownership of sport broadcasting is based on contracts. In most cases, it is the organizer, rather than the broadcaster, that owns the rights»[3-4].

Civil judgement No. 145 ruled by the Taipei District Court is one of the few domestic legal cases that have dealt with the broadcasting rights of sports games. The judge ruled that «(…) as the defendant used the signals for broadcasting, he naturally owned the interests from the game. As to whether the defendant obtained other commercial benefits, this is not to be explored in this case. Regarding the contractual relation binding both parties, it does not mean that the defendant is entitled to the copyrights just because he had paid royalties to use the signals for broadcasting». This example means that contracts do not suffice to regulate the authorized use of copyrights or the ownership of copyrights. The judgement needs to be based upon the case itself.

d) Taiwan's copy right law, article 12

«Where a work is completed by a person under commission, except in the circumstances set out in the preceding article, such commissioned person is the author of the work; provided, where an agreement stipulates that the commissioning party is the author, such agreement shall govern.

Where the commissioned person is the author pursuant to the provisions of the preceding paragraph, enjoyment of the economic rights to such work shall be assigned through contractual stipulation to either the commissioning party or the commissioned person.

[3] Z.X. Zhang, *Study on dispelling doubts of copyrights of sport game broadcasting*, 2008, web: http://www.copyrightnote.org/ArticleContent.aspx?ID=2&aid=322, last search on 2017/Dec/1.

[4] Y.Y. Chang, S.J. Lai, *Research on the legal issues on the broadcasting of ball games: focusing on American law*, in *Quarterly in Fair Trade*, 17, 3, 2009, p. 1 s.

Where no stipulation regarding the enjoyment of economic rights has been made, the economic rights shall be enjoyed by the commissioned person».

The default term of this article might serve to solve the said issue to some extent. But when the person recoding the game is not a commissioned person that has a contractual relation with the organizer, the organizer cannot claim rights against someone who films. But players in the filmed images might claim their rights.

3. In Japan, broadcasting rights are often interpreted using the concept of players' image rights and the management rights for sports facilities[5]. Some also argue that 'broadcasting rights' (houeiken) vested in the organizer of a sporting event is no more than one kind of creditor's right as set forth in a contract. The broadcasting rights only belong to both parties of the contract, rather than to a third party.

In Taiwan, some articles set forth by sporting venues are similar to the Japanese counterpart (that is, houeiken regulations). In China, on the other hand, some claim a right termed 'sport property right', which means that event organizers are entitled to decide whether to authorize a TV network to broadcast that event, and that such authorized parties may be requested to offer economic benefits.

4. A sports game itself cannot be copyrighted. A person without being authorized to broadcast a game does not infringe on copyright laws, but he/she might have violated the image rights of players. In addition, the management rights regarding a sporting venue are probably a source of exclusivity. However, we may need to consider the issue of fairness when we are talking about a public stadium.

We are also advised to think about efficiency. Suppose that every player of a game has the right to negotiate his/her own contract, would it be harder for us to prepare a complete contract and to undermine the possibility of broadcasting that game. As we are ushering in the age of 'we-media', we have to think more about this especially there are no explicit clauses governing the relations among

[5] Y. Li, *General discussion on property right of sport game: Comparative study of Japan*, 2015, web: https://read01.com/38KMG6.html#.WlWY3SP3U0o, last search on 2017/Dec/1.

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players, the team and the organizer in a game played by student-athletes.

Kai-Li Wang
Yi-Pei Huang

*Abstract*

'We-media', a term akin to 'citizen journalism' in English, refers to today's wide use of online technology to offer news materials or comments. Modern digital devices give an easy access to the Internet, to which users can upload texts, music, photos or audio/video clips. When it comes to watching live sports games on one of today's cutting-edge gadgets, however, there is a conflict between 'individual podcasting' and broadcasting by traditional television (TV) networks. Previous literature shows that broadcasting rights are not inherent; instead, they form a contractual relationship. This means the effects under broadcasting rights (especially exclusivity effect) must be set out in a contract. In Asia, however, sports played by student-athletes are not bound by well-organized regulations and contractual rules. As a result, the ownership and scope of broadcasting rights in the said sports are not defined clearly. As 'We-media' is gaining importance today, we consider it necessary to discuss the nature of broadcasting rights for sports played by student-athletes. We will explore specifically the legal basis for exclusivity effect because this is the bottom line for negotiating a broadcasting contract.

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# Protecting the sports organisations properties presented by Mr. International level[1]

SUMMARY: 1. International Level. – 2. National Level. - 2.1. Paris name (Exemple). - 2.2. Dubai innovation.

1. International level

Why?

How?

Is the international sports organisations such us FIFA, IOC, UEFA protect their names, logos of the major events as a trade marks?

Is the logos of the major of the worldwide events could be considered as a trade mark?

Can we consider the sports organisations as a trader?

Article 1 (Definition): The Fédération Internationale de Football Association (FIFA) is an association registered in the Commercial Register of the Canton of Zurich in accordance with art. 60 ff. of the Swiss Civil Code.

Article 67 (Rights in competitions and events). 1. FIFA, its member associations and the confederations are the original owners of all of the rights emanating from competitions and other events coming under their respective jurisdiction, without any restrictions as to content, time, place and law. These rights include, among others, every kind of financial rights, audiovisual and radio recording, reproduction and broadcasting rights, multimedia rights, marketing and promotional rights and incorporeal rights such as emblems and rights arising under copyright law. 2. The Council shall decide how and to what extent these rights are utilised and draw up special regulations

[1] From powerpoint.

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to this end. The Council shall decide alone whether these rights shall be utilised exclusively, or jointly with a third party, or entirely through a third party.

2. National level
– Sports movement
– National sports federations
– Professional clubs
– Ligues
– Municipalty
– Goverment

2.1. Paris name (Exemple)

The article L.711-4-h of the code of intellectual property said that no name or image of municipality could be used us a tradmark.

The appel court of Paris on december 13- 2007 decide to protect the Paris name in the case of La marque Paris L'été

2.2. Dubai innovation

DSC 2017 law

As per the new regulation of Dubai sports Council 2017 all person physical or entities should have the permission of DSC for using the name of Dubai in the sports events.

Taoufik Zahrouni

*Abstract*

Why and how the international sports organisations protect their names, logos of the major events as a trade marks? Is the logos of the events a trade mark? Can we consider the sports organisations as a trader? The powerpoint aims to answer these questions, analyzing national and international level.

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# The Regulatory and Disciplinary Authority of International Sports Federations

SUMMARY: 1. Introduction. – 2. 'SV Wilhelmshaven case'. – 3. Privity of contract. – 4. Implications. – 5. Solutions. – 6. Conclusion.

1. With the possible exception of the International Olympic Committee and the World Anti-Doping Agency, international sports federations (IFs) do not enjoy any special legal status in international or national laws[1]. Sports federations are merely associations composed of members and the constitution and regulations of any sports federation is consequently in general also only binding on the members of that federation[2]. This was the basis for the judgment of the German Federal Court in the 'SV Wilhelmshaven case'[3], when it ruled that the North-German Football League and the German Football Association acted inappropriately when it enforced decisions of the FIFA disciplinary chamber against SV Wilhelmshaven.

This has important regulatory implications for IFs. It effectively means that any rules, regulations or codes of conduct adopted by an IF will only bind the national federations that are members of the IF. It will not automatically bind any leagues, clubs or athletes that are affiliated to national federations merely because they are members of a national federation affiliated with the IF.

This poses some interesting dilemmas. For instance, if the FIFA Regulations on the Status and Transfer of Players only binds national federations and not clubs, it would bring the entire football transfer

[1] S. CORNELIUS, *The Legal Status of International Sports Federations*, in *Global Sports Law and Taxation Reports*, I, 2014, p. 6 s.

[2] *Ibidem*.

[3] BGH, 20.09.2016 - II ZR 25/15.

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system crashing down. Some clubs that have complied with the obligations to pay training compensation and who were not legally obliged to do so, may at least then be entitled to recover such payments.

Furthermore, as the 'Wilhelmshaven case' also illustrated, it means that IFs do not necessarily have disciplinary jurisdiction over clubs or leagues that are affiliated to its members. IFs may therefore lack any direct enforcement mechanism to ensure compliance with their regulations and may have to rely on indirect enforcement through national federations.

The purpose of this paper is to reflect on this dilemma and to propose some simple solutions that can address the problems that may arise.

2. SV Wilhelmshaven is a professional football club based in Wilhelmshaven, Germany and affiliated to the *Deutscher Fußball-Bund* (DFB). Its men's first team played in the lower divisions of the Bundesliga in Germany[4].

In 2007, SV Wilhelmshaven contracted a player, Sergio Sagarzazu and he eventually played 38 matches for the club in 2007 and 2008. In 1998, Sagarzazu began his football career as a boy at Atlético Excursionis in Argentina and in 2005 he moved as amateur player to Atlético River Plate[5].

On 14 June 2007, Atlético Excursionis and Atlético River Plate lodged separate disputes with FIFA to claim training compensation in terms of the FIFA 'Regulations on the Status and Transfer of Players' from SV Wilhelmshaven. The claims were for € 100,000 and € 60,000 respectively. The FIFA Dispute Resolution Chamber essentially upheld these claims and ordered SV Wilhelmshaven to pay € 100,000 to Atlético Excursionis and € 57,500 to Atlético River Plate within thirty days[6].

[4] For a full discussion of *SV Wilhelmshaven eV/Norddeutscher Fußball-Verband eV* OLG Bremen Urt vom 30.12.2014 – U 67/14, cfr. S. Cornelius, L.Helmchen, *Om sokkerspelers te kontrakteer is nie perdekoop nie*, in *Journal of South Africa Law*, 2016, p. 181.

[5] *Ibidem*.

[6] *Ibidem*.

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SV Wilhelmshaven failed to pay the training compensation that was awarded and on 23 March 2009, took the matter on appeal to the Court of Arbitration for Sport (CAS). On 5 October 2009 the CAS upheld the decision of the FIFA Dispute Resolution Chamber in respect of both claims[7]. SV Wilhelmshaven failed to comply with the CAS award, but did not use the opportunity to take the CAS award on review to the Swiss courts.

On 13 September 2011 the FIFA Disciplinary Committee imposed fines on SV Wilhelmshaven because of its failure to pay the training compensation as ordered by the CAS. These fines had to be paid within thirty days, failing which, the club's men's first team would forfeit six league points. SV Wilhelmshaven also ignored the fines and FIFA turned to the DFB to impose the forfeiture of the six league points. The DFB not only docked the six league points, but also debited the clubs's financial account with the amount of the FIFA fines.

SV Wilhelmshaven still refused to pay the training compensation and on 15th August 2012 the FIFA Disciplinary Committee determined that the club's first team would forfeit a further six league points. Because the club had in the meantime been relegated to a lower division, it now fell to the *Norddeutscher Fußball-Verband* (NFV), and not the DFB, to implement this sanction. SV Wilhelmshaven then decided to pursue the matter before the German civil courts. As a result, the FIFA Disciplinary Committee ruled on 5 October 2012 that the club had to be relegated to a lower division. SV Wilhelmshaven took this decision on appeal to the CAS, but was unsuccessful[8]. The NFV subsequently ratified the FIFA decision and relegated SV Wilhelmshaven to a lower league. This was confirmed on 20 February 2014 by an internal tribunal.

The club then instituted proceedings in the German civil courts to challenge both the forfeiture of league points, as well as the relegation to a lower league. The matter is brought before the *Amtsgericht Bremen*, which ruled that the matter must be referred to the *Landgericht Bremen*. The application is dismissed in the *Landgericht Bremen* because the CAS ruled against SV Wilhelmshaven and the club did not make use of the opportunity to take the matter on re-

[7] CAS 2009/A/1810 & 1811.
[8] Unreported case.

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view to the Swiss national courts. SV Wilhelmshaven then took the matter on appeal to the *Oberlandesgericht Bremen*.

The *Oberlandesgericht Bremen* held that the matter was essentially a challenge of a decision by the NFV to relegate SV Wilhelmshaven to a lower league and to dock the league points. The court held that imposition of the disciplinary sanctions by the NFV is not sustainable in German law because it serves as a mechanism to enforce the CAS ruling and FIFA decision contrary to Article 45 of the Treaty on the Functioning of the European Union. Article 45 provides that workers enjoy freedom of movement within the European Union (EU). Furthermore, all forms of discrimination based on nationality among workers of member states, relating to employment, remuneration and conditions of service, must be eliminated. The court accepted the argument of SV Wilhelmshaven that the duty to pay training compensation, hinders the free movement of the player within the EU and is therefore in conflict with Article 45 (20). The player concerned is an Italian citizen who took up employment in Germany. Therefore, the Treaty for the Functioning of the European Union applies both to the person and territorially in this case. The fact that the player held, apart from his Italian citizenship, also Argentine citizenship, makes no difference.

The NFV then took the matter on further appeal to the *Bundesgerichthof*. The *Bundesgerichthof* upheld the finding of the *Oberlandesgericht Bremen* in so far as it relates to the player compensation which is incompatible with Article 45 of the Treaty on the Functioning of the European Union.

But, more significantly for this discussion, the *Bundesgerichthof* then added that the decision of the *NFV* to relegate Wilhelmshaven to a lower league, amounts to enforcement of a disciplinary decision first attributed to the FIFA Disciplinary Committee and passed down by the DFB. The court then explained that the disciplinary authority of an association is based on membership. Since Wilhelmshaven was not a member of either the DFB or FIFA, their decisions could not affect Wilhelmhaven's membership of the NFV. There was also no special third party relationship, which could serve as the basis for action.

The court held that the rules of a superordinate association apply in principle only to subordinate associations that are members of the

superordinate organisation. They do not extend to the members of the subordinate association solely on account of the membership of a subordinate association in the higher-ranking superordinate association[9]. Put differently, FIFA rules apply in principle only to FIFA members and not necessarily to clubs and leagues that are affiliated to FIFA members.

It is possible to include corresponding clauses in the statutes of the respective subordinate association, according to which certain rules from the statutes of the superordinate association should also apply to and against the members of the subordinate association. However, this must be done explicitly, particularly if disciplinary authority is concerned.[10] If an association considered a delegation of disciplinary authority or wished to adopt the rules of a superior umbrella organisation, this would have to me made clear and certain beforehand[11].

If the articles of association of a lower-level association do not contain corresponding clauses, a member of that association cannot then be taken to be aware not only of the articles of its association, but also of the statutes of a superordinate association, possibly also to a third level[12]. The court could find no sufficiently clear reference to the relevant structure of such an association pyramid[13].

Although the court recognised that standardised rules were essential for fair participation in a particular sport, the rules relating to training compensation and the related disciplinary rules, were not necessary elements for the operation of the sporting and competition aspects of the league concerned, so that it could not be said that any competitor in the league would have gone out on that premise without an express reference to that effect[14].

3. The doctrine of privity of contract is arguably one of the most fundamental principles of the law of contract[15]. Hutchinson and Pre-

[9] Par. 41.
[10] Par. 42.
[11] Par. 52.
[12] Par. 42.
[13] Par. 44.
[14] Parr. 54-55.
[15] *Cullinan v Noordkaaplandse Aartappelkernmoerkwekers Koöperasie Bpk*, 1, SA, 1972, 761 (A) 770D-H.

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torius[16] refers to privity of contract as a cornerstone of the law of contract. In 'Bowring v Vrededorp Properties CC'[17], Brandt JA explained[18] that «(t)he notion that B can be allowed to claim performance against C of a contractual undertaking by A is clearly an anomaly that flies in the face of contractual privity».

And in 'Sefalana Employee Benefits Organisation v Haslam'[19], Marais JA held:

«If an offeror has contracted unconditionally to buy shares from a shareholder a repudiation by the offeror of the agreement may well entitle the offeree to damages. But a shareholder to whom no offer has been extended, let alone accepted, and with whom there is therefore no contractual privity is in a very different position. (…) A reading which gratuitously confers upon shareholders with whom there is no contract the same benefits as those with whom there is a contract (…) is, to my mind, unjustified and inherently unlikely to have been intended».

In other words, a contract generally only operates between the parties[20] and in general only the parties to a contract, and no-one else, acquire rights to claim performance and incur liability to render performance in terms of that contract[21]. This means further that only a party to a contract can commit a breach of that contract and that the conduct of a third party cannot constitute breach of that contract, while only the party to a contract can in general seek redress for breach of that contract[22].

In the context of a sports association, this principle was explained in 'Rowles v Jockey Club of South Africa'[23] as follows:

«The Club's Rules are the domestic statutes of a voluntary asso-

[16] D. Hutchinson, C. Pretorius, *The Law of Contract*, Cape Town, 2013, p. 21.

[17] 2007, 5 SA, 391 (SCA).

[18] 396H.

[19] 2000, 2 SA, 415 (SCA).

[20] *Wynland Construction (Pty) Ltd v Ashley-Smith*, 3, SA, 1985, 798 (A) 817H s.

[21] *Cullinan v Noordkaaplandse Aartappelkernmoerkwekers Koöperasie Bpk*, 1, SA, 1972, 761 (A) 770D-H; cfr. also *Pfeiffer v First National Bank of SA Ltd*, 3, SA, 1998, 1018 (SCA) 1025E-H.

[22] *Sweets from Heaven (Pty) Ltd v Ster Kinekor Films (Pty) Ltd*, 1, SA, 1999, 796 (A) 800E-F.

[23] 1954, 1 SA, 363 (A) 364C-E.

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ciation. In order to achieve its objects its rules also refer to the conduct of non-members. But since the rules have no statutory authority they cannot, save in so far as a non-member has bound himself by agreement to observe them, be legally binding upon non-members. Similarly, the Club cannot, apart from contract, impose its will upon non-members by legal process. It can do so extra judicially, however, because it is a powerful organisation, in the same way as a financially strong brewery may factually exercise control over hotel proprietors and the victualling trade. It stands to reason, therefore, that primarily the Club exercises control over racing through its own organs and functionaries».

The court added in 'Cronje v United Cricket Board of South Africa'[24] that the «contractual basis must be in existence at the time the decision is made»[25].

In 'Herbex (Pty) Ltd v Advertising Standards Authority'[26], the court held that the Advertising Standards Authority (ASA) has no jurisdiction over any person or entity that is not a member of the ASA. The court explained[27] «that the respondent's determination of complaints relating to the applicant's advertisements imposes its code on the applicant and makes it subject thereto. It cannot do so as it has no jurisdiction over the applicant and the applicant is not subject to its code. The practical effect of the respondent's actions makes it irrelevant that the applicant is not one of its members, as it is treated exactly the same as a member. It effectively renders the applicant a *de facto* member of an association that it does not wish to belong to.

(…) As a voluntary association, the sole source of the respondent's power is its articles. Its articles create a contract only between it and its members. Only its members agree to be bound by the respondent's code, and are so bound. As stated above, this is accepted by the respondent.

In analysing the lawfulness of the respondent's conduct *vis-à-vis*

[24] 2001, 4 SA. 1361 (T).

[25] Cfr. also *Johannesburg Country Club v Stott,* 2004, 5 SA, 511 (SCA).

[26] 2016, 5 SA, 557 (GJ). Cfr. also *Medical Nutritional Institute (Pty) Limited v Advertisings Standard Authority* (15/30142) [2015] ZAGPJHC 317 (18th September 2015).

[27] 564B-565E.

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non-members, it is important to be mindful of the principle of privity of contract.

(…) While the respondent and its members are free to agree that they (ie the parties to the contract) will be bound by the respondent's articles, code and procedural guide, they are precluded by the doctrine of privity of contract from agreeing that a third-party non-member will be so bound. The respondent and its members cannot by agreement between themselves confer jurisdiction upon the respondent in respect of a non-member third party's advertising».

In the United States of America, the Supreme Court explained in 'NCAA v Tarkanian'[28]:

«UNLV delegated no power to the NCAA to take specific action against any university employee. The commitment by UNLV to adhere to NCAA enforcement procedures was enforceable only by sanctions that the NCAA might impose on UNLV itself», and added[29]:

«The NCAA enjoyed no governmental powers to facilitate its investigation. It had no power to subpoena witnesses, to impose contempt sanctions, or to assert sovereign authority over any individual. Its greatest authority was to threaten sanctions against UNLV, with the ultimate sanction being expulsion of the university from membership. Contrary to the premise of the Nevada Supreme Court's opinion, the NCAA did not – indeed, could not – directly discipline Tarkanian or any other state university employee. The express terms of the Confidential Report did not demand the suspension unconditionally; rather, it requested 'the University to show cause' why the NCAA should not impose additional penalties if UNLV declines to suspend Tarkanian».

In England, Lord Denning explained in 'Lee v Showmen's Guild of Great Britain'[30]:

«The jurisdiction of a domestic tribunal, such as the committee of the Showmen's Guild, must be founded on a contract, express or implied. Outside the regular courts of this country, no set of men can sit in judgment on their fellows except so far as Parliament authorises it or the parties agree to it».

[28] 488 US 179 196.
[29] 197-198.
[30] 1952, 2 QB 329 341.

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And in 'Enderby Town Football Club Ltd v Football Association'[31] he added:

«The rules of a body like this are often said to be a contract. So they are in legal theory. But it is a fiction… Putting the fiction aside, the truth is that the rules are nothing more nor less than a legislative code – a set of regulations laid down by the governing body to be observed by all who are, or become, members of the association».

The existence of such a contractual relationship cannot be inferred merely because an athlete or club participates in a particular sport. In *Gasser v Stinson*[32], the court surmised:

«There is an unreality, I think, about the notion of a contract coming into existence between each competitor and the IAAF – not least because entries in competitions are made by the national federations and not by the competitors themselves – and even more unreality about the notion of a contract being formed when the competitor presents himself or herself for dope testing. The *animus contrahendi* must be open to question».

As a result, an IF does not have regulatory or disciplinary authority over an athlete or a club merely because they participate in a particular sport or merely because they are affiliated to a member of that IF.

4. This has important regulatory implications for IFs. It effectively means that any rules, regulations or codes of conduct adopted by an IF will only bind the national federations that are members of the IF. It will not automatically bind any leagues, clubs or athletes that are affiliated to national federations merely because they are members of a national federation affiliated with the IF.

This poses some interesting dilemmas. For instance, if the FIFA Regulations on the Status and Transfer of Players only binds national federations and not clubs, it would bring the entire football transfer system crashing down. And at least some clubs that have complied with the obligations to pay training compensation and who were not legally obliged to do so, may then be entitled to recover such payments.

[31] 1971, Ch. 591.

[32] *Grasser v Stinson* (Unreported) 1988, High Court of Justice, No. CH-88 G-2191 of 1988.

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Furthermore, it means that IFs do not necessarily have disciplinary jurisdiction over clubs or leagues that are affiliated to its members. IFs may therefore lack any direct enforcement mechanism to ensure compliance with their regulations and may have to rely on indirect enforcement through national federations.

5. Since the difficulty with the regulatory and disciplinary authority of IFs are based on contract (or the lack of contract), the solutions to the problem and the difficulties that it could pose, should also be found in contract.

In the English case of 'Modahl v British Athletic Federation Ltd'[33], three grounds for the establishment of regulatory and disciplinary authority were explained. These were:

a) Club or other affiliation. Membership of a club, association or league can provide the basis for regulatory and disciplinary authority of an IF if the rules or constitution of the club, association of league clearly provides that its members are subject to the rules and discipline of a particular IF.
b) Participation. Where an athlete or club participates in an event hosted by the IF, the athlete or club can be taken to have submitted to the rules and discipline of the IF through its participation.
c) Submission. Where an athlete or club is faced with the regulatory or disciplinary authority of an IF, the athlete or club can submit to such authority and the athlete or club will then be bound as if the athlete or club had been a member of the IF all along. Care, should however be taken in this regard. As the courts have shown in SV Wilhelmshaven[34] and 'Herbex (Pty) Ltd v Advertising Standards Authority'[35], the mere participation in disciplinary proceedings may not in itself be adequate to establish submission to the regulatory and disciplinary authority of an IF.

[33] 2002, 1 WLR 1192.

[34] BGH, 20.09.2016 - II ZR 25/15.

[35] 2016, 5 SA, 557 (GJ). Cfr. also *Medical Nutritional Institute (Pty) Limited v Advertisings Standard Authority* (15/30142) [2015] ZAGPJHC 317 (18th September 2015).

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The case of 'Cronje v United Cricket Board of South Africa'[36] added another option which could be applied in appropriate circumstances.

d) Party autonomy. The doctrine of privity of contract and party autonomy also means that a party is in general free to decide with whom it contracts. A party can resolve that it, as well as its members, will not in future contract with a particular athlete or club, effectively imposing a ban on such athlete or club.

And lastly, in 'NCAA v Tarkanian'[37] the court provided for a fifth way in which an IF can impose its authority and disciplinary authority on an athlete or club.

e) Indirect enforcement. An IF can secure indirect enforcement of its rules and disciplinary measures by leaving it up to its member, to which the athlete or club is affiliated, to take action. If such member fails to take action, the IF can then impose its regulatory and disciplinary authority on its member and sanction it for failing to address the compliance and discipline of an athlete or club affiliated to that member. However, as SV Wilhwelmshaven[38] has shown, this approach may involve some risks.

6. Since sports federations are merely associations composed of members and the constitution and regulations of any sports federation is consequently in general also only binding on the members of that federation[39]. But this does not mean that IFs cannot have any authority over individual athletes or clubs that are affiliated to the members of an IF. There are various ways in which the authority of an IF can be devolved down to athletes and clubs. The best way to this, is to ensure that all the members of an IF have a clear provision in their own rules or constitutions, which not binds those affiliated to each particular member, to submit to the regulatory and disciplinary authority of the IF, but also imposes a duty of those af-

[36] 2001, 4 SA, 1361 (T).
[37] 488 US 179 196.
[38] BGH, 20.09.2016 - II ZR 25/15.
[39] *Ibidem.*

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filiated to the member, to impose such a provision on any leagues or associations that may belong to such affiliates.

Steve Cornelius
Daniel Badenhorst

*Abstract*

With the possible exception of the International Olympic Committee and the World Anti-Doping Agency, international sports federations (IFs) do not enjoy any special legal status in international or national laws. Sports federations are merely associations composed of members and the constitution and regulations of any sports federation is consequently in general also only binding on the members of that federation. This was the basis for the judgment of the German Federal Court in the 'SV Wilhelmshaven case' (BGH, 20.09.2016 - II ZR 25/15), when it ruled that the North-German Football League and the German Football Association acted inappropriately when it enforced decisions of the FIFA disciplinary chamber against SV Wilhelmshaven. [A similar ruling was made in the South African case of 'Herbex (Pty) Ltd v Advertising Standards Authority' 2016 5 SA 557 (GJ)].

This has important regulatory implications for IFs. It effectively means that any rules, regulations or codes of conduct adopted by an IF will only bind the national federations that are members of the IF. It will not automatically bind any leagues, clubs or athletes that are affiliated to national federations merely because they are members of a national federation affiliated with the IF.

This poses some interesting dilemmas. For instance, if the FIFA Regulations on the Status and Transfer of Players only binds national federations and not clubs, it would bring the entire football transfer system crashing down. And at least some clubs that have complied with the obligations to pay training compensation and who were not legally obliged to do so, may then be entitled to recover such payments.

Furthermore, as the 'Wilhelmshaven case' also illustrated, it means that IFs do not necessarily have disciplinary jurisdiction over clubs or leagues that are affiliated to its members. IFs may therefore lack any direct enforcement mechanism to ensure compliance with their regulations and may have to rely on indirect enforcement through national federations.

The purpose of the paper is to reflect on this dilemma and to propose some simple solutions that can address the problems that may arise.

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# The Training Compensation system of FIFA

SUMMARY: 1. The training compensation system of FIFA. - 1.1. The principle. - 1.2. Payment of training compensation. - 1.3. Responsibility to pay training compensation. - 1.4. Entitlement of an association to receive training compensation. - 1.5. Training costs. - 1.6. Calculation of the training compensation. - 1.7. Special provisions for EU / EEA. – 2. Jurisprudence. - 2.1. Obligation to offer a contract and the exception. - 2.2. Evidence for the termination of training before 21. - 2.3. Agreements that exclude the training compensation. - 2.4. Bridge transfers. – 3. The Olivier Bernard Case. – 4. The Training Compensation in other sports. – 5. Conclusions.

1. The training and development of young players is fundamental in the world of sports. In fact, the considerable social importance of sporting activities and in particular football, legitimates the objective of encouraging the recruitment and training of young players[1]. The Fédération Internationale de Football Association (FIFA) has created a detailed system for the payment of «training compensation» that encourages the training of young players by awarding financial compensation to clubs that have invested in training young players[2]. FIFA regulations cover training compensation in international cases, concerning clubs that have the obligation of paying training compensation to another club which is a registered member of a different national football association.

1.1. The FIFA Regulation on Status and Transfer of Players (FIFA RSTP) establishes the principle that between the ages of 12 and 23,

[1] M. CUSUMANO, *The Training Compensation System, http://www.economistjurist.es/breaking/sportslaw-training/*

[2] FIFA, *Commentary on the Regulation of Status and Transfers of Players,* 2006, p. 61.

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a player is undergoing his sporting education and that during this timeframe, compensation for his training is payable[3]. Clubs that invest in the training of a player are entitled to a financial compensation for the education that the player received by the club up to the age of 21 as a general rule, unless it is evident that the player had terminated his training period before this age[4]. In the latter case, training compensation is limited to the period between 12 and the age when the player's training was effectively terminated, but the calculation of the amount payable shall be based on the years between the age of 12 and the age when it is established that the player actually completed his training.

Article 20 of FIFA RSTP regulates that compensation for training shall be paid to a player's training club(s): (1) when a player signs his first contract as a professional, and (2) each time a professional is transferred until the end of the season of his 23rd birthday. This obligation arises whether the transfer takes place during or at the end of the player's contract. The provisions concerning the training compensation are analyzed in Annexe 4 of the said regulation[5].

Moreover, if a player who is younger than 23, breaches his employment contract without just cause, besides compensation for contractual breach for which the player and the new club shall be jointly liable, the new club, on top of this, shall have to pay training compensation to the former club.

1.2. The training compensation is payable before the end of the season of the player's 23rd birthday, either when the player is registered for the first time as a professional, or when he is transferred as a professional to a club affiliated to another national association while maintaining its status as a professional.

On the other hand, this kind of compensation, is not due when the former club breaches a contract with a player without just cause. A club that has terminated a contract with a player without being entitled to do so shall not be rewarded for its attitude. Furthermore,

[3] FIFA, *Regulation on the Status and Transfers of Players*, 2016, p. 66.

[4] FIFA, *Commentary on the Regulation of Status and Transfers of Players,* 2006, p. 112.

[5] FIFA, *Regulation on the Status and Transfers of Players*, 2016, p. 25.

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no training compensation is due when the player transfers to a category 4 club (see below), i.e. a club on the lowest level in the categorization ladder of clubs with respect to training compensation as the majority are purely amateur clubs. Finally, no training compensation is due if the player reacquires amateur status when he is transferred to a new club[6].

1.3. Training compensation system aims to benefit all clubs that have contributed to the training of a young player. The regulation defines that the training compensation shall be distributed on a pro-rata basis according to the years of training received by the player. Therefore, when a player signs his first employment contract, all the clubs that have contributed to the training of the player as from the age of 12 are entitled to training compensation for the timeframe that the player was effectively trained with the club. This is initially calculated, in accordance with the players' career history as provided in the player passport. But for every subsequent transfer of the professional player until the end of the season of his 23rd birthday, only the last club for which the player was registered is entitled to receive training compensation.

In both cases, the deadline for payment is 30 days following the registration of the professional with the new national association. It is a responsibility of the new club to calculate the compensation and the way in which it should be distributed to the clubs where the player previously trained. When a player over 23 years of age is transferred, no training compensation is due[7].

1.4. An association is entitled to receive the training compensation which in principle would be due to one of its affiliated clubs, if it can provide evidence that the club in question – with which the professional was registered and trained – has in the meantime ceased to participate in organized football and/ or no longer exists due to, in particular, bankruptcy, liquidation, dissolution or loss of affiliation.

[6] FIFA, *Commentary on the Regulation of Status and Transfers of Players,* 2006, p. 113.

[7] FIFA, *Commentary on the Regulation of Status and Transfers of Players,* 2006, p. 115 s.

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These «missing years» will be distributed to the association of the country where he was registered and shall be used for youth development[8].

1.5. In order to facilitate the calculation of the amount of training compensation due, the training costs are not calculated for each individual club. Instead, associations are instructed to divide their clubs into a maximum of four categories in accordance with the clubs' financial investment in training[9]. Following this, all clubs are classified into categories and the training costs are determined at confederation level for each category. FIFA has allocated all associations to categories and has established on a confederation basis the training costs for the different categories. The training costs are set for each category and correspond to the amount needed to train one player for one year multiplied by an average «player factor», which is the ratio of players who need to be trained to produce one professional player[10]. This categorization is reviewed on an – almost – yearly basis and remains almost the same during the last 12 years (only the association of Belgium has been «promoted» from Category 2 to Category 1». Six European associations (Belgium, England,

| CONFEDERATION | CATEGORY I | CATEGORY II | CATEGORY III | CATEGORY IV |
|---|---|---|---|---|
| AFC - Asian Football Confederation | | USD 40.000 | USD 10.000 | USD 2.000 |
| CAF - Confederation of African Football | | USD 30.000 | USD 10.000 | USD 2.000 |
| CONCACAF - Confederation of North, Central American and Caribbean Association Football | | USD 40.000 | USD 10.000 | USD 2.000 |
| CONMEBOL - South American Football Confederation | USD 50.000 | USD 30.000 | USD 10.000 | USD 2.000 |
| OFC - Oceania Football Confederation | | USD 30.000 | USD 10.000 | USD 2.000 |
| UEFA | 90.000 | 60.000 | 30.000 | 10.000 |

[8] FIFA, *Regulation on the Status and Transfers of Players*, 2016, p. 67.

[9] FIFA, *Commentary on the Regulation of Status and Transfers of Players,* 2005, p. 118.

[10] FIFA, *Regulation on the Status and Transfers of Players*, 2016, p. 67.

Germany, Italy, Netherlands, Spain), together with Argentina and Brazil, are the only associations of Category one[11].

1.6. As a general rule, to calculate training compensation due to a player's former club, it is necessary to take the costs that would have been incurred by the new club if it had trained the player itself. This happens in order to encourage solidarity within the world of football. In this way, clubs are discouraged from hiring young players from clubs in other countries just because the training costs in these countries are lower.

In other words, clubs that have the resources to sign players from abroad will be paying a foreign club according to the costs of its own association[12]. Accordingly, the first time a player registers as a professional, the training compensation payable is calculated by taking the training costs of the new club multiplied by the number of years of training, in principle from the season of the player's 12th birthday to the season of his 21st birthday. In the case of subsequent transfers, training compensation is calculated based on the training costs of the new club multiplied by the number of years of training with the former club. To ensure that training compensation for very young players is not set at unreasonably high levels, the training costs for players for the seasons between their 12th and 15th birthday (i.e. four seasons) shall be based on the training and education costs of category 4 clubs. The Dispute Resolution Chamber may review disputes concerning the amount of training compensation payable and shall have discretion to adjust this amount if it is clearly disproportionate to the case under review. Up to now, a lot of clubs had requested the application of its article in cases under consideration before FIFA or CAS, but it has never been applied[13].

[11] FIFA, Circular n. 959, 16 March 2005 & FIFA Circular n. 1085, 11 April 2007 & FIFA Circular n. 1142, 15 April 2008 & FIFA Circular n. 1185, 22 April 2009 & FIFA Circular n. 1223, 29 April 2010 & FIFA Circular n. 1264, 19 May 2011 & FIFA Circular n. 1299, 27 April 2012 & FIFA Circular n. 1354, 3 May 2013 & FIFA Circular n. 1418, 2 May 2014 & FIFA Circular n. 1484, 30 April 2015 & FIFA Circular n. 1582, 26 May 2017.

[12] FIFA, *Commentary on the Regulation of Status and Transfers of Players*, 2005, p. 119 s.

[13] FIFA, *Regulation on the Status and Transfers of Players*, 2016, p. 68.

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1.7. Special provisions apply to transfers within the EU/EEA as the result of the understanding reached between FIFA and UEFA on the one hand and the European Union on the other in March 2001. For players moving from one association to another inside the territory of the EU/EEA, the amount of training compensation payable shall be established based on the following:

a) If the player moves from a lower to a higher category club, the calculation shall be based on the average training costs of the two clubs.

b) If the player moves from a higher to a lower category, the calculation shall be based on the training costs of the lower-category club.

Moreover, the regulation states in art. 4 of Annexe 4 that inside the EU/EEA, the final season of training may occur before the season of the player's 21st birthday if it is established that the player completed his training before that time. But, if the former club does not offer the player a contract, no training compensation is payable unless the former club can justify that it is entitled to such compensation. The former club, in order to be entitled to request training compensation, shall offer the player a contract in writing via registered post at least 60 days before the expiry of his current contract. Such an offer shall furthermore be at least of an equivalent value to the current contract. This provision is without prejudice to the right to training compensation of the player's previous clubs[14].

## 2. Jurisprudence

2.1. A first matter where the jurisprudence has been contradictory is if the obligation of art. 6.3 of Annex 4 of the former club to offer a contract 60 days before the expiry of the last contract in order to be entitled to receive training compensation, applies only to professional player or to both, professional and amateur players. FIFA DRC has considered that it is both important, whether the club makes an offer for a contract for a first time or the offer is for a renewal[15]. On the contrary, there are decisions where it was considered that the

[14] FIFA, *Regulation on the Status and Transfers of Players*, 2016, p. 69.
[15] Dispute Resolution Chamber of FIFA, 27 April 2006, 461185.

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obligation to offer a contract applies only if there is a contractual relationship between the player and the club and that amateur players do not have to be offered a new contract in order to have the right to training compensation[16].

Moreover, it has been accepted in several decisions that the requirement to offer a contract by registered mail has to be seen only as a condition of proof and not as an additional formal requirement. Witness statements and fax receipts can also serve as conditions of proofs in order to be proven that an offer has indeed taken place[17].

The FIFA RSTP does not provide information on how a club that did not offer a contract could justify its entitlement to training compensation. Regarding this issue the jurisprudence has developed the concept of «genuine and bona fide interest in retaining the services of the player»[18]. The burden of proof that there was a «genuine and bona fide interest in retaining the services of the player» is always of the former club and it is higher in case the player was already a professional with the club[19].

It has been accepted by CAS that a club shows a genuine interest by (a) having sent a letter to the player indicating that the club wanted the player to remain at the club for the next season; (b) submitting evidence that it had been negotiating a professional contract with the player; and (c) that it had properly trained the player for eight consecutive seasons[20].

On the contrary, it has been considered that a club does not show a genuine interest if (a) it does not offer a contract to the player; (b) the player never played for the first team; and (c) his 'playing time' with the youth teams of the club decreases[21].

2.2. For this exception to be applied, the competent bodies emphasize that more than one indication must exist for the earlier end-

[16] CAS 2006/A/1177, 28 May 2007.

[17] CAS 2009/A/1757, 30 July 2009 & CAS 2008/A/1521, 12 December 2008.

[18] CAS 2006/A/1152, 7 February 2007.

[19] L. Monbaliu, *Training Compensation: The Obligation to offer a Contract: an analysis of recent jurisprudence*, in *World Sports Law Report*, 13, 12, 2015.

[20] CAS 2009/A/1757, 30 July 2009.

[21] TAS 2014/A/3587, 18 December 2014.

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ing of a player's training[22]. In all cases up to now, it has been decided that in order for the exception to be accepted, the player shall have played a considerable number of matches with the first team, together with other indications that could be participations in the national (men) representative team, many years as professional[23], transfer fees paid or contract earnings and other contractual clauses in the player's contract/s[24].

2.3. Often, agreements are signed between parties that are trying to cover training compensation. In these cases, it has been determined that the right to training compensation can only be excluded through an agreement between the former and the new club[25].

2.4. Clubs, sometimes are tempted to avoid the payment of Training Compensation by conducting fast consecutive transfers, also known as «bridge transfers». In this kind of transfers, the player is never fielded by the bridge club, who loans or sells the athlete to the real transferee[26]. The jurisprudence disapproves such behaviors, outlining the circumstances under which it has to be considered justified to order the purchasing club to compensate the training club(s) of a player[27]. The following factors have been accepted by CAS and DRC as indications of an attempt to avoid the payment of training compensation and have been sufficient to satisfy the tribunals in the past: 1) Short stay to the lower category clubs. In the aforementioned cases, the stay lasted only 4 to 9 days. 2) No matches and no trainings for the intermediate clubs. As shown above, none of the athletes had played for the lower level club in a match before ascend-

[22] Dispute Resolution Chamber of FIFA, 21 February 2006, 26562 & CAS 2003/O/527, 21 April 2004 & CAS 2006/A/1029, 2 October 2006 & CAS 2011/A/2682, 25 July 2012.

[23] Dispute Resolution Chamber of FIFA, 22 July 2004, 74353.

[24] CAS 2004/O/594.

[25] Dispute Resolution Chamber of FIFA, 27 April 2006, 46146A and Dispute Resolution Chamber of FIFA, 2 November 2005, 115377 and Dispute Resolution Chamber of FIFA, 4 February 2005, 25528A and Dispute Resolution Chamber of FIFA, 9 November 2004, 114642.

[26] M. Cusumano, *The Training Compensation System*, *http://www.economistjurist.es/breaking/sportslaw-training/*

[27] CAS 2009/A/1757, 20 July 2009, CAS 2011/A/2477, 4 October 2011.

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ing to the higher-level club. 3) Contact/s between the player and the final club before the series of transfers take place. In two of the examined cases, the destination club had been in a direct contact with the athlete before the initial transfer. 4) An unusual sequence of transfers without any logical explanation[28].

Even if the exception of art. 5.4 of Annex 4 of the FIFA RSTP explicitly permits it and even if CAS vaguely has accepted the possibility of a club objecting training compensation calculated on the basis of the FIFA amounts to prove disproportion on the basis of concrete evidentiary documents, e.g. invoices, costs of training centres, budgets etc[29], the said exception has never been accepted by the competent bodies, even if it has been submitted in various cases and up to now, the indicative amounts are the only ones that have ever been awarded[30].

3. Olivier Bernard, was a young football player, trained in the «espoirs»(youth) team of Olympique Lyonnais, that refused the offer of a professional contract for one year made by Olympique Lyonnais and concluded a professional contract with the English club Newcastle United FC, whereas under the regulation for «joueurs espoirs» applicable in France, he should have signed his first professional contract with the club which had trained him. Olympique Lyonnais took then legal proceedings seeking an award of damages against Olivier Bernard and Newcastle United FC equivalent to the remuneration which this player would have received over one year if he had signed the contract proposed to him by the club. The French Court of Cassation, as final court of appeal, referred questions to the European Court of Justice (ECJ) on the scope of the principle of freedom of movement for workers and the possible restrictions which national measures can impose in a situation like the one under examination.

The ECJ, after confirming that a professional player of a sports

[28] Dispute Resolution Chamber of FIFA, 22 July 2010, 7101140 and Dispute Resolution Chamber of FIFA, 31 October 2013, 10131359.

[29] CAS 2009/A/1810 &1811, 5 October 2009.

[30] Dispute Resolution Chamber of FIFA, 1 June 2005, 65234andDispute Resolution Chamber of FIFA, 4 February 2005, 25313 and Dispute Resolution Chamber of FIFA, 22 July 2004, 74353 and Dispute Resolution Chamber of FIFA, 24 March 2004, 34368and Dispute Resolution Chamber of FIFA, 15 January 2004, 7472B AND CAS 2004/A/560.

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team is a worker within the meaning of European Union law and that collective agreements, such as the Charter for «joueurs espoirs», are covered by the EU Treaty, the ECJ found that the obligation imposed by the regulation on the «joueur espoir» to conclude his first professional contract with the club which has trained him is a restriction on freedom of movement for workers. Stressing the importance of sport in the European Union in view of its social and educational function, the ECJ noted that such a restriction could be justified by the objective of encouraging the recruitment and training of young players, provided that it is actually capable of attaining that objective and is proportionate. In this case, the ECJ asserted that a scheme which provides first refusal in recruiting a young player to the football club which has trained him, together with a right to compensation if the young player prefers to sign his first professional contract with another club, is acceptable in so far as it encourages the clubs to provide training for young players. Regarding the requirement to respect the principle of proportionality, the ECJ stated that the compensation provided for, if the young player signs a contract with another club, must be calculated on the basis of the costs borne by the original club in training both future professional players and those who will never play professionally. On the other hand, the rules at issue in the main proceedings, which provide for the payment of damages which are calculated not in relation to the training costs incurred by the club, but in relation to the total loss suffered by the club, go beyond what is necessary to encourage the recruitment and training of young players and cannot therefore be justified[31].

4. Except of FIFA for football, other International Sports Associations, have adopted its own systems on training compensation. The most important systems are summarized as follows:

I. Basketball

The International Basketball Federation («FIBA») has applied compensation for the development of a player under the age of eighteen

[31] European Court of Justice, 16 March 2010, C-325/08.

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(18), when a transfer has been approved by FIBA. The General Secretary of FIBA establishes a reasonable compensation for the development of the player. Such compensation shall be based primarily on the investments made by the club that has contributed to the development of the player.

At or after the player's eighteenth (18) birthday, the club of origin has the right to sign the first contract with the young player. If the player refuses to sign this contract and decides to move to a club of another national federation, the two clubs shall agree on a compensation sum. If the clubs do not find an agreement on the compensation within four (4) weeks of the date on which a letter of clearance has been requested by the new club's federation, either club has the right to request that the compensation be determined by FIBA. Such request shall take place in writing within six (6) weeks of the date on which the letter of clearance for the player in question was first requested by the new club's federation. The decision shall be taken by the Secretary General who may hear the two clubs and/or federations involved and/or the player if he considers it appropriate. The player shall not be eligible to play for his new club until the compensation agreed upon by the two clubs or determined by the Secretary General has been paid[32].

II. Handball

The Training Compensation system in the organized Handball is analyzed in Article 5 of the European Handball Federation (EHF) «Rules of Procedure for Transfer». In these regulations it is stipulated that a club may request training compensation if a player is transferred to a club in another country of another European Federation, under the following conditions:

– the player is between 16 and 23 years old at the time of his transfer.

– the club had a contract with the player at any time between his 16 and 23 years old.

– the contract with the player was terminated at the date of his transfer.

[32] FIBA, *Internal Regulations*, p. 13 s.

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– the training compensation is requested during the transfer procedure (by the last club having a contract with the player).

– the transfer/request for training compensation has been made within 12 months after the end of the last contract of the player with a club in the respective country.

If a request for training compensation is made during the transfer procedure of a «young» player under the above conditions, each club which had a contract with this player (between the age of 16 and 23) has the right to receive training compensation from the «new» club. The compensation can also be agreed on between the «new» club and the «training clubs»; if no agreement is reached, the EHF regulations provide that the «training» clubs shall receive 2,500 € for each season during which they had a contract with the player.

The said Regulations also provide that the respective National Federation may request a training compensation if a «young» player is transferred to a club in another country of Europe, under the following conditions:

– the player must be between 16 and 23 years old at the time of his transfer.

– the player must have been participated in an official match of the national team at least once before his transfer.

– the training compensation shall be requested during the transfer procedure.

The compensation can be agreed on between the «new» club and the National Federation, but if no agreement is reached, the National Federation shall receive 500 € as training compensation for each season that the player was at least once part of the national team in an official match.

III. Ice Hockey

The International Ice Hockey Federation(IIHF), has established a transfer fee that it is a kind of training compensation, for International Transfer Certificates and for «fax approvals». The IIHF administration costs incurred by each fax approval will be charged by the IIHF office in each individual case. Moreover, a transfer service fee reflects the costs connected with the execution of the transfer procedures. The former member national association shall not

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charge more than a CHF 500 service fee for the entire transfer procedure[33].

IV. Rugby

The training compensation system for «Contract Players» in Rugby is described in International Rugby Board, Regulation 4 on Player status, Player contracts and Player movement. In recognition of the investment made by Unions, Rugby Bodies or Clubs in the training and/or development of Players, when:

(a) a Contract Player whose written agreement has expired enters into a written agreement for the first time with a Union, Rugby Body or Club outside his Home Union, his Home Union shall be entitled to compensation for his training and/or development;

(b) a Non-Contract Player enters into a written agreement for the first time with a Union, Rugby Body or Club outside his Home Union, his Home Union shall be entitled to compensation for his training and/or development.

When a Non-Contract Player moves outside his Home Union and retains his status as a Non-Contract Player, then, the Player's Home Union shall have no claim to compensation.

Moreover, the system for «Associate Players» is different:

The Young Players Protocol in Art. 6 defines that compensation for the investment made in Associate Players may be payable whether the player is transferred before acquiring the status of a Contract Player or if his registration is requested to be transferred while he is still an Associate Player. Any compensation payable in such circumstances should reflect the actual investment made by a Union, Rugby Body or Club in a player registered with a Licensed Training Centre. This will include the quality, regularity/frequency of training and coaching received.

5. Following the aforementioned review, it is very important to be answered, if there is a need of training compensation in every sport. Through the author's point of view, the motivation for the training and development of young sportsmen is a principle widely

[33] IHHF, *International Transfer Regulation*, p. 11.

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accepted mostly in the sporting world but also in sports law. If we then considered that in accordance with the EU law, sports (not only football) and economic activity are notions that very often come together (eg Olympic Games), then it seems that this need is extended, not only to sports that are performed by professional player, but also to amateur sports.

Focusing on the training compensation in football, we believe that several issues have arisen, that FIFA has to reconsider in its transfer compensation system, that could be summarized as follows:

a) The situations where a European citizen is transferred from an association outside the EU to an association inside the EU, shall be reexamined, since this is a clear infringement of the EU law.

b) It has to be clarified if the obligation to offer a contract of art. 6.3 of the Annexe, is applicable to both amateurs and professionals, since the jurisprudence remains contradictory and that causes an insecurity to the whole system. A club registering the player is not sure if it has to pay the said compensation, the former/previous club/s are not sure if they have the right to receive it and the player does not know if it bears this kind of compensation.

c) It shall also be clarified, if the obligation to offer a better contract, including the formal requirements applies only to professional players or to amateurs too.

d) It should also be clarified, what the regulation means in art.6.3 of the Annexe as «equal value to the current contract». It remains unclear how this value is calculated: total earnings of the contract, annual earnings of the contract/s, monthly pro rata earnings of the contract, bonuses, benefits, comparison with the earnings of the last year of the previous contract or of the total earnings of the contract etc.

e) FIFA RSTP stipulates that the obligation to offer the player a contract lies only with the former club of the player as opposed to the previous clubs. In our opinion, it would be much more balanced and fair, the different references of Annex IV of the FIFA RSTP to the «former club», to be regulated more extensively, to include all previous clubs where a player has been registered. In reference with the rationale of the said article, the jurisprudence indicates that «the spirit of and purpose of article 6 para 3 of Annex 4, is to penalize clubs which are obviously not interested in the players' services as a

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professional, no matter if the club would have to offer the player an employment contract for the first time or a renewal due to the expiry of an already existing contract». It seems therefore, contrary to the spirit of the regulation that a club which never expressed any interest in retaining the player, can request to be compensated for its training, irrespective of whether it was the former club, strictly speaking, or another previous club[34].

5. Last conclusion and maybe the most important of this analysis, is the compatibility of the current FIFA training compensation system, with the EU law. As it was referenced above, the Bernard decision underlines that EU Law applies to European club football insofar as it constitutes an economic activity in the sense of Article 2 of the Treaty since football is an economic activity. It was also stated by the ECJ in this case that training compensation is a practice worth of protection, but since its regulated system has strong economic implications, it falls under the remit of EU Law.

But it seems that training compensation system limits the ability of clubs to take on players and that the restrictive effects are not proportionate to the pursuit of the objectives of the system. Very often the amounts to be paid are much higher not only from the real costs incurred by the training clubs not only for the said player but also from the costs borne by the original club in training both future professional players and those who will never play professionally.

Therefore, the FIFA training compensation system very often leads to disproportionate results that can be demonstrated by the two following examples:

A Greek football club that registers a 20-year old player trained in Greece as a professional for the first time, would have to pay to the training club a much lower amount as training compensation than the amount that a Cypriot club of the same category would have to pay, if it wants to register the same player.

Moreover, the training compensation due to a club like Barcelona

[34] J. F. Vandellos, *The entitlement to Training Compensation of «previous» clubs under EU Competition Law, http://www.asser.nl/SportsLaw/Blog/post/the-entitlement-to-training-compensation-of-previous-clubs-under-eu-competition-law-by-josep-f-vandellos-alamilla.*

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FC, which has great tradition in the training of young players, would be the same as for any other club of La Liga which has trained a player for the same term, despite the fact that Barcelona indisputably has a much higher budget allocated to the training of young players.

Following the above, it seems that the current system is something that jeopardizes the free mobility within the EU and has an impact on the commercial relations between clubs and players in the sense of Article 101, it is unstable in case someone decides to appeal against it and for these reasons it has to be reformed.

Alkis Papantoniou

*Abstract*

The Fédération Internationale de Football Association (FIFA) has created a detailed system for the payment of «training compensation» that encourages the training of young players by awarding financial compensation to clubs that have invested in the training of young players.

FIFA Regulations on the Status and Transfer of Players provide that between the ages of 12 and 23, a player is undergoing his sporting training and education. Training compensation is payable in international transfers, when a player is registered for the first time as a professional or when a professional player is transferred between clubs of two different Associations, before the end of the season of his 23rd birthday.

The amount is payable within 30 days of the registration of the player and is calculated on a pro rata basis according to the period of training that the player spent with the training club/s. In order to calculate the compensation due for training and education costs, Football Associations divided their clubs into a maximum of four categories in accordance with the clubs' financial investment in training players.

Special provisions apply to transfers within the EU/EEA, as a result of the understanding reached between FIFA and UEFA on the one hand and the EU on the other in March 2001.

The Dispute Resolution Chamber (DRC) of FIFA may review disputes concerning the amount of Training Compensation and has discretion to adjust this amount if it is clearly disproportionate to the case under review.

An analysis of the training compensation system and of the relevant jurisprudence of the FIFA DRC and of the Court Arbitration for Sports will enable the participants of the Congress to better understand the importance and the impact of this regulation to the sporting world.

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# New legislative framework of sports facilities and athletic events in Greece For A) Licensing of conducting Sporting Events; B) Licensing of Sporting Facilities

SUMMARY: 1. Legislative Background. – 2. Previous Law. – Implementation. - 2.1. Licensing of Sporting Facilities. - 2.2. Licensing to conduct Sports competitions. – 3. New Law: Implementation Forecasts. - 3.1. Is the Subject of the Law actually satisfied? – 4. Conclusions. – 5. Legislation.

1. Prior to the adoption of the new Law 4479/29-06-2017, the licensing of Sporting facilities was transacted by the implementation of a Law of 1999 (Law 2725/1999)[1] by the institution of Decentralized Administration (Article 1-8), which is a sector of the Greek Public Administration, while the licensing of Sports competitions was carried out by the designated Regions (Article 9), which in collaboration with the Municipalities, constitute the primary and secondary sector of Local Authorities, correspondingly. This particular Law, defined the operating conditions («… of any areas of Sports competition or Sports training facilities of all national, regional, municipal, community or association sports clubs, all fitness centers or Sports training areas and of all athletic establishments in general…»)[2].

Then, in 2002, with Law 3057/2002, Article 56[A] was added[3], focusing on the conditions (…licensing of Sporting facilities and permission to perform Sports competitions…)[2], which was partially modified by Law 3207/2007 and finally it was replaced by Article 22 of Law 4049/2012[4]. On these legal bases, the services of the Decentralized Administrations and the Regions in particular and according to

[1] Law 2725/1999 (Government Gazette A-121 / 17-06-1999). La numerazione delle note deve ricominciare da 1.

[2] M. HEKMATNIA, A. KHOSHNEVIS, *Sport Intellectual Property*, cit., p. 129.

[3] Law 3057/2002 (Government Gazette 239 / A / 10-10-2002).

[4] Law 4049/2012 (Government Gazette A 35 / 23-2-2012).

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their jurisdiction, were responsible for the licensing of Sporting facilities and the legalization of conducting Sports competitions of all the Greek sports correspondingly.

## 2. Previous Law

2.1. The licensing of Sporting facilities involved athletic establishments (…of all national, regional, municipal, community or association sports clubs, all fitness centers…) and the license was granted by the Decentralized Administration Coordinator (Article 56a of the Law. 2725/1999, Government Gazette 121A) after receiving the recommendation of the competent Compliance Control Committee of Sporting Facilities[5].

This very critical Decentralized Administration's Compliance Control Committee controlled all the Sporting facilities where athletic events of any category were held. In collaboration with the Technical Services of the corresponding Municipalities, the Committee made a positive suggestion when, apart from the structural and constructional data (whereas for the large installations, the Environmental Commitments Standards), they inspected according to their opinion for any other required components that were deemed necessary for the safe conduct of Sports competitions and training[6].

However, it was noted that while the Municipalities were obliged (article 2-F550/no. 28688/2014), they did not update the data regarding the conditions of their Sporting facilities, nor did they proceed to the regularization of possible arbitrary constructions of the Sporting facilities, which were under their jurisdiction[7]. At the same time, the engineers of the technical services of the Municipalities, did not assume responsibility for issuing certificates that a structure is statically adequate and for the proper operation and maintenance of electromechanical installations (all of which were required by the Audit Committee), and consequently the licensing of the Sporting facilities could not be issued. The financial cost of assigning all the above to private engineers, as well as conducting an environmental

[5] Law 2725/1999 (Government Gazette A-121 / 17-06-1999).

[6] As suggested.

[7] Law 4178/2013 (Government Gazette A 174/8-8-2013).

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impact study possibly required in many cases, also burdened financially the Municipalities and therefore dysfunctions were observed[8].

Summing up all the above, the completion of the licensing of Sporting facilities as a whole was renewed with validity extensions of the existing license, based on issued Common Ministerial Decrees concerning all the athletic establishments, without implementing the statutory two-year pre-requisite control[9].

2.2. The license to conduct Sports Competitions under Law 4049/2012, article 22 (… is granted by the head of the competent Sports authority of the related Region…) and provided that (… the Sporting facility has in force the above-mentioned license of sporting establishments, the event is held by the approval of a documented Federation, the General Secretariat for Sports etc…).

However, it was observed that in the same Sports Facility, a number of sporting activities of the same institution were held periodically and usually weekly, thus resulting in the services of the Regions to be continuously asked to issue a number of licenses for conducting Sports competitions, not only for the meetings of all professional categories that included spectators, but for any athletic events (football, basketball, volleyball, motorsports, athletics, water sports, etc.), throughout the Attica Region.

There was no legal obligation that required the Associations to provide the Federation with a license of an authorized stadium, as requirement for participation in the championship and the Federations to draw up the calendar of competitions based only on the previous statements of the Associations and to simply inform the Police of the schedule by listing the Association, the Stadium, the number of their license and its expiry date. Simultaneously, the Sports Services of the Region would issue a Permanent License for the season in progress, regarding the sport and the specific Sporting facility and only in special cases (unexpected repair of premises, punishments, etc.) a special license would be issued for individual meetings.

[8] Government Gazette 2507/B).

[9] 329823/22861/1694/307/07-10-2016. Common Ministerial Decrees, issued by the ministers of Hellenic Ministry of Internal Affairs and Administrative Reform, Hellenic Ministry of Culture and Sports, Hellenic Ministry of Economy and Finance.

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It is virtually impossible, due to the plethora of sports clubs and the continuing shortage of staff, to issue separate permits for each athletic meeting and for each kind of sporting event. It could directly (a) by categorizing licenses for conducting Sports Competitions (eg. professional matches, amateur matches, school games etc.) depending on the category of the participating associations, just as described above with Article 4 “the classification of stadiums” and b) by the issuance of a permanent license per sport club for the whole of the season in progress and for all competitions, given that it uses the same Sporting facility and without any alterations on the previous license, to dramatically reduce bureaucracy and licensing delays.

3. The new Law 4479/2017, in Article 4, initially categorizes the Sporting facilities and classifies them according to “small” or “large” capacity, thus fulfilling a significant and positive intervention but with a very short implementation period available for the Municipalities and the Regions.

With the next article (No. 5), it essentially eliminates the responsibilities previously given to the Decentralized Administrations and transfers them to the Municipalities for the “small” stadiums, and the Regions for the “large” ones. (Table 1).

Subsequently, Article 6, regulates matters of the Audit Committee, which is currently constituted by the head of the Region, (this competence is also removed from the Decentralized Administration) and cooperates mainly with the services of the Regions and the Municipalities. Finally, Article 7 regulates matters for issuing licenses to hold sporting events. The last three articles deduct the authorities from the Decentralized Administration and transfer them to the Regions and Municipalities respectively[10].

3.1. With the proposed, initially positive, changes important matters regarding the services arise, originally with the classification of the Sporting facilities of the Municipalities and the Regions in categories, then by the staffing of their Technical Services and the unobstructed co-operation with the Audit Committee, the staffing of

[10] Law 4479/2017 (Government Gazette A 94 / 29.06.2017).

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Table 1 - *Categories of sporting facilities*

| | | | OUTDOORS/ Seats | INDOORS/ Seats | POPULATION | ACTIVITY | License of Sports Facility | Licence to conduct Competitions |
|---|---|---|---|---|---|---|---|---|
| 1 | Joint Sports Facilities | A1 | Up to 500 | | Up to 200 | Training | Head of the Municipality | Region |
| 2 | Joint Sports Facilities | A2 | Up to 500 | | More than 2000 | Training and Competitions | Head of the Municipality | Region |
| 3 | Joint Sports Facilities | B1 | 500 to 5.000 | | | Local and amateur competitions | Head of the Municipality | Region |
| 4 | Joint Sports Facilities | B2 | 500 to 5.000 | | | Competitions of National Categories | Head of the Municipality | Region |
| 5 | Joint Sports Facilities | D | | Up to 1.000 | | | Head of the Municipality | Region |
| 6 | Joint Sports Facilities | E1 | | More than 1.000 | | Local amateur competitions | Head of the Municipality | Region |
| 7 | Joint Sports Facilities | C1 | 500 to 5.000 | | | Competitions of National or Professional categorical | Head of the Region | Region |
| 8 | Joint Sports Facilities | C2 | More than 5.000 | | | Competitions regardless of Category | Head of the Region | Region |
| 9 | Joint Sports Facilities | E2 | | More than 1.000 | | Competitions of National categoris | Head of the Region | Region |
| 10 | Joint Sports Facilities | F | | More than 1.000 | | Competitions of National or Professional categorical | Head of the Region | Region |

*Segue*

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*Segue:* Table 1 - *Categories of sporting facilities*

| | | | | | |
|---|---|---|---|---|---|
| 11 | Special Sports Facilities | G | Configurations in the natural environment (sea-river-woods) or in communal city space, as well as installations for Air Sports | Head of the Region | Region |
| 12 | Special Sports Facilities | H | Special touristic infrastructures (ski centers, racetracks, etc.) | Head of the Region | Region |
| 13 | Special Sports Facilities | I1 | Temporary configurations to conduct competitions, within a sports facility that is licensed for another kind of Sport (Outdoors configurations | NO | Region |
| 14 | Special Sports Facilities | I2 | Temporary configurations to conduct competitions, within a sports facility that is licensed for another kind of Sport (Indoors configurations) | NO | Region |
| 15 | | | Temporary configurations to conduct competitions, within a sports facility which is under Article 32 of Law. 2725/99 and is licensed by the Region, private fitness center, private school of gymnastics or within a non sporting facility (hotel, school, exhibition Centres, etc. | NO | Region |

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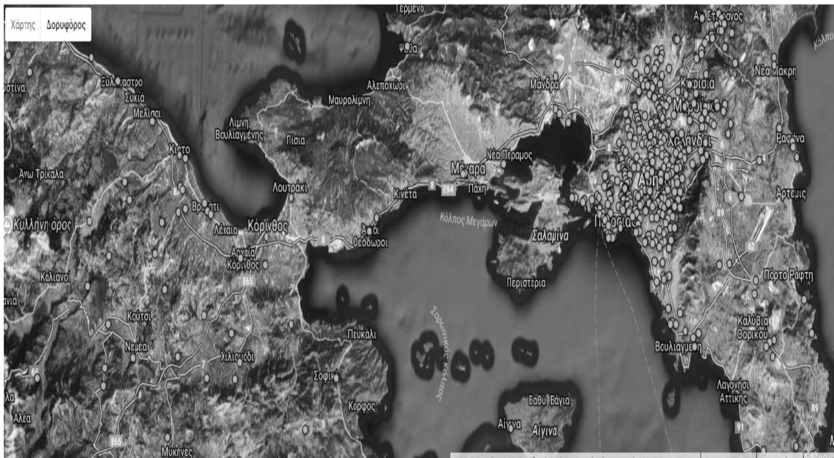
the equivalent Sports Services especially in the Regions and finally with the transference of authorities.

Particularly with the transference of authorities it is foreseen that for the "small" stadiums the licensing of Sporting facilities will be issued by the Municipality and the license to conduct Sports competitions by the Region, so as to establish a significant control of different services (permanent licensing authority e.g. for all the hundreds of thousands of healthcare companies which are licensed by the equivalent municipal authority, under the control of the Regional Health Inspectors' Service). However, in all the "big" and critical stadiums for both the licensing of the Sporting facilities as well as the licensing to conduct Sports competitions, to be issued by the same administrative structure and in particular by the Region.

Figure 1 - *Mapping of Athletic Facilities in the Region of Attica*




However, this very important transference of authorities from the Decentralized Administrations, to the Regions in particular, takes place without any provision of support for the hosts (Regions - Municipalities) and without the corresponding "transfer" of state resources and personnel for the application of the specific authorities, as explicitly provided by "Kallikrates" program, which is a firm re-

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quest of the Union of Regions of Greece and the Central Union of Municipalities of Greece[11].

4. In the many years of the implementation of the old Sports Law 2725/99 the main problems identified regarding the licensing of Sporting facilities were the lack of their categorization according to their size, the malfunctions of the inspection committees that were in co-operation with the Technical Services of the Municipalities, the continued subsistence of officials, etc. thus resulting in significant delays for the parties involved. At the same time, the applied prolongation of athletic establishments' licenses that were already in force through annual Common Ministerial Decrees only relocated the problem by increasing the risks concerning particularly safety matters of Sporting Facilities.

Regarding the licensing of Sporting events the absence of a) categorization of licenses for conducting Sports Competitions (eg professional, amateur and school games, etc), and b) the legal unfeasibility of issuing a Permanent license per association for the entire duration of the Sports games season has created unnecessary operational and bureaucratic problems in the Athletic world.

Today with the new law the transference of responsibilities to the Local Authorities is not negative, especially with the categorization of Sporting Facilities by their 'small' (A1, A2, B1, B2, D, E1) or 'big' (C1, C2, C2, F, and G) potentiality, although it is particularly negative that it is carried out without the transfer of the corresponding resources and structures as explicitly provided by "Kallikrates".

Summing up the above, it is initially and immediately suggested that:

A) Regarding the licensing procedure for Sporting facilities.

1) The licensing of the largest Sporting facilities should be issued either by the respective Municipalities of the establishment or by the General Secretariat for Sports and all Sports Competitions licenses from the Region, so that two different service control structures are always present.

2) Review of Article 6 paragraph 2d and Article 5 paragraph 4 of Law 4779/17

[11] Law 3852/2010 (Government Gazette 87A / 7-6-2010).

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B) Regarding the licensing procedure for General Secretariat for Sports

1) For unregulated sports to be presented with an opinion of the General Secretariat of Sports to the Licensing Service,

2) Categorization of licenses to hold General Secretariat for Sports (e.g. professional, amateur, school games)

3) Possibility to issue permanent licenses for the season in progress per association,

4) After the date 8th October 2017 based on current legislation, the issuing of a license will not be permitted and a direct solution is suggested,

5) Restore employee incentives to participate in committees, accountability procedures, etc.

Finally, if the new law is implemented exactly as it's published, the Sporting Services of the Regions will have to be operated directly by technical and administrative staff, and service incentives must be introduced, as this critical athletic subject is an additional task for them

5. Law 2725/1999 (Government Gazette A-121/17th June 1999) *«Amateur and professional sport and other provisions»*.

Law 3057/2002 (Government Gazette 239/A/10th October 2002). *«Amendment and supplementation of Law 2725/1999, Regulation of issues of the Ministry of Culture and other provisions»*.

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*Abstract*

In Greece, just a few weeks ago, major amendments to the current "Athletic Law" were passed, which concerned, on the one hand the new licensing of athletic facilities and on the other hand the legalization of hosting athletic events of all kinds of sports. Prior to the adoption of the law, all the above-mentioned sports' related licenses, were carried out, and based on the legislation in force, by the department of "Decentralized Management", which is a sector of the Greek public administration, along with the Municipalities and Regions which are the local government organizations that follow. However, after seven (7) years, the "weakening" of the Decentralized Management was launched and the transfer of its athletic related responsibilities to the Municipalities and Regions of Greece began. How prepared and competent are the services of the Municipalities and Regions so as to be able to cope with this important change in Athletic Policy and Action? What is anticipated based on the amendments of the athletic Laws?

How will the athletic facilities be categorized, according to their type, size, dynamic capacity and category of hosted sports events?

How will the "Athletic Facilities License" be granted, which would be the appropriate and competent Municipal or Regional Control Committees? Can the existing Administrative staff and know-how cope with the advancement in Greek Sport activities?

In this article there will be use of important primary athletic elements and data, due to official authority, as well as the presentation of the most important administrative dysfunctions to date.

Thus, once the current situation has been realistically and reliably depicted, the direct Political-Service actions will be presented in co-operation with the new legislative revision of the Athletic Law, so that Greece can be reliably involved with European or Global Athletic activities.

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## Sessione II

# SPORT SAFETY, INTEGRITY AND SECURITY

# Efficiency of Sports Current Sanctions

SUMMARY: 1. Introduction. – 2. The effectiveness of sports sanctions. – 3. Conclusions.

1. Nowadays, the following situation takes place in theory of law: there is need to deny of some of formal statements formed a long time ago for the purposes of further resultative development of law. Therefore, the formal statement on the issue that law has to be assured by state compulsion has to be reconsidered.

Combination of legal compulsion measures and positive provisional measures is able to build relieble cover from offences of law, raise law prestige, weaken positions of legal nihilism, which are still strong enough.

Similar combination of «compulsive» and «positive provisional» includes rules of sports regulations.

In connection with assurance of law by state compulsion, rules of sports regulations have controversial approach. On the one hand, rules of sports regulations may be assured by force of state compulsion (for instance, violator appeals sanction applied to him in court, and state via court deliver the final decision on rightful comprehension of sanction). On the other hand, this provisional measure is more like additional, than main. More often sports federation, which establishes its own internal rules and sanctions for its violation, deals with violators through its own methods of compulsion.

State sanctions are not able to foresee all cases and reasonable limits of their application. Sports federations understand their own potential better than state does and deal with abovementioned much more effectively.

In the scientific doctrine, sanctions may be differentiated into crim-

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inal, civil, administrative, tax, budget or corporative depending on a field of rules of law.

Most domestic researchers agree that sports sanctions have civil nature and in their essence are «certain corporate sanctions» that are related to clearly defined persons who made up this corporation.

Examples of such sanctions include disqualification for the use of doping, suspension from training and competition for violating the rules of the sports federation, the accrual of penalty seconds for violating the rules of distance, etc.

The abovementioned arguments relating to the existence of sanctions in sports federations, positive provisional measures and enforcement mechanisms for the enforcement of corporate rules, as well as their potential state protection, certainly prove the legal nature of such rules, which can be called a type of a rule of law.

2. Let us dwell into the problem of the effectiveness of sports sanctions.

Decision of the Executive Committee of the International Paralympic Committee dated 7th August 2016 on the suspension of membership of the Russian Paralympic Committee, which immediately came into force, automatically led to the suspension of Russian Paralympic athletes (the entire Russian Paralympic team) from participation in the Paralympic Games in 2016 in Rio de Janeiro.

According to the Constitution of the International Paralympic Committee[1], German Law is applied to this organisation and this document ['The law of Germany shall govern the IPC and this Constitution'] (clause 13.1). The headquarters of this organization is located in Germany, Bonn (the Federal State of North Rhine-Westphalia) (clause 1.2).

In this case, the International Paralympic Committee issued an unlawful and illegal decision that affected punishment of innocent, including those who need special (increased) legal protection – persons with disabilities, Paralympic athletes for whom participation in the International Paralympic Games is universally recognized form of individual medical and social rehabilitation and resocialization, and

[1] IPC Constitution *www.paralympic.org/sites/default/files/document/141113141030725_2014_10_01+Sec+i+chapter+1_0_IPC+Constitution.pdf.*

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an opportunity of such participation is an essential element of their quality of life associated with the fundamental right to life.

As its known, the decisions of the German court confirmed the conclusions of the Sports Arbitration Court, referring to the rules of «soft law».

It should also be noted that nowadays, due to the complexity and variability of relations in society, many things can not be strictly divided into white and black, and in our case – «soft» and «hard» law. The implementation of the rules of sports law is achieved to a lesser extent by legal, and to a greater extent by political and information means, the separation of «hard» and «soft» law becomes rather fuzzy. Sports relations are so complex and intertwined that in many cases it is difficult to determine the nature of the rules that govern them.

3. Therefore, nowadays, an actual discussion on the correlation of state and sports sanctions, establishing an adequate balance between economic rights and social rights takes place.

The aim of any limitation is to create an adequate mechanism to prevent deviant behavior and maximize its effectiveness. An unclear definition of duties that lead to the application of sports sanctions and their lack of personification will impede the application of the institution of sport responsibility and contribute the formation of uncertainty and wide discretion of the rights and duties of participants in sports relations.

For the purposes of the problem's solution on the effectiveness of sanctions in sports, it is necessary to define the principles which will allow reaching agreement in the system of legal sanctions and according to which reasonable means of legal technics may be offered.

The goal have to be achieved with the least social expences and the greatest expected, planned result. The principle of effectiveness manifests itself in the legislative definition of the offense and the appropriate type and measure of legal responsibility for its commission.

Efficiency, as well as the stability of legal sanctions, directly depends on the system in principles implementation.

Thus, when the modern approach to the definition and legal nature of sporting exercises is examined, the following statetement can be made: lots of issues of this problem are still undiscovered and completely new page in theory of law begins – research of different

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variations of modern regulators of social relations, which requires close cooperation of theory and practices.

OLGA A. SHEVCHENKO

*Abstract*

Nowadays, a discussion on the correlation of state and sports sanctions, establishing an adequate balance between economic rights and social rights takes place. The principle of the effectiveness of sports sanctions manifests itself in the legislative definition of the offense and the appropriate type and measure of legal responsibility for its commission. Rules of sports regulations may be assured by force of state compulsion. More often sports federation, which establishes its own internal rules and sanctions for its violation, deals with violators through its own methods of compulsion.

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# Discipline, Self-discipline and KOTINOS of Sports Safety and Security

SUMMARY: 1. Preface. – 2. The Connotation and Denotation of the Concept of Sports Safety and Security. – 3. Heteronomy and self discipline safeguard of sport safety and security. – 4. Back to the original spirit of sports.

1. In order to effectively safeguard the sports safety, we must first clarify the connotation and extension of a series of related concepts; secondly, to distinguish the "discipline" and "self-discipline" of security protection[1] and puts forward the main countermeasures, and fundamentally, it is necessary to guide people to pay attention to the Olympic spirit, advocating KOTINOS[2]. To strive for the virtues of carry forward, let the darkness melt in the light, make sports become world peace and harmony of human power.

Sports safety does not only mean the physical safety of athletes. It should be extended to all sports participants. The first is to pupils and middle school students, college students, etc.; second is to sports spectators as "collaborators" or "co-works". The objective should be extended from "physical security" to the property safety, reputation and other non-physical security.

In today's world of sport security, mainly rely on the "discipline" law, including the relevant national legal, various regulations, sport

[1] Discipline refers to the social power constraints on people, such as laws, regulations and rules (Religion), industry association rules etc. "Self-discipline" refers to the inner constraints of people, such as morality, habits, etc.

[2] In Greek, the word KOTOS means extreme aggression, which means that anger within the heart cann't be dispelled. With the same root KOTINOS for the wild olive branch, a symbol of denial to the human instinct of aggression (NO) and transformed into the ideal lofty and glory, to praise and recognition of human beings through tenacious efforts to overcome the limitations of the feat.

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event organization rules; second is to rely on the "self –discipline" of sports morality. In view of the development of sports, due to the increasingly rampant money and championship, the moral restriction of self-discipline is fading and weakening, so it has to strengthen the legal restriction of heteronomy. In the face of objective reality, we have to strengthen the legal protection of sports safety so as to make it more intensive, more powerful and effective.

But we must realize soberly and objectively and clearly pointed out: what Hegel said: "the reality is reasonable", although became "famous", but the "reasonable" only to the "dominator". The demand of ruled is changing, and even the use of violence to change "reality". I think, in the face of the reality of money worship and championship, we should point out: «at the beginning of human, everything and all kinds of social relations can be used and adjusted to customs». It was only later that the law and morality were separated from customs and habits, so that today's sports security has to rely on the morality of self-discipline and the laws of heteronomy. But this is contrary to the original spirit of the Olympics, namely, the spirit of KOTINOS. The original Olympic movement regulated only by KOTINOS.

Human beings can't lose their ideals. In depth thinking on sports safety jurisprudence, we solemnly put forward solemn hope: when we have to strengthen the legal protection of sports safety, meanwhile we should vigorously publicize the original spirit of the Olympic. Specifically, making the use of all opportunities, especially during the Olympic Games time with the attention of the world, denounce sport money worship and championship, propaganda the Olympic Movement KOTINOS spirit.

2. When proposing the concept of "sports safety and security", people usually think that it refers to the safety of "athletes" and refers only to physical safety of athletes. While as long as a further l inquiry, we must face these problems:

First, the university, secondary school, primary school students have the problem of "sports safety"? There is no doubt that you must answer "yes"! There are in total more than 8,000 papers on sports safety and more than 7,000 papers from various aspects of physical education searched from Chinese web data. Being that case,

"security" should not just be a 'professional sport athletes' patent. Second, even the professional sports athletes, the "guarantee" of the "security", but also not only refers to "physical safety"[3]. In addition to "physical safety", at least there are "property safety", "reputation security" and other security issues need to be protected. Thirdly, in many cases, sport participants are not only "athletes" but also "spectators" and "spectators" are generally more numerous than "athletes" (and referees). I call athletes (as well as referees, etc.) as "the main body of sports", the spectators called "sport synergy" or "exercise aid". In fact, sport event may not exist, if there is no "sport synergy" or "exercise aid". And "sports synergy" also has sports safety and security issues. Fourth, from the perspective of organizing sports events or events related, there is the distinction between overall safety and security and individual's. The guarantee conditions, requirements, means, etc., is also quite different. Fifth, in addition to the above, as sports as social activities participant by the main body of sport and sport synergy, and the social system is widely linked, inseparable. There is no doubt that it is inextricably linked to the social environment, international and domestic political ecology, economic conditions and even religious beliefs, customs, cultural development and so on. Therefore, the safety and security of sports can't be narrowed into legal protection and moral protection.

To sum up, "sports safety and security" is a very broad, large volume, and very complex issues, should be noticed by the International Olympic Committee, devote more energy, organizes more people, in-depth research and analysis, to contribute to sports safety.

The 23th IASL Conference in Rome set up the special topic of sport safety and security, has received praise and attention from all walks of life. If on the basis of the establishment of permanent IntegrityÅCSafety and Security committee of sports competition, there are regular researchers who conduct planned studies and make significant contributions to sport around the world. Not only that, the sports law including sports safety and security legal regulation is getting more and more attention, therefore, it is necessary to establish

[3] The "body safety" here refers to physical security, life safety, health, safety and so on.

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an international sports law school to cultivate sports law postgraduate students and doctoral professionals. As China as a big sports country with population of 1 billion 400 million, is striving to become a sports power. At the same time, China is developing a mass sports program in a nationwide[4]. With the steady development of China's economy and promotion of national strength, China will make greater contributions to sports development, including sports integrity, safety and security, and achieve more fruitful results. I believe that Chinese sports law practitioners are willing to set up an Institute of international sports law or International Institute of sports law and efforts[5]. In this regard, the Chinese government and people from all walks of life will also give strong support.

3. All laws are "heteronomy", that is, the discipline made by a strong organization outside of the subject, which is used to restrain the behaviour of the subject. If there is ignorance of the precepts, the behaviour subject will be subject to sanctions outside the body of the powerful institutions. As far as the heteronomy of sports safety and security is concerned, it consists of two major parts. One is the laws and regulations of the state; the other one is the international organization of sports and sports events under the mandatory binding rules and regulations. "soccer hooligans" in the football tournament, played the way big hit, even beating the players, the referee, this is certainly the relevant event constraint rules, more strictly to the criminal law. When it comes to bloodshed, "soccer hooligans" can even be severely punished. International sports organization has no criminal punishment (from criminal detention and arrest until the penalty) right, but it can be punished by criminal organizations of

[4] In China, popular sports is booming. "Reform and opening up" is increasingly beneficial to sports, and all the national fitness events are going up well. In the past, for example, the national Marathon had only two or three games a year, and now has more than 300 games a year. In just one city of Shanghai, the number of entries for the 2016 civic Games was 1461524.

[5] My proposal is specific: the Institute of international sports law or the Institute of international sports law, directly under the International Olympic Committee, but not any country. The former mainly trains master students and doctoral students; the latter absorbs graduates of master's degree and Ph. D. degree, and is mainly engaged in research.

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the state. On the other hand, other means it has, such as those who have used doping in violation of the rules, have been sentenced to a considerable period of suspension, which may force others to comply with the relevant provisions. The actual effect of international sports organizations has great authority and "heteronomy", there is no state power support the disciplinary measures (the domestic sport organization as same as "international sports organizations"), but because of having the "equivalent" or "equivalent" binding. For example, in the athlete's view, the "ban" does not deprive him or her of the right as a human but deprives him of the right as an athlete. Of course, this is a spiritual life. Therefore, if we want to improve the authority of international sports organizations, we must consider the value of "equivalent" to deprive individuals of their right to life and freedom. The ban is the result of the consideration of the "equivalent" price. However, "heteronomy" has limited, and more importantly, athletes' self-discipline, which is the athlete's own moral accomplishment. Self-discipline almost always takes effect. Great athletes, not only have excellent sports skills and capability, but also the noble moral in the competition. Sports, of course, should fully demonstrate their strength. Especially in sports, you have to "beat" each other to win an opponent. But here the "beat" is not the cuff and kick and make them die. Even the reality in the boxing, definitely not beat the opponent to death as well. In boxing match, one side hits the other side and continues to hit as soon as possible, until l concede defeat. However, in addition to specific boxing rules stipulates that certain parts of the human body are "sacred and inviolable" (For example, not to be allowed "kick groin", "choke neck" and so on), requires each athlete consciously restrain himself, never intentionally foul and hurt opponents. In fact, most sports have already formed all kinds of complete heteronomy rules. Nevertheless, sportsmanship as the strict self-discipline is still a powerful guarantee for sports healthy development. Consciously abide by the rules, is a kind of noble sports morality, because the nature of these rules is to protect the athlete's life safety, ensure the normal sports and events, and promote sports healthy development. Some high-risk sport, there are always some unexpected or unexpected risks. In mountaineering, for example, it is almost inevitable that there will be sudden danger. It is very important to give full play to team spirit, support each other,

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help each other, and give full play to the spirit of self sacrifice. Shining example of sports history has recorded many athletes and the noble moral self sacrifice to save feat. In the context of the prevalence of money worship and championship, it is especially important to extol and spread sportsmanship. The 'heteronomy protection' of sports safety and security has been a hot topic in sports law for a long time and has done fruitful research on it. However, in view of the vigorous development of sports, sports involved population scope and number showed a surge in momentum; and human consciousness of self protection is enhanced. Thus, not only the "protection" ranges from the original limited to the physical, life, and property safety and security to reputation and so on, sports safety "discipline guarantee" is also put forward higher requirements. These problems have aroused the close attention of the sports law and put forward some insightful suggestions. For example, according to the particularity of 'physical education accident', Shanghai sports law researchers put forward in the third party school sports injury accident appraisal institutions, the identification process, identification of mechanism of injury accident in physical education process can have such traffic accidents as to authoritative[6]. Under the active efforts of Doctor Huiying Xiang, The Court of Arbitration for Sport Shanghai Alternative Hearing Center had held several seminars on sports disputes resolution, and some innovative suggestions were put forward[7]. The sports law experts from the United States, Russia, Japan, South Korea, Switzerland, Finland and other countries, put forward some fresh and unique insights on ensuring the safety and security of sport, has attracted close attention of Chinese government and sports law researchers. In China, the local government issued the national fitness activities held on sports safety and security regulations, which has a very important position[8].

[6] Tan Xiaoyong, Song Jianying and Yang Beilei, *Study On The Legal Problems of Physical Education Injury Accidents*, Beijing, 2015, p.141 s.

[7] X. Huiying, *The Necessity of The Development of Sport Globalization of Sport, The Alternative Hearing Centre of CAS Settled in Shanghai*, in *Sport Science Journal*, 6, 2012, p. 7 s.

[8] For example, in 2017, Chinese Shanghai Sports Bureau issued the first "on the city held the national fitness events guidance", "guidance" has a total of 19 articles, covering the scope, principle, hold the responsibility of the government, disputes eight, from the

What is worth vigilance is: “Heteronomy” is increasingly becoming the only means or main means of solving sports safety and security problems. In fact, it’s against the original spirit of sports.

4. As for the original spirit of sports, the Greek scholar Moss made a very brief introduction in the book “The Original Ecology of The Olympics”[9]. In the Moss Gurion’s book, there does not heteronomy and only “self discipline”. As Moss Gurion wrote, the original ecology of the Olympic movement is to overcome the natural human instinct of aggression, is the nature of civilization competition, is to improve the natural conditions and beyond by physical, its social nature is the purification of soul, cultivate noble moral.

The old saying «man’s nature at birth is good» one side reflects human ancestors nature, the other side is the evil. The choice of one side is incomplete and inappropriate. To carry forward the good side of human nature is, of course, an excellent thing; but the development of the evil side of human nature will harm the community and harm society, and therefore must be curbed and overcome. The ancient Greece Mycenae period (15 Century BC to 11th Century) popular racing, wrestling, boxing, jump, discus and other sports competitions, the winner was the game prizes, participating people just for the pleasure of the game, this happy win to overcome the physical limitations of confidence and admiration for cheer. As a sign of victory, a crown of wild olive branches is presented by the host of the event. The Greek language of this wild olive is KOTINOS, means a symbol of human non-material aggression instinct transformed into

perspective of government sports departments, provide the supervision path more clearly do match guidance and service, for each game unit. The “guidance” Provisions (11) held in swimming, skiing, scuba diving, rock climbing and other high-risk sports fitness events should be carried out in accordance with the relevant provisions of the “operating in high-risk sports licensing management measures” etc.. Water sports under water shall be carried out in accordance with the relevant provisions of the regulations of the people’s Republic of China on the administration of traffic safety and the regulations on the administration of navigation safety for water and underwater activities in People’s Republic of China. Air sports competitions shall be carried out in accordance with the relevant provisions of the measures for the administration of national aviation sports competitions and other relevant regulations.

[9] (Greek) Moss Gurion nice (2008), *The Original Ecology of The Olympic Movement*. Translated by Shen Jian, Shanghai, p. 6 s.

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an ideal material form. Moss, in the book "the ecology of the Olympics", quoted the book on Contemporary College psychiatry: Sport is a typical example of human aggressive instinct transformed into ideal. This change is called idealization or qualitative change and is the only natural way to protect oneself from aggressive instincts. There is no hiding the fact, modern sports are far away from the original ecology of the Olympic Movement «of the spirit, which is reflected in the nature of nature and social nature of the movement of the way, and reflects the alienation etc.». From the perspective of the history of sports development, the Olympic movement is the original "to overcome the natural human instinct of aggression" and improve and beyond by nature of natural conditions of physical fitness[10].

However, great changes have taken place in modern sports, and more and more sports seem to be no longer for "overcoming", but for strengthening the innate human aggression instinct. As for sports "social nature", in the original culture, purification of the soul of noble moral quickly degenerated into poison soul and encourage bad moral misery. Money doctrine and championship are prevalence, in the development of some countries to incapable of further increase the point. Some athletes of collective doping, the implementation of "some countries of the whole nation system" in order to win the gold medal and pure for the purpose of certain countries of the athletes failed to colour harsh punishment, and even some countries forced the players assume the task of collecting information, is not generally contrary to the spirit of the Olympic sports, but seriously to desecrate the. All this is contrary to the spirit of self-discipline to carry forward the noble morality.

In view of this, as an important branch of the IASL, the integrity, safety security committee should make a clear-cut stand: First, we call on all countries to immediately abolish the "national training program" and train athlete system. Second, cancel all the athletes qualified after the national training. Third, all athletes who take drugs to win competitions should be given severe punishment and banned from the competition forever. Fourth, call on all countries of the

[10] (Greek) Moss Gurion nice, *The original ecology of the Olympic movement*, cit., p. 131.

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world to learn from China and other countries, and promote and develop mass sports with the help of the state. Fifth, the Olympic sports ethics committee will be established to recognize the noble athletes and give them the highest honor of the global moral model.

NI ZHENGMAO

*Abstract*

Discipline is an important means to ensure sports safety and security. Under the background of the popularity of money and money, it is especially important to strengthen the security of sports through discipline. However, we need more to carry forward the KOTINOS which is origin spirit of sports, enhance self-discipline, so as to ensure the true and healthy development of sports.

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# Criminogenic Manifestations of Football Fans[1]

SUMMARY: 1. Introduction. – 2. Definition of the term «criminogenic manifestation». – 3. Types of football fans criminogenic manifestations. - 3.1. The Verbal Aggression. - 3.2. The physical aggression.

1. The key to understanding crime is not the study of specific criminal acts, but to identify the main points contributing to criminal behaviour in general.

– An event on the sports ground is capable of immersing both an active fan and a viewer into a state of overall joy and euphoria, or depression and disagreement.

– «Sport can perform not only creative, but also destructive functions in society» - the famous English philosopher Aldous Huxley.

– In order to understand the nature of crimes committed by football fans, first, it is necessary to understand their criminogenic manifestations.

– The offences of football fans are not predetermined by any wording and are not fixed by any criminal and/or administrative responsibility for what was done in the legal acts of the Republic of Latvia, but the specificity of such encroachments urgently requires a number of changes and additions.

– The issue of offences committed by fans of visiting teams is more relevant than those committed by local fans in the territory of the Republic of Latvia.

– Offences of football fans are not predetermined by any wording and are not fixed by any criminal and/or administrative responsibility for what was done in the legal acts of the Republic of Latvia,

[1] From Powerpoint.

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but the specificity of such encroachments urgently requires a number of changes and additions.

– The issue of offences committed by fans of visiting teams is more relevant than those committed by local fans in the territory of the Republic of Latvia.

2. Term is mostly used either in combination with a specific type of crime, or it is replaced by a broader concept «deviant behaviour».

– Asocial behaviour of criminal orientation is a criminogenic manifestation of adolescents.

– Asociality is considered as an evasion of the moral norms implementation, directly threatening the well-being of interpersonal relations.

– Aggressive behaviour, sexual deviations, gambling, vagrancy, sponging

– The human nature is fundamentally antisocial and selfish, since the desire to satisfy personal interests often leads to the fact that people realize their criminal, delinquent and deviant behaviour.

– If the term «criminogenic manifestations» is viewed as deviant behaviour, then manifestations that contribute to the commission of a crime mean any behaviour contradicting the dominant norms of society.

– In sociology, social deviation or deviant behaviour is determined as behaviour or characteristics that violate meaningful social norms and expectation sand are negatively evaluated by a large number of people.

– Sociologists and psychologists agree that two researches are needed to study deviant behaviour why people violate laws or social norms and how society reacts to that.

– The reaction of society to deviant behaviour suggests that social groups actually create deviation by themselves, creating rules which violation is a deviation from the generally accepted norm.

Deviation is relative, but not absolute.

3. The scientific society initially determines the behaviour of football fans as deviant.

– Officials of international and national football organizations, the management of football clubs also limits the behaviour of fans in the

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stadiums, thus indicating that such actions are deviant from the generally accepted social norms.

– Sport bears not only the functions of mankind physical development but is also one of the foundations of states and aggression origin.

– Aggression, as one of the forms of deviant behaviour, underlies the other two types of deviant behaviour at the stadium, namely verbal and physical aggression.

3.1. The verbal aggression of the football fans includes:
- Negative discussion of a football match;
- Team slogans shouting;
- Singing encouraging songs;
- Negative statements about a team/player;
- Negative statements about an opposing team/player;
- Negative statements about the fans of the opposing team;
- Racism and xenophobia;
- The expression of discontent with football officials;

3.2. The physical aggression of football fans includes:
- Damage to public/private property;
- Throwing objects on a football field;
- Lighting and throwing fireworks;
- Fights;
- Showing obscene gestures.

Thank you for your attention.

Karina Zalcmane

*Abstract*

Author defines the term «criminogenic manifestation» – used in combination with a specific type of crime – and presents the types of football fans criminogenic manifestations: verbal aggression and physical aggression.

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# A Comparative Study on Integrity in Sports Games Focusing on the Legal Responsibility of «Match-fixing» in Korea

Summary: 1. Introduction. – 2. Criminal liability. - 2.1. Establishing fraud. - 2.2. Establishing interference with business. - 2.3. Violation of National Sports Promotion Act. – 3. Liability under administrative and disciplinary frameworks. – 4. Civil Liability. - 4.1. Contractual liability. - 4.2. Liability in tort. – 5. Conclusion.

1. Korea achieved the world's sixth «Sporting Grand Slam» when Pyeong Chang was chosen to host the Winter Olympics in 2018. Fairness, a basic tenant of sport, has been consistently undermined in Korea, however, due to what the Korean government has described as the «four evils» the privatization of sports organizations, biased judgments made by the referees resulting in parental suicide, physical and psychological assaults by senior players and coaches on junior players and corruption in relation to the Athlete School Entrance Examinations. In this sporting environment, match-fixing has also become a contemporary sporting problem. Moreover, the growth of internet gambling, the use of various deceptive tactics and gambling options, such as spread and first scoring betting, are also making it easier to match-fix. Gambling is not the only driver, however. Teams may, for example, seek to fix a match with an opponent team to advance that team to the next round of a tournament. Match-fixing scandals which became public from 2011 to 2013 and the Korean public's critical response to those scandals eventually led to a series of major reviews and reforms. The Ministry of Culture, Sports and Tourism announced comprehensive measures known as the 'Normalization of Sports Organizations' in 2013 and completed a comprehensive audit of 2,099 sports organizations by December 2013. Practical and operational approaches to combating match-fixing were

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subsequently strengthened, including the introduction of a reporting hotline, reorganization of education programs and increased investigative resources.

From a legal perspective, the National Sports Promotion Act was amended in 2014. In addition to specific offences under the National Sports Promotion Act, however, the Korean legal system also provides for other offences under which parties participating in match-fixing may be liable. Parties may be liable for a breach of criminal or civil law, and even sued on the basis of contract or tort. Because match-fixing involves predetermining the outcome of a sporting activity, it could be said that actors are participating in a fraudulent scheme, for example, they may also be disciplined under administrative arrangements.

This paper provides an outline of the formal approaches to combating match-fixing in Korea. It divides the approaches into three categories: criminal liability; liability under administrative procedures and the disciplinary power of sporting organizations; and legal liability under civil law. The discussion of criminal liability is further divided into an analysis of laws applying to specific actors, such as financiers, brokers and players, and laws triggered by the type or context of the match-fixing, including fraud, sporting-specific legislation and intimidation. Korea has recently increased its administrative and disciplinary responses to match-fixing and this section of the chapter also highlights the role of sporting organizations such as the Korean Sport and Olympic Committee.

2. Korean criminal law may be invoked to combat match-fixing based on the status of the alleged criminal actor. Financiers, for example, typically plan the match-fixing and prepare the funds. Brokers transfer money to the players and order the bets. The players, coaches and supervisors participate directly in match-fixing and receive the funds. The senior players and members of organized criminal gangs intimidate coaches, supervisors and players who do not respond to their demands to fix matches. The Korean legal framework provides a number of avenues to prosecute such alleged offenders.

Financiers and brokers involved in match-fixing are joint principal offenders and have been shown to interfere with the fair execution of

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sports covered by the Korean Sports Toto. They provide financial benefits to players through illegal solicitation. Accordingly, fraud (article 347), interference with business through deception (article 314), receiving or giving a bribe by breach of trust (article 357) and gambling or habitual gambling (article 246) under the *Korean Criminal Act No. 7623 2005* ('*Criminal Act*'), may apply to their actions.

2.1. The Korean legislative framework may also be invoked to combat acts designed to lose a game via a player's mistake or poor performance where compensation is received for such acts and they cause damage Sports Toto operators and purchasers who have paid and betted under the belief that the game was a fair contest. This poor performance may be the equivalent of fraud under the criminal law (article 347 of the *Criminal Act*). The requirement to establish fraud is that a person acquires property or financial benefit by deceiving others. The players who participate in match-fixed games are accessory to the fraud and the force behind the match-fixing who designs and supports the match-fixing through illegal websites may be considered to be the main perpetrator of the fraud. Even when match-fixing is unsuccessful, attempted fraud may be able to be established (article 347 and 352 of the *Criminal Act*)[1].

2.2. Interference of business (article 314 of the *Criminal Act*) may be established on the basis of poor performance because it deceives stakeholders, including Sports Toto, who trust that there will be a fair game, process and result[2]. This conduct arguably interferes with the work of all who have placed trust in the fair progress and outcome which has been corrupted by the match-fixing.

2.3. Most match-fixing will be in violation of the *National Sports Promotion Act*. A person who uses cheating to damage the fairness of sports competitions or obstruct fair execution of sports covered by the Sports Toto are subject to imprisonment of up to five years or a fine of up to 25 million WON (article 47 of this law).

[1] S. Park, *Criminal liability and match-fixing*, in *The Korean Association of Sports Law*, 14, 3, 2011, p. 217 s.
[2] *Ibidem*.

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3. The Ministry of Culture, Sports and Tourism is responsible for administrative guidance and supervision of efforts to combat match-fixing. The Ministry is an executive agency which may take administrative disciplinary actions and administrative legal restrictions in accordance with the principle of the rule of law. The Constitution also recognises the rights of sports organisations and federations to exercise disciplinary power on the basis of their sports autonomy. In addition, the Korea Sports and Olympic Committee, which arguably has the power to punish match-fixing offenders and exercise its supervisory power to demand that sports federations punish such offenders. Whether the Korea Sports and Olympic Committee has the administrative and disciplinary power to conduct disciplinary action is a matter of legal debate in Korea[3].

As the 2011 match-fixing scandal in professional football became a serious social problem which expanded to embroil professional volleyball and baseball, the Ministry of Culture, Sports and Tourism announced comprehensive countermeasure known as, Creating Measures for Fair and Transparent Sports Environment on 21 February 2012 to combat further match-fixing[4], in order to ensure transparency for the operation of school athletic clubs and to improve the accountability of sports organizations, a unified certification process under the Korea Sports and Olympic Committee was introduced and the procedures for issuing performance certificates were revised to facilitate online certification[5]. Furthermore, the Korean University Sports Federation announced its resolution on the 'Normalization and advanced measures for university sports including prohibiting financial scouting of players and self-awareness resolutions'[6].

4. Civil Liability

[3] C. Choi, *Legal Regulations on Sports Gambling and Match-fixing*, in *The Korean Association of Sports Law*, 15, 1, 2012, p. 9 s.

[4] S. Lee, *Cooperative Measures to stop Match-Fixing*, in *Hankuk News*, 2 February 2012, accessed 7th November 2015, *www.newshankuk.com/news/content.asp?fs=12&ss=57&news_idx=201202211218361314.*

[5] S. Shon, *A study on the Match-fixing of Sports and its Prevention*, in *The Korean Association of Sports Law*, 16th January 2013, p. 83 s.

[6] I. Choi, *Resolution of the University Sports Council to stop financial scouts*, in *Chosun News*, 22 May 2012, accessed 5 May 2015, *news.chosun.com/site/data/html_dir*.

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4.1. Players and supervisors participating in major sporting events have a direct contractual relationship with their clubs, and the club may directly claim damages caused by the match-fixing from the offenders[7]. Since referees typically do not have a direct contractual relationship with the participating clubs, in theory, any clubs that are damaged by a referee's involvement in match-fixing cannot rely on contractual liability to sue that referee, and only have the right to claim damages caused by unlawful acts. Interestingly, the German precedent of a 'contract with a protective effect to benefit third parties' (*Vertrag mit Schutzwirkung zugunsten Dritter*) may be recognized to deal with this issue in exceptional cases. Even if the contracting party is an organizer, player or sports organization, for example, the referee or the spectator may need to be protected by the contract as a third party[8]. In other words, if a referee is involved in match-fixing, the legal relationship, including employment contracts between the association or federation and the referee may have the effect of establishing a right in favour of the allegedly damaged clubs to claim contractual damages. In accordance with article 391 of the *Civil Code*, where a referee affects the performance as a performance assistant, the intention or negligence of the referee shall be deemed as that of the federation or association hosting the sporting event in which case the federation or association may face liability.

4.2. Article 750 of the Korean *Civil Code* stipulates that any person who causes loss or inflicts injuries on the life, body, health, property or other rights of another person either intentionally or negligently, shall be liable for that unlawful act. The type of losses which might be claimed as part of a tort case. This infringement of legal interests generally includes cases where unlawful acts are recognized and where the violation occurs due to aggressive acts or passive omissions. In addition, such unlawful acts must be either intentional or negligent and actual damages must arise to satisfy the applicable requirements.

The liability for unlawful acts in match-fixing applies to anyone

[7] K. Nam, *Liability for the Match-fixing of the Soccer Referees*, in *Chung-Ang Law Associations,* 13, 2, 2011, p. 139 s.
[8] K. Yeun, *Researching in Sports Law*, Seoul, 2013.

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including referees, players, coaches and club supervisors. In principle, a decision made by the referee in accordance with his or her opinion and knowledge during the match is final; therefore, even if the referee has made a wrong decision, the referee may not be held responsible. However, article 750 of the *Civil Code* stipulates that liability will be imposed on the unlawful act of manipulating matches intentionally. In particular, if the referee accepts a bribe or commits corruption, the referee may be criminally liable and subject to disciplinary proceedings[9]. In contravention of these statutory obligations, if a person accepts, demands or promises property or property benefits and in return commits an unlawful act such as being involved in match-fixing or being an agent, such an act may violate that person's duty of care and the person may face liability for damages caused by the person's unlawful acts[10]. Even if a person does not violate any legislation, the violation of the obligations stipulated in the constitutions or competition rules of the applicable sports association, federation or union, including the doctrine or norms of good faith, may be treated as a breach of that person's duty[11].

Finally, federations or associations hosting a competition may be found liable under article 756 of the *Civil Code* as an employer of a referee. In cases where more than one claim is available, the team which is the victim of the match-fixing may choose the claim most likely to succeed, including liability for being a performance assistant under the contract or a claim in tort.

5. The problem of match-fixing is not new, but recently it has developed into a serious social issue in Korea due to various changes in sporting environments. The K-League scandal of 2011 and the reality of match-fixing and illegal gambling in key sports such as soc-

[9] For examples, referred to article 29(1) *Bicycle and Motorboat Racing Act No.12688* 2014, which states that if a racer or umpire receives, requests or promises good or financial gains, in return for any illegal solicitation for favour related to his or her duties, he or she shall be punished by imprisonment with labour for not more than five years, or by a fine not exceeding 15 million won. Also refer to article 25 and 30 for more application.

[10] K. Choi, *Tort liability for referee*, in *The Korean Association of Sports Law,* 14, 3, 2011, p. 37 s.

[11] *Ibidem*.

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cer, volleyball, baseball and basketball created an understanding that match-fixing was a structural, social evil in Korea. In response, the Korean government took various measures to combat match-fixing. The Ministry of Culture, Sports and Tourism introduced new measures to create a fair and transparent sporting environment, and the *National Sports Promotion Act* was amended. As this chapter shows, Korea also has numerous other legal and administrative mechanisms to combat corruption. Legal and administrative action alone, however, will not solve the problem of match-fixing. The efforts to combat match-fixing also require the improvement of labour conditions for players, greater fairness and transparency in the student athlete selection system. Moreover, increasing the ethical awareness of all people including players, referees, association executives and spectators is extremely important. A solution requires a greater focus on sports ethics education programs[12]. It is also necessary to improve the reporting and whistle-blower system introduced in [2014] so that it functions as a mutual check between sports organizations and players.

KEE-YOUNG YEUN

*Abstract*

The match-fixing of game results has been a historical issue in overall sport games. Recently, it is developing into a graver social issue as the sport environment and paradigm shifts spontaneously. Recent consecutive cases of sport corruption in «match-fixing case of K-league» in 2011, professional baseball league and V-league in 2012 are making a massive impact on sport society as well as general society.

Extensive numbers of cases in which the game results were match-fixed for illegal sport gambles were caught in popular games including soccer, volleyball, baseball, and basketball. The Korean government recognizes the issue of integrity and fairness as a structural social evil and tries to devise a countermeasure. Ministry of Culture, Sports, and Tourism has revised National Sports Promotion Act in order to eradicate irrationality and to cre-

[12] M. LEE, K. SEO, '*suposu sungbujojak: yenrimumjehwa haekyungbangan*' (*Sports match-fixing: Ethics issues and solutions*), in *The Korean Association of Sports Law,* 21, 1, 2013, p. 115 s.

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ate comprehensive countermeasure to foster fair and transparent environment for sports.

The newly revised National Sports Promotion Act includes a newly added Article 14 (3) which defines that 1. The player, coaching staffs, judges, and executive and staff members of game group of professional sport should not provide nor ask for any economic profit as a return for accepting illegal solicitation. 2. The player, coaching staffs, judges, and executive and staff members of game group of professional sport should not promise to provide nor ask for any economic profit as a return for accepting illegal solicitation. The violators of this article will be sentenced either maximum 7 years in prison or maximum 70 million won fine. (Revised 2014. 1. 28)

In this paper, I would like to write the analysis of the legal framework and cases of match-fixing in Korea focusing on the criminal, administrative, and civil laws in order to find a solution to match-fixing of game results. While improvement of labor conditions for sport players, selection system of student athletes, and strong legal remedy can serve as solutions for extermination of match-fixing of game results, it is also highly demanded to foster and strengthen ethics among the sport participants including players, judge and committee members, and spectators. I would like to explore measures to develop sport ethics education program for the sport participants to strengthen education and public relations.

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# Quale diritto per la frode sportiva? Criticità giuridiche

SOMMARIO: 1. Note introduttive. – 2. Cos'è frode sportiva? – 3. La disciplina della frode sportiva. - 3.1. La disciplina negli ordinamenti sportivi. - 3.2. La disciplina negli ordinamenti di natura pubblicistica. – 4. Criticità giuridiche. - 4.1. Le criticità emergenti dalla disciplina della frode sportiva negli ordinamenti sportivi. - 4.2. Le criticità emergenti dalla disciplina della frode sportiva negli ordinamenti di natura pubblicistica. – 5. Considerazioni conclusive.

1. La frode sportiva condivide con il *doping* molti tratti e caratteristiche, sia per quanto concerne l'illecito in sé (oggetto, finalità e soggetti), sia per quanto riguarda la disciplina giuridica (entrambi sono oggetto di normazione sportiva e di natura pubblicistica).

Se, però, per il *doping* si è giunti ad una disciplina condivisa in ambito pubblicistico e sportivo[1], lo stesso non si è verificato per la frode sportiva.

Nel corso della presentazione si cercherà di evidenziare le criticità

[1] Non è questa la sede per richiamare le vicende evolutive della disciplina del doping, da parte degli ordinamenti giuridici sportivi, così come per gli ordinamenti di natura pubblicistica, per la cui disamina approfondita, aggiornata al 2011, si rimanda ad A. Di Giandomenico, *Doping*, Roma, 2011. Qui basti ricordare come il punto di cesura sia costituito dall'istituzione della WADA e dalla redazione del Codice WADA (per il quale siamo giunti almeno alla terza versione), con il quale si è giunti ad una disciplina pressoché uniforme del *doping* da parte degli ordinamenti sportivi che lo hanno adottato (ossia tutte gli sport olimpici e molti altri ancóra). Il codice WADA, meglio la sua definizione di *doping*, poi, è stata fatta propria dall'UNESCO, nella *Convenzione internazionale contro il doping nello sport*, che, a sua volta, conta 187 Stati che hanno depositato strumenti di approvazione, accettazione, adesione o ratifica. Si è realizzata, così, una sorta di uniformità trasversale nella disciplina del *doping*, nella quale sono accomunate tanto organismi sportivi, quanto ordinamenti statali.

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giuridiche emergenti dalla disamina della disciplina della frode sportiva, tanto dagli ordinamenti giuspubblicistici, quanto da quelli sportivi.

2. In via preliminare, appare importante sottolineare come, nonostante la denominazione, la locuzione indichi qualcosa di precipuo, che si differenzia significativamente dalla frode in senso generale.

In particolare, la frode ordinaria può essere intesa come un inganno diretto a danneggiare un diritto altrui: essa consta di due elementi distintivi quali l'intento di conseguire un risultato che altrimenti non si sarebbe realizzato (almeno non in quella misura), intento concretizzato ponendo in essere inganni, astuzie o raggiri[2].

Ad un primo sguardo la frode sportiva non sembra differenziarsi significativamente dalla frode in senso generale, potendosi ritenere integrata quando è rilevata una serie di condotte, atti od omissioni, elusive di norme, atte ad alterare il corso della competizione o ad assicurare un vantaggio indebito.

A qualificare la frode come sportiva è l'oggetto della condotta os-

[2] È interessante sottolineare come la definizione di frode sia tratteggiata in maniera relativamente uniforme da parte dei vocabolari/dizionari della lingua italiana (a titolo esemplificativo, si vedano G. Devoto – G.C. Oli, *Nuovo vocabolario illustrato della lingua italiana*, I, Firenze, 1992, p. 1238; quanto la definizione data dal vocabolario Treccani, disponibile al link *http://www.treccani.it/vocabolario/frode/*). Quando si passa a cercarne una definizione giuridica, non si registra, tuttavia, la medesima uniformità. Nell'ordinamento italiano, addirittura, non esiste una vera e propria definizione di frode, che può delinearsi come una condotta penalmente rilevante, atta a trarre in inganno i destinatari (nelle norme ordinariamente per indicarne la presenza è usato il termine "fraudolentemente"). Si tratta di una distinzione esito di un'evoluzione per cui, inizialmente, tanto la dottrina quanto la giurisprudenza hanno accolto l'ipotesi dell'esistenza di una distinzione tra frode rilevante in campo civilistico e frode avente rilevanza penalistica, così che per configurare una frode civile era sufficiente rilevare l'inganno della vittima con qualsiasi mezzo, dunque anche con la semplice menzogna, mentre per la frode penale occorreva qualcosa in più, in particolare una sorta di *mise en scène* che convalidasse i fatti falsamente affermati (in questo senso si veda F. Antolisei, *Manuale di diritto penale. Parte speciale,* I, Milano, 2008, p. 365). La ricerca degli elementi distintivi tra frode civile e penale non ha prodotto, tuttavia, risultati inequivocabili, così che la dottrina italiana si è gradualmente orientata verso la negazione dell'esistenza di una linea di distinzione tra i due tipi di frode: un orientamento che attualmente appare essere condiviso in maniera pressoché unanime dalla dottrina italiana (*ex pluribus*, si vedano F. Antolisei, *Manuale di diritto penale. Parte speciale*, I, cit., p. 365 s. e V. Manzini, *Trattato di diritto penale italiano*, Torino, 1986, specialmente p. 674).

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sia l'alterazione del corso della competizione sportiva. Un oggetto che, però, è motivo della differenza che distingue essenzialmente la frode sportiva da quella ordinaria: se nella frode ordinaria, infatti, si individua sempre un soggetto passivo, che risulta essere danneggiato dall'azione fraudolenta, nella frode sportiva ad essere danneggiata non è alcuna soggettività particolare, quanto il principio fondante l'ordinamento sportivo, ossia il corretto svolgimento della competizione[3].

Proprio questa sua particolarità costituisce la frode sportiva come un illecito tipico nella pratica sportiva: per quanto tentata o consumata, la frode costituisce, infatti, una violazione dell'obbligo di rispettare il principio di lealtà e correttezza, principio che rappresenta l'estrinsecazione della ragion d'essere dell'ordinamento sportivo, costituitosi per la regolazione delle competizioni[4].

3. Attesa la definizione di frode sportiva, emerge subito un tratto distintivo, comune per altro al *doping*, dato dalla ricerca di annullare l'incertezza dell'esito della competizione[5]. Nello stesso tempo, però,

[3] Si ricorda in proposito che se una caratteristica essenziale dello sport è data dal confronto competitivo, che ne costituisce espressione, cui si partecipa con l'obiettivo del conseguimento della vittoria, viene in rilievo l'interesse a che tale confronto avvenga in maniera corretta. Si tratta di un interesse la cui tutela sembra essere peculiare dell'ordinamento sportivo, il quale, secondo quanto appena detto, si costituisce e si struttura per assicurare un confronto competitivo che avvenga secondo un criterio di correttezza, facendo sì che le forze in campo non siano palesemente sbilanciate a favore di una delle parti in competizione. È questa la *ratio* sottostante la divisione delle competizioni per genere, come la suddivisione in categorie: il confronto avviene tra sportivi che partano da una potenzialità quanto più possibile paritaria

[4] Barbarito Marani Toro ha osservato che «le organizzazioni sportive hanno dovuto ispirarsi ad un *ideale di uguaglianza e di giustizia che non trova riscontro in nessun ordinamento giuridico generale*. Il requisito peculiare di tutti i giuochi competitivi infatti, dal quale dipende la creazione delle 'incertezze', è costituito, com'è noto, dalla *par condicio* dei giuocatori e cioè dall'uguaglianza di posizioni che deve essere assicurata per durata dello svolgimento del giuoco» (A. Barbarito Marani Toro, *Sport*, in *Noviss. Dig. it.*, XVIII, Torino, 1971, p. 48). Egli continua, poi, evidenziando che il principio della *par condicio*, «che è fondamentale rispetto a tutti gli altri, va applicato e rispettato sia nel senso che devono essere uguali per tutti i partecipanti le regole, le condizioni ambientali e strumentali, i requisiti (di sesso, età, eventualmente di peso, ecc.), ed ogni altro elemento che possa avere rilevanza sullo svolgimento nella gara e sul suo risultato, sia nel senso che devono essere per quanto è possibile del medesimo valore i valori sportivi dei partecipanti» (*Ibidem*, p. 49, nota 1).

[5] Si ricorda come l'incertezza dell'esito della competizione costituisca il vero fondamento

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emerge una differenza con il doping stesso, allorquando si considerano i soggetti coinvolti. Se nel doping, infatti, i soggetti coinvolti sono essenzialmente legati al mondo sportivo (atleti, dirigenti sportivi, professionisti della sanità), per quanto riguarda la frode sportiva, invece, si registra, oltre al necessario coinvolgimento degli sportivi, l'ingresso di persone ed interessi del tutto estranei al mondo sportivo. Si tratta di persone e interessi, spesso legati alla criminalità organizzata, che utilizza questo tramite per veicolare e riciclare i proventi delle proprie attività illecite. Tutto ciò rende la frode sportiva un illecito che ha particolari riflessi non solo sull'integrità dello sport (meglio della competizione sportiva), ma ha anche addentellati sulla politica criminale ad un livello internazionale[6].

della piacevolezza del confronto agonistico, rendendolo spettacolo appetibile e godibile. Sulla base di questa semplice constatazione appare evidente come la frode sportiva ed il *doping*, nel tentativo di alterare l'equilibrio competitivo, arrechino un *vulnus* essenziale all'integrità dello sport. *Ex pluribus*, si veda Claudio Tamburrini, laddove annota che «there is an element of tension and uncertainty in play. The players want something to come off. He wants to succeed by his playing, and all those who take part in the game (participants as well as spectators) wait to see the end of that tension (the outcome of the game) with excitement. Professional sport shares this moment of uncertainty with play. It is the chanciness inherent in competition that makes sport such an exciting activity» (C.M. Tamburrini, *What's Wrong with Doping?*, in T. Tännsjö, C. Tamburrini (eds.), *Values in Sport*, London, 2000, p. 210). Pertanto, «take away the uncertainty and you remove the *raison d'etre* of sport; and its appeal to spectators. Betting related match-fixing, although not a new phenomenon, is threatening to overtake doping as the greatest threat to sport's integrity and appeal» (T. Serby, *Gambing Related Match-fixing: a Terminal Threat to the Integrity of Sport?*, in *The International Sports Law Journal*, 1-2, 2012, p. 7). Nello stesso senso anche R. H. McLaren, laddove afferma che «corruption, in any of the foregoing forms, robs sport of its essential feature of uncertainty of the outcome and accelerates its spin into the forum of entertainment, and thus it no longer is sport. Corruption gnaws away at the fundamental foundations of sport and therefore of sporting integrity. It becomes essential to protect that integrity to ensure that sport is free from any corrupt influence that might cast doubt over the authenticity and unpredictability of the sporting result» (R.H. McLaren, *Corruption: its Impact on Fair Play*, in *Marquette Sports Law Review*, 19, 1, 2008, p 15).

[6] In tal senso vanno le considerazioni dello studio *Match-fixing in sport*, ordinato dalla Commissione Europea (più specificamente dal Directorate General for Education and Culture, nel quale si afferma che «resorting to criminal justice in the fight against match-fixing shows that sporting manipulation can be not only a 'simple' breach of sporting rules but also an offence against the public in a broader sense. In the field of doping the use of criminal justice mechanisms has resulted in an active fight against doping. Furthermore the application of an offence, whether general or specific, can facilitate the prosecution of perpetrators who are not members of the sports association con-

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3.1. La frode sportiva costituisce pertanto un illecito tipicamente sportivo, che trova riscontro nell'ordinamento sportivo italiano, ove è considerata sostanzialmente in maniera uniforme, pur ricorrendo a differenti modi di disciplinarla.

Una pluralità di possibilità attinente alla sua disciplina (frode come fattispecie a sé stante rispetto all'illecito sportivo[7]; frode ricadente nell'àmbito ampio dell'illecito[8]; fino addirittura a non richiamare espressamente l'illiceità del comportamento fraudolento[9]).

Una pluralità di definizione concernente l'individuazione del comportamento integrante la frode sportiva, per cui si può passare da una definizione estremamente ampia della frode sportiva (che si ritiene integrata non solo quando si ritengono violate le norme *antidoping*, ma anche quando si rileva l'alterazione dell'equilibrio competitivo o l'alterazione del risultato del confronto agonistico)[10] ad una defini-

cerned; sanctioning through sporting sanctions can only reach those directly involved in sport. Indeed, people who are "behind" match-fixing are commonly linked to organised crime, not the sports world. This raises the question of whether sports organisations are capable of tackling the problem of match-fixing alone (sport autonomy) or whether cooperation with public authorities and legislative intervention are necessary» (*Matchfixing in sport. A mapping of criminal law provision in EU 27*, 2012, p. 16). Sul coinvolgimento della criminalità organizzata nello sport, in particolare il calcio, si veda anche D. Hill, *The Fix. Soccer and Organized Crime*, Toronto, 2010.

[7] Per gli sport di squadra, a titolo esemplificativo, così dispongono il *Regolamento di Giustizia 2016/2017* della FIP (la frode sportiva è disciplinata dall'art.59, l'illecito dall'art. 60), il *Regolamento giurisdizionale* della FIPAV (l'art. 81 dedicato alla frode sportiva e l'art.82 all'illecito sportivo) ed il *Regolamento di Giustizia e Disciplina* della FIGH (l'intero art. 2 è dedicato alla disciplina di illecito e frode sportiva); per gli sport individuali si vedano in particolare il *Regolamento di Giustizia e Disciplina* della FGI (nel quale l'art. 4 disciplina l'illecito sportivo, mentre la frode sportiva è normata dall'art. 35); il *Regolamento di Giustizia Sportiva 2016* della FIN (l'art. 18 disciplina l'illecito sportivo, l'art.19 la frode sportiva); il *Regolamento di Giustizia sportiva federale 2016* della FCI, nel quale l'art.3 disciplina l'illecito sportivo, mentre l'art.4 norma la frode sportiva.

[8] Per gli sport di squadra vanno in tal senso le disposizioni del *Codice di Giustizia Sportivo* della FIGC, il cui art. 7 disciplina l'illecito sportivo, senza far menzione della frode sportiva; per gli sport individuali si veda il *Regolamento di Giustizia* della FIDAL, che nelle definizioni poste all'art. 2, co. 2, cita unicamente l'illecito sportivo, senza far menzione alcuna della frode sportiva.

[9] È emblematico il caso della FISI, il cui *Regolamento di giustizia*, pur disciplinando le norme procedurali e processuali, non dispone alcunché in materia di illecito e/o frode sportiva.

[10] Restando ai regolamenti citati, si rimanda in particolare all'art. 19 del *Regolamento di Giustizia Sportiva 2016* della FIN.

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zione significativamente più ristretta che, per esempio, finisce per distinguere la frode sportiva dal *doping* e dall'illecito sportivo[11].

Una pluralità, infine, di modalità sanzionatorie disposte dalle singole Federazioni: una pluralità di modalità sanzionatorie sia per quanto riguarda i soggetti sanzionabili[12], sia per quanto concerne le sanzioni previste[13].

3.2. Per quanto riguarda gli ordinamenti di natura pubblicistica, in via preliminare sembra importante sottolineare come la frode spor-

[11] Ordinariamente questo accade per quei regolamenti di giustizia che disciplinano specificamente la frode sportiva: a titolo esemplificativo, tornando ad uno dei regolamenti già citati, la frode sportiva è integrata nelle ipotesi di cui all'art. 35 del *Regolamento di Giustizia e Disciplina* della FGI («1. Ogni azione fraudolenta, tendente ad eludere, mediante false attestazioni documentazione sull'età ed i requisiti personali, la violazione di norme che regolano il tesseramento degli atleti circa la cittadinanza o altra condizione personale, nonché la violazione norme per la partecipazione a Campionati ed altre manifestazioni ufficiali di categoria, ovvero l'assunzione di incarichi federali, costituisce frode sportiva, […]. 2. Integrano ipotesi di frode sportiva tutte le infrazioni previste ex legge 401/89»); mentre si ha illecito sportivo nelle ipotesi di cui all'art. 4 («1. Rispondono di illecito sportivo le società, i loro dirigenti, i soci e i tesserati in genere, i quali pongano in essere personalmente o a mezzo di terzi, anche non tesserati, atti diretti ad alterare lo svolgimento o il risultato di qualsiasi attività tecnica agonistica federale, ovvero ad assicurare a chiunque un ingiusto vantaggio, nonché ad eludere norme statutarie o regolamentari»).

[12] Appare importante osservare in proposito come i regolamenti sportivi si mostrino criptici nelle disposizioni, potendosi arrivare spesso ad individuare i soggetti incolpabili solo dopo un'interpretazione spesso svolta in via deduttiva. Ciò premesso, quando la frode sportiva è disciplinata specificamente, i soggetti sanzionabili possono essere ordinariamente tanto gli atleti tesserati, quanto i dirigenti delle società, quanto le società sportive stesse. Più in particolare, la FGI prevede espressamente la punibilità di tesserati e società, mentre il regolamento della FCI non dichiara espressamente chi sia perseguibile, ma potrebbe desumersi in via analogica che i soggetti perseguibili siano «gli affiliati, i soci degli affiliati, i dirigenti, gli atleti, i tecnici, i giudici di gara, collaboratori e ogni altro soggetto tesserato che svolge attività federale», considerato l'obbligo di informare, sancito *ex* art. 1, co.11, gli organi preposti nel caso si abbia notizia «che sia stato compiuto o stia per compiersi un illecito sportivo od una frode sportiva». La FIP sanziona tanto i tesserati (si presume gli atleti), quanto le società sportive, per responsabilità oggettiva.

[13] Per quanto concerne le sanzioni, invece, le disposizioni dei regolamenti di giustizia sono piuttosto esplicite, prevedendo quasi tutte come pena massima la radiazione (la FIPAV e la FCI in questo caso costituiscono quasi un'eccezione prevedendo, rispettivamente, una pena massima per i tesserati di 2 e 3 anni di inibizione), disponendo, però, in maniera piuttosto varia la grandezza della sanzione inibitoria minima (30 giorni per la FCI; 3 mesi per la FIPAV; 6 mesi per la FGI; 3 anni la FIP).

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tiva sia essenzialmente indifferente per gli stessi: appare ben difficile sostenere che la tutela del corretto svolgimento della competizione possa essere considerato interesse meritevole di tutela da parte dello Stato. Quale la motivazione per statuire la tutela di un bene che dovrebbe ricadere nella sfera privata dei cittadini?

In realtà, l'interesse degli Stati nei confronti della frode sportiva nasce proprio dalla constatazione dell'intreccio fra gli interessi della criminalità organizzata ed il mondo delle competizioni sportive[14]: al riguardo appare importante sottolineare il ruolo pionieristico dell'Italia, che con l'emanazione della legge 401/89 ha aperto la via alla disciplina della frode sportiva da parte degli Stati. Si può affermare, senza timore di essere smentiti, che molte delle legislazioni statali successive siano un calco della disciplina posta in essere dall'Italia[15].

Una disciplina che sembra proiettare la propria influenza anche sulla Convenzione del Consiglio d'Europa sulla manipolazione di

[14] La genesi della legge 401/89 è una conferma di quanto appena detto: si ricorda in proposito come la disciplina della frode sia nata, infatti, dalla scoperta dell'esistenza di una forma alternativa al Totocalcio (allora sotto diretta gestione dei Monopoli di Stato), il c.d. Toto-nero, gestita dalla camorra. In tal caso, l'interesse dello Stato ad intervenire in materia era piuttosto evidente, poiché i proventi del Totocalcio erano poi utilizzati dallo Stato per finanziare il sistema nazionale sportivo: un interesse che emergeva, per altro, dall'intitolazione della legge (Interventi nel settore del giuoco e delle scommesse clandestini e tutela della correttezza nello svolgimento di manifestazioni sportive), dalla restrizione dell'ambito applicativo della fattispecie penale alle competizioni sportive organizzate dal CONI, dall'UNIRE o altri enti riconducibili ai predetti enti (art. 1, co. 1), nonché dalla previsione di un'aggravante nel caso in cui il risultato della competizione fosse influente «ai fini dello svolgimento di concorsi pronostici e scommesse regolarmente esercitati» (art. 1, co.3).

[15] A mero titolo esemplificativo, la Francia punisce la frode sportiva, *ex* art. 445-1-1 del codice penale, per cui «Les peines prévues à l'article 445-1 sont applicables à toute personne qui promet ou offre, sans droit, à tout moment, directement ou indirectement, des présents, des dons ou des avantages quelconques, pour lui-même ou pour autrui, à un acteur d'une manifestation sportive donnant lieu à des paris sportifs, pour que ce dernier accomplisse ou s'abstienne d'accomplir, ou parce qu'il a accompli ou s'est abstenu d'accomplir, un acte modifiant le déroulement normal et équitable de cette manifestation». La Spagna sanziona penalmente la frode sportiva ai sensi dell'art. 286 bis, co.4, per cui «Lo dispuesto en este artículo será aplicable, en sus respectivos casos, a los directivos, administradores, empleados o colaboradores de una entidad deportiva, cualquiera que sea la forma jurídica de ésta, así como a los deportistas, árbitros o jueces, respecto de aquellas conductas que tengan por finalidad predeterminar o alterar de manera deliberada y fraudulenta el resultado de una prueba, encuentro o competición deportiva de especial relevancia económica o deportiva».

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competizioni sportive[16], la cui definizione di manipolazione della competizione[17] è esattamente il calco della definizione posta art. 1, co. 1, della legge italiana, per cui la frode sportiva si ritiene integrata da «chiunque offre o promette denaro o altra utilità o vantaggio a taluno dei partecipanti ad una competizione sportiva organizzata dalle federazioni riconosciute dal Comitato olimpico nazionale italiano (CONI), dall'Unione italiana per l'incremento delle razze equine (UNIRE) o da altri enti sportivi riconosciuti dallo Stato e dalle associazioni ad essi aderenti, al fine di raggiungere un risultato diverso da quello conseguente al corretto e leale svolgimento della competizione, ovvero compie altri atti fraudolenti volti al medesimo scopo».

Stante la norma, sostanzialmente ripresa da altre legislazioni nazionali e dalla Convenzione europea, la frode sportiva si configura come fattispecie di mera condotta[18], come reato a consumazione anticipata[19]: nella disposizione non è affatto contemplato che l'offerta o

[16] La Convenzione sulla manipolazione di competizioni sportive (CM (2014)20, CETS n. 215) è stata adottata dal Comitato dei Ministri, nel corso del suo 1205mo meeting il 9 luglio 2014 ed aperta alle firme e ratifiche il 18 settembre 2015, in occasione della 13ma Conferenza dei ministri dello sport del Consiglio d'Europa, tenutosi a Magglingen. La Convenzione entrerà in vigore dopo 5 ratifiche, che includano almeno 3 stati membri del COE. Alla data del 1 ottobre 2017 si hanno 31 Stati firmatari, dei quali solo 3 hanno ratificato (Norvegia, Portogallo ed Ucraina).

[17] «*Manipulation of sports competitions* means an intentional arrangement, act or omission aimed at an improper alteration of the result or the course of a sports competition in order to remove all or part of the unpredictable nature of the aforementioned sports competition with a view to obtaining an undue advantage for oneself or for others».

[18] Sul punto, Traversi ha commentato che «il delitto in esame, non presupponendo il verificarsi di alcun evento lesivo, si configura quindi come reato di pura condotta, assimilabile a quello di "istigazione alla corruzione" previsto dall'art. 322 cod. pen. sul cui modello sembra conformato» (A. Traversi, *Diritto penale dello sport*, Milano, 2001, p. 74).

[19] In proposito è stato argomentato che, «ai fini della consumazione del reato, è sufficiente la semplice offerta o promessa di un vantaggio, fatta al partecipante di una competizione sportiva. Non è richiesto che l'offerta venga accettata o la promessa accolta (fattispecie che integra gli estremi del reato previsto dal secondo comma), né tantomeno che il risultato della gara risulti alterato. La frode sportiva, in sostanza, è un delitto di mera condotta, a consumazione anticipata, che si perfeziona con il compimento della azione indicata, indipendentemente dal verificarsi dell'evento dannoso rappresentato dalla alterazione del risultato della competizione sportiva» (T. Ianniello, *Frode sportiva e rapporti con il delitto di truffa previsto dal codice penale*, in Aa. Vv., *Diritto dello sport. Profili penali*, a cura di A. Guardamagna, Torino, 2009, p. 61).

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la promessa vadano a buon fine o che il destinatario accetti, essendo semplicemente rilevante l'atto del promettere e dell'offrire[20].

Un reato di pericolo che si configura, infine, come reato comune, seguendo quel chiunque che non esclude alcuno dalla possibile incriminazione[21].

4. Stante il quadro normativo appena delineato, si potrebbe concludere che la frode sportiva sia fattispecie iper-normata: accanto alle disposizioni degli ordinamenti sportivi si ha, infatti, la disciplina dei singoli Stati, alle quali si possono aggiungere norme sovranazionali (almeno per quegli Stati che ad oggi hanno ratificato la Convenzione europea sulla manipolazione di competizioni sportive).

Una copertura normativa della fattispecie niente affatto soddisfacente, presentando criticità in parte dovute alla natura degli ordinamenti disciplinanti, in parte alla disciplina posta in essere.

4.1. Per quanto concerne la disciplina posta in essere dagli ordinamenti sportivi, emergono criticità giuridiche attinenti l'oggettivazione stessa della frode sportiva: criticità che derivano, probabilmente, da una ragione di ordine teoretico, dovuta alla difficoltà di specificazione della fattispecie, una volta che si decida di andare un po' oltre della generica definizione, per cui la frode sarebbe integrata ogni qual-

[20] Al riguardo Traversi ha osservato che «per la sussistenza del reato è sufficiente che l'offerta o la promessa corruttiva vengano portate a conoscenza del partecipante. Non è invece richiesto né che l'offerta venga accettata o la promessa accolta, né tantomeno che il risultato della competizione risulti in alcun modo alterato» (A. Traversi, *Diritto penale dello sport*, cit., p. 74). In questo senso si vedano anche Vidiri, il quale annota che «in ogni caso, non è necessario che il requisito dell'accettazione per la realizzazione del delitto *de quo*, essendo sufficiente la semplice conoscenza nel "partecipante" della formulazione della proposta corruttrice» (G. Vidiri, *Frode sportiva e repressione del giuoco delle scommesse clandestine (Legge 13 dicembre 1989, n. 401)*, in *Giustizia Penale*, 1992, II, c. 650); e Lamberti, il quale conviene sul punto osservando che «non è naturalmente necessario il requisito dell'accettazione per la consumazione del delitto 'de quo' in riferimento specifico al 1° comma, essendo sufficiente la semplice conoscenza nel 'partecipante' della formulazione dell'offerta o della promessa» (A. Lamberti, *La frode sportiva*, Napoli, 1990, p. 210).

[21] In tal senso si veda A. Meyer, *Sport (dir. pen.)*, in *Dig. Disc. Pen., XIII,* Torino, 1990, p. 580.

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volta l'equilibrio competitivo sia alterato in una maniera occulta e dissimulata.

Ci si domanda, così, se l'attenzione dovrebbe concentrarsi sul risultato finale, oppure sullo svolgimento della competizione nel suo complesso: può essere considerata frode sportiva la combinazione del risultato a metà del confronto, senza influenzarne la continuazione? Può essere considerata frode sportiva accordarsi sul tempo della prima violazione delle regole?

Sempre restando nell'ambito della disciplina posta in essere dagli ordinamenti giuridici sportivi, ulteriori profili di criticità sorgono non appena si consideri la perseguibilità dei soggetti coinvolti. Secondo quanto già accennato, la frode sportiva, al contrario del *doping*, registra sì il necessario coinvolgimento dei partecipanti alla competizione sportiva, ma anche di soggetti estranei all'ordinamento sportivo, che spesso ne sono i veri istigatori, in vista del perseguimento di interessi propri, spesso illeciti[22].

In proposito, gli ordinamenti sportivi, quand'anche avessero definito in maniera specifica la frode sportiva, conferendo autonoma esistenza alla fattispecie, predisponendo anche previsioni sanzionatorie puntuali e severe, manifestano una difettività essenziale, poiché estendono la propria competenza unicamente su quanti appartengano in maniera strutturale ad essi[23].

[22] La preoccupazione del coinvolgimento della criminalità organizzata emerge con chiarezza dal Preambolo della Convenzione europea, laddove si ribadisce la preoccupazione circa il coinvolgimento della criminalità organizzata negli episodi di manipolazione dei risultati sportivi («Expressing concern about the involvement of criminal activities, and in particular organised crime in the manipulation of sports competitions and about its transnational nature»).

[23] In questo caso emerge in tutta evidenza una criticità propria *dell'ordinamento* sportivo, il quale appare limitato e, allo stesso tempo, assoluto. Si ha, infatti, una limitazione che agisce sia *ratione subiecti* (in quanto la regolazione normativa ha efficacia solo su quanti sono riconosciuti e si riconoscono parte dell'ordinamento giuridico sportivo) sia *ratione materiae* (essendo escluse per carenza di competenza la disciplina e, soprattutto, la salvaguardia di beni e/o interessi, che risultino eccentrici rispetto il *focus* dell'ordinamento giuridico sportivo, che si costituisce per la regolazione delle competizioni). Per contro, si ha anche una competenza disciplinare assoluta nei confronti di quei soggetti, che sono riconosciuti parte dell'ordinamento sportivo, per quanto di competenza del diritto sportivo, così che non è raro trovare previsioni punitive molto severe che possono giungere fino alla previsione della radiazione, con cui l'esistenza delle persone cui tale sanzione è destinata viene cancellata. Si tratta di una competenza assoluta che è eviden-

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Di qui una sorta di sovranità dimezzata, che fa sì che l'ordinamento sportivo sia spesso deprivato della possibilità di perseguire pienamente tutti i responsabili, non potendo agire nei confronti di quanto sono spesso i reali istigatori della fattispecie in questione[24].

Una difettività che ha riflessi anche sulle possibilità di indagine degli organi giudiziari sportivi che, sempre in ragione della natura convenzionale dell'ordinamento sportivo, non possono acquisire evidenze se non tramite resoconti testimoniali e/o risultanze probatorie di derivazione extra-ordinamentale (prove acquisite nel corso di indagini di organi giudiziari statali), la cui confutazione è di fatto resa impossibile, data l'origine[25].

ziata anche dall'esistenza del c.d. "vincolo di giustizia", che impone l'obbligo di accettare e rispettare la disciplina posta in essere dalle Federazioni e dal conseguente obbligo di adire gli organi di giustizia interni a ciascuna federazione o disciplina associata, per la tutela dei loro diritti e per la risoluzione di tutte le controversie insorte tra soci, tra associazione e soci, o tra soci ed organi federali, attinenti allo svolgimento dell'attività sportiva, con esclusione di ogni altra giurisdizione in materia, sottraendo alla competenza del giudice statale una grande quantità di controversie. A questa competenza disciplinare assoluta fa da contraltare la difettività che si origina nella natura convenzionale degli ordinamenti giuridici: le persone aderiscono volontariamente agli ordinamenti giuridici sportivi, le cui regolamentazioni hanno effetto solo su chi è riconosciuto e si riconosce parte dell'ordinamento giuridico sportivo. Sul punto Foster, delineando i tratti distintivi di una *global sports law*, ha affermato che «Its chief characteristics are first that it is a contractual order, with its binding force coming from agreements to submit to the authority and jurisdiction of international sporting federations, and second that it is not governed by national legal systems» [K. Foster, *Is there a Global Sports Law?*, in R.C.R. Siekmann, J Soek (eds.), Lex Sportiva*: What is Sports Law?*, The Hague, 2012, p. 37].

[24] Una consapevolezza della incompetenza della giustizia sportiva a perseguire i correi non appartenenti all'ordinamento sportivo emerge comunque dalle disposizioni di alcuni regolamenti sportivi che ne prevedono comunque la perseguibilità (in tal senso si veda a titolo esemplificativo l'art. 1, co. 11, del *Regolamento di Giustizia sportiva federale 2016* della FCI, ove si stabilisce che «è sancita la punibilità di coloro che abbiano perso la qualifica di tesserati, nel corso di un procedimento disciplinare avviato nei loro confronti, per fatti commessi in costanza di tesseramento, e si siano resi responsabili della violazione dello Statuto, delle norme federali o di altra disposizione normativa o regolamentare. A tali soggetti, qualora sanzionati, sarà applicato il provvedimento della inibizione a rivestire in futuro cariche o incarichi nell'ambito delle attività federali e/o societarie, ovvero di proibizione a prendere parte a manifestazioni e/o eventi sportivi organizzati nell'ambito dell'attività della FCI, con la contestuale proibizione di frequentare impianti sportivi e la zona neutra destinata ad atleti e personale addetto, fino ad eventuale revoca per riabilitazione». Quale efficacia possano avere tali disposizioni è tutto ancóra da verificare.

[25] Circa l'intrinseca debolezza del sistema di acquisizione delle prove nel procedimento

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4.2. Anche la disciplina giuridica della frode sportiva approntata dagli ordinamenti di natura pubblicistica delinea un quadro ricco di chiaroscuri.

In primo luogo, sembra importante annotare, tuttavia, come detta disciplina non presenti quella difettività essenziale della sovranità che, invece, contraddistingue gli ordinamenti sportivi: per quanto concerne l'Italia e quegli Stati che ne hanno mutuato la definizione *ex* art. 1, co. 1, della legge 401/89, il delinearsi della frode sportiva come reato comune evita che si presentino quei vuoti di competenza che lasciano il sapore amaro di una giustizia dimezzata.

Accanto a ciò emergono tuttavia alcune criticità giuridiche degne di essere evidenziate. In particolare, va segnalato come la delineazione della fattispecie come reato di mera condotta spinga il diritto degli Stati verso un'eticità normativa che mal si concilia con quella separazione fra diritto e morale che contraddistingue il diritto nell'età contemporanea, in ossequio all'ideale illuminista che ne costituisce il fondamento[26].

Non solo, sanzionare la frode sportiva come fattispecie rilevante per il diritto di natura pubblicistica implica affermare un interesse dello Stato a che le competizioni sportive si svolgano in maniera corretta. Ci si domanda quale sia la *ratio* dell'inclusione nell'ambito dell'interesse dello Stato di qualcosa che, invece, sembra essere essenzialmente appartenere alla sfera privata dei cittadini, considerandone la natura intrinsecamente innecessaria[27].

sportivo, dovuta alla natura convenzionale dell'ordinamento in cui si colloca, basti solo pensare, per un verso, all'impossibilità di verificare la veridicità della deposizione se non tramite altri riscontri testimoniali concordanti o il ricorso a materiale probatorio proveniente da processi statali (in Italia è disposta l'osmosi del materiale probatorio fra i due ordinamenti, sia pure con alcune limitazioni): materiale probatorio, la cui attendibilità è data, non potendosi procedere ad alcuna verifica da parte degli organi giudiziari sportivi.

[26] Non è questo il luogo per delineare il rapporto fra diritto e morale, così come si è venuto configurando nel diritto a partire dall'Illuminismo giuridico in poi. Qui basti solo ricordare come si tratti di un dogma del positivismo giuridico non più messo in discussione. In proposito Kelsen ha affermato che «la purezza metodologica della scienza giuridica è quindi minacciata non soltanto dal fatto che non tiene conto dei limiti che separano la scienza del diritto da quella della natura, ma soprattutto dal fatto che non la si distingue affatto dall'etica o la si distingue senza sufficiente chiarezza, cioè dal fatto che non si ha chiara distinzione fra diritto e morale» [H. Kelsen, *La dottrina pura del diritto* (1960), Torino, 1966, p. 74].

[27] In proposito, Luca Di Nella sostiene che «l'ambito da cui deve prendere l'inda-

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Si tratta di una criticità che si ritiene persistere anche in presenza di una connotazione dello sport, rintracciabile nei documenti normativi dell'UE, come attività avente rilevanza sociale sia per l'essere strumento atto a contrastare patologie e comportamenti devianti ed a favorire processi di integrazione a vari livelli, sia per l'essere peculiare strumento pedagogico, particolarmente nell'educazione ai valori della cittadinanza e della coesistenza sociale[28]. Quale l'interesse tutelato da una disciplina pubblica del corretto svolgimento della competizione?

Una criticità questa che appare mitigata, tanto nella Convenzione europea quanto nelle disposizioni legislative nazionali (almeno quella italiana), da una restrizione dell'ambito di competenza della disciplina

gine sull'attività sportiva è quello del giuoco. Dal punto di vista fenomenologico, lo sport si presenta empiricamente come un sistema di comportamenti umani collegati tra loro dall'dea fondamentale del giuoco ed aventi come fine comune il giuoco stesso, ossia il soddisfacimento di quello che, nel relativo modello di comportamento, costituisce il bisogno che è alla base dello stimolo ludico» (L. Di Nella, *Lo sport. Profili teorici e metodologici*, in Aa.Vv., *Manuale di diritto dello sport*, a cura di L. Di Nella, Napoli, 2010, p. 14). In tale direzione va anche la definizione proposta da Brian Rodgers, il quale ha affermato che «ideally, all the four following elements are present in a sport, and the first two are always present. Any sport involves physical activity, it is practised for a recreational purpose, there is an element of competition and a framework of institutional organization» (B. Rodgers, *Rationalising Sports Policies: Sport in its Social Context*, Council of Europe, Strasbourg, 1977).

[28] È importante ricordare come lo sport sia entrato espressamente fra gli ambiti di competenza dell'UE, con l'entrata in vigore del TFUE, nella versione consolidata dopo il Trattato di Lisbona. In particolare, all'art. 165 si dispone che «l'Unione contribuisce alla promozione dei profili europei dello sport, tenendo conto delle sue specificità, delle sue strutture fondate sul volontariato e della sua *funzione sociale ed educativa*» (pt. 1, co.2). Una funzione sociale ed educativa che è meglio tratteggiata dal *Libro bianco sullo sport* (COM(2007) 391) nel quale si precisa che lo sport «offre ai giovani possibilità interessanti di impegno e partecipazione alla società, e può aiutarli a rimanere lontani dal crimine» (pt. 2.4). Non solo, ma «lo sport contribuisce in modo significativo alla coesione economica e sociale e a una società più integrata. Tutti i componenti della società dovrebbero avere accesso allo sport: occorre pertanto tener conto delle esigenze specifiche e della situazione dei gruppi meno rappresentati, nonché del ruolo particolare che lo sport può avere per i giovani, le persone con disabilità e quanti provengono da contesti sfavoriti. Lo sport può anche facilitare l'integrazione nella società dei migranti e delle persone d'origine straniera, e sostenere il dialogo interculturale. Lo sport promuove un senso comune di appartenenza e partecipazione e può quindi essere anche un importante strumento d'integrazione degli immigrati. […] Lo sport promuove un senso comune di appartenenza e partecipazione e può quindi essere anche un importante strumento d'integrazione degli immigrati» (pt. 2.5).

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a taluni tipi di competizione sportiva (ossia quelle organizzate da una serie di associazioni meglio specificate)[29]: ciò sembra indicare che non è il corretto svolgimento della competizione in sé ad essere oggetto di tutela, quanto quello di alcune competizioni (magari quelle oggetto di scommesse o giochi a pronostico)[30].

A queste criticità si aggiungono le perplessità emergenti dalla configurazione della fattispecie come reato di mera condotta, sempre a livello europeo che nazionale, dando rilievo giuridico all'intenzione di alterare il corso della competizione. Se questo non sembra sollevare particolari questioni nell'ambito degli ordinamenti sportivi, una volta passati sul piano degli ordinamenti pubblicistici, con ciò non si rischia di scivolare verso un diritto del sospetto? Ed ancóra, come si prova l'intento? A che punto del suo costituirsi acquista rilievo giuridico?

5. Tornando all'interrogativo insito nel titolo, ossia quale sia il diritto applicabile per la frode sportiva, da queste brevi considerazioni è emerso come la frode sportiva sia soggetta alla disciplina di almeno due tipi disciplina giuridica, ossia quello degli ordinamenti sportivi e quello degli ordinamenti giuridici di natura pubblicistica (almeno per quegli Stati che ritengono giuridicamente rilevante la frode sportiva).

Si è visto, inoltre, come la frode sportiva sia ordinariamente sanzionata piuttosto severamente dagli ordinamenti sportivi, sia pure con una molteplicità di definizioni e comminazione di sanzioni.

Una pluralità di definizioni e sanzioni che fanno emergere, oltre a quelle già evidenziate, criticità giuridiche attinenti la coerenza politica delle organizzazioni sportive nel perseguire la frode sportiva: la

[29] Oltre alla già citata restrizione della competenza della legge italiana, la Convenzione europea restringe l'ambito di applicazione delle proprie disposizioni, stabilendo che «*Sports competition* means any sport event organised in accordance with the rules set by a sports organisation listed by the Convention Follow-up Committee in accordance with Article 31.2, and recognised by an international sports organisation, or, where appropriate, another competent sports organisation» (art. 3 – *Definitions*, co.1).

[30] A conferma di ciò basti ricordare come la legge italiana sia stata emanata sulla scorta dell'emersione di scommesse parallele sulle partite di calcio, gestite dalla criminalità organizzata: un giro parallelo di scommesse il cui contrasto ha pienamente giustificato l'intervento legislativo, ricordando come queste arrecassero un vulnus alla gestione statale dei giochi a pronostico allora diffusi (Totocalcio e Totip), i cui proventi, fra le altre cose, erano utilizzati a finanziare il CONI e le attività sportive in genere.

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diversità di approcci, definizioni e sanzioni della frode sportiva non favoriscono certo un'efficacia delle politiche di contrasto del fenomeno. Ci si domanda se non sia più funzionale percorrere la medesima via intrapresa per il contrasto della diffusione del *doping*, ossia la creazione di un'agenzia mondiale preposta allo scopo, che provveda anche all'emanazione di un codice mondiale contro la frode nello sport.

Per quanto riguarda la disciplina posta in essere dagli ordinamenti di natura pubblicistica, è stato osservato come questa possa nascondere delle insidie dettate essenzialmente da un possibile scivolamento verso un profilarsi degli ordinamenti stessi in senso etico, con relativo snaturamento del diritto, almeno così si è venuto configurando a partire dall'Illuminismo.

Ciò è dovuto probabilmente al verificarsi di un fenomeno cui si è assistito anche per quanto concerne la disciplina del *doping*, ossia ad un'osmosi fra i due tipi di ordinamento, per cui gli uni hanno fatto proprie le definizioni poste dagli altri, sovente con risultati non sempre ottimali, almeno su un piano di teoria giuridica.

Ciò è dovuto anche alla consapevolezza del coinvolgimento sempre più diffuso della criminalizzata organizzata, che utilizza questi canali per riciclare i proventi delle sue attività illecite: un inserimento che rende la fattispecie un autentico *vulnus* all'integrità dello sport (meglio delle competizioni sportive), un *vulnus* arrecato sul piano strettamente sportivo, ma con addentellati anche sul piano criminale e sociale.

In questo intrecciarsi di piani normativi, in questo intersecarsi di disposizioni, a causa anche di una scarsa coordinazione normativa, si registrano spesso spazi di "impunità", che lasciano in bocca il sapore amaro di una giustizia mancata.

Ci si domanda, allora, quando si avrà il coraggio di uscire da tentativi giustizialisti per accedere, invece, ad una disciplina della frode sportiva che finalmente trovi soluzioni credibili per ciascuno dei due tipi di ordinamento.

Anna Di Giandomenico

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*Abstract*

La frode sportiva è illecito sportivo che condivide alcuni elementi costitutivi con il *doping*. Entrambi mirano ad alterare l'equilibrio competitivo e la conseguente incertezza dell'esito del confronto sportivo; entrambi richiedono il necessario coinvolgimento dei partecipanti alla competizione. La frode sportiva è illecito sportivo che si differenzia, tuttavia, dal *doping* per alcuni tratti distintivi, in quanto richiede la necessaria compartecipazione dei partecipanti alla competizione, lede non tanto alcune soggettività, quanto il principio fondante l'ordinamento sportivo, ossia il corretto svolgimento della competizione. Non solo, nella frode sportiva, oltre al necessario coinvolgimento degli sportivi, si rileva l'ingresso di persone ed interessi del tutto estranei al mondo sportivo, persone ed interessi legati spesso alla criminalità organizzata, che utilizza il mondo sportivo per riciclare i proventi delle proprie attività criminose.

Un coinvolgimento che ha sollecitato l'attenzione non solo del diritto sportivo in senso proprio, ma anche delle legislazioni nazionali, sovranazionali e internazionali, che hanno prodotto una serie di norme, convenzioni e trattati, tesi a contrastare il fenomeno.

All'interno di tale complesso intreccio normativo, emergono alcune criticità giuridiche che sollevano perplessità e difficoltà di applicazione normativa, che hanno reso e rendono tuttora l'azione di contrasto alla frode sportiva spesso inefficace. In tal senso appare emblematico, per quanto riguarda l'ordinamento sportivo, il difetto di sovranità, che lo rende incompetente nei confronti di chi non appartiene al mondo sportivo e lo limita notevolmente nelle possibilità di indagine. Per quanto riguarda la disciplina di natura pubblicistica, invece, emerge la difficoltà di inserire la tutela del corretto svolgimento della competizione sportiva all'interno dell'ambito degli interessi degni di tutela da parte dello Stato; così come appare difficoltoso conciliare i tempi della giustizia dello Stato con quelli necessariamente rapidi della giustizia sportiva.

Il tutto produce una sensazione di sostanziale "ingiustizia", determinando un clima di sospetto che purtroppo sembra inficiare le competizioni sportive, soprattutto quelle di interesse nazionale e/o internazionale.

Sports fraud shares some constituent elements with the hypothesis of doping. Both aim at altering the competitive equilibrium and the consequent uncertainty of the outcome of the sporting comparison; both require the involvement of the participants in the competition. Sports fraud, however, differs from doping for some distinctive traits, such as the involvement of other participants of the competition. It violates the principle of fair competition. Sports fraud is characterized by subjects and interests unrelated to the sports world, often linked to criminal organizations.

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The seriousness of the phenomenon has stimulated a national and international legislation aimed at countering it.

Obviously, the critical aspects of the application of the rules are not lacking. In this sense, the lack of sovereignty, which makes it incompetent to those who do not belong to the sports field, seems emblematic, as far as the sports system is concerned. It is not always easy, therefore, to identify the right remedy for the protection of the correct conduct of the sporting competition.

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# Criminal Law Regulation of Age Fraud of Athletes

SUMMARY: 1. Introduction. – 2. Athlete age fraud and the harm. - 2.1. Athlete age fraud. – 3. The risk of athlete age fraud. - 3.1. Destroy the athletic spirit of fair play. - 3.2 Athletes' Age Fake Creates Crimes. - 3.3. The Age Fake of Athletes Prevents the Sustainable Development of Sports in China. – 4. The Cause of Athlete's Age Fraud. - 4.1. Distorted thoughts. - 4.2. Management System: The Contradiction of management mechanism. - 4.3. Sports Morality: Little binding force. - 4.4. Legal basis: Lack of legal and regulatory constraints. – 5. The Criminal Law Regulation of Athletes Age Fraud and the Path. - 5.1. The type of counterfeiting behaviour of athletes and the standard of criminal law regulation. - 5.1.1. Classification of Age of Counterfeiting Behaviour of Athletes. - 5.1.2. - Criminal law regulates athletes' age counterfeiting. - 5.2. The Specific Path of Regulating Athletes' Age. - 5.2.1. Application of fraud. - 5.2.2- Abuse of power. - 5.2.3. Forged or altered the identity of the resident's identity card. - 5.2.4. Setting up the Crime of False Competitive Sports.

1. Age, identity and other personal information fake events endless, in all areas are involved, the age of cadres fraud, the students in order to enroll in school and the age of fraud and admission when the identity of the phenomenon of fraud we are all heard, and now sports. The field of athletes age fraud is also common. IOC Chairman Jacques Rogge said in July 2011 that «I cannot open any newspaper because of a newspaper that is about fraud in competitive sports competitions». In Germany, Italy, Belgium, Hungary, Turkey, Greece and in China, South Korea, Singapore is the existence of such a phenomenon can be seen that this is a world problem and a very harmful issue. Whether it is high-level professional athletes, or low-level grass-roots athletes are immune. For this incident, most of the current response measures are to the players involved in the industry within the regulatory punishment, and most of the only moral con-

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demnation and short or permanent suspension, fines, it is difficult to effectively curb the occurrence of these acts. As a result, there is an urgent need for legal intervention on the issue, and in particular the need for punitive regulation such as criminal law. There are scholars in India who explicitly require the law to intervene to restrain the athlete's age fraud, and that athletes such behavior is not only contrary to moral behavior, through legal intervention, to their behavior into criminal behavior[1]. And India's three sports alliances, the Indian Weightlifting Federation, the Indian Athletics Federation and all the Indian Football Confederation, have embarked on a fight against the age of the athletes, but also deliberately set up a «national anti-movement age fraud law», April 1, 2010 officially implemented, the law aims to curb the age of athletes' fraud.

2. – 2.1. Guangdong Provincial Sports Bureau in 2009 in its province of nearly 15,000 athletes were bone age shooting test, the test results show that the age of the contestants of more than 3,000 people, the result is staggering. 2010, when the age of less than 16 years old Dong Fangxiao violated the International Federation of sports on the age of the provisions of the athletes[2], resulting in the Chinese gymnastics women's team was deprived of the Sydney Olympic women's bronze medal, the time for our athletes for the first time because of «age door» by international sports Organization to cancel the game results. This event did not follow the end, but has just begun, in addition to Dong Fangxiao in 2010, the Super League in the Shenhua players Feng Renliang also because of age fraud was suspended for three games. February 16, 2011, nine Chinese figure skaters were exposed to participate in the International Slip Youth and adult group figure skating tournament when there are age fraud problems, which involves double slip Zhang Dan, Zhang Hao, hope Star Sui Wenjing, Han Cong and women's singles player Geng Bingwa[3]. This is not

[1] Law to check players' age fraud soon, from *The Times of India* timesofindia.indiatimes.com/sports/more-sports/others/Law-to-check-players-age-fraud-soon/articleshow/5341824.cms.

[2] Guangdong found more than 3,000 athletes age counterfeit class of energy projects up from *www.yznews.com.cn/yznews08/tyxw/2009-03/11/content_2594660.htm 19/2/2017*.

[3] Mi Xiu, *Chinese sports ten age gate: Hua Hua was questioned gymnastics bronze was deprived*ÅCfrom *www.titan24.com 19/2/2017*.

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only in the country caused by an uproar, but also in the international community is also widely concerned, was alerted to the International Olympic Committee President Jacques Rogge, he said that the fight against «age gate» is not soft, as long as the discovery of such incidents, The By the impact of these events, the 2013 World Gymnastics Championships in the process, the age of our gymnasts again by the American gymnastics team openly questioned. In 2015, the Chinese Association of Farmers also received a report on the age fraud of athletes Wang Chenglong in Heilongjiang Province, and finally verified that it would suspend the registration of national athletes and not participate in all the events organized by the China Athletics Association[4].

Athletes 'age gate' is not my own unique chaos, foreign sports industry also exist. In 2006, US Washington citizens thought they pulled 17-year-old talent star Esmailyn and signed a contract of employment, but later learned that in 2009, Esmailyn was actually 21 years old (born in 1985 instead of 1989). In addition, he not only falsified the age, even the name is false, his name is not Esmailyn but Carlos Lugo. And Pitcher Wandy Rodriguez was hired by Houston Astros in 1998. They did not know that he was 19-year-old Wandy, thought he was 17-year-old Eny Cabreja, not knowing that Wandy had convinced a friend to let him borrow his identity, because in the mid-80s, 17-year-old baseball player than 19-year-old athletes Influential.

With the deepening of sports professionalism and the degree of marketization, the moral misconduct and the lack of ethics in the field of sports have distorted and alienated the essential purpose of sports, and the «fair competition» of the core of sports moral principle has been discredited and damaged internationally the image of Chinese sports. This kind of negative deviation from the sports ethics is the betrayal of the athletes and the blasphemy of the sports spirit, which seriously violates the original intention of the development of competitive sports.

[4] Qi Yue, *Athlete Wang Chenglong by the masses reported that the age of fraud by the Association for punishment*ÅCfrom *http://www.chinanews.com/ty/2015/03-25/7158525.shtml.*

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3. – 3.1. Athletes age fraud as China and the global sports circle of the 'hidden rules' to challenge the fair competitive rules, a serious violation of the fair sports spirit. At present, the national sports have age standards and restrictions to ensure fair play, and age fraud destroyed the fairness of sports. If an older athlete goes a few years later to a younger game, the result will be no suspense. Of course, in some projects, the age of the existence of competitive advantage, and fraud as old age, the same results can not truly reflect the level of athletes. By changing the age of people to change the rules of fair competition, the consequences could be disastrous. More importantly, the age of fake athletes in the good results after the game, not only will not be punished, but will be rewarded, which for those who do not have age fraud, is a huge impact. This may make them psychologically unbalanced and induce them to also try age fake. This is a serious consequence of the age of fraud has become the entire field of sports 'hidden rules, so that the rules of fair competition should be lost.

3.2. If the age of the athletes is not effectively curbed, it will inevitably cause the alienation of the values of competitive sports, and the values of sports are closely linked with the social values. Positive sports values will of course promote positive social values, and this negative sports values It will have a very negative impact on social atmosphere, and even worsen the social atmosphere, misleading the public in the course of life also choose to fraud, and cause social confusion. And the behavior of athletes age fraud highlights the people involved in the material interests of the malformed values, the social environment caused serious harm. This false age that does not conform to ethical morality poses a threat and damage to social resources and jeopardizes the social environment.

3.3. The age of fake athletes is a serious violation of the athletic spirit of sports, to a large extent to break the principle of fairness of sports and the principle of harmony. Athletes age fraud will inevitably produce false results, so that can not accurately reflect the level of competitive sports in China. The unfair competition of athletes' age fraud will also counter the enthusiasm of athletes who are actively working hard, causing the talent to compete and the waste of talent,

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and the real talents are buried, thus hindering the real 'fresh blood' inflows our athletic sports team[5]. This phenomenon is also easy in the training of quick success, Destructive Enthusiasm, seeking immediate interests, contrary to the training rules, etc., strangled some very promising reserve talent, contrary to the principles of sustainable sports.

4. – 4.1. Utilitarianism, that is, efficiencyism, is a philosophy of ethics in a theory. Advocate the pursuit of 'greatest happiness'. Under utilitarianism, advocates should do what can be 'best attained'. The so-called maximum good calculation must depend on the sum of the senses of each individual involved in the act, in which each individual is treated for the same weight, and happiness and pain can be converted, the pain is only 'negative happiness'. Different from the general ethical doctrine, utilitarianism does not take into account the motives and means of a person's behavior, considering only the effect of an act on the greatest happiness value. Can increase the maximum happiness value is good; the contrary is evil. Bentham put forward the utilitarian principle on the basis of utilitarianism, which is based on the tendency to increase or reduce the happiness of the stakeholders, that is, to promote or hinder the tendency of such happiness to agree or not any action[6].

Competitive sports 'competitive' word, highlighting the characteristics of such sports, competitive sports is the overall development of the body, to maximize the mining and play people (individuals or groups) in physical, psychological, intellectual and other aspects of the potential Based on the movement of climbing technology and the creation of excellent athletic performance as the main purpose of a movement of the process. Competitive sports is an institutionalized and systematic competitive sports. Its main features are competitive and technical, display (performance) and entertainment, the inevitable pursuit of higher, faster, stronger, do their best to get the best results, especially in the gold medal and the temptation of huge bonuses.

[5] Huaxun Lan, *An Analysis of the Age False Phenomenon of Chinese Athletes*, in *Journal of Sports Culture*, 9, 2011.

[6] J. Bentham, *On the Principles of Morality and Legislation*, Business Publishing House, 2000.

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Some athletes are fooled by the qualifications of the managers, coaches, or even instigated, and are not limited to the eligibility of the entry, in order to qualify for the entry, and to achieve the best results. And unscrupulous falsification of age, tampering with occupation, impostor, and even forfeiture of origin and other corrupt practices are in the eligibility of fraud. And according to the relevant scholars found that the field of sports and local government assessment of the next level of the sports sector are generally based on athletes to obtain the results of the game to be reward and punishment, which makes the sports sector leaders and coaches to the athlete's performance as a personal. Secondly, athletes can also get a lot of special incentives and preferential policies from their game results, for example, their excellent results can contribute to the entire team and reward, especially in the game, in order to give their own salaries to political capital and unscrupulous; like the Olympic Games such an international competition, as long as a war fame, must be everything[7]. They are fully consistent with the performance of utilitarian, utilitarian principle of the relevant content. Therefore, we believe that the reason for the emergence of such chaos is mainly based on the proliferation of utilitarianism in competitive sports, which leads to coaches and athletes, for the best interests, driven by various interests prone to moral consciousness of the situation, thus So that athletes, coaches produce age fake ideas, and recklessly implemented.

4.2. China's current sports management system based on China's most basic administrative system derived from the pattern is mainly fragmented, hierarchical management. From the General Administration of Sport to the provinces, municipalities and districts (county) Sports Bureau is the implementation of the level of business guidance, sports bureaus at all levels also need to be responsible for its people's government at the same level, the General Administration of Sport is on behalf of the national interests, on behalf of the country to exercise the appropriate management Rights, local governments at all levels of the interests of the country and sometimes there will be differences in the interests of the country, which is contradictory

[7] Guoqing Deng, *On the False Age of Athletes*, in *Journal of Hubei Radio & TV University*, 5, 2013.

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derived places, leading to the following general sports bureau at all levels of sports out of a dilemma. In this contradiction, the local sports bureau management options tend to local government, mainly because their funds are allocated by the local government, the leadership of the Sports Bureau is also determined by the local government decision, the performance appraisal is also by the local government carry out. Therefore, to weigh the pros and cons, they must first consider the interests of the local government, and secondly to take into account the interests of the country, which led to the emergence of government fraud, so that the original cannot change the age of the local government to come forward, the public security organs It had to be neglected[8].

4.3. As the legal intervention in the field of sports content less, the current competitive sports is mainly related to the rules of the game, sports organizations, internal rules, rules of discipline and sports ethics to be bound. We all know that the relationship between law and morality is always closely linked, and there are differences, the moral constraints are far less powerful than the law play a regulatory role. Sports ethics is a category of morality, which mainly involves the athletes, coaches and sports management departments of the three aspects of moral behavior constraints, due to the existing sports organizations within the rules and rules of the rules of the athletes age fraud is not perfect, it will fully reflect the weak nature of sports moral constraints, in the case of organic can be involved in most of the personnel will have utilitarian mentality and ignore the physical constraints of sports morals, and ultimately the emergence of the phenomenon of age fake athletes.

4.4. The development of competitive sports has been so long, but there are many legislative gaps and legal deficiencies in many aspects of the field. Most of the competitive sports disputes are to rely on the rules of discipline within the sports to be punished, the athletes age is no exception, from the above a lot of chaos punishment results can be seen that these sports organizations within the rules of

[8] Deng Guoqing, *On the False Age of Athletes*, in *Journal of Hubei Radio & TV University*, 5, 2013.

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discipline punishment is too insignificant, some age fraud Athletes are only subject to a month or three months of punishment, this punishment means that a month, three months after their fake behavior was natural acquiescence, and can not play a containment and disciplinary role. As Bentham said: «The value of punishment in any case, are not less than enough to exceed the value of the proceeds of the crime, if less than, then the crime will certainly commit, even if there is punishment worth: the whole punishment will pay the flow, Completely invalid». The relevant laws of the country, although there is a special 'Sports Law'[9], but since the promulgation of the Ministry of Law since 1995, basically no major changes to improve, in 2009 revised the deletion of the 'Sports Law' Article 47[10]. The most recent revision was in 2016, when it was removed from Article 32[11], although this is also the performance of advancing with the times, but for sports and other violations of sports have not been specified in detail. In addition, other relevant laws and regulations in China, there are very few violations of competitive sports violations, especially for the age of athletes fraud does not have any laws and regulations have specific provisions and explanations, whether it is law and order The Law of the People's Republic of China on the Law of the People's Republic of China, the Law on the Administration of Punishment, the Law on Tort Liability, or the Criminal Law, The provisions of the «alteration, forgery of the file, the competent authorities at or above the county level directly responsible person in charge or other directly responsible persons to give administrative sanctions, constitute a crime, shall be held criminally responsible», but did not mention 'constitute a crime' And the legal provisions of

[9] J. Bentham, *On the Principles of Morality and Legislation*, cit.

[10] The 10th meeting of the Standing Committee of the 11th National People's Congress passed the Decision of the Standing Committee of the National People's Congress on Amending the Law on August 27, 2009, and deleted Article 47 of the Sports Law of the People's Republic of China: «Sports equipment and supplies for national and international sports competitions must be approved by the institutions designated by the sports administrative department of the State Council».

[11] November 2016 «National People's Congress Standing Committee on the revision of the» People's Republic of China Foreign Trade Law and other 12 law decision «on the» People's Republic of China Sports Law to amend the deletion of Article 32: «national sports. The national record shall be confirmed by the sports administrative department of the State Council».

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the criminal liability applicable to these laws and regulations, these laws are blank and fuzzy provisions are greatly reduced their risk costs, relying solely on sports organizations within the rules and regulations are difficult for those who violate sports ethics and even illegal acts to be severely punished, it is difficult So that people involved in the understanding of the seriousness of the problem, it is more difficult to Head to curb the wanton spread of these events, it will encourage some people even more emboldened. And when the lack of legislation, will inevitably lead to the legal awareness of the relevant personnel in law enforcement, compliance with the law has been flawed. Therefore, the legal basis of the imperfect, for such violations provide an opportunity to violate the law.

5. Article 34 of the «Sports Law» in China clearly stipulates that sports «athletes should abide by sports morals, not fraud, malpractice». Athletes through the means of age cheating to seek competitive advantage and even get higher performance and awards, is a false performance of the performance of false, our law will not tolerate the existence of such incidents. However, in the case of sports misconduct prohibited by law, it mainly deals with irregularities, disciplinary offenses and offenses. Some scholars have classified the behavior of the athletes as false, which mainly refers to the behavior of the sports organizations which are restrained according to their rules and regulations. They think that this is in line with the behavior of false age. Athletes false age to participate in the competition, which is not a violation of the corresponding game project rules or laws, but against the relevant disciplines and regulations, and the referee in the course of the game cannot be punished for such acts, the judiciary is no right to pursue, but only by the relevant associations, alliances and other organizations to be punished[12].

But I believe that the behavior of athletes age fraud is not only contrary to the sports morality and sports rules, disciplinary behavior, but there should be a violation of the relevant laws of the situation, and even constitute a serious crime and serious circumstances,

[12] J. Zhao, Nali, *Legal Thinking on «Age Gate» Event*, in *Sports journal of Chinese lawyer*, 2, 2011.

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and only such recognition, you can curb athletes the proliferation of age fraud has played a strong role. We are not to all the age of the athletes are classified as criminal offenses, but for some of these serious circumstances, causing serious social harm to criminal law regulation, and we propose the criminal law is not completely excluded from the internal punishment of sports organizations and civil law regulation, but on the basis of these mechanisms, supplemented by criminal law to effectively curb.

5.1. – 5.1.1. According to the different consequences of the behavior of such acts, the existing athletes age fraud behavior of the type of distinction, the following three types: First, do not hurt the interests of third parties behavior. This type mainly refers to those athletes who have undergone age fraud, but they have not been able to do so in the event of competition, or have failed to win the game, and have not been rewarded. This is not the case for others, society and the country caused bad results; second, harm the interests of others behavior. The type refers to those who age after the fake athletes after participating in the competition, relying on the advantages of age fraud, won the other athletes should be the reward and honor, the other athletes to obtain incentives, honor rights and interests caused by violations; third, damage social, national interests of the age of fraud. And some athletes age fraud on the social and national interests caused by serious violations, for example, some athletes age fraud will be related to the relevant documents forged, thus violating the crime of forgery for the protection of social and public order interests, may exist Crime can harm national interests. And the high level of national events, the behavior of the age of fraud is not only the main body of the fraud, but also the subject of national races, because of its fraud and the reward is the national interests of the infringement, and high Level of the event more compelling, tend to have adverse effects on the community.

5.1.2. In the above section, we have done a more detailed classification of athletes' age fraud, and not all of these three types are subject to criminal law. If that is the case, it will lead to serious crimes, excessive intervention in the sports industry, and the possibility of causing justice Waste of resources. We according to the age

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of the athletes of different types of specific circumstances, to determine the standard of criminal law regulation.

First, does not hurt the interests of third parties behavior, without criminal law. The reason why the type of intervention without criminal law to be bound, because the following points: First, there is no damage to criminal law. This kind of behavior is similar to the case of non-criminalization of the crime of no victim. The criminal law should maintain modesty and whether it is judged as a criminal act. It mainly considers that the act is against the legal interest. The most important purpose of criminal law is the protection of legal interest. The function of legal interest determines that criminal law should be the last resort of legal protection, because the criminal law is inherently incomplete, that is, criminal law cannot be for all the severity of the law and act of destruction[13]. It can be seen, if by other means or punishment path can effectively protect the legal benefits, you can minimize the use of criminal law regulation. For example, in 2015, Guangzhou Evergrande Taobao club athlete Hu Ruibao because of the existence of name and age fraud, was suspended for 3 months, as a member of ordinary football players, against the whole team to win the role played by the game is not Large, its age fraud does not cause harm to the interests of third parties, therefore, its sports organization within the ban penalty can play a restraint and disciplinary effect, which also meet the principle of compatibility; Class behavior is generally subjective and vicious, through the sports organization internal discipline or administrative law, civil law and other penalties, can play a punishing effect, without harsh criminal law intervention; Finally, if such acts were forced to intervene in criminal law, is not conducive to Sports competition is normal, is not conducive to the smooth development of sports industry autonomy.

Second, hurt the interests of others seriously, should be regulated by Criminal Law. First of all, against the property, personal information and other criminal law. This type is the athlete by virtue of the advantages of its age fraud, deceived the other contestants and organizers of the case, won the final race awards and honors, which is the organizers and other «seed» legal interests of the infringement,

[13] T. Jiang, *A Study on the Crime of Non - direct Victim Crime*, in *Legal studies*, 1, 2011.

Secondly, the scope of punishment should be limited to serious damage in the case, that is beyond the sports discipline, administrative law, civil law regulatory capacity of the category, otherwise the consequences of some minor damage to criminal law, will be contrary to The Modesty of Criminal Law and the Mode of Sports Industry Autonomy.

Third, hurt the society, the national interests of the age of fraud, should be criminal law. Personal interests are criminal law to protect the legal interests, social and national interests is to criminal law to protect the important legal benefits. The age of counterfeiting of such athletes is a result of serious harm, which is more serious than the damage to the interests of the third party, so it is in line with the modesty of the criminal law. The current situation we all see clearly, it is the rules of the game, industry norms and other criteria is difficult to constrain the proliferation of the behavior, and the behavior does exist on the social and national interests of the situation, criminal law in the case of forced intervention in the field is In full compliance with the principle of modesty, and in the regulation at the same time will certainly uphold the principle of careful punishment, not too harsh, it will not be too light punishment, grasp the degree will be through the criminal law just right The act is effectively curbed.

5.2. According to the analysis of the above situation, for the damage to the state, social interests and serious damage to the interests of others, the crime of fraud to give a normative analysis of the law, I believe that criminal law can be the following path to the two types of behavior to be restricted:

5.2.1. In our current Criminal Law, there is no crime about the age of the athletes in their own age. Therefore, under the existing regulations, it is more appropriate to use the crime of fraud to punish the athlete's age. Article 266 of the Criminal Law of the People's Republic of China clearly stipulates that fraud is the purpose of illegally occupying for the purpose of falsifying the facts or concealing the truth and defrauding the large amount of public and private property. The object of fraud is not fraudulent by other illegal interests.

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When an athlete participates in a match or transfer, age is a decisive factor in getting a qualifying or transfer success. Because the human life is limited, so older athletes training life is relatively short also become common sense, but also lead to athletes thinking to change the age, to deceive the level of access to more opportunities to achieve their own interests. First of all, the main body, the whole process of fraud, involving the main body is in line with the main qualifications of fraud, fraud on the subject of the crime is no special requirements, the general subject can become the subject of the offense, thus, In the event of fraud, whether it is athletes, coaches, or sports organizations and other people within the outside world, can meet the identity of the identification of fraud; secondly, in the subjective, involving people in the material or spiritual interests of the desire to implement And the objective aspect of the crime of fraud is mainly manifested in the fact that the perpetrator fictitiousness, conceals the truth, causes the victim to produce the wrong knowledge, and thus delivers the property and the larger amount of the act. Athletes age fraud in full compliance with this situation, fraud itself is a fictional fact, to conceal the truth of the performance, in this false basis on the eligibility, and then even get excellent results and gold medals and bonuses, some people think that although they age Fraud, but the excellent performance of the game is by personal ability, but the nature of the return, if not because of false age as a basis, how they successfully entered the game does not belong to their own. Therefore, the athletes through the act of age fraud, deceive the higher authorities, from the eligibility to participate in the qualifications, as well as cheating the organizers and the audience, so that the organizers and the audience have been the interests of the loss; Finally, the object of the crime, the athlete age fraud In addition to violating the rights and interests of some events, it also infringes upon the property rights of the audience, the fair competition rights of other personnel, the club, the organizers and other parties.

The application of the provisions of the crime of fraud to the age of the phenomenon of athletes to be punished can be convenient and effective to curb such acts, do not have to amend the existing criminal law to reduce the number of unnecessary trouble. And the athlete's age fraud does cause fraud to the club, tournament organizers,

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other athletes and the audience, so it is reasonable to punish it for fraud

5.2.2. In addition to fraud, the athletes age fraud also involves the crime of abuse of power offenses. Article 397 (1) of the Criminal Law of the People's Republic of China stipulates that the crime of abuse of power means that the staff of the State organ deliberately transcends the power, violates the legal decision, deals with the matter that it has no right to decide or handles, or violates the provisions of the public service, resulting in public property, And the interests of the people suffered heavy losses. The subject of the crime is a special subject, that is, the state organs staff. The reason why the athletes age fraud occurred in the crime of abuse of the crime of abuse, because sometimes the process of age fraud is not athletes or coaches themselves can do, already involved in the public security organs involved.

First of all, in the crime of the main body, the crime of abuse of power is set for the special subject of the charges, that is required by the state organs staff. Athletes age fake behavior, the identity of athletes is not a state organ, the charges certainly do not apply to the players involved in the whole process of fraud, sometimes there will be public security organs to help, the final success of the electronic file in the age The application of the offense is mainly for the age of fraud involved in the process of the relevant state organs to be applicable to the staff; secondly, the crime of abuse of the subjective crime of the subjective, The behave is a subjective intent, and the perpetrator knows that his or her conduct will result in a significant loss to the public property, the state and the people's interests, and that the result may be taken or laissez-faire. The age of the athletes involved in the incident in the case of public security police officers and other state organs must be aware that the age of athletes is false age and abuse of authority to be changed, which is fully consistent with the subjective recognition; again, in the objective, the performance of abuse of power, resulting in public property, the interests of the state and the people suffered heavy losses. Abuse of power refers to the unlawful exercise of the authority of the duties of the act, that is, on behalf of the state organs of the general duties of the matter, to improper purpose or illegal way to implement the activi-

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ties of the purpose of breach of duty. Citizens personal status, age, the key information is the public security department of the household registration police to be registered to modify, which is related to the scope of public security police, they are free to use these rights for athletes to change the false age, it is abuse of power; On the object of crime, the object of abuse of power is the normal activity of state organs. As a result of the abuse of power by the staff of state organs, the destruction of a specific work of the state organs has caused serious damage to the interests of the state, the collective and the people, thus jeopardizing the normal activities of the state organs. The object of abuse may be the public property or the personal and property of the citizen. In this case, the police officers involved in the state organs such as the age of fraud done, it also affected the normal activities of state organs, so the whole is consistent with the crime of abuse of the applicable.

In this reason, it is proposed to apply the crime of abuse of power, mainly in order to use other charges to bind athletes, coaches and other subjects at the same time, the use of the charges effectively restrain the age of fraud involved in the state organs staff, especially the direct power of public security Police, they are in contact with citizenship information the nearest state organs staff, as long as they put this last line of defense, athletes age will be a certain degree of containment, will also reduce the number of chain of criminal activities.

5.2.3. In addition to the above offense, the athlete's age fraud should also involve falsifying and altering the identity card. The offense mainly refers to the act of forging and altering the identity card. Specific charges set in Article 280, paragraph 3 of our «Criminal Law»[14]. The offense is a special offense for the purpose of forging a state document, and many of the elements are basically the same as those forging a state document. The crime set to the main body is no special restrictions, athletes, coaches such as the general subject are in line with the subject of the crime identified. When the athletes want to carry out the age of counterfeiting behavior, is nothing

[14] Article 280, paragraph 3, of the Criminal Law of the People's Republic of China: «Forging or altering the identity card of a resident shall be placed on file».

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more than the choice of public security organs or other means to change fraud, and through the public security organs to change the way of fraud, we have been identified as the public security organs involved in the crime of abuse of power, so through other means to change fraud That is, forged the case of the crime of state documents, and because of the particularity of the identity card, so constitute a forged, alteration of the identity card.

Specific analysis, we can also be identified elements of the crime to be confirmed. First of all, the main body of the crime, forged, transforming the identity of the main body of the crime is the main body, that is, l6 years of age with criminal responsibility of natural persons are in line with the conditions, athletes, coaches and other related subjects, especially athletes, as long as To achieve the age of criminal responsibility, through the counterfeit identity documents, household registration documents for age fraud, can be identified as forged, the transformation of the identity of the crime of the main body of crime; secondly, the subjective aspect is subjective intent, and can only be a direct intention, that know Is to forge the transformation of the identity card and the implementation of the behavior of the behavior, and hope to be forged, altered identity card forged, made out. In the act of mobilizing fake, as long as the parties have a subjective intention that is consistent with the subjective elements of the crime, of course, there are some athletes in the real case of funds for age fraud and not to inform the coaches and their team, so only to exclude the coaches of the crime The possibility of fake, alteration of the identity of the identity of the crime of the objective aspects, mainly for the forgery, alteration of the identity card of the behavior of the residents. «Forged», is the person without a copy of the production rights of the false identity card; «change», refers to the use of altered, erased, stitching and other methods, in the real identity card to change, change the name, age Matter contents. Resident ID card means that according to the provisions of the Law of the People's Republic of China on Resident Identity Card, the public security organ shall be responsible for the printing, management and issuance of documents issued to the Chinese citizens who have attained the age of 16 years of age to prove their identity. Whether it is competitive sports competition or other aspects of our lives, the identity of the citizens is generally through the identity card, athletes

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age fraud, most of the resident ID card from the age of change to start, that is to forgive a fake of the identity card, which in real terms to enjoy two ID cards, two ages. What is more, the direct production of fake household registration information, and then apply for fake resident identity cards, these acts are typical forged, alteration of the identity of the crime of identity crime; Finally, the object of the crime, the crime the object is the national resident identity card management system. With the development of the economy and the increasing mobility of the population, the role of the resident identity card system is particularly important, which is not a substitute for the household registration system. The act of obstructing the identity card of the resident will affect the normal management activities of the country on the manufacture, use and supervision of the resident identity card to a great extent. Therefore, the behavior of athletes age fraud, not only undermine the athletic sports athletic spirit, but also serious to the national identity card management system violations, constitute a crime and the need to bear the corresponding criminal responsibility.

5.2.4. Through the above provisions of the existing criminal law on the age of athletes to regulate the phenomenon of fraud, although they are reasonable, but I think the best way is to combine a lot of false competitive sports games, the establishment of a unified false competitive sports crime, so that more clear the university's relevant behavior to be a strong punishment. The idea of setting up the offense is mainly based on some scholars in the study of 'match-fixing' class crime, the establishment of «false football competitive crime» point of view[15]. So I take into account the existing criminal law on the charges really difficult to fully reflect the many characteristics of the false competitive games, it is proposed in the criminal law to set up a «false competitive sports competition» to combat the age of fraud and other athletes such crimes.

There are a wide range of false competitive sports competitions. The age of the athletes is only the tip of the iceberg. Although we are discussing the problem of age fraud for athletes, we should set

[15] Guo Yuchuan, *Analysis of Fake Soccer Behavior and Criminal Law Regulation*, in *People's Forum*, 12, 2011.

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up a lot of chaos in competitive sports in order to make better use of criminal law. A systematic offense, and not for each violation of the law to set up a new offense, that will only increase the waste of legislation resources, so we propose not to add «athletes age fake crime» but «false competitive sports crime» Through the addition of the system of the charges, you can better implement the 18th session of the Fourth Plenary Session of the rule of law in accordance with the law, so that in the field of sports have better laws to follow, according to the rule of law on the basis of the rule of law, The proliferation of many competitive sports games.

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*Abstract*

Age fraud of athletes swept the field of competitive sports unknowingly, and caused many negative effects, not only undermine the athletic spirit of fair sports, but also spawned criminal acts. Through the case analysis and comparative research at home and abroad, it is found that due to the negative influence of utilitarianism, the contradiction of management mechanism, the rules of relevant rules, the weak standard of industry and the lack of laws and regulations, it is necessary to discipline within the sports organization and other mechanisms on the basis of the criminal law. And through the analysis of the standard of criminal law regulation, put forward on the serious damage to the interests of others to counterfeit acts and damage to society, the national interests of the age of false acts of criminal law regulation, for which through the four paths to be regulated, that is, through the existing provisions of the fraud Crime, abuse of power, forged and altered the identity of the identity of the identity of the perpetrators can play a certain mandatory constraints, if the new false competitive sports crime more able to rule the country according to law enforcement to provide a strong legal basis and protection.

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# A Doping Scandal in Russia
# Politics or Reality

Summary: 1. Introduction. – 2. Background. – 3. Doping in Professional Sports. – 4. History of the World Doping. – 5. The Concept of Doping. – 6. Narcotics. – 7. Food Supplements. – 8. International Standard for Therapeutic Use Exemptions. – 9. The Violations of Anti-Doping Rules. – 10. Doping and Totalitarian Regimes of Power. – 11. Political Competition Determines the Development of Doping and Anti-Doping Technology. – 12. New Kinds of Doping. – 13. Doping and Sports Medicine. – 14. The Concept of the Intelligence-Based Testing. – 15. Organized Crime and Doping. – 16. Problems of the Illicit Trafficking of Doping. – 17. Preclinical and Clinical Tests in Professional Sports. – 18. Reports of Professor McLaren. – 19. Some International Problems Should Be Solved. – 20. Conclusion.

1. Doping is not only a result of fraudulent actions of athletes, their desire to win at any cost and break the rules of Fair play in order to get cash bonuses and undeserved rewards. Doping is also the result of the actions of politicians who want to win political opponents, to show the world the superiority of their countries and nations through the victories of their athletes. Doping is also a consequence of competition of the Doping and Anti-Doping technologies that producing in the laboratories of the most developed and advanced countries. We have only one way to solve the problem of doping. It is necessary to unite all international community against this evil. All countries should strengthen administrative and criminal liability for violations of Anti-Doping laws, to join efforts to combat international organized crime, illegally distributing prohibited substances. It is necessary to introduce access on an equal basis to athletes of all countries to modern technologies of sports medicine, to ban testing new pharmacological agents on athletes. Drug manufac-

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turers should be required to indicate in the specifications possibility to use medical drugs in professional sports.

2. Recently the doping scandals shuddered professional sports. In December 2014 ARD – the German TV channel broadcast Hajo Seppelt's documentary film "The Doping Secret: How Russia Creates Champions" where Russia was accused of athletes' doping support at the state level[1].

According to the film, it is easy in Russia to buy doping on the Internet and the Russian athletes tried to eliminate revealed positive doping tests for bribes, and a large-scale falsification of doping tests took place in the Russian Anti-Doping laboratory. The film showed that sports doctors quasi helped athletes to use the new prohibited substances and to remove them from athletes' bodies in due time. Therefore, the concrete facts and surnames of officials were specified in this film.

Following the broadcast film there was a big scandal in the sports world, WADA initiated investigation of the facts mentioned in the film, and in November 2015, it published a report about the results of this investigation. WADA's Independent Commission confirmed these facts and declared that Grigoriy Rodchenkov, the head of the Moscow Anti-Doping laboratory, in spite of requirements of the World Anti-Doping Code had destroyed 1417 doping tests in his laboratory. Valentin Balakhnichev, the former head of the Russian Athletics Federation, as well as Grigoriy Rodchenkov was also accused for falsification of doping tests and bribery[2].

Rodchenkov's illegal actions caused the situation when achievements of many athletes at the previous Olympic Games and International Championship raised doubts about it. Following the results of investigation WADA came to the following conclusion "The culture of cheating has taken roots deeply in Russia. According to the investigation the consent with cheating at all levels is widespread and it exists for a long time". Then WADA recommended to disqualify

[1] A. Kabanov (in press), *Doping is Supported in Russia at the State Level*, in *Commersant*, 4th December 2014.

[2] *WADA: two Moscow laboratories eliminated doping tests.* Retrieved May 19, 2016, from *ria.ru/sport/20151109/1317524622.html*.

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all Russian athletes from any international competitions and to disqualify five coaches and five athletes for life. International Association of Athletics Federations (IAAF) supported these recommendations and suspended Russia's membership in this organization for an indefinite period[3].

So how did Russia react to this scandal? There were many emotions, talks on slander and lie, double standards, that there were no such problems in the Russian sport and that it is gross lie of the West, etc. The official reaction was another. The Ministry of Sport made an official statement on November 10, 2015 that it respected WADA's independent investigation and it would fight doping rigidly in association with international sports organizations[4].

The Russian President Vladimir Putin also responded to these events. He demanded to perform the domestic investigation in coordination with the international organizations and to protect health of our athletes[5]. The work of the Moscow Anti-Doping laboratory was suspended. Mr. Rodchenkov, director of this laboratory, was dismissed. The Administration of RUSADA gave up its power; the activity of this organization was suspended. Russian President Vladimir Putin made an important conclusion in March 2017. Here is what he said: "We must listen to WADA requirements, because we have to admit that we have reliably identified cases of doping, and this is absolutely unacceptable. And this means that the existing system of monitoring the use of doping has not worked, and this is our guilty"[6].

It is sad, but it is true. In 2015, 12536 samples were taken from athletes in Russia, of which 127 were recognized as Anti-Retrieved May 19, 2016, Italy (129), India (117) and France (84). In Russia, using of doping already takes place in children's and youth sports

[3] *Russia may be disqualified from athletics competitions, from www.newsru.com/sport/09nov2015/wada.html.*

[4] Ministry of Sport of Russia made statement to WADA's accusations, (in press), in *Sport-Express,* November 10, 2015.

[5] *Putin against doping scandal has invoked to protect athletes from administration of the forbidden drugs*. Retrieved January 17, 2016, from *www.newsru.com/russia/11nov2015/putinolimp.html.*

[6] WADA, *doping, globalism: on the meaning of Putin's speech in Krasnoyarsk*. Retrieved March 3, 2017, from *ruskline.ru/opp/2017/mart/03/wada_doping_globalizm_o_smysle_rechi_putina_v_krasnoyarske*.

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schools. In our country it is possible freely buy anabolic steroids in internet shops. Russian legislation does not prohibit the conduct of clinical and preclinical trials of new drugs on athletes. Our law enforcement system does not properly investigate Anti-Doping laws violations. For example, in 2015, not a single sports doctor or trainer was brought to administrative responsibility for inducing the use of prohibited substances and methods in Russian Federation[7].

However, Hajo Seppelt continued the revelations and in March 2016, he presented the third film "Russia's Red Herrings" where he stated that the death of RUSADA's Executive Director could be deliberate, as he had been going to provide to the West the confidential information on doping in Russia. Moreover, he had accused Russia's government of failure to take drastic measures for improvement of the doping case[8].

The doping scandal had also the contrary consequences. For example, it took only one day for Professor Timofei Sobolevskii, the deputy chief of Moscow Anti-Doping laboratory, to get a job in Anti-Doping laboratory in Los Angeles (USA). The former chief of laboratory where according to WADA many FSB undercover employees worked got it with success[9].

By the way, this case with Mr. Rodchenkov, the chief of the Moscow Anti-Doping laboratory, is not the first case. On the eve of Sochi Olympic Games (2014), one of the Russian athletics medalists of London Olympic Games informed WADA on falsification of positive doping tests for money in this laboratory. Even at that time, these facts had been confirmed. Moreover, the chief of laboratory Mr. Rodchenkov and his relative had been detained by FSB of the Russian Federation in Moscow on suspicion of doping distribution[10]. Disciplinary Committee of WADA on the eve of the Olympic Games recommended withdrawing accreditation of the Moscow Anti-Dop-

[7] A. Peskov, *Sport and Unlawful Behavior*, Moscow: Prospect, 2016, p. 115 s.

[8] *ARD Broadcaster informed about New Doping Violations in the Russian Sport*. Retrieved March 21, 2016, from www.newsru.com/sport/07 March 2016.

[9] T. Ganeev (in press), *The defendant in doping case got the same job in the USA*, in *Izvestia*, 28th December 2015.

[10] M. Kelnerand, N. Harrisand and W. Stewart, *Victory in our Fight for Russian Doping Justice: Drugs, Bribery and Cheating no more Investigation Triggers Official Probe*, in *The Mail on Sunday*, 16th November 2013.

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ing Center due to «inadequate reliability». Many efforts were made to cancel this decision. However, WADA obliged the Moscow Anti-Doping Laboratory to employ international independent experts, to develop a new program for control of sampling quality and allowed laboratory to work at Winter Olympic Games in Sochi. The Government of Russia allocated 27 million EUR for Anti-Doping arrangements, reconstruction and equipment of two laboratories in Moscow and Sochi[11].

There were other scandals in 2015. Due to the mass doping in the Olympic training center for race walking (Saransk, Mordovia, Russia) in 2015 V. M. Chegin, a famous coach and order bearer, was forced to leave elite sport (the Center was even named after this coach). Mr. Chegin prepared more than 50 Masters of Sport of International Class. His pupils became winners of World Championships and Olympic Games. However, for some reason they were constantly pursued by doping scandals. Before the Olympic Games 2008 (Beijing, the People's Republic of China), five of his racewalkers were disqualified from competitions due to presence of EPO. Before the World Championship 2013, the doping was found in blood of four of his racewalkers, and they refused participation in competitions. In July 2014 Elena Lashmanova, also his pupil, was disqualified, a deadly doping was found in her blood. At last, in 2015 Chegin's pupils: Kirdiapkin, Borchin, Kaniskina and Kanaikin were disqualified based on Biological Passport Index[12].

The doping was also actively used in other Russian sports previously. In 2012 - 2013, the multiple World and Europe champion swimmer Iuliia Efimova and the six-time javelin champion of Russia Lada Chernova were caught in doping. In particular, Iuliia Efimova was disqualified by the International Swimming Federation for 16 months. The sportswoman admitted that she periodically administered bioactive additives and one of them had a prohibited substance, and it was not specified on a label[13].

Winter Olympic Games in Sochi (Russia, 2014) were not devoid

[11] *Russia spent 27 mln EUR for two Laboratories* (in press), in *Sport-Express*, 25.12.2013.

[12] *Chegin, Viktor Mikhailovich.* Retrieved February 2, 2016 from *ru.wikipedia.org*.

[13] I. Efimova, *Preparation with Dope is my Mistake.* Retrieved from May 20, 2014, from *summer.sport-expres.ru/aquatics/reviewrs/44482*.

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of doping scandals. A week prior to the Games EPO was found in blood tests of our biathlonists Ekaterina Iurieva and Irina Starykh. The Russian weightlifter, the world and Europe champion - A. Lovchev and three other Russian weightlifters were accused of doping at Weightlifting World Championship in Houston (USA, 2015)[14].

All these doping scandals in Russia in 2015-2016 have created public opinion in the world that the Russian sport cannot exist without doping and all sporting wins are a result of illegal manipulations with athletes' health. However, is it true? Are the western professional sportsmen so faultless?

3. Of course, not Doping is an international problem and it concerns all countries in the world. In 2015, WADA registered 1649 violations of Anti-Doping legislation. What do you think is the share of Russia in the total number of these violations? It is 10%. Is this a lot or a little? The share, for example, of Italy is 8 percent, India 7 percent, the share of France and a small country like Belgium together is about 9 percent[15].

During the Games in Sochi (Russia, 2014) the German biathlonist, the five-time Olympic champion and the six-time world champion Evi Sachenbacher-Stehle, the skier of the Ukrainian Olympic Team Marina Lisogor, the hockey player of the Latvian National Team Vitalii Pavlov, the Italian bobsledder William Frullani, the Swedish hockey player Nicholas Backstrom were accused of doping. Moreover, the German police sought through Evi Sachenbacher-Stehle's house for presence of the prohibited drugs and biological additives as doping was a penal act in Germany.

After Winter Olympic Games in Sochi (Russia, 2014) the doping was found in blood test of the Austrian skier Johannes Dürr and the Polish bobsledder Daniel Zalewski. The Disciplinary commission of the International Olympic Committee (hereinafter referred to as IOC) immediately annulled all their sporting achievements in Sochi. Moreover, may be will be new revelations among the athletes participat-

[14] *Lovchev's Dope: Politics or Shame?* Retrieved January 25, 2016, from *www.sport-expres.ru* 24th December 2015.

[15] WADA. Official site. Retrieved October 19, 2017, from *www.wada-ama.org/en/anti-doping-statistics*.

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ing in the Sochi Olympic Games since samples have been taken at 45% of participants of these Games and according new rules the result will be stored within ten years.

In particular, the unexpected information was provided in May 2013 by a "watchdog" of the World Anti-Doping Agency (hereinafter referred to as WADA) about the fact that representatives of sports official delegations from seven countries had brought a large number of intravascular infusion lines to Winter Olympic Games in Sochi (Russia, 2014). Besides there were found utilized needles and syringes near the residence of some national Olympic teams. In addition, this is, as we know, already a violation of Anti-Doping rules[16].

4. However, no facts surprise. The doping problem in professional sport is as old as the sea. Even in the ancient Olympic Games, athletes used sesame seeds and some species of psychotropic mushrooms (amanita extract, etc.). Some of them drank wine with a lot of lamb meat and garlic, ate sheep testicles before the competition, which were a dope source under the name of testosterone.

The beginning of modern professional sport development in the nineteenth century was connected with use of such stimulators as caffeine, cocaine, codeine and strychnine. At that time, some athletes usually used caffeine or wine enriched with cocaine as a doping. The doping was actively distributed in the modern Olympic Games. For example, at the Olympic Games in St. Louis (the USA, 1904) doctors rescued marathon runner Thomas Hicks after he had drunk a significant dose of brandy with strychnine.

However, at that time it was not considered violation of rules of morality and right. The first and only "Olympic" violator of Anti-Doping rules was revealed at Summer Olympic Games in Mexico City (Mexico, 1968) when the doping test really appeared. This violator was the Swedish athlete Hans Gunnar Liljenwall who had the excess amount of alcohol in blood[17]. However, at the Olympic Games in Munich (Germany, 1972) it was found out that already seven athletes had used doping. Henceforth the Olympic Games always had

[16] *Seven national teams were suspected of doping in Sochi Games*. Retrieved February 2016, from *www.newsru.com/sport/14may2014/wada.html*.

[17] V. Steinbach, *Reverse of the medal*, Moscow, 2008.

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a large number of doping scandals. For example, on the eve of the Olympic Games in Salt Lake City (USA, 2002) almost all Finnish ski national team members were disqualified, then the American bobsledder team was disqualified. The prohibited substances were also found in the Russian skiers Natalia Baranova, Olga Danilina and Larisa Lazutina.

Moreover, if at the beginning of the XX century athletes often used drugs and alcohol which could remove pain and fatigue, then later the improved types of doping were used, including anabolic steroids – substances influencing the person at the hormonal level. Anabolic steroids were especially widely adopted in the American sport – bodybuilding and weightlifting in the late 1950s and early in the 1960s. It is interesting that it was legal in the USA. It was promoted by means of the large advertising campaign, medical recommendations and prescription of doctors. Anabolic steroids gained the greatest popularity in 1970-1980s as a drug for stimulation of athletes' energy supply systems and revival after great training and competitive stress[18].

Due to doping the high sporting achievements began to be registered everywhere in the world. Historians describe this "doping era" as follows: "Artificially calmed shooters began to shoot better and quickly excited runners began to show the best start speed. Tireless players provided higher rate on fields what increased the staginess of matches. In addition, the weight began to rise on the weightlifting platform! It is unbelievable. The audience was delighted. People watched Games with ecstasy"[19].

Further, there appeared new substances: *erythropoietin* (increases endurance and force), diuretic (removes liquid, increases flexibility and masks doping, etc.). Then people learned to transfuse blood of athletes, to oxygenate it with special substances, to carry out other manipulations with blood.

As many experts noted the doping became more various, targeted and effective, as well as hazardous to health of athletes. For many international organizations and countries, the doping was not an

[18] *Pharmacological Products and other Substances Prohibited in Sport.* Retrieved April 21, 2012, from *sportswiki.ru*.

[19] I. Kurinoi, *Games acceptable before Heaven*, Moskow, p. 292.

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everyday occurrence any more, it was considered as a serious violation and in some countries as a crime.

The death of the cyclist from Denmark Knud Jensen at the Olympic Games in Rome (Italy, 1960) became a landmark in modern history of fight against doping. At first, the officials declared that he died of heart attack caused by sunstroke. However, the autopsy showed a significant concentration of amphetamine in athlete's organism. Therefore, the doping version of death became official[20].

This incident entailed a chain of other important historical events connected with development of fight against doping. 1963 - The Council of Europe created a special committee on fight against doping. In that year, France became the first country, which had adopted the Anti-Doping legislation. 1966 - The International Federations of Cycling and Football (FIFA) officially implemented the doping control at the World Championships. 1967 - The IOC assigned a special medical commission for doping control. 1999 - WADA was founded. 2003 - The World Anti-Doping Code was adopted. 2005 - UNESCO approved the International convention on fight against doping in sport. As a result, the network of the international and national authorities on fight against doping was founded. Now in the world there are over 30 Anti-Doping laboratories accredited by IOC where samples of ca. 120 thousand athletes are tested annually[21].

However, Anti-Doping organizations continue their development. Due to the doping scandals in Russia in 2014-2016, the International Olympic Committee made decision on creation of independent Anti-Doping body at the international Court of Arbitration for Sports (CAS). This division (CAS Anti-Doping Division) shall perform and make decisions on the doping facts instead of the Disciplinary commission at Summer Olympic Games in 2016 in Rio de Janeiro (Brazil)[22].

5. What is a doping in general? The word "doping" according to one of the versions means the African stimulating drink from a grape

[20] V. Steinbach, *Reverse of the medal*, cit., p. 139 s.

[21] *Role of the World Anti-Doping Agency in Control of Doping in Sport*, Retrieved May 17, 2014, from *sportswiki.ru*.

[22] *IOC makes Doping Results Management and Sanctioning Independent*, Press Release IOC, 01 March 2016.

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peel made by Zulu warriors; according to another version, it is a mix of tobacco and datura. There is also an assumption that the English verb "to dope" with meaning "to hurry a horse on race" is the cornerstone of doping. Indeed previously, the doping was widely used in horse races[23]. However, we care not about the philological meaning of this word, but the interpretation of the word "doping" from the legal point of view, in particular, of the international sports law. According to the World Anti-Doping Code, the doping is defined as commitment of one or several violations of the Anti-Doping rules provided by this code.

First, it is presence of a prohibited substance, its metabolites (intermediates and products of metabolism) or marker (character) in sample of athletes. Default of athlete in providing the biological sample is also a violation. Besides, intravenous infusion of "improved" blood, physical and chemical blood manipulations, in particular, boosting the number of red blood cells in the bloodstream (blood doping), use of genetic cells to improve athletic performance (gene doping) are forbidden. An attempt to use these prohibited substances and methods is also a violation.

According to the so-called "rule of strict liability", the athlete will be punished even if he or she confirms that he or she took biological additives with a label without a list of corresponding ingredients. For example, he/she proves that the prohibited substances were prescribed by the personal doctor or the coach beyond his/her will. On the other hand, he/she confirms that he/she didn't know about presence of the prohibited substances in food or drinks and his/her personnel suppressed this fact. Anyway, the athlete will be guilty.

Article 2.1.1 of the World Anti-Doping Code states the following: «It is athlete's personal duty to ensure that no prohibited substance enters his or her body [...] Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Athlete's part be demonstrated in order to establish an Anti-Doping violation [...]»[24].

In fact, athlete's guilt is only significant for estimation of degree of punishment. However, the athlete will be always guilty if any

[23] V. Mkrtchian, *Doping: History and Facts*. Retrieved January 29, 2014, from *http://www.yerkramas.org/2012/07/05/doping-istoriya-i-fakty*.

[24] *World Anti-Doping Code 2015*, Moscow, RUSADA, 2016.

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banned substance is found in his or her body. In fact, the principle of strict liability prevails in the World Anti-Doping Code, which was used by Stalin during mass repressions in the USSR. In those days, a person was convicted upon a statement of his neighbor or work-fellow, and ascertainment of guilt was not obligatory.

Whether it is for good or for bad when an innocent athlete is punished – this is a subject of another research. Nevertheless, to our opinion there is a positive moment in modern rules of WADA. Each athlete has to realize the responsibility to ensure that no prohibited substance enters his or her body and no prohibited method is used; and to understand that no defensive arguments can help him or her avoiding real punishment.

WADA annually updates the international standard, which contains the list of prohibited substances and prohibited methods. Professional excellent athletes should know this list, in particular the substances and methods which should not use under any circumstances and which should not use only on competition period. For example, it is at any time prohibited to use anabolic steroids, peptide hormones, beta-2 agonist, hormones and metabolic modulators, diuretics and other drugs, which conceal doping. Performance-enhancing drugs (amphetamine, bromantane, etc.), glucocorticosteroids and cannabinoids (cannabis, hashish, etc.) are prohibited during the competition period. It is also prohibited to use so-called beta-blockers, which cause decrease in arterial pressure and decrease in heartbeat (Atenololum, Carvediolum, etc.)

6. As for recreational drugs, recently discussion about expediency of such prohibition was conducted in sporting world. In May 2013 WADA's executive committee made a sensational decision at the meeting in Montreal (Canada) to increase threshold value of marijuana content in athlete's body by 10 times (up to 150 nanograms for 1 urine milliliter). In practice, it means that the athlete can smoke some "pot" 2-3 days prior to competitions[25].

In our opinion, this is rather controversial decision, which will promote "recreational" drugs not only in the sports environment, but

[25] *Executive Committee and Board of Founders of WADA are going to Present the Final Version of Code 2015.* Retrieved January 1, 2016, from *www.rusada.ru/print/5269*.

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also in the whole world. In addition, this decision appears to be unfair in relation to the athletes who have been ignominiously punished before for marijuana. In this regard, we would like to remind that football players R. Apcharch (1983), R. Dent (1987), boxer T. Witherspoon (1985), basketball player E. Griffin (1988) and many other athletes were disqualified for this delict.

At the same time, the other drug – cocaine – is still being considered as a doping. For example, recently the Belgian judoka Charline Van Snick, who had won bronze in the Olympic Games in London (Great Britain, 2012) was caught in use of cocaine at World Championship in Rio de Janeiro 2013. Moreover, the Belgian judoka is not the only one. Many worldwide famous athletes, in particular, the Cuban high jumper, multiple world record-holder Javier Sotomayor, the Romanian football player Andrian Mutu, the Swiss tennis-player Martina Hingins, the English football player Paul Gascoigne, the world heavyweight champion Mike Tyson and many others were into cocaine. For example, Paul Gascoigne confessedly could use cocaine with nine more portions of brandy before a football match[26].

Diego Armando Maradona, the best football player in the history according to *The Times* was perhaps a cocaine user number one and the fan of other types of doping in the history of professional sport. Maradona was arrested many times, convicted for storage of cocaine and persistent violations, disqualified for use of doping. There was even a special sentence about his obligatory doping control after each football match.

However, it must take into account that cocaine can get to athletes' body beyond the will. For example, the facts of detection of cocaine in Colombian football players who drank tea with coca leaves, which was a national tradition at local restaurants, are widely known.

7. However, it is necessary to admit that that narcotic are not a topical issue for professional sport now. Nowadays athletes are interested in another thing – they use the best pharmaceutical drugs

[26] Top-5 athletes, who ruined career with drugs (2014) Bigmirnet. Retrieved February 21, 2014, from *sport.bigmir.net/football/other/1558149-TOP-5-sportsmenov—pogubivshih-kar-eru-narkotikami*.

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and the latest technologies provided by sports medicine. In particular, all athletes without any problems can get so-called food supplement. Food supplements do not belong to drugs and therefore do not pass strict clinical studies, often they are produced without exact description of the ingredients used at production, and they are sold on the Internet freely and without supervision. Owing to this fact, they became "favorite treat" of enormous number of athletes.

Lately the food supplements with *methylhexaneamine*, which was earlier produced, of a geranium for treatment of nasal stuffiness became popular. This WADA prohibited substance suddenly increases performance of athletes. Now it is actively used under various names in food supplements. Without knowledge of this, many athletes use these food supplements and involuntarily become violators of Anti-Doping rules.

Therefore, it isn't recommended to athletes to buy unknown food supplements, especially which contain words "muscles", "force", "explosion", "energy" and even no formula information at all. However, this situation concerns many food supplements. According to the Medical commission of the IOC, which investigated 600 most popular food supplements, almost every fifth supplement contains a substance prohibited by WADA, which was not specified on the label by the producer[27].

The same goes for common medicines. The list of the *medicines* prohibited by medical commission of the IOC exceeds 10 thousand units. In fact, according to experts anything can improve performance: various tranquilizers, vaccines, vitamins and even drugs that regulate menstrual period and Viagra. As a result, some athletes cease using common drugs necessary for recovery and health promotion due to fear of negligent doping.

The funny thing is that athletes began to be afraid of taking not only medicine, but also usual food. For example, 196 Chinese athletes before the Olympic Games in London (Great Britain, 2012) refused to eat pork, beef and mutton due to previous cases of addition of substances, prohibited by WADA, to meat products by the

[27] A. Vdovin, D. Vdovin, *Everyone takes doping. Only poor are caught.* Retrieved May 14, 2014, L: *www.shooting-ua.com/books/book_18.3.htm*.

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Chinese producers[28]. Unfortunately, this fear has reasonable ground to believe in it. There are some cases in the history when chicken with increased concentration of testosterone was given to athletes, or when Coca-Cola with caffeine over prescribed limit by several times was given at the Olympic Games. Moreover, it is quite possible that it was done on purpose.

However, the prohibited substances and methods do not cover the list of Anti-Doping violations. For example, what to do if an unknown substance is found in athlete's body and nobody knows whether it is a new pharmaceutical invention or it has other unknown origin? The answer is simple. According to WADA's international standard all the pharmacological substances not registered by government authorities as therapeutic agent, which are found in biological samples of athletes, are a doping with all that it entails. These substances include medicines, which are under preclinical or clinical examination. It follows that they never should be tested on athletes.

8. However, there is a way to use doping quite legally. According to the World Anti-Doping code (Article 4.4) and the *International Standard for Therapeutic Use Exemptions,* each athlete can use the prohibited substance or method if he or she has the corresponding documentary medical grounds and official permits. For example, many "asthmatic athletes" rather often use such permits. That enables them to use doping legally, in particular, to use various inhalers with Beta-2 agonist which significantly increase endurance and physical activity.

All experts note that proportion of "asthmatic athletes" in national teams of the certain countries is by three and more times more than proportion of asthmatics in the population of these countries. So, at the Summer Olympic Games in Sydney (Australia, 2000) 600 of more than 10 000 thousand athletes had asthma. At the Winter Olympic Games in Salt Lake City (USA, 2002) practically all Norwegian skiers and biathlonists also needed therapeutic treatment due to this disease[29].

[28] *Olympic Favorites starve for Medals*. Retrieved March 7, 2012, from *sport.rbc.ru/news/5755320b9a7947102987b73d*.

[29] D. Pilipenko, *Crime in sport*, Moscow, 2007, p. 119 s.

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For some reason the athletes of the Olympic team of the USA have asthma very often. "Asthmatic athletes" won significant number of all Olympic medals for the USA. In particular, among famous "asthmatics" from the USA are nine-time Olympic swimming gold medalist Mark Spitz; six-time Olympic swimming gold medalist Amy Van Dyken; Olympic swimming champion Nancy Hogshead; multiple Olympic champion and World champion – track and field athlete Jackie Joyner-Kersee and many others[30]. In 2015, US athletes in only 43 cases violated the Anti-Doping rules. This is more than 3 times less than Russian athletes are. However, the French say there are statistics, and there is a blatant lie. In fact, positive samples in American athletes de facto were identified in 77 cases, but in 43 cases, they were not recognized as violations of Anti-Doping rules. Because they used doping legally in accordance with the International Standard for Therapeutic Use Exemptions[31].

It is strange but neither the IOC, nor WADA do not give an assessment to these facts for many years and, in particular, answer questions: whether "legal" doping creates advantage to "ill" athletes in comparison with "healthy" athletes? Moreover, is whether issuance of such therapeutic permits is always lawful? Nevertheless, we will hope that soon the corresponding explanations and decisions at the international level from the IOC and WADA will be provided.

9. Falsification or attempt of falsification of any doping control procedure is also a violation of Anti-Doping rules. For example, falsification of doping control may include fraud of athlete who undergoes test with urine of other person by means of a micro-container and catheter implanted into the body. Deliberate deterioration of urine with aroma compounds, change of identification numbers of biological samples, allegedly breaking the vessels with these samples, etc. will aggravate athlete's guilt.

The fact of illicit possession of prohibited substance by athlete or service members in the rooms, which are under their control, is equal

[30] *Asthma and Sport. Out speak about Sport*. Retrieved December 20, 2013, from *stop-asthma.ru/astma-i-sport*.

[31] WADA. Official site. Retrieved October 19, 2017, from *www.wada-ama.org/en/anti-doping-statistics*.

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to the use of doping as well. The anabolic steroids found, for example, in the car of the athlete is a violation of Anti-Doping rules if the athlete doesn't prove that someone else used the car and the found drugs belong to this person. However, it is not simple to prove it in practice. Even the fact of purchase of doping by the athlete in Internet or in a different way is unambiguously considered by WADA as possession of prohibited substance, even if the purchase is made for a friend or a relative.

The violations of Anti-Doping rules also cover non-informing WADA on the location by the athletes entering a testing pool. The thing is that these athletes according to the international rules have to inform WADA about their daily location and possibility of testing by means of a special electronic Anti-Doping Administration & Management System – ADAMS. In addition, if they provide insufficient information on their location (for example, somewhere in the woods near the settlement), it will be considered as skipped test. For example, if the athlete is not available for test in time and the place specified by him, then his absence is considered as violation. Moreover, if he commits three violations within 12 months, then he may be disqualified for violation of Anti-Doping rules, and deprived of all sports awards, points and prizes.

It is a marvel even such severe and rigorous control measures that can be carried out by the international and national Anti-Doping authorities at any time and in every location in the world do not stop some representatives of professional sport using prohibited substances and methods. In general, adverse dynamics of doping was noted in the Russian Weightlifting, Powerlifting, Swimming, Cycling Federation, as well as in the Russian football union[32]. At the same time it must be taken into account that many violations of Anti-Doping rules are not revealed among the athletes especially who are out of the sphere of the international and national doping control.

Revealing of Anti-Doping violations in high performance sport is very difficult as some scientific sports and medical centers, sports doctors, coaches and athletes take the systematic and rather qualified actions for concealment of use of doping traces. "If the doping course

[32] *Report on RUSADA business in 2012.* Retrieved November 19, 2014, from *www.rusada.ru/about/annual_reports*.

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is estimated properly, the Vdovins says, and all its traces are removed from the body in due time, then chances to catch the athlete are almost zero: pharmacologists are always at least on a half-step ahead of laboratories of the International Olympic Committee"[33].

Some athletes try to stimulate their organisms by themselves and to hide traces of the prohibited substances and methods used by them. They do a lot of things: they eat enormous quantity of lemons, drink red dry wine in large volumes, using antibiotics and diuretics, stick testosterone plasters on the body, eat epysterone in large volume (for maintenance of normal level of testosterone), etc.[34]. Other athletes even perform autohaemotherapy, i.e. before competition, they intramuscularly insert with the syringe their own blood, which has been extracted earlier from the vein, in order to stimulate the organism.

10. Some countries especially with totalitarian regime pay attention "doping" researches. It is their medical-biological secret laboratories where the so-called "legal doping", first, for military purposes was created. Fascist Germany, for example, has created a doping under the brand name *Pervitin*. Spies, pilots and tankmen used it extensively. Hitler liked to get injections of pervitin as well[35]. Fascists constantly improved this doping, made experiments on prisoners, forced them to go around in a circle after use up to 90 km with 20 kg backpacks loaded with stones. Prisoners cheerily marched with songs within a day, and then many of them fell and died.

"Temmel", the German company, produced 29 million tablets of this doping for fascist troops for the purpose of creation of an ideal soldier – a "live" robot. Soldiers of the Third Reich amazed with endurance and intelligence indeed. In the last years of World War II fascists created even more perfect doping – "Energiepille" – mix of pervitin, cocaine and morphine which now are a part of famous and banned in many countries psychostimulant "extasy"[36]. According to

[33] A. Vdovin, D. Vdovin, *Everyone Take Doping*, cit.

[34] *How to hide Administration of Steroids and Prohibited Preparations*. Retrieved November 7, 2012, from *sportswiki.ru*.

[35] *Methamphetamine*. Retrieved December 7, 2015, from *ru.wikipedia.org/wiki*.

[36] *Pervitin is a Weapon of the Third Reich*. Retrieved December 18, 2013, from *ynik.info/2008/07/30/pervitin*.

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some experts, fantastic sporting achievements of fascist Germany at the Olympic Games in 1936 were connected with use of this doping[37].

During Cold War, the leading countries of the world began to establish special pharmacological laboratories, which created new doping being destructive to athletes' health. Unfortunately, politicians of the different countries of the world were closed to Nazi philosophy concerning the Olympic victories as "military victories in peace time", and began to use sport as a tool of political prestige, an indicator of the superiority over opponents, other political systems and the regimes of power. For achievement of these purposes and receipt of prestigious Olympic gold medals, they sacrificed life and health of athletes and forget about development of mass sport and its main tasks connected with improvement of spiritual and physical entity of a person, formation of healthy lifestyle of population.

For example, according to unclassified data of GDR secret services ca. 10 thousand world-class athletes of this country were participants of a doping special program. In 2007, 167 former athletes of GDR received compensation from the German government for the compelled use of doping during their sports career[38]. For this reason, the German swimmer Christiane Knacke-Sommer decided to abandon the gold medal won at the Olympic Games in Moscow in 1980. However, it is not clear whether it was a nobility or politics[39].

Mass media also reported about encouragement of use by government bodies of some countries of a so-called "sex doping". In particular, allegedly in some Olympic teams of east countries sexual contacts of young sportswomen with men during competitions, artificial termination of pregnancy on the eve of competitions were encouraged as all this had doping value, influenced muscles and blood circulation of female body well. So, according to some information

[37] I. Bombela, *Anabolic Steroids: Elimination of Illiteracy 2*. Retrieved February 21, 2012 from *steroid.su/anabolicheskie-steroidy-likvidaciya-negramotnosti-2*.

[38] *German Athletes will be Paid for Use of Doping*. Retrieved November 7, 2012, from *lenta.ru/news/2006/12/13/doping*.

[39] T. Borisova, G. Morozov, *Unfair Games*. Retrieved November 12, 2014, from *rormistr2011.foxibiz.com*.

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active sexual life of young sportswomen from the national teams of GDR was "supported" by the whole staff of coaches, doctors and masseurs. Therefore, "sex doping" turned young girls of age 14–16 into super champions[40].

11. Athletes of the western countries, for example, Germany, were the same; they used steroids, testosterone, estrogen, and erythropoietin and above mentioned Pervitin under pressure of sports politicians. In 1955 physiologist, John Ziegler developed the modified molecule of synthetic testosterone with increased anabolic properties (*Dianabol*) for the national weightlifting team of the USA. The salad bowls filled with Dianabol (also known commonly as methandrostenolone), named also "Champion's breakfast" were eaten by athletes in unlimited quantity. Then the American weight lifters, athletes and team sport athletes began to show unprecedented results at the international competitions[41].

Some countries tried to exert influence on results of Anti-Doping analyses. According to some researchers the USA, for example, was purposely provided to WADA the methods of determination of doping used by athletes of the socialist countries. At the same time the American scientists produced doping, which was very effective in the past – Stanozolol, an anabolic steroid that was impossible to be found in body. Thus, the USA controlled the international Anti-Doping policy and defined who could be caught on doping and who could be unpunished[42].

However, nothing is secret that shall not be made manifest. For example, the world famous Canadian athlete Ben Johnson had been using Stenazolol with impunity for many years. Nevertheless, he was exposed at the Olympic Games in Seoul (South Korea, 1988) where he showed fantastic performance. New techniques allowed revealing Stenazolol in his sample. It is interesting Moscow experts helped to do it. As it later became clear, in 1986, they found the traces of this

[40] D. Pilipenko, *Crime in sport*, cit., p. 121 s.

[41] *Brief Doping History in Sport*. Retrieved March 2, 2014, from *zmix.ru/food/chemistry/articles-doping/item*.

[42] I. Bombela, *Anabolic steroids*, cit.

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doping in his sample on Goodwill Games in Moscow, but they did not disclose this fact for political reasons[43].

Moreover, this history proceeds in modern days. At the beginning of 2016, the most famous Russian tennis-player M. Sharapova and many other famous Russian athletes were caught in use of Mildronate (Meldonium). That was another scandal when the Government of Russia and the Russian Ministry of Foreign Affairs made the corresponding inquiries to WADA. This substance has been entered to WADA banned list by representatives of the USA in order to compromise the Russian athletes who earlier "were fond" of this drug in large quantities[44].

Competition among countries generated competitive fight also between Doping and Anti-Doping technologies. As a rule, in the beginning there are new substances and methods invented in special medical-biological laboratories, which facilitate setting up unprecedented sports records. Then it turns out that they result in unacceptable health risks to athletes. Then there are created new lists of banned substances and methods, as well as new technologies for identification and recording of these banned substances and methods. It becomes more difficult to reveal new types of the banned substances and methods.

As mentioned before it is not for nothing that the new edition of the World Anti-Doping Code 2015 provides a 10-year period of prescription (earlier 8-year period) for doping violations. It will help to find doping by means of modern technologies, which, for example, ten years ago was "successfully" removed before competitions from athletes' body by "experts of sports medicine" in full confidence of impunity of their actions.

12. Doping is revealed eventually, despite use of modern doping scientific technologies. Recently, for example, there was created the *gene doping*. The gene doping is officially determined by WADA and included to the banned list. However, it first, this doping was

[43] A. Dzhusoyti, *Oh, sport, you are the syringe. The informal Doping World Cup continues*. Retrieved May 8, 2012, from *www.compromat.ru/page_24442.htm*.

[44] *Mildronate became Doping upon an Initiative of the Americans*. Retrieved December 14, 2016, from *www.ntv.ru/novosti/1612376/*.

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impossible to reveal. Meanwhile it is very dangerous both for health of athletes and for other people as it can cause dangerous genetic mutations in body of future human generation.

However, most recently scientists wrote about the "progressive" direction in science – "sports genetics", which was capable to provide "selection" of athletes at gene level. It is known that such countries as the USA, the Great Britain, the Netherlands and Canada succeeded a lot in confidential research on sports genetics. For example, by means of genetic engineering scientists learned to build up the muscle mass of the athlete with little effort or to "improve" vessels for intense oxygen transportation, or to suppress athlete's pain thresholds.

Time went by. Now the international sports society thinks of how to secure sport against genetic engineering. Especially that it is rather difficult to reveal artificial changes at the gene level, as according to experts the genes, which are artificially entered into the body, are almost indistinguishable from real genes. Now WADA spends about 1 million dollars a year for development of Anti-Doping technologies in the sphere to sports genetics[45].

Most recently "*Blood doping*" had the same situation, some experts also considered fight against this doping as impossible or ineffective. However, as we know, the biological passport of the athlete was created for prevention of frauds with athletes' blood. Now it is improved and includes *hematologic* (for definition of blood values), *steroid* (definitions of steroid hormones) and *endocrine* passports in Russia. The opportunities of fight against a so-called "blood doping" increased significantly[46].

We cannot shut out emergence in years ahead of any essentially new types of doping, for example, with *use of nanotechnologies and biotechnologies*, in particular, bionic prostheses, implantation in bodies of athletes of any devices, which enhance locomotor system with provision of additional force, speed, flexibility, etc. Moreover, per-

[45] *Role of the World Anti-Doping Agency in control of doping in sport*. Retrieved May 17, 2014, from *sportswiki.ru*.

[46] E. Malinovskaya, *The Biological Passport of Athlete – Results and Prospects*. Collection of materials of II Russian scientific and practical conference "Doping in sport: risks, counteraction, and prevention", Moscow, RUSADA, 2012, p. 66 s.

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haps, there will be doubts in efficiency of fight against new types of doping in the sphere of nanotechnologies and biotechnologies. It will also be necessary to look for new Anti-Doping methods of identification of "improvement of body" and to define new standards of behavior of athletes and procedures of doping control. Apparently, this fight between Doping and Anti-Doping technologies will exist until professional sport exists, as battle between good and evil. Defeats and victories will interchange each other forever and every time on a new round of development of science and opportunities of human body.

In addition, we cannot shut out *legalization of some types of doping* as it has happened to marijuana. Maybe biotechnological modifications of human body, such as, for example, "Cheetah Flex-Feet" of the Paralympic champion Oscar Pistorius will become an everyday occurrence in professional sport. «In the context of biotechnical modifications it is quite logical to doubt expediency of WADA, Mia Andy and Beatriz Garcia says, we live in the era when not only athletes change themselves by means of various technologies. Whether will the fact that the athlete takes drugs for improvement of the performance concern anyone if the same is done by all other members of society?»[47].

13. It should be noted that now high performance sport could not exist without new technologies and achievements of sports medicine, without use of results of modern medical-biological researches and new effective drugs of pharmaceutical industry any more. More and more victories of athletes are a result of collective work of coaches and sports doctors, so-called "biomedical support" of sports activity, but not a result of an athlete.

Medical-biological researches for the benefit of high performance sport are conducted in all developed countries, including Great Britain, the USA, Germany, Australia, Canada, China and Korea (the English Sport Institute, the Federal Institute of Sports Sciences in Bonn, the Australian Sport Institute, etc.). Russia is not an exception. Now "athlete-star" of modern Russia is surrounded by the whole group

[47] E. Mia, B. Garcia, *Fundamentals of Olympism*, Moscow, 2013, p. 105.

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of people in white coats: a team doctor, clinical pharmacologist, biomechanic, physiotherapist, massage therapist, dietitian, reflexologist, medical psychologist, etc. For high performance sport the electronic medical cards are created, there are also created special cross-disciplinary laboratories, pools with underwater athletic track, climatic rooms, rooms for video analysis, psychological testing, manual influences and so forth[48].

Athletes from "high performance sport" are literally "stuffed" with various modern biological additives and pharmaceutical drugs on the eve of big sports events. The so-called expensive "vitamin and mineral complexes" for athletes are often made of exotic types of raw materials (for example, biomass of larvae or internals of the African catfish, etc.), and delivered to athletes on an individual basis taking into account their genetic and biological analysis[49].

However, it can be noted that some modern pharmaceutical preparations and medical technologies used are near to doping. Moreover, maybe someday they will be included to WADA's banned list. In particular, according to the World Anti-Doping Code (Art. 4.3 of the Code) for this purpose it is necessary that methods or substances correspond to two of three criteria: improved performance (1), represented real or potential risk for health of the athlete (2) and contradicted to "spirit of sport" (3).

It can be stated with full confidence that all medical methods are directed to achievement of high performance in sport therefore, they already correspond to one of criteria of WADA. In addition, there is a probability that in future WADA will be able to find in modern medical methods other criteria, in particular connected with potential risks for health of athletes or contradiction to "spirit of sport".

For example, it is always possible to raise doubts about observance of "spirit of sport", the principle of "equal opportunities" and "fair game" at the Olympic Games when athletes of "poor" and "rich" countries are placed in a position of inequality. Some athletes

[48] V. Kotenko, *High performance medicine and sport*, in *Who is who in medicine?*, 2013, p. 5.

[49] *Report of the chief of FMBA of Russia V. V. Uiba on enlarged session of board of FMBA as of July 23, 2013*. Retrieved November 19, 2014, from *www.gcgie.ru/Kollegia-FMBA2013/Doklad-Kol.pdf*.

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are under careful attention of well-qualified medical personnel in expensive stationary and mobile medical complexes. They are overloaded in large quantity with "authorized" biological additives, special food and drugs, placed in pressure chambers for oxygen-helium therapy, etc. Other athletes from the "poor" countries are deprived of such opportunities at the Olympic Games and other great international sports competitions.

There are also doubts in assessment of legitimacy of some drugs and methods used by doctors for improvement of performance. For example, according to the banned list 2017 WADA excluded all forms of procedure with blood or its components, including physical or chemical methods. However, sports medicine uses regularly the methods of low intensity laser therapy which allow "raising high-speed and power components of muscles" and blood transport functions, stimulating hemostasis, metabolism, etc. The experts should answer a question whether laser radiation is one of types of such "procedures" with blood or not

There is another example. Some countries widely use pressure chambers with pure oxygen, which can increase transfer of oxygen to athlete's cells by 10-15 times. Meanwhile, as we know, many substances and methods have been prohibited by WADA due to "accelerated oxygen supply". Now many experts do not know, for example, how to qualify the use of pressure chambers in sports medicine[50]. In Norway, use of pressure chambers by athletes is even prohibited by the law, in Italy the athletes can be placed under criminal jurisdiction for use of pressure chamber and so-called "hypoxic centers"[51]. In addition, legitimacy so-called "oxygen" cocktails (inhalation of xenon) by the Russian athletes during the international competitions raised doubts as according to international experts these cocktails stimulated production of erythropoietin in athletes' body. It is not for nothing that in May 2014 WADA equated inhalations of xenon and argon to the use of doping. Now the use of these gases will lead to immediate punishment of all athletes[52].

[50] E. Mia, B. Garcia, *Fundamentals of Olympism*, cit., p. 104.

[51] D. Pilipenko, *Crime in sport*, cit., p. 112.

[52] *Substances, which the Russian Athletes used in Sochi are stated as Doping.* Retrieved June 15, 2014, from *www.newsru.com/sport/20may2014/xenon.html*.

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One must not exclude that now some pharmacists in some countries continue to search for the substances, which can be removed from athletes' body as fast as possible so that the athletes could be "good" ahead of doping control. New types of doping are also produced. For example, according to the Chief of Russian Federal Medical and Biological Agency V. Uibu the new "psychological doping" has been used in a number of the Asian countries. This doping is using by means of special psychotechnics from olden times and turn the athletes into "zombies". In his opinion, the destiny of these athletes can be sad if their consciousness is blocked to the end of their life[53].

Therefore, it would seem that all countries in the nearest time have to combine efforts in order to decide finally, what modern achievements in sports medicine are doping and what are not. In addition, WADA should find the actual border between modern technologies of sports medicine and the prohibited substances and methods. All should put into operation the international standards of the sports law and standards in the sphere of sports medicine, obligatory for all countries, in this regard.

Besides, it would seem that the International Olympic Committee, WADA and other international sports and medical organizations have to define system of measures for equalizing of rights and opportunities of athletes of "rich" and "poor" countries, in particular, affordability of advanced technologies of sports medicine to all athletes, especially during the Olympic Games and great international sports competitions.

In our opinion development of uniform sports complexes for the period of the Olympic Games and other international sports competitions available to all athletes of "rich" and "poor" countries would ensure the principles of the Fair game and equal opportunities in sport, sports ethics and rules of the international sports law. We'd really appreciate if in this regard all politicians and sports officials remember that the main thing in sport, as baron de Coubertin, the fa-

[53] E. Merkacheva (in press), *Victory Gene. MK has found out what Scientific Developments are used by Athletes at the Olympic Games in Sochi*, in *Moscow Komsomol*, 10 December 2013.

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ther of the modern Olympic Games, repeatedly emphasized, is a noble and fair victory and that according to rules of the Olympism the competitions are among the athletes, but not among the countries.

14. It is difficult to find traces of doping because many athletes and their mentors from the sphere of sports medicine have learned to remove banned substances effectively by means of the most modern technologies. Therefore, the role of evidences on use of substances banned by WADA by athletes is very high. That is why we need in special investigative methods and different ways of obtaining information. Some experts speak about it as a new trend in fight against doping.

There appeared such a concept as intelligence-based testing. It means that finding of using doping conducted according to operational information of law enforcement agencies and security services. For example, the Australian Anti-Doping Agency uses operational information of Boarder Guard Service and Customs Service, Anti-Doping Agency of Great Britain (UKAD) uses operational information of Organized Crime Control Bureaus, which regulate the drug control, etc.

In some countries there is special software allowing comparing operational data of law enforcement agencies and secret services with the international Anti-Doping information system ADAMS (Anti-Doping Administration and Management System)[54]. In this regard, the experience of integration of anonymous hot lines for athletes, coaches and members of sports delegations for reporting about violations of Anti-Doping rules deserves our attention.

15. Distribution of doping in professional sport is supported also by Organized Crime. In particular, the international organized crime plays a negative role in distribution of doping in sports world. The history of the international organized crime in the doping market originates from the beginning of the 1970s when a "brilliant" idea of distribution of anabolic steroids came to the management of the Italy-American mafia, which was engaged in transportation, and sale of

[54] A. Derevoidov, *Fight against Doping: Innovative Approaches to Testing Planning*, in *Bulletin of RMOU*, 2, 2012, p. 89 s.

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drugs. In order to promote use of anabolic steroids the Italy-American mafia financed the movie «Pumping Iron», 1977, devoted to bodybuilding where Arnold Schwarzenegger had had the leading part. Later he admitted that he had used anabolic steroids[55]. The movie developed by mafia made commercial success and a grotesque character of Schwarzenegger with his enormous muscles became a factor of distribution of anabolic steroids around the world. Mafia actively distributed anabolic steroids not only in sporting world, but also among show business stars, famous movie, theater and ballet actors who sometimes had strong physical overworks in their professional life.

However, the Italy-American crime was overpowered by "the Russian mafia", which in the middle of 1990s offered tons of cheap and rather high quality anabolic steroids, as well as animal growth hormones to the international market. According to the western experts, doping from Russia made on the former Soviet medical-biological laboratories, which were known for high scientific technologies[56]. Today the victory won by the "Asian mafia", which has massive opportunities for production and supply of cheaper doping. The general scheme of production and sale of doping is the following. The prohibited substances are made generally at the small enterprises in China, India and Thailand where the cheap labor is situated and the pharmaceutical industry is developed. Sometimes also, the large pharmaceutical companies are engaged in this illegal business. Profitability of this criminal business is unbelievable. The income surpasses expenses in hundreds times. The main international doping traffic has tended from Thailand, China and India to Europe and the USA now. Every year about 30 million doses of various prohibited substances for the sphere of professional sport and extreme physical activity are produced in India[57].

According to the statement of WADA, 99 percentage materials for production of doping are supplied by the organized criminal communities from the People's Republic of China. China reacted to this statement rather painfully and began the total check upon

[55] A. Donati, *World Traffic in Doping Substances*, Montreal, WADA, 2007, p. 29.
[56] *Ibidem*, p. 38 s.
[57] *Ibidem*, p. 47.

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this charge[58]. Indeed, the Chinese preparations prevail in the doping market now.

In addition, in the world of globalization and Internet, it is easy and legal to buy doping on a mass basis for sports clubs, using Internet technologies. Therefore, for example, recently it was found out that the Spanish football club "Real Sociedad" officially spent about 300 thousand EUR a year for purchase of the prohibited drugs for the players[59].

There is the same situation in Russia. Everyone can buy many WADA banned substances in any search system in Internet. The courier could bring them to you without asking any recipes from doctors. The revenue of only one doping online store was estimated by experts at 40 million dollars a year[60].

However, it is rather difficult to reveal this trading system on the Internet as it is often integrated into the general system of medicine trade. It is also easy to sell doping at fitness-centers to so-called "gym rats" and body builders (persons who are engaged in bodybuilding). The doping in these centers is being sold illegally by coaches, in sport bars, etc.

Some so-called "black" sports doctors also sell expensive banned substances or drugs under testing to elite athletes, as well as give them the "deep scientific consultations" on methods of concealment of use of banned substances. The income of these black doctors who work in the sphere of professional sport is estimated at 30 thousand dollars a year for one elite athlete[61].

16. One more unresolved legal problem deserves close attention – illicit trafficking of doping by means of distance sales, including Internet. As previously reported, it is not a problem to get doping on Internet in Russia. However, the question now arises of whether such distribution and purchase of the prohibited substances is law-

[58] *Chinawas accused of Production of Doping* (in press), in *RBK daily*, 20th February 2013.

[59] *President LFP knew about Purchase of Doping*. Retrieved November 15, 2014, from *rsport.ru/football/20130205/643454533.html*.

[60] A. Zubareva, *Sporting wheels*, in *RBK* (*Business magazine*), 9, 2012.

[61] *Ibidem.*

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ful. The answer it is illegal. According Goods Distance Sales Regulations (cl. 5) the distance sales of goods (including Internet) which are banned or limited by the legislation of the Russian Federation is prohibited. The doping belongs to goods the realization of which is limited not only by the Russian, but also by international legislation. In Russia, for example, dispensing is possible if the seller has the corresponding license, in particular, anabolic drugs can be sold only upon presentation of medical recipes.

It is also necessary to take into account that import of medicines from other countries is possible only if they are included in the Russian State Register of Medicinal Remedies, have manufacturer's certificate of origin. In certain cases, they should have permission of authorized Federal Executive Authority (Art. 47 of Federal Law as of 12.04.2010 No. 61-FZ "On drug circulation"). However, who does provide control of drug circulation in the Russian Federation? This organization is called Federal Service for Supervision in the Sphere of Health Care (Roszdravnadzor). Fight against illegal distribution of doping and anabolic steroids should be also performed by Authorities of the Ministry of Sports of Russia, the Ministry of Health and Social Development of the Russian Federation, Rospotrebnadzor, Federal service for fight against drug trafficking, Federal Customs Service (FCS), the Ministry of Internal Affairs, FSB and Rospatent. However, there is no due coordination of work among various departments in the sphere of fight against doping. Perhaps it is time to create the special state commission for coordination of this work.

Of course, there are also required the certain changes in the Russian and international legislation regulating circulation of drugs with substances prohibited by WADA. First, it is seemingly necessary to demand that drugs manufacturers should specify on mandatory basis the presence of substances prohibited by WADA, as well as risks and contraindications for the sporting persons in Instruction for use of drugs. These duties should be established for all drugs manufacturers. In this regard, it would make sense if formulators were obliged upon application of drug for state registration to provide the corresponding information on presence of substances prohibited by WADA and possibility of use of a concrete drug in professional sport.

Above-mentioned measure would help athletes define what is a doping and what is not. In addition, it would allow avoiding the

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"doping" risks connected with the use of common drugs by athletes during illness. In addition, it is desirable that these rules would be established by the international legislation.

It is also seemingly necessary to increase legal and pharmacological awareness of athletes about doping and its consequences, as well as about licensed drugs. In this regard, the experience of France where doctors conduct open and anonymous consultations for athletes in the special medical centers for the prevention of use of doping deserves attention. In France these centers are a general part of public health system, they are founded with support of different socially oriented government authorities. Every athlete can get advice and examined anonymously there. And it is very important as athletes have an opportunity to be convinced themselves of legitimacy of the drugs prescribed by doctors, to learn about presence of banned substances in food supplements and quality of the food cooked for them.

17. One more problem deserves close attention. It is a problem of using substances under preclinical and clinical tests in professionally sport. According to WADA, banned list as it was already mentioned any pharmacological substances prohibited for use as therapeutic agent by the correspondent government bodies, for example, drugs under preclinical and clinical tests are considered as a doping.

However, in practice it is very difficult to do. Especially, when the developed states officially encourage carrying out medical-biological researches for the benefit of the elite sport. That is why it is very important to settle all issues connected with use of drugs at the legislative level.

How are conducted clinical studies and tests of new drugs in the Russian Federation? According to Article 43 of Federal Law as of 12.04.2010 No. 61-FZ "On drugs circulation" participation in clinical studies of drugs for medical use is voluntary. The voluntary consent of patient for participation in clinical studies should be confirmed by his signature on a special information leaflet.

According to this Article 43 implementation of clinical studies of drugs for medical use with participation of orphan children, pregnant and lactating women, military personnel (except for drugs developed for military operations), law enforcement officers, persons

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who serve sentence in custody and also persons who are in custody in pretrial detention centers is forbidden

However, there is no legal ban on implementation of clinical tests of new drugs for such category of examinees as professional athletes. Meanwhile, exactly this category of persons is attractive to the various researches connected with effect of innovative drugs and methods at extreme physical activities. This category of persons should not be object of such studies what follows from the international obligations of the Russian Federation, in particular, from provisions of the World Anti-Doping Code and the International Standard, which specifies the list of methods and substances, prohibited for athletes. In our opinion, the tests of new drugs on professional athletes have to be definitely banned. Moreover, these bans should be also imposed in other countries of the world

18. Let us come back again to the doping scandal in Russia. In May 2016, the investigation of this scandal was entrusted to an independent commission headed by Canadian Professor Richard McLaren. Professor McLaren prepared two parts of the report. The first part was published in July 2016; the second was published in December 2017.

Professor McLaren's report concluded that the massive facts of falsification of samples in the Sochi Anti-Doping Laboratory were "part of a state-controlled, reliable system", and the Ministry of Sport, RUSADA and the Russian Federal Security Service were involved in this process. About 1000 Russian athletes were accused of using doping. Among them were 15 Russian Olympic medalists in London, 12 Olympic medalists in Sochi, 6 medalists in the Paralympic Games.

It seems that McLaren's report had catastrophic consequences for Russia. Some important officials of the Russian Ministry of Sport were dismissed. The activities of the Russian Anti-Doping Laboratory and the Russian Anti-Doping Agency were suspended. The Council of the International Association of Athletics Federations (IAAF) decided temporarily remove Russia from international competitions. One third of our athletes could not go to the Olympic Games in Rio. Besides the International Paralympic Committee suspended the membership of the Russian Paralympic Committee.

Nevertheless, there are doubts concerning some main conclusions

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contained in Professor McLaren's report. First, the main conclusion of Professor McLaren that there is a state system of doping support in Russia. It is very difficult to agree with this main result of the independent investigation of professor McLaren.

Russia has adopted many legal acts to combat doping. We have a document such as the State Development Strategy in the field of physical culture and sports, and the fight against doping defined as a strategic goal in this document. The Labor Code, the Criminal Code, the Code of Administrative Offenses and the Federal Law on Physical Culture and Sport regulate the fight against doping in the Russian Federation. For example, in the law on physical culture and sports appeared the special article "Prevention of doping in sport and combating it". Another example, the Russian Ministry of Sport in 2016 approved the new All-Russian Anti-Doping rules.

Despite the fact that RUSADA's work was suspended, we should admit that this agency was very active. The author of this article calculated that from 2009 to 2015, RUSADA officers themselves found 935 Anti-Doping rule violations among Russians athletes[62]. In this connection, the question arises. Is it possible to accuse the Russian state of supporting doping if this state issues a huge number of legal acts to combat doping and bring hundreds of athletes to responsibility for violations of these rules? It seems we should answer "No". Therefore, it is difficult to agree with the main conclusion of Professor McLaren, that Russian state supports doping. This is not true. This conclusion formed presumably under the influence of politicians. However, this is only personal point of view.

There are also have doubts about the legal procedures connected with the collection of evidences. It is very difficult to explain why the representatives of Russia were not the members of the McLaren Commission. Why did Professor McLaren not come to Russia, in particularly, in laboratory in Sochi, did not talk to Russian sports doctors, sportsmen and officials? Any investigator should go to the scene of the crime. We lawyers know this is obvious fact. Of course, it is difficult to believe in the objectivity and quality of such investigation, which based only on paper documents without communi-

[62] WADA, Official site. Retrieved October 19, 2017, from *www.wada-ama.org/en/anti-doping-statistics*.

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cation with different sides of the criminal process. Moreover, some officials confirmed this conclusion. Recently, the Director General of the International Olympic Committee, Christopher de Klepper, admitted in writing that the evidences of the professor McLaren against Russian athletes is insufficient to apply sanctions to them[63].

Nevertheless, Russia made serious conclusions from this scandal. Russia created a public independent Anti-Doping commission. The National Anti-Doping Laboratory transferred from the Ministry of Sport to the Moscow State University. The National plan to combat doping in Russian sports was adopted in February 2017. There are many measures, including detailed regulation of the activities of doctors, trainers and other specialists in the prevention of doping in sport. Russia even wants to deprive of property of persons convicted of Anti-Doping rule violation, to change the rules of selling medicinal products and biological supplements containing substances prohibited by WADA. Besides there are measures for dismissing from the state and non-state service of managers, disqualified for Anti-Doping violations and other measures. On July 10, 2017, the Russian government adopted Decree No. 1456-r, which approved a set of measures to implement this plan[64].

At last, in Russia, the law of criminal liability for declining to dope appeared in 2016. However, the sanctions of this article maybe not severe enough. For example, the penalty established only one year of imprisonment for inducing a minor athlete to doping. If the athlete is dead after doping, then the punishment is set only three years imprisonment (article 230.1). Criminal responsibility strengthened for a coach, a specialist in sports medicine if prohibited substances and methods used without the consent of athletes. Such liability provided in new another article 230.2 of the Criminal Code[65].

[63] *WADA admits McLaren's 'Doping' Evidence against Russian Athletes Insufficient*. Vestnik Kavkaza. Retrieved October 1, 2017, *vestnikkavkaza.net/news/WADA-admits-McLaren%E2%80%99s-%E2%80%98doping%E2%80%99-evidence-againstRussian-athletes-insufficient.html*.

[64] Order of the Government of Russia of July 10, 2017 No. 1456-r. Retrieved August 1, 2017, *www.garant.ru/products/ipo/prime/doc/71615410/*.

[65] Federal Law of 05.06.2012 N 54-FZ: «On Amending Articles 230 and 232 of the Criminal Code of the Russian Federation and Certain Legislative Acts of the Russian Federation». Information retrieval system "Consultant Plus".

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There is another question. Why Russian athletes not involved in criminal prosecution in Russia? We know, that many Russian sportsmen deliberately using prohibited substances and methods. Using dope, they are unfairly making victories, deceiving other athletes and fans. Meanwhile, there is practice of criminal prosecution of athletes in Austria, Greece, Germany, Italy, Poland, Switzerland, France and other countries. It seems Russia should follow the example of these countries and establish criminal liability own athletes for doping.

19. However, there are legal problems that needing to solve at the international level. The first, we should think about the correlation of collective and individual legal responsibility in international sports law. Now, according to the current norms of the World Anti-Doping Code, the activity of the National Sports Federation, which unites thousands of athletes, can be suspended or stopped due to violation of Anti-Doping rules only by several dozens of athletes. As a result, many innocent and clean sportsmen suffer from this legal injustice. Many honest sportsmen are deprived of the opportunity to compete in international competitions. We can ask the question: is this right? It seems the right answer "No". Another example. According to FIFA rules, any sports judge can decide to hold the next match at empty stands due to a small group of extremist fans. Is this true for most law-abiding fans? It seems the right answer "No" too. Sports lawyers maybe should think about how to avoid such legal conflicts and make the rules of sports law more just and right.

Besides, it is necessary to improve the technology of Anti-Doping rules at the international level. This work is already underway. The International Olympic Committee decided in July 2017 to establish an Independent Testing Authority. This body will conduct testing of athletes; solve all problems associated with failed tests and therapeutic use exemptions. Even WADA and the International Olympic Committee cannot influence it. Moreover, a special Ad-Hoc Committee of the Court of Arbitration for Sports (CAS) will implement sanctions. This judicial system already worked in Rio (Brazil, 2016) and this system will work fully in the Olympic Games at Pyeongchang (Korea, 2018)[66].

[66] *Independent Testing Authority on track - Olympic News*. Site IOC. Retrieved October 14, 2017: *https://www.olympic.org/news/independent-testing-authority-on-track*.

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International Sports Law needs in other reforms, which ensured the objectivity of international investigations into facts that undermined the integrity of sport. Perhaps we should create an international agreement that would ensure sufficient representation of all countries in international sports organizations, involving in such investigations. For example, there is not a single representative of such a large sports country as Russia in the WADA and the Executive Committee of the Paralympic Committee. Moreover, this applies to not only Russia, but also other countries. Representatives of Africa, the Middle East and the Far East, in particular, representatives of China, India, Iran, Brazil, Saudi Arabia, Qatar and other countries should be more in international sports organizations. Maybe this will allow paying attentions opinions of all countries, contribute to balanced and adequate decision-making by international sports organizations on the problems of sports integrity.

It seems there is also one very important problem concerning investigations in the sphere of sports integrity. This problem is the immunity of leaders of international sports organizations. We all well remember the corruption scandals in FIFA and UEFA. Moreover, we have no sympathy for sports international leaders, guilty of corruption. However, it is very difficult to understand why only one or two countries have the right to prosecute such persons. As it seems, there is always the risk of unreasonable political influence in such cases. Maybe the criminal prosecution of top-level sports officials should be conducted in accordance with certain rules established by the international community, taking into account the opinion of all countries. Perhaps we should involve independent international law enforcement organizations, such as Interpol, in the investigation of such international sports crimes. Maybe, in order to combat crime in professional sports, it is advisable to set up special criminal international investigative bodies and courts.

20. Now we do not know what decisions the International Olympic Committee will take with regard to Russian sport. Any decision can be made. However, it seems that a certain historical time will be needed to understand everything. Nevertheless, preliminary conclusions can be drawn already now.

Sport belongs all world and humanity. Sport is a tool of im-

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provement of physical and moral qualities of the person. If sport is deprived of these ideals and high-minded ideas, sport will lose its attractiveness.

Sport should not to be a platform for geopolitical games. Politicians of all countries of the world have to realize finally that sport is not a method of victory of one country over another; it is not an indicator of the political superiority. It is a way of unity of humanity based on the fair competition and the atmosphere of friendship. Moreover, they have to do everything in order to bring sport out of the sphere of politics, to combine efforts in fight against doping and to create equal conditions to athletes of all countries for fair victories. No doping. No politics in sports. Only integrity of Sports. Only Sports Law supremacy. Only peace, kind and lovely cooperation in sports.

Anatoly Peskov

*Abstract*

The article devoted to doping scandal in Russia. However, the author tried to look at this problem much deeper. As he considers, politicians and totalitarian regimes of power contribute to the spread of doping. However, the athletes themselves are also to blame for violating the rules of the World Anti-Doping Code and Fair Play. Doping became, as many experts note, not only more diverse, highly specialized and efficient, but also very dangerous for the health of athletes. One of the main factors that allow athletes to escape responsibility, it is corruption. Facts take place when doping divisions occur to corruption, particularly when positive samples disappear in an unknown direction, doping – tests falsified. The author pays particular importance to research and new technologies in the field of sports medicine, including generating new kinds of ways to influence the human body. The article also examines the practice of International Standard for Therapeutic Use Exemptions. The author suggests to improve international sports law, to develop new enforcement mechanisms in the fight against doping, to impose a ban the testing of new drugs on professional athletes.

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# La responsabilità del gestore di un impianto sportivo e i casi di esonero di responsabilità

SOMMARIO: 1. Il Gestore dell'impianto sportivo. – 2. La posizione di garanzia del gestore dell'impianto sportivo. – 3. La responsabilità civile del gestore dell'impianto. – 4. Il risarcimento danni.

1. Nell'àmbito dell'esercizio dell'attività sportiva, la questione della responsabilità civile concerne gli atleti, gli operatori sanitari, le società, le associazioni, gli organizzatori di manifestazioni sportive e, non in ultimo, il gestore dell'impianto, ovvero la persona fisica o giuridica che mette a disposizione degli utenti spazi e attrezzature per lo svolgimento di attività sportive in condizioni di sicurezza. Questi è tenuto a garantire e predisporre un servizio di assistenza a coloro che accedono alla struttura, al fine di tutelare la loro integrità, siano gli stessi dipendenti, atleti e spettatori. Il gerente dell'impianto può coincidere con il proprietario dell'edificio o essere diverso da quest'ultimo, in forza di un contratto di «*gestione convenzionata*»[1], ovvero la forma di amministrazione degli impianti sportivi piú utilizzata in Italia, almeno per quanto concerne gli edifici di proprietà degli Enti locali[2]. In questa sede, ipotizziamo il caso in cui i due sog-

[1] Si tratta della circostanza in cui l'Ente pubblico rimane il proprietario dell'impianto e, attraverso una specifica convenzione che segue ad un bando, affida la gestione ad un ente privato, con il quale vengono concordate le modalità di conduzione. Come già accennato, questa è la forma di gerenza che sempre piú frequentemente gli Enti locali, impossibilitati a fare fronte agli oneri di gestione e di funzionamento dell'impiantistica sportiva, scelgono di porre in essere, predisponendo un accordo diretto con gli utilizzatori dell'edificio, che assumono il duplice ruolo di fruitori dell'impianto e responsabili della conduzione dello stesso.

[2] Il censimento Istat in collaborazione con il CONI del 1964 ha rilevato che l'ottanta per cento degli impianti apparteneva agli enti locali – in termini vedi Atti del Con-

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getti non coincidano e le responsabilità siano ripartite tra gli stessi. Orbene, considerando l'opzione generale in cui la manutenzione straordinaria deve essere resa ad opera dell'Ente proprietario, vediamo che il conduttore deve garantire le condizioni di agibilità, predisponendo, altresì, idonee misure utili ad impedire che si possano verificare sinistri o fatti che ledano coloro che accedono alla struttura. Lo stesso, nel rispetto della suddivisione delle mansioni di cui alla convenzione stipulata con l'Ente proprietario dell'immobile, deve occuparsi della manutenzione ordinaria dell'edificio e provvedere alla comunicazione di eventuali richieste di intervento che prevedono il sussidio da parte dell'intestatario dell'immobile.

2. Stando a quanto sancito dall'articolo 40 c.p. ovvero che «Nessuno può essere punito per un fatto preveduto dalla legge come reato, se l'evento dannoso o pericoloso, da cui dipende l'esistenza del reato, non è conseguenza della sua azione od omissione. Non impedire un evento, che si ha l'obbligo giuridico di impedire, equivale a cagionarlo», il gestore è titolare di una posizione di garanzia che gli impone di rispondere, non senza limiti, per gli eventuali danni patiti dai fruitori della struttura. In linea con quanto appena assunto e con la necessità di porre degli argini alla responsabilità penale dell'amministratore ritroviamo numerose pronunce giurisprudenziali secondo le quali l'indagine sul nesso eziologico, ai sensi della predetta norma, va effettuato attraverso il ricorso alle regole desumibili dalle leggi di copertura di carattere universale, dalle leggi statistiche, dalle massime di comune esperienza e attraverso le valutazione di tutti i fattori presenti e interagenti nel caso concreto[3]. L'oggetto della posizione di garanzia è «prevenire il pericolo», ovvero l'obbligo di protezione che riguarda anche i pericoli atipici, cioè quelli che l'utente non si attende di trovare (come ad esempio succede nell'escursionismo), diversi quindi da quelli connaturati a quel *quid* di pericolosità insito nell'attività (il

vegno Atri, 14-15 maggio 2012, *Le scienze dello sport - Il laboratorio atriano*, a cura di G. Sorgi, Roma, 2012, p. 248.

[3] Cass. pen., 14 dicembre 2005, n. 4462, in *CED Cass.*, rv. 233244; Cass. pen., Sez. un., 10 luglio 2002, n. 30328, *ivi*, rv. 222138; Cass. pen., 15 maggio 2003, n. 27915, ined.; Cass. pen., 5 luglio 2004, n. 36805, ined.; Cass. pen., 1° dicembre 2004, n. 46586, in *CED Cass.*, rv. 230599.

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caso delle piste di gokart o delle piste di enduro). Al contrario, deve escludersi che un tale obbligo di protezione si possa estendere sino a comprendere i c.d. pericoli esterni (*rafting*, volo dell'angelo, *Street luge*, *Slack Lining*), ma, nondimeno, il gerente deve prevenire quei pericoli fisicamente esterni, ai quali si può andare incontro anche in caso di comportamento imprudente di terzi (il caso delle piste da sci e *snowboard*).

Secondo una recente sentenza della Corte di Cassazione, la colpa omissiva di cui alla citata norma del codice penale deve trattenere un obbligo giuridico non necessariamente vincolato all'esistenza di una norma o regola dettata da fonte pubblicistica o privatistica. L'onere, invero, può derivare dall'attività propria dell'obbligato in quanto possibile fonte di pericolo. Ad esempio, nel caso del gestore dell'impianto e delle piste da sci servite, si prevede che quest'ultimo abbia l'obbligo della manutenzione e del mantenimento in sicurezza delle piste medesime in virtù del contratto concluso con lo sciatore che utilizza l'impianto[4].

3. La società (o l'a.s.d. – associazione sportiva dilettantistica) che gestisce impianti ed attrezzature dovrà tutelare l'incolumità di coloro che li utilizzano, anche a titolo gratuito, sia in forza del principio del *neminem laedere*, sia nella sua qualità di custode delle stesse attrezzature (come tale civilmente responsabile, per il disposto dell'art. 2051 c.c. dei danni provati dalla cosa, fuori dall'ipotesi del caso fortuito), sia infine, quando l'uso delle attrezzature dia luogo ad un'attività da qualificarsi pericolosa, ai sensi dell'art. 2050 c.c. La maggior parte della giurisprudenza, infatti, considera il gestore quale custode della struttura e come tale detentore del potere, di fatto e di diritto, di vigilanza e di controllo sulla cosa. Fuori dall'esimente del caso fortuito, ovvero dall'ipotesi che nessun ragionamento umano possa prevedere, quanto contemplato dall'art. 2051 c.c.[5] sussiste quando il danno è prodotto dalla cosa. Diversamente, se il danno deriva dall'opera dall'uomo, viene adottata la previsione di cui all'art. 2043 c.c, vale a dire «Qualunque fatto doloso o colposo, che cagiona ad altri un danno

[4] Cass. pen., 9 novembre 2015, n. 44796, in *Foro it.*, 2016, II, c. 86 ss.

[5] Art. 2051 c.c.: «Ciascuno è responsabile del danno cagionato dalle cose che ha in custodia, salvo che provi il caso fortuito».

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ingiusto, obbliga colui che ha commesso il fatto a risarcire il danno». In ogni caso, il danneggiato ha l'onere di provare il nesso causale[6] fra la cosa in custodia e il danno, ovvero di dimostrare che l'evento si è prodotto come conseguenza normale della particolare condizione, potenzialmente lesiva, posseduta o assunta dalla cosa[7]. In altre parole, una condotta è causa di un evento se e solo se essa ne è *condicio sine qua non*, cioè condizione senza la quale l'evento non si sarebbe prodotto. Al fine di stabilire la sussistenza di questo nesso, si deve far riferimento alla c.d. causalità adeguata[8], per cui la condotta è causa quando, normalmente, è idonea a provocare quell'evento. Il principio alla base di quanto appena assunto è quello del predetto *neminem ledere*, secondo il quale ogni soggetto è tenuto ad astenersi dal ledere la sfera giuridica altrui. Non è dunque sufficiente evidenziare che una cosa ha prodotto un danno, per poi avvalersi della presunzione *ex* art. 2051 c.c. o *ex* art. 2043 c.c. A questi fini, occorre la prova di una necessaria ed obiettiva correlazione tra la cosa e il danno, essendo intuitivo che la responsabilità di cui ai citati articoli non possa affermarsi a carico del gestore della cosa la quale, nella causazione del danno, abbia svolto un ruolo di semplice occasione del danno o un molo del tutto inerte e passivo. Nello specifico, egli potrà essere ritenuto responsabile per gli eventi dannosi che si sarebbero potuti

[6] Ai sensi dell'art. 40 c.p., il nesso causale deve essere individuato tenendo conto delle leggi di copertura di carattere universale, delle massime di comune esperienza e della valutazione di tutti i fattori presenti e interagenti nel caso concreto (Cass. pen., sez. un., 10 luglio 2002, n. 30328, cit.; Cass. pen., 15 maggio 2003, n. 2791, cit.; Cass. pen., 5 luglio 2004, n. 36805, cit.; Cass. pen., 1° dicembre 2004, n. 46586, cit.).

[7] Cass., 5 aprile 2005, n. 7062, in *Rep. Foro it.*, 2005, voce *Responsabilità civile*, n. 467 Cass., 22 luglio 1987, n. 6407, *ivi*, voce cit., n. 136.

[8] Cass., 23 giugno 2015, n. 12923, in *Rep. Foro it.*, 2016, voce *Responsabilità civile*, n. 102: «In tema di responsabilità civile extracontrattuale, il nesso causale tra la condotta illecita ed il danno è regolato dal principio di cui agli artt. 40 e 41 cod. pen., in base al quale un evento è da considerare causato da un altro se il primo non si sarebbe verificato in assenza del secondo, nonché dal criterio della cosiddetta causalità adeguata, sulla scorta del quale, all'interno della serie causale, occorre dare rilievo solo a quegli eventi che non appaiano – ad una valutazione "*ex ante*" – del tutto inverosimili. Ne consegue che, ai fini della riconducibilità dell'evento dannoso ad un determinato fatto o comportamento, non è sufficiente che tra l'antecedente ed il dato consequenziale sussista un rapporto di sequenza temporale, essendo invece necessario che tale rapporto integri gli estremi di una sequenza possibile, alla stregua di un calcolo di regolarità statistica, per cui l'evento appaia come una conseguenza non imprevedibile dell'antecedente».

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prevedere ed evitare con la normale diligenza del buon padre di famiglia. Invero, qualora non vi sia l'obiettiva correlazione tra cosa e danno, l'utente potrà servirsi della tutela di cui all'art. 2043 c.c. se ne ricorrano le condizioni, e cioè quando i danni siano stati cagionati da un pericolo occulto caratterizzato dai caratteri dell'insidia o trabocchetto non identificabili e non immaginabili. Al contrario, si deve ribadire che il caso fortuito è idoneo a superare la presunzione di responsabilità del custode-gestore. Ne consegue che al fine di riconoscere la responsabilità dell'amministratore sarà indispensabile dimostrare il nesso causale tra la cosa in custodia e il danno arrecato e che il gestore non potrà essere ritenuto responsabile per gli eventi dannosi cagionati agli utenti dell'impianto a causa della loro stessa condotta colposa (es. il fuori pista). Inoltre, l'eliminazione dei rischi naturali, ovvero: la presenza di zone alberate ai fianchi del tracciato, la mutevolezza del pendio, la presenza di tratti nevosi di differente consistenza, non può e non deve essere compito del gerente, il quale, al contrario, deve limitarsi alla segnalazione del pericolo non immediatamente percepibile[9]. Oltre quanto appena asserito, è utile sottolineare che sotto il profilo della pericolosità, le attività sportive comportano di prassi l'accettazione del rischio da parte dei soggetti che le praticano. Per questo motivo, quando il gestore dell'impianto abbia adottato tutte le cautele per contenere il rischio nei limiti confacenti alla specifica attività, i danni eventualmente sofferti dai partecipanti dovranno ricadere sugli stessi senza che vi siano responsabilità da imputare in capo al gestore. Continuando a tracciare la casistica, in virtù di quanto sancito dall'art. 2049 c.c.[10], l'amministratore dell'impianto sportivo può essere chiamato a rispondere per fatti che attengano al comportamento dei suoi dipendenti nell'esercizio delle loro funzioni. La norma si applica ogni qualvolta si abbia un rapporto di lavoro subordinato, ove viene riconosciuto il potere direzionale e «*decisionale a padroni e committenti*». Al fine di ravvisare la responsabilità di cui sopra, l'attività deve essere il motivo generante dell'illecito e al di fuori dalle mansioni stabilite che siano controllabili dal

[9] Trib. Cuneo, 14 gennaio 2009, in *Giur. merito*, 2009, p. 2150 ss.

[10] Art. 2049 c.c.: «I padroni e i committenti sono responsabili per i danni arrecati dal fatto illecito dei loro domestici e commessi nell'esercizio delle incombenze a cui sono adibiti».

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datore di lavoro. Anche in questo caso, il gestore-datore di lavoro può vantare l'esenzione della responsabilità dimostrando il caso fortuito. Inoltre, qualora l'azione lesiva posta in essere vada aldilà dei compiti stabiliti, la responsabilità del datore di lavoro-gestore concorre con quella del soggetto-lavoratore che ha posto in essere l'azione pregiudizievole dalla quale è conseguito l'evento lesivo[11]. Oltre quanto narrato, vediamo che negli ultimi anni con l'avvento dello sport-spettacolo, i casi relativi alla responsabilità dei gestori di impianti sono aumentati e portano ad una necessaria differenziazione tra le ipotesi di responsabilità del gestore e quelle dell'organizzatore dell'evento sportivo. Infatti, con riguardo all'ipotesi di danni subiti dagli spettatori in occasione di uno spettacolo sportivo (partita di calcio, gara di nuoto, partita di tennis o di pallavolo), la giurisprudenza dominante in passato attribuiva la responsabilità al gestore dell'impianto, facendo esclusivo riferimento all'art. 2043 c.c., sul presupposto che il gestore dovesse adottare tutte le misure idonee a preservare l'incolumità di atleti e soggetti terzi. Successivamente, si è consolidata la teoria secondo la quale si qualifica la gestione di un impianto sportivo quale attività pericolosa e il gestore dello stesso responsabile *ex* art. 2050 c.c. Ad oggi, invece, la Corte di Cassazione ha maturato la convinzione che l'organizzatore dell'evento sportivo è tenuto a garantire al pubblico pagante: il diritto di assistere alla competizione e le condizioni minime di agibilità dei luoghi e della sicurezza dell'incolumità personale. Ne consegue, che lo stesso deve attuare misure la cui adozione serva a prevenire tali rischi. L'omissione delle stesse da parte della società/associazione organizzatrice dell'incontro giustifica l'attribuzione della responsabilità, a titolo contrattuale ed extracontrattuale ai sensi dell'art. 2049 c.c. Tale obbligo ricade esclusivamente sulla società organizzatrice dell'evento a carico della quale grava l'onere di adottare le citate misure. Tenendo conto di quanto sopra, vediamo che in capo alla società che organizza la manifestazione sportiva (che può o meno coincidere con il gestore del luogo), si potrebbe ascrivere una responsabilità di natura con-

[11] Cass., 9 giugno 2016, n. 11816, in *Foro it.*, 2016, I, c. 2765 ss., con nota di A. DAVOLA, *Responsabilità del datore di lavoro e nesso di occasionalità necessaria: la rilevanza delle finalità del preposto ai fini dell'imputazione dell'illecito*, e Cass., 26 giugno 2015, n. 13229, in *Rep. Foro it.*, 2015, voce *Prova civile in genere*, n. 40.

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trattuale in virtú del fatto che «la vendita del biglietto include certamente il dovere di adottare tutte le misure idonee ad assicurare l'incolumità degli spettatori»[12].

4. Ad ogni modo e in ogni caso, i sinistri devono essere connessi alla frequentazione dei luoghi e alla permanenza negli stessi e, come già asserito, devono essere causati comportamenti dolosi o colposi direttamente o indirettamente riferibili al conduttore. In termini pratici, è necessaria una valutazione fattuale, ove la descrizione dei fatti sarà fondamentale a sostenere le ragioni per ottenere l'esonero della responsabilità o il contrapposto diritto al risarcimento danni per infortunio. Una corretta analisi potrà permettere di evitare di incorrere in procedimenti infondati con conseguente condanna alle spese legali. In tema di risarcimento danni, tenendo conto di quanto detto sopra riguardo all'onere dalla prova ed alle eventuali esimenti, vediamo che nel caso in cui il custode possa essere considerato responsabile dei sinistri che si verificano all'interno della struttura questi debba provvedere al risarcimento dei danni. Al fine di evitare il rischio di dover riparare economicamente il danneggiato in prima persona e per rispondere alle condizioni formulate all'interno della maggior parte dei suddetti accordi di «gestione convenzionata», il gerente deve farsi carico di stipulare una congrua polizza di responsabilità civile contro i danni a terzi. Le compagnie, nella maggior parte dei casi, verranno chiamate a manlevare i loro assicurati e a risarcire i danneggiati, a norma di quanto sancito dall'art. 1917 c.c.

Valentina Porzia

*Abstract*

Il gestore dell'impianto sportivo fornisce agli atleti e agli spettatori gli spazi all'interno dei quali è praticata l'attività sportiva; deve, pertanto, garantire la massima efficienza nella gestione dell'impianto, con specifica attenzione ai requisiti di sicurezza. Egli è responsabile della sicurezza di chi accede al centro sportivo e della sua corretta amministrazione. Per questo motivo, e al fine di evitare eventi pregiudizievoli per gli utenti, il gestore

[12] Cass., 19 dicembre 2014, n. 26901, in *Rep. Foro it.*, 2015, voce *Responsabilità civile*, nn. 251 e 297.

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deve adottare tutte le misure precauzionali appropriate. Deve sorvegliare la sicurezza delle apparecchiature e degli impianti, nonché la loro manutenzione, ordinaria e straordinaria. La sua responsabilità può essere: contrattuale, se c'è un rapporto negativo con il danneggiato, o non contrattuale, in caso di illecito in una relazione tra due o piú persone

Sports center's manager provides the athletes and the spectators with the space for sporting activities and must therefore ensure the administration of the goods with maximum efficiency, regarding, in particular, to the security and safety requirements peculiarities of its function. He is responsible for the safety of those who access the centre and its proper administration. For this reason, and in order to avoid injurious events to users, the manager must take all the appropriate precautionary measures. He must supervision of the safety of equipment and installations, as well as their ordinary and extraordinary maintenance. Responsibility can be: contractual, if there is a negative relationship with the damaged, or non-contractual, in case of illicit in a relationship between two or more persons.

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# CAS Jurisprudence on Match-fixing under the context of Domestic Criminal Law Intervention

Summary: 1. Preface. – 2. Background and brief introduction of the case. – 3. The jurisdiction of CAS. – 4. Applicable law. – 5. Burden of proof and standard of proof. – 6. Commentary and thinking.

1. Sports autonomy is the basis and core characteristic of sports organizations and sports activities. To some extent, sports autonomy means little interference by the national judiciary in sports. Just as former International Olympic Committee Rogge said: «sports autonomy does not mean beyond the law or not abide the principle of good governance»[1]. It means it will also be regulated by law when it is beyond the scope of sports activities. Of course, criminal law, as the last line of defense to protect society, the intervention of sports is very cautious.

Match-fixing is the biggest threat to sports autonomy, which not only does great harm to sports, but also has serious social harm. Therefore, on the one hand, Match-fixing will be regulated by the sports autonomy system, and on the other hand, it will be regulated by the national criminal law. Such as «The People's Republic of China Sports Law" article 51 para. 2 states: «Bribery, fraud, organize gambling in competitive sports, constitutes a crime, shall be prosecuted criminally responsible». Match-fixing is usually connected with bribery or gambling regulated by criminal law. In 2002, the referee Gong Jianping was alleged match-fixing for bad call, which is the first case

[1] IOC President Addresses Sports Ministers at First World Olympic Sport Convention [EB/OL]. [2010-10-23/2015-06-05]: *www.olympic.org/news/ioc-president-addresses-sports–ministers-at-first-world-olympic-sport-convention*.

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of criminal law intervention sports[2]. In 2010 China Football Association officials as Nan Yong was sentenced 10 years and 6 months to prison for match-fixing and bribery. In August 2013, the new generation of Dongpu Yuanzhou club's former coach Jiang Dongxi on suspicion of involvement in the Korean Basketball League soccer gambling (KBL), had been sentenced: life ban coaching and was jailed for 10 month[3]. In order to strengthen the prevention and combating of match fixing, after professional baseball "Black Sox Scandal" in 1919, the United States' Legislative Department promulgated the "federal sports bribery law" which contain "match fixing" clause. Therefore, criminal intervention is not an individual phenomenon.

International sports supervision organizations pay great attention to the fight against sports "match fixing", "bribery" and "illegal gambling", has also developed a "zero tolerance policy", Betting Fraud Detection System and a series of rules and measures. The Court of Arbitration for Sport (CAS) is an independent international sports dispute settlement organization based in Lausanne, Switzerland, known as the Supreme Court of Sport. CAS handled the first known FK Pobeda case on the match-fixing since 2009, more match-fixing cases have been issued in recent years. However, there are not many cases at the same time being involved domestic criminal law. The match-fixing case of the Turkey Super League CAS 2013/A/3258 Besiktas Jimnastik Kul bu v. UEFA, CAS how to deal with these cases involved in the domestic criminal law at the same time?

2. In April 14, 2011, the new law No. 6222 came into force in Turkey, which specifically stipulated the manipulation of competition in Turkey as a criminal act. Besiktas is a Turkey football club, belonging to the Turkey Football Association (TFF), TFF compliant sequence belonging to the union of European Football Association (hereinafter referred to UEFA). In March 2011, Besiktas Club chief coach Bernd Schuster resigned, and then his assistant T was appointed to the position until the end of the season. The club was ranked fifth

[2] The investigation of judicial intervention HeiShao Gong Jianping became the first caught the suspected referee: *news.xinhuanet.com/nsports/2002-03/22/content_327681.htm*

[3] South Korean Basketball Coach banned for life and jailed for 10 month *sports.163.com/13/0907/10/985MU4NH00052UUC.html*.

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in the Turkey Premier League, although less than Fenerbahçe SK and Trabzonspor Club 21 points, but still was selected April 2014 semi-final compete with the Gaziante sport club. In March 2011, Turkey police began recording phone calls and blocking Y's messages in the context of being suspected involved match-fixing. The criminal investigation prompted TFF to review all of the alleged football matches, including the Turkey Cup final between the Besiktas and the IBB Spor club. The Turkey Football Association's ethics committee and Disciplinary Commission have carefully examined the facts. After the investigation, the two committees agreed that the competition was suspected of being manipulated, removed officials S and T, and X from the club. In July 2, 2012, the 16th high Criminal Court of Istanbul (hereinafter referred to as the high court) was based on the evidence it received and the testimony of the witness, determined the officials of the club manipulated the final competition in May 11,2011. The high court sentenced the club officials to imprisonment for 1 years and 3 months, fines and bans related to football activities.

In addition, UEFA has disciplinary punishment on the clubs for involved in match-fixing. Based on based on existing evidence to reach criteria of comfortable of satisfaction, the UEFA disciplinary organization determined as following: According to article 2013/2014 of UEFA League regulation 2.08, the club was disqualified from participating in the 2013/2014 European league. The club appealed to UEFA for disciplinary committee's decisions, and in July 15, 2013, the UEFA appeals Department maintained the UEFA disciplinary committee's decision. And then the club appeal to CAS, CAS finally rejected the appeal and supported UEFA's decision.

3. According to UEFA DR (2008 Edition), article 47, the UEFA statutes stipulates that the decisions made by the disciplinary department may be appealed to CAS, and the specific conditions are specified. Article 62 of the UEFA statutes states that any decision made by the UEFA organization, which excludes any national court and any other arbitration institutions, may appeal to the CAS, which is subject to the first paragraph of the statutes. In addition, the procedures signed by both parties further confirm the jurisdiction of the CAS.UEFA is the governing body of European football, dealing with all sorts of questions about European football, regulating, standard-

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izing, supervising, and discipline the affiliated national associations and their affiliated clubs, staff and athletes. The Turkey football association belongs to the UEFA, so UEFA has jurisdiction over the Turkey domestic competitions. And UEFA League regulations article 2.05 and article 2.06 and UEFA statues article 50 para. 3 and UEFA disciplinary regulations (2008) article 50 defined the UEFA the right of jurisdiction for the domestic match-fixing.

4. Article R58 of the CAS code of sport-related Arbitration provides the following: «The Panel shall decide the dispute according to the applicable regulations and subsidiarily to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision». Therefore, the applicable laws to this case are the UEFA rules and regulations. Further, Article 63, para. 3 of the UEFA Statutes provides as follows: Moreover, proceedings before the CAS shall take place in accordance with the Code of Sports-related Arbitration of the CAS. "The parties have not expressly or impliedly agreed on a choice of law applicable to these proceedings before CAS. Therefore, the rules and regulations of UEFA shall apply primarily, and Swiss law, as UEFA is domiciled in Switzerland, shall apply subsidiarily.

The main UEFA rules applicable in this case include the following: Article 50 UEFA-Statutes provides: «The Executive Committee shall draw up regulations governing the conditions of participation in and the staging of UEFA competitions. It shall be a condition of entry into competition that each Member Association and/or club affiliated to a Member Association agrees to comply with the Statutes, and regulations and decisions of competent Organs made under them. The admission to a UEFA competition of a Member Association or club directly or indirectly involved in any activity aimed at arranging or influencing the outcome of a match at national or international level can be refused with immediate effect, without prejudice to any possible disciplinary measures». Article 2.08 UEL Regulations 2013/2014 provides that UEFA may be comfortably satisfied that a club has been involved in match fixing

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activities only «on the basis of all factual circumstances and information available to UEFA».

5. As a general legal principle, a party claiming a right based on a claimed fact shall bear the burden of proof. As a match-fixing case, it is usually the sport supervision organization who claims that a match has been manipulated, so it is up to them to bear the burden of proof. Different from other cases such as doping cases, match-fixing didn't take the responsibility of "transfer" to the other party, that is to say, the burden of proof is always in the supervision (organization)[4].

Generally speaking, the principle of beyond any reasonable doubt is the highest standard of proof in the common law system and is only applicable in criminal trials. The seriousness of the consequences of criminal cases determines the need for such high proof standards for investigative institutions. The principal of Balance of Probability is the general standard of proof in civil procedure. In the case of CAS 2009/A/1926 CAS[5], the arbitration tribunal has the following interpretation of the "balance of probabilities" standard: […] let the arbitral tribunal adopt it […] a fact has been in accordance with the "balance of probabilities" standard of proof, it means that, in percentage, the arbitration tribunal accepted the fact that possibility has occurred is 51%[6]. There is no doubt that the "balance of probabilities" more easily than the standard of "beyond reasonable doubt". CAS procedure is different from the criminal procedure in the nature of public law and has no power of "formal investigation of state". Therefore, according to Swiss law, the principle of "excluding reasonable doubt" can't be applied to CAS procedure for it's the principal of public law[7].

[4] Efraim Barak, Dennis Koolaard, *Match-fixing: The aftermath of Pobeda «what have the past four years brought us?»*, CAS Bulletin, 2014/1.

[5] CAS, 2009/A/1926, ITF v. Richard Gasquet and CAS, 2009/A/1930, WADA v. ITF & Richard Gasquet.

[6] CAS, 2009/A/1926 and CAS, 2009/A/1930, cit.

[7] «The duty of proof and assessment of evidence […] cannot be regulated, in private law cases, on the basis of concepts specific to criminal law such as presumption of innocence and the principle of "*in dubio pro reo*" and the corresponding safeguards contained in the European Convention on Human Rights». (cfr. Judgement of the Swiss Federal Tribunal, 31 March 1999, 5P.83/1999, consid. E 3.d).

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Therefore, the principle of "comfortable satisfaction" has become the unique standard principle in sports cases, which is usually applied to doping cases. The word anti-doping code 3.1 provide: «The standard of proof shall be whether the Anti-Doping Organization has established an anti-doping rule violation to the comfortable satisfaction of hearing panel, bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt». Therefore, comfortable satisfaction standard is between beyond reasonable doubt and the standard balance of probabilities.

6. This case is about a European club which, in order to win the national cup and qualify for the European Cup, has played in very serious and far-reaching manipulation activities though its top officials. Other club players were approached and bribed or induced arrhythmia in the same competition, the criminal investigation confirmed the extent of match-fixing. Submissions to the CAS including evidence collected by state authorities in Turkey, reveal the improper methods, purposes and illegal activities represented by the club. Turkey court has made prison convicted because match fixing not only violates the rules of sports, but also serious violations of criminal law. In addition to the club's domestic criminal penalties, UEFA as a governing body continued to give punishment, reflecting the determination of the sporting authorities to fight against match-fixing and bribery.

To fight against match-fixing, UEFA and CAS is a cooperative and coordinated gesture to intervention of domestic criminal law. In the case of reliable evidence, the relevant evidence set out in Clause 2.08 of UEFA League rules is «all true information and information available to UEFA». At the same time, the provision in this article specifically states that UEFA can be trusted, but not limited to, a decision from a state or sport administration department, a national arbitration tribunal or a national court. Taking into account the nature of the conduct in question and the paramount importance of fighting corruption of any kind in sport and also considering the nature and restricted powers of the investigation authorities of the governing bodies of sport as compared to national formal interrogation au-

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thorities[8], the Panel is of the opinion that cases of match fixing should be dealt in line with the CAS constant jurisprudence on disciplinary doping cases. Therefore, the UEFA must establish the relevant facts «to the comfortable satisfaction of the Court having in mind the seriousness of allegation which is made»[9].

There is the decision of the High Court. As explained above (see paragraphs 147- 151), UEFA cannot rely exclusively on the findings of a state court without making its own assessment of these findings and without explaining which other elements should form the basis of its decision. However, this does not mean that Art. 2.08 sentence 3 UELR has no function at all. A conviction by a state court for fixing a match can justify the initiating of disciplinary proceedings. The Appellant, according to its By-laws/Statutes, is responsible for the match and the game operations. But because – as was submitted – It only has, in comparison to the state, limited practical and legal means at its disposal to prevent unlawful disturbances to the match and the game operations, Art. 2.08 sentence 3 UELR– as a product of club autonomy – also provides a legitimate legal way to help combat and prevent such disturbances. Thus, a criminal conviction from a state court can corroborate, confirm, and/or supplement the impressions acquired and conclusions reached by the federation itself. It is in this way that the decision of the High Court can be used in the present case as an evidentiary indicator of the correctness of the challenged decision of the UEFA Appeals Body.

Match-fixing is fatal to sports autonomy, so it is of paramount importance to fight against any form of corruption in the field of sport which international Sports organizations are increasing fighting against. However, compared with the state formal interrogation organs in nature, the international sports organization limited investigation power. Then, it is a development trend to combat these behaviors by means of cooperation between sports organization and state investigation authorities. In fact, such cooperation has already begun, such as FIFA and Interpol have reached an agreement, to

[8] «The paramount importance of fighting corruption of any kind in sport and also considering the nature and restricted powers of the investigation authorities of the governing bodies of sport as compared to national formal interrogation authorities» (CAS, 2009/A/1920, FK Pobeda, Aleksandar Zabrcanec, Nikolce Zdraveski v. UEFA).

[9] CAS, 2005/A/908, nr. 6.2 (cf. CAS, 2010/A/2172, pa. 20, citing CAS, 2009/A/1920).

strengthen their work relationship and exchange of information. These behaviors also bring bad influence to the society, and the domestic criminal institutions are also strengthening the regulation of these behaviors. Some Chinese scholars believe that match-fixing is a serious violation of sports spirit and sports law benefit crime, because of its unique not be protected by the existing criminal, regulation of these behavior need separate legislation to create separate criminal law. Some scholars have put forward set accusation against the match-fixing, such as Wang Libin proposed to increase the crime of match-fixing. Wang Xiaoling proposed to build match-fixing of crime[10]. Lv Wei proposed the addition of illegally operating match-fixing crime in the amendment to the criminal law[11]. There are lawyers believe that current legal in China constraints on the behavior of soccer match-fixing is not recommended, the amendment to the criminal law can establish control style match results of sin, sanctions on the use of money to control the game results behavior. In a word, it is a consensus between the sports supervision organizations and the domestic criminal authorities to resolutely fight against on match-fixing. Therefore from another point of view, we have to worry about sports autonomy will be affected for public law intervention. As more and more countries will regulate match-fixing by criminal law regulation, sports supervision organizations also rely on state mandatory investigation, and will inevitably weaken the autonomy of sports, and causing other problems. Therefore, how to balance and control the boundary of the domestic criminal law intervention is the key.

HUIYING XIANG

*Abstract*

Match-fixing is the biggest threat to sports autonomy, but also it has serious social harm. Therefore, Match-fixing will be regulated by the sports autonomy system, and also by the national criminal law. To fight against match-fixing, UEFA and CAS cooperate.

[10] WANG QINGGUO, JIA JIAN, *Regulation of criminal law on the manipulation of competition*, in *Journal of Capital University of Physical Education*, 2014, 6, p. 547-552.

[11] LV WEI, *American regulation of crime control in sports competitions*, in *Journal of Wuhan Sports University*, 2015, 1, p. 45-49.

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# A New Instrument in the Fight against Doping
# The Athlete Biological Passport ("ABP"). Light and Shade

SUMMARY: 1. Introduction. – 2. WADA's "testing" approach: reasons for a failure. – 3. EPO's detection difficulties, and first attempts. – 4. Problems Arising. – 5. The Athlete Biological Passport (ABP) as 'alternative' approach. – 6. Benefits and disadvantages. – 7. Legal Issues. – 8. Conclusions.

1. To talk about the Athlete's Biological Passport (ABP) as an 'alternative' instrument of detection of Anti-doping Rules Violations (ADRV's) needs first a brief mention of what has been the WADA's 'testing' approach, and the reasons (if any) of its failure.

Another part of the script will be devoted to the EPO's[1] detection, its difficulties, the first methods and the main problems arising.

The last part of the work will be dedicated to the Athlete's Biological Passport (ABP), not only as 'alternative' instrument of anti-doping rules' detection, but also as instrument conceived to monitor some physiological parameters of athletes during the time (blood, urine), with a special part devoted to the main legal issues arising from, particularly focusing on CAS jurisprudence (repeatedly urged on such a matter).

2. As from its foundation in 1999, WADA's approach to detect prohibited substances (or methods) was based on single 'tests' – 'in' and 'out' of competitions – on physiological fluids of the athletes, such as blood or urine.

[1] EPO (Erythropoietin), also known as hematopoietin or hemopoietin, is a glycoprotein cytokine secreted by the kidney in response to cellular hypoxia; it stimulates red blood cell production (erythropoiesis) in the bone marrow [source: *www.wikipedia.org*].

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Nevertheless that, this system – apparently simple, logical and effective – has revealed a complete failure.

The reasons for such a failure are many, and can be, schematically, identified as follows:

– Lack of uniformity of testing procedures[2]

– Interference of external factors[3]

– Lack of efficiency and effectiveness (both on discovering ADRV's, and on discouraging doping practices)[4]

– No compliance (or late compliance) to WADA Code by some International Federations[5].

Coming into the first reason, it needs to be pointed out that before the introduction of the WADA Code (2008), each NADO (Na-

[2] WADA ABP Operating Guidelines (last version 6.0 of January 2017) are available on-line, at the WADA's 'institutional' website, *www.wada-ama.org*, to the following URL: *www.wadaama.org/sites/default/files/resources/files/guidelines_abp_v6_2017_jan_en_final.pdf*). Their purpose is «to provide a harmonized process for both the Haematological Module and the Steroidal Module of the ABP, following nearly identical administrative procedures in ADAMS (Anti-Doping Administration Management System, ed.)». With regard to them, it is worth mentioning that, even if mandatory (for each member State which has ratified the 2005 UNESCO International Convention against Doping in Sport), their compliance is left to each National Anti-Doping Organization (NADO). Furthermore, it's a new of these days (November 3, 2017) that WADA has suspended the accreditation of Paris laboratory (the new is available on-line to the following URL: *www.wada-ama.org/en/media/news/2017-11/wada-suspends-accreditation-of-paris laboratory*).

[3] Like the recent cases of Jamaica (in 2012 only 106 anti-doping tests, no one of them blood test!) and Russia (In November 2015, the World Anti-Doping Agency [WADA] published a report and the International Association of Athletics Federations [IAAF] suspended Russia indefinitely from world track and field events. The United Kingdom Anti-Doping agency later assisted WADA with testing in Russia. In June 2016, they reported that they were unable to fully carry out their work and noted intimidation by armed Federal Security Service [FSB] agents. After a Russian former lab director made allegations about the 2014 Winter Olympics in Sochi, WADA commissioned an independent investigation led by Richard McLaren. McLaren's investigation found corroborating evidence, concluding in a report published in July 2016 that the Ministry of Sport and the FSB had operated a "*state-directed failsafe system*" using a "*disappearing positive* [test] *methodology*" [DPM] from "*at least late 2011 to August 2015*". Source: *www.wikipedia.org*.

[4] According to H. Ram (CEO of the Anti-Doping Authority of the Netherlands): "*presently, there are about 50 'true' NADOs functioning worldwide, and they cover the majority of sport events*" (on his 'Stuck in the mud or going fast forward? The status of global anti-doping', presentation made in Aarhus, NL, in October 26, 2015, p. 15).

[5] Amongst them: IBF, NHL, NBA.

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tional Anti- Doping Agency) has conducted, globally, about 270.000 anti-doping tests per year (on a worldwide basis).

After WADA Code introduction's this amount did not increase, but, on the contrary, it decreased, settling to 230.000 anti-doping tests about, in 2015[6].

In the same year, of all the tests conducted, only 1.649 corresponded on ADRV's, with an average of 0,72 % of total samples[7].

The more "tested" sports were, in particular, football (with 32.362 tests), athletics (30.306), cycling (22.652), and weightlifting (10.262)[8].

The thing that stands out most, is that the anti-doping offence rate settles to 1% (about) of total tests[9]: average which is the same since the Anti-Doping Administration and Management System (ADAMS)[10] introduction!

Virtuous athletes? Inefficiency of tests? The truth is probably in the middle.

The substances identified as Adverse Analytical Findings (AAF's) by the Anti-Doping Administration & Management System (ADAMS), for each drug class, all sports including, are: 1) Anabolic Agents (1728 cases, equal to 50% of all AAF's); 2) Stimulants (528 cases, equal to 15%); 3) Diuretics and other "masking" Agents (428, equal to 12%); 4) Glucocorticosteroids (215 cases, equal to 6%)[11].

Taking a look at some statistics, the sports with the highest number of ADRV's were the followings:

[6] Source: WADA 2015 Anti-Doping Rule Violations (ADRVs) Report.

[7] Source: WADA 2015 Anti-Doping Rule Violations (ADRVs) Report (p. 5).

[8] Source: WADA 2015 Anti-Doping Rule Violations (ADRVs) Report (p. 8 s.).

[9] According to H. Ram (CEO of the Anti-Doping Authority of the Netherlands): «less of 1% of all doping tests performed lead to the successful prosecution of an ADRV» (on his 'Stuck in the mud or going fast forward? The status of global anti-doping', mentioned above, p. 31).

[10] Anti-Doping Administration and Management System (ADAMS) was introduced with the purpose to harmonize anti-doping policies in all sports and all countries. It coordinates anti-doping activities and provides a mechanism to assist all the stakeholders involved. In particular, it is a web-based database management tool for data entry, storage, sharing, and reporting designed to assist stakeholders and the World Anti-Doping Agency ("WADA") in their anti-doping operations. Further informations are available on-line, at the WADA's 'institutional' website, *www.wada-ama.org*, to the following URL: *www.wada-ama.org/en/adams*.

[11] Source: WADA 2015 Anti-Doping Rule Violations (ADRVs) Report.

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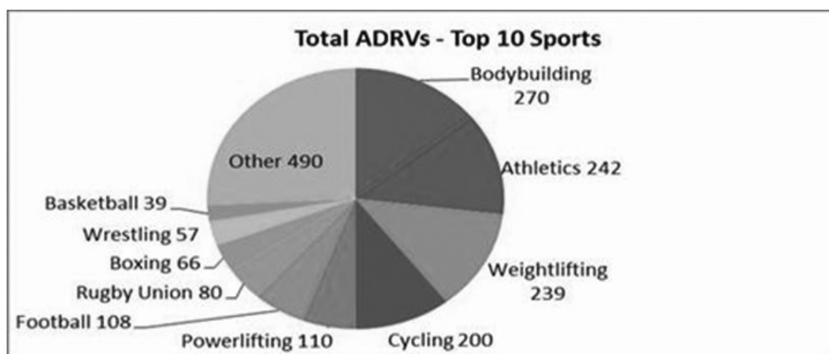
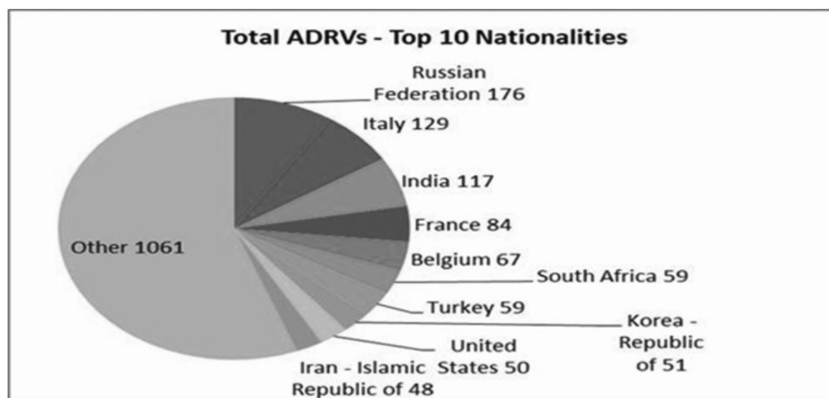



While the nationalities with the highest number of ADRV's were the followings:




Source: WADA 2015 Anti-Doping Rule Violations (ADRVs) Report (page 6).

3. As mentioned in the opening, the EPO was, for several years, one of the main (if not the largest) performance enhancing drugs used by the athletes (especially in sports that require great aerobic effort, over long distances).

It is natural, therefore, to ask what is EPO, and – most of all – why it is considered as "prohibited substance" by the WADA Code[12].

[12] The World Anti-Doping Code (last version, in force as from 2015) is «the funda-

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EPO is a hormone naturally generated in adult kidneys and is the body's principal regulator of the biological process responsible for the amount of circulatory red blood cells.

An increase of EPO present in the body will result, therefore, in an overall rise of red blood cells, the amount of oxygen available to the muscle and lead to a clear boost in aerobic performances.

The anti-doping community, aware of its performance enhancing potential, declared it a prohibited substance in 1989, even though no harmonized, effective and analytical detection method was found until year 2000[13].

Developing an effective test for its detection was a great challenge, as the main difficulties were (almost) three:

1. To tell between what has been naturally produced by the body (so called "endogenous" EPO), and what has been 'artificially' produced (so called "exogenous" EPO) by other factors (e.g. transfusions);

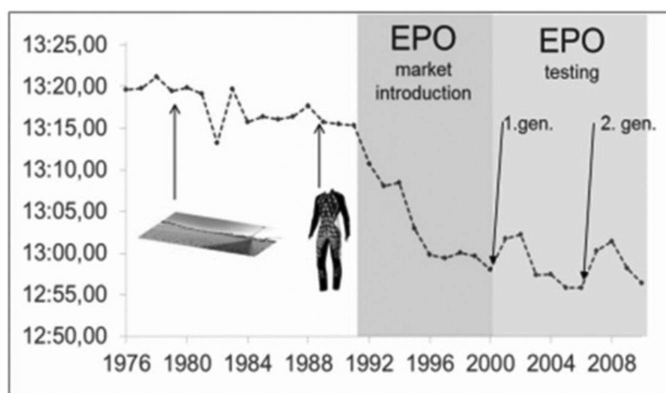
2. The relatively short 'half-life' of EPO in bodily fluids (as a consequence of it, the need to carry out tests in a timely manner);

3. The intake of the substance: a) intermittently (before the competitions); b) in small doses (so to avoid any Adverse Analytical Finding, AAF's) by the athletes.

To get a closer idea of EPO's introduction on the market, as well as EPO's testing, it is possible to look at the following chart:

mental and universal document upon which the World Anti-Doping Program in sport is based», whose purpose is «to advance the anti-doping effort through universal harmonization of core anti-doping elements» (so page 11 of the Code, 'Purpose'). It is available on-line at the WADA's 'institutional website (*www.wada-ama.org*) to the following URL: *https://www.wada-ama.org/sites/default/files/resources/files/wada-2015-world-anti-doping-code.pdf*.

[13] During the "interim period" abuse of the drug was reported by several rumors.




The values represented in the left side are the top 8 (of 20 reported) average time in 5000m in Cycling[14].

A first attempt of EPO's detection was made by the Union Cyclists Internationale ("UCI") in 1997, with the introduction of "NO START" Rule.

According to this rule, the test was conducted on race days and any cyclist showing an hematocrit level (the proportion of red blood cells to total blood volume, ed.) over 50%, was instantly disqualified[15].

This method has not been free of problems, as, on one hand, athletes with a 'naturally low' hematocrit level could administer EPO without ever being caught (for them was easier "to cheat", e.g. with infusions of saline solutions), on the other hand, athletes with a 'nat-

[14] S. Ernst, P. Simon, *A quantitative approach for assessing signi?cant improvements in elite sprint performance: Has IGF-1 entered the arena?*", on *Drug Testing and Analysis*, Vol. 5, Issue 6, June 2013, p. 386.

[15] So was the case which involved the Italian cyclist (and former champion of the 'Giro d'Italia' and the 'Tour de France') Marco Pantani. During the 'Giro d'Italia' of 1999, on a control (test) made on June 5 (in the lap of Madonna di Campiglio), the Italian cyclist was found with an hematocrit level of 51,8%, and consequently disqualified by the race. Few years before, on the 'Milano-Torino' race (on October 18, 1995), after an accident occurred during the race, he was found with an hematocrit level of 60,1% (think that standard values do not go over 35-40% for a 'normal' person, and over 45% for an athlete).

urally high' hematocrit level were more subject to "unfair" sanctions (as the rise of such level was not due to 'artificial' factors).

In 2000 it was introduced the "EPO-test", whose aim was to identify 'synthetic' EPO that is not produced by the body.

It consisted, in particular, in an analytical technique known as 'isoelectric focusing' in the urine: following this technique, the higher is the difference of electric charge in the urine, the higher is the probability of assumption of 'synthetic' EPO (in other words: not produced by the body, so-called "recombinant").

Its first trial was during the Sydney Olympic Games of year 2000, and it's still in use as detection method (although not with the same outcome of the early years).

Notwithstanding the above, in several cases – especially in the one involving the American cyclist (and former 7-times champion of the Tour de France) Lance Armstrong[16] – emerged some criticalities on such a test.

4. The main problems arising from the EPO-test (and the reasons for its failure) were: A) the actions taken by the Anti-Doping "Community"; B) the intrinsic difficulties of detection; C) the actions taken by the Athletes.

Coming to the first issue, in 2001, the first positive EPO test was declared by the Lausanne WADA laboratory and concerned the urine sample given by the Danish cyclist Bo Hamburger.

The cyclist successfully appealed the decision before the Court of Arbitration for Sport (CAS)[17], as the laboratory failed to comply with uniform identification criteria to the cyclist's A and B samples[18].

[16] Case Usada/Armstrong, judgment of 20 October 2012 (the reasoned decision is available on-line, at the USADA's website *http://cyclinginvestigation.usada.org/*, to the following URL: *http://d3epuodzu3wuis.cloudfront.net/ReasonedDecision.pdf*).

[17] The decision is available on-line, at the CAS website *www.cas-tas.org*, to the following URL: *https://jurisprudence.tas-cas.org/Shared%20Documents/343.pdf*.

[18] In particular, identification criteria required 80% of the bands to be in the 'basic region'. While the 'A' sample was found to be above this level, the 'B' sample had 78,6% of bands in the basic region (in one of the official maxims, reads as follows: «It is not acceptable for the B sample to be subjected to different standards from the A sample. The whole purpose of the B sample is to confirm the A sample. However, such confirmation only makes sense if the same test method has been applied to both samples and

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As sharply observed by a doctrine, «the decision caused the EPO-test, WADA and the anti-doping practitioners to lose scientific and legal credibility»[19].

Thus, in 2003 there was a revision of the EPO-test by an independent scientific commission: a fact which did not stop, however, the scientific community from not considering, so far, such a test completely reliable[20].

Turning our attention into the second issue, the intrinsic difficulties of EPO's detection were consisting, basically, in: A) the so-called "detection windows" of the substance; B) its development.

In relation to the first aspect, it needs to be underlined the short 'half- life' of EPO.

As a matter of fact, EPO of first generation remains into the bodily fluids no longer than 3 days, while EPO of second (Epoietin delta, or 'Dynepo')[21] and third (CERA)[22] generation no longer than 7 days.

Moreover, the assumption of it in 'micro-doses' by the athletes could further reduce the window, to only 12-18 hours post-injection[23].

if the test results are evaluated pursuant to the same principles. If the test results of the B sample have not been measured using the same standards as in the A sample, the A sample is not confirmed, rather a new analysis has been carried out pursuant to a different method of evaluation)».

[19] So E. Mason, *The Athlete Biological Passport: a 'magic bullet' for EPO detection?*, (part. 1), on *www.lawinsport.com*, 6 February 2013;

[20] Cfr., amongst the many, G. Banfi et al., *Clinica Chimica Acta*, 411. 15-16, 2010, p. 1003 s.; M. Beullens et alii, *Blood*, 107, 2006, p. 4711 s.; C. Lundby et alii, *Applicated Physiology,* 105,2008, p. 417s.

[21] EPO of 2nd generation, it is synthesized by the use of recombinant DNA and, unlike other analogues, with the use of human cells and not of animal cells (for further information, cfr. Z. Sharkoh, L. Royle, R. Saldova, J. Bones, J. Abrahams, NV. Artemenko, S. Flatman, M. Davies, A. Baycroft, S. Sehgal and M. W. Heartlane, *Erythropoietin produced in a human cell line (Dynepo) has significant differences in glycosylation compared with erythropoietins produced in CHO cell lines*, in *Mol Pharm*, 8, 1, February 2011, p. 286 s.).

[22] Acronym for "Continuous Erythropoietin Receptor Activator", CERA have an extended half-life and a mechanism of action that promotes increased stimulation of erythropoietin receptors compared with other erythropoiesis-stimulating agents (ESAs) [Source: www.wikipedia.org].

[23] So M. Ashenden, E. Varlet-Marie, F. Lasne and M. Audran, *The effects of*

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In relation to the second aspect (concerning the drug development), it is possible to notice the presence in the market of same other drugs, with the same physiological effects, but generating different isoelectrical values in the urine (with the consequence of higher detection difficulties), as well as lack of uniformity in regulation of the drug in some emerging markets (e.g. Asia).

Turning our attention to the third issue (actions taken by the athletes), it should be pointed out that the first methods to avoid (or circumvent) the controls were made by them.

The most common ones were, in particular: a) the assumption of the substance on micro-doses (so to avoid "detection windows"); b) the assumption of the substance in an 'intermittently' way (so to make detection harder); c) the use of anti-coagulants (in order to dilute the substance, and escape controls); d) the intake of blood transfutions by 'conspirational' doctors before competitions (in order to dilute the substance).

5. An Athlete Biological Passport (ABP) is an individual, electronic record for each athlete, in which the results of all doping tests are collected in the framework of this programme over a period of time[24].

The Passport for each athlete contains, in particular:

– Results of individual urine tests;

– Results of individual blood tests;

– An Hematological Profile, consisting of the combined results of hematological parameters analysed in a series of blood samples;

– A Steroid Profile, consisting of the combined results of steroid levels in a series of urine samples.

It works through the identification of a longitudinal profile ('over the time') for professional athletes, by carrying out, during the sporting season, of:

*microdose recombinant human erythropoietin regimens in athletes*, in *Haematologica*, 91, 8, 2006, p.1143 s.

[24] Source: UCI (*www.uci.ch*), 'The Athlete Biological Passport – ABP' (definition available to the following URL: *http://www.uci.ch/clean-sport/the-athlete-biological- passport-abp/).*

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– Blood exams, out of competition (in order to fix the hematological profile);

– Urine exams, out of competition (in order to fix the steroid profile);

– Targeted tests in competition;

– Targeted tests out of competition (in order to update certain parameters, and/or trace specific substances).

More specifically, once the biological data are entered in ADAMS, a notification is sent to the Athlete Passport Management Unit (APMU)[25], which updates the Athlete's Passport and applies the ABP software, i.e. the 'Adaptive Model'[26].

The APMU proceeds with the mandatory steps outlined in the Guidelines[27], which includes liaising with an expert panel established by the IFs, if the athlete's hemoglobin (HGB) and/or OFF-hr-Score (OFFS) values exceed the 99.9 percentile of the expected ranges returned by the Adaptive Model, the athlete is called for an explanation first (especially on the percentage of reticulocytes[28] in the blood), then (in case of unsatisfying explanation) is reportedly suspected of doping, and an investigation is opened to him/her[29].

[25] Settled on each NADOs.

[26] The Adaptive Model is a mathematical model that was designed to identify unusual longitudinal results from athletes: it calculates, in particular, the probability of a longitudinal profile of marker values assuming that the athlete has a normal physiological condition.

[27] WADA ABP Operating Guidelines (last version 6.0 of January 2017) are available on-line at the WADA's 'institutional' website, *www.wada-ama.org*, to the following URL: *https://www.wada.ama.org/sites/default/files/resources/files/guidelines_abp_v6_2017_jan_en_final.pdf (English)*.

[28] Immature red blood cells, typically composing about 1% of the red blood cells in the human body. In the process of erythropoiesis (red blood cell formation), reticulocytes develop and mature in the bone marrow and then circulate for about a day in the blood stream before developing into mature red blood cells (source: *www.wikipedia.org*).

[29] On CAS, 2015/A/4005, International Association of Athletics Federations (IAAF) v. All Russia Athletics Federation (ARAF), Sergey Kirdyapkin & Russian Anti-Doping Agency (RUSADA), award of 25 April 2016 (which will be further discussed in paragraph 7), it is highlighted that «the ABP focuses on the effect of prohibited substances or methods on the body, rather than on their detection. For such purposes, the ABP was developed as an individual, electronic record for each athlete, in which the results of all doping tests over a period of time are collated. The ABP involves regular monitoring of biological markers on a longitudinal basis to facilitate the indirect detection of

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Thus, passing quickly to the percentage of reticulocytes in the blood, the following chart could give a closer idea:

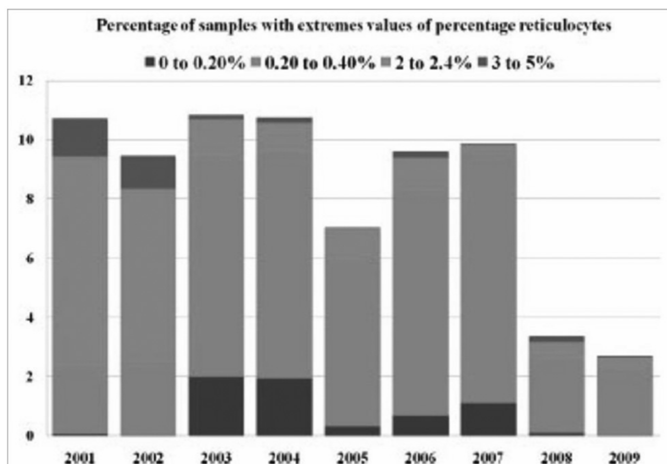


**Figure 3.** Percentage of sample whose RET% values are extremes: low values (blue) are typical of an OFF phase (previous intake of ESA or blood transfusion), while high values (green) indicates an ON phase (recent use of ESA or haematological disease).

Source: M. Zorzoli, F. Rossi, *Implementation of the* biological passport: the experience of the International Cycling Union 2010, on Drug Testing and Analysis, Vol. 2, Issue 11- 12 (November-December 2010), p. 546.

The ABP has, however, a contraindication: athletes, at the time of tests, are asked to indicate the existence of additional factors that could alter the hematic figures (and give them specific documentation)[30].

prohibited substances and methods. The list of relevant markers for a specific class of substance (e.g., substances enhancing oxygen transfer such as recombinant EPO) are identified and monitored on a regular basis for a given athlete, in order to establish an effective longitudinal monitoring program. The collection and monitoring of values corresponding to these identified markers constitutes an individual longitudinal profile. Each collected sample is analyzed following the appropriate analytical protocol and the biological results are incorporated into the Anti-Doping Administration and Management System (ADAMS)» (so para. 8 of the award).

[30] Such as trainings in altitude, hydration course.

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6. As sharply observed by a doctrine: «The concept of the biological passport is to evaluate, on an individual and longitudinal basis, the effects of doping substances and prohibited methods – blood doping and gene doping – on the body. Indirect biological markers can be measured and used to establish an individual's biological profile, when variations in an athlete's profile are found to be incompatible with physiological or medical conditions; a disciplinary procedure may be launched on the presumption that a prohibited substance or method has been used. As such, an athlete with a biological passport is his or her own reference»[31].

Another doctrine further highlighted that: «the (ABP, ed.) enables indirect detection of doping rather than relying upon positive test results. It was introduced to improve the detection of cheating, catching those who manage to avoid detection by direct testing for illegal substances»[32].

Such an instrument bears, like any other mean of detection of Anti-doping Rules Violations (ADRV's), advantages and criticalities[33].

Taking into account the disadvantages, they could be identified, first, in the presence of variables: a) medical (e.g. the physiological conditions of the single athlete); b) sporting (e.g. the specificity of the trainings, the altitude of trainings), which could affect the ABP's results[34].

Another problem is represented by the costs: the ABP it requires a considerable budget[35].

[31] Cfr. M. Zorzoli, F. Rossi, *Implementation of the Biological Passport: the Experience of the International Cycling Union 2010*, on *Drug Testing and Analysis*, 2, 11- 12 (November-December 2010), abstract.

[32] Cfr. L. Freeburn, *The Union Cycliste Internationale: a Study in the Failure of organizational Governments of an International Federation*, on *International Sports Law Journal* (ISLJ), 1-2, 2013, p. 73.

[33] For a comment, especially about the legal and scientific concerns of the cycling community after its first introduction, cfr. N. Hailey, *A false start in the race against doping in sport: concerns with cycling's biological passport*, on *Duke Law Journal*, 61, 2011, p. 393 s.

[34] In any case, such a variables are to be taken into account for the purposes of investigation.

[35] The ABP, to be effective, requires almost three exams/tests for each athlete over the sporting season (every single one it costs almost 1.200 Euro). In 2012, the ITF (International Tennis Federation) spent about 2,4 million euros for ABP's program, and, in the same year, UCI spent about 5,5 million euros.

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It should be mentioned, moreover, that in the past have occurred – in some countries[36] – some breaches of the athlete's privacy, through the unauthorized exchange of sensitive data concerning them[37].

The last objection could be that ABP it represents 'only' a statistical method.

Such an objection, however, can be overcome by considering that ABP is not just a statistical method, as it is: a) 'corrected' by the experience of statisticians and hematological experts; b) 'fixed' on personal parameters (for each athlete involved in the Program).

Turning our analysis into the benefits, it is worth mentioning that the ABP it has, first, a greater degree of accuracy (and therefore less uncertainty) in ADRV's detection[38].

The reason for this is quite intuitive: it's a longitudinal profile ('over the time') of the athlete's physiological parameters, so it's harder (almost impossible) to cheat, as well as raise the 'typical' objections related to a single test (physical condition of the moment, test errors, etc.).

Second, there is a greater adaptability degree of data collection

[36] UK, Australia.

[37] On June 2013, UKAD announced to have signed a Memorandum of Understanding (MoU) with NHS (National Health Service) Protect that allowed for the sharing of information in relation to «the detection, deterrence, enforcement or prevention of an anti-doping rule violation», including information on «the prescribing, supplying, administering or disposing of NHS drugs within or for an NHS body». Although the NHS Protect's Information Governance Lead stated that the sharing of information were within strict legal boundaries, details of what those limits included, and what medical practitioners' duties were under that MoU, were not clarified. Furthermore, several years ago, Australia's anti-doping agency, ASADA, conducted a similar initiative to access confidentially held medical information by Australia's publicly funded universal health care system, called 'Medicare'. In that programme, athletes' medical records were cross-checked for evidence that they were using WADA banned substances. The scheme was subsequently abandoned when the Office of the Privacy Commissioner and the Australian Government Solicitor deemed the programme illegal and that ASADA did not have legal authority to conduct the programme (source: B. Koh, "*Anti-doping and medical privacy*", on *www.lawinsport.com*, 19 July 2013).

[38] e.g. the Growth Hormone (a prohibited substance, due to its performance enhancing ability) is easier to 'cheat' in urine-test (source: P. Gibbs, B. Koh, *Navigating the WADA prohibited list: catchalls and consistencies*, on *www.lawinsport.com*, 4 May 2013, p. 4).

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procedures to requirements asked by the International Anti-doping Regulations[39].

Third, the great 'deterrence' factor which has, today, a disqualification for doping[40] (there is a broad use, in this respect, of 'moral clauses', and/or 'escape clauses' in players' contracts, especially by the sponsors), within whose anti-doping program the Biological Passport is considered (as we will see soon) to be one of the more reliable means of proof.

Last, a major trust amongst the athletes' community in such an instrument[41].

7. Art. 2 ('Anti-Doping Rule Violations'), para. 2 ('Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method') of the WADA Code currently in force (2015), reads as follows: «It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body and that no Prohibited Method is Used. Accordingly, it is not necessary that intent, Fault, negligence or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping rule violation for Use of a Prohibited Substance or a Prohibited Method».

On the official Commentary it is highlighted that such a 'Use or Attempted Use' «may be established by any reliable means", intending with that "admissions by the Athlete, witness statements, documentary evidence, conclusions drawn from longitudinal profiling, including data collected as part of the Athlete Biological Passport».

In the case CAS 2004/O/645[42], USADA vs. Tim Montgomery[43],

[39] So the WADA ABP Operating Guidelines, last version 6.0, of January 2017;

[40] Despite what H. Ram, on his *Stuck in the mud or going fast forward? The status of global anti- doping'*, mentioned above (footnotes 4 and 9), tells («we don't know to what extent the present programs [whereabouts, Athlete Biological Passport, storing of samples, new analytical tools, ed.] deter athletes from doping», p. 47 of the presentation).

[41] Thinking about some declaration of 'top level' athletes (e.g. the tennis player Roger Federer, who declared himself "totally favourable" in adoption of ABP in tennis).

[42] Award available on-line to the following *www.doping.nl/media/kb/682/CAS%202004_O_645%20USADA%20vs%20Tim%20Montgomery%20-%20Decision%20on%20Evidentiary%20&%20Procedural%20Issues%20(S).pdf* (English).

[43] Tim Montgomery was a top-level American track and field athlete. As a sprinter,

CAS Panel held that «Doping offences can be proved by a variety of means»[44], and in particular, in the absence of any adverse analytical finding, other types of evidence can be substantiated, amongst them «the uncontroverted testimony of a wholly credible witness, sufficient to establish that the athlete has indeed admitted to have used prohibited substances in violation of applicable anti-doping rules»[45].

That said, as correctly observed by a doctrine[46], an 'abnormal' outcome of the ABP is neither automatically doping, nor a true probability of doping, but simply «how the profile differs from what is expected in clean athletes»[47].

As mentioned before, only in case of overcoming of his/her personal parameters (especially in the blood) the athlete is called for an explanation, and just in case of unsatisfying explanation he/she is reportedly suspected of doping, and an investigation is opened to him/her.

Nevertheless that, the reliability of the ABP was challenged by the athletes several times, and the CAS jurisprudence provided several issues in relation to that.

he won several track and field titles, including World Championship and Olympic Gold Medals, as well as a world record.

[44] So para. 4 of the award ("Law");

[45] So the official maxim of the award (point 2). The case, in particular, began when, in 2004, USADA informed Montgomery that it had received sufficient evidence to indicate that he was a participant in a wide-ranging doping conspiracy implemented by the Californian-based Bay Area Laboratory Cooperative ("BALCO"). USADA sought to ban Montgomery for four years. The legal issue revolved around the fact that USADA had charged Montgomery with the violation of applicable IAAF anti-doping rules, notwithstanding that Montgomery had never tested positive in any in-competition or out-of-competition doping test. The matter proceeded directly to a single final hearing before the Court of Arbitration for Sport ("CAS"), which ruled in the above mentioned way (for further information about the 'BALCO scandal' (which involved, amongst the others, the five-time olympic medal (three of them gold), at the 2000 Summer Olympics in Sydney, Marion Jones, please refer to: *https://en.wikipedia.org/wiki/BALCO_scandal*).

[46] D. Mavromati, (University of Lausanne, former Managing Counsel to the CAS) on her *Legal Issues related to the application of the ABP Programme*, presentation made in 2011.

[47] So D. Mavromati, (University of Lausanne, former Managing Counsel to the CAS) on her *Legal Issues related to the application of the ABP Programme*, mentioned above, p. 4.

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A first case was CAS 2010/A/2178 Caucchioli vs. CONI (Italian Olympic Committee) & IOC[48].

Pietro Caucchioli, an Italian professional cyclist, was part of UCI ABP programme.

The UCI expert panel considered that his blood profile (consisting in thirteen samples collected between 2008 and 2009) could only be explained by the use of a prohibited method.

An allegation under art. 2.2 of the WADA Code was brought before the national anti-doping tribunal, which found it proved, and consequently sanctioned the athlete with a two-year period of ineligibility.

The cyclist appealed the decision before CAS, by submitting, first, that samples taken before the publication of WADA ABP's Guidelines could not be relied on because analysis under ABP could not have retrospective effect; second, that the sample analysis was unreliable because of breaches of the International Standards (provided by such Guidelines); lastly, that his blood profile could not be attributed to the use of a prohibited substance when it has properly evaluated.

By acknowledging the basic principle according to which the alleged violation was subject to the substantial rules of the applicable law at the time when it occurred, and that the new substantive rules could not have retrospective effect, the Panel held that using new methods of analysis (such, in this case, the ABP) did not infringe this principle, as it did not involve a new substantive legal rule, but rather "an improved method of proceeding to detect violations".

The relevant substantive legal rule in issue – namely the anti-doping rule violation of using a prohibited method – was in force at the time of the alleged violation.

The method of detection of blood doping- as the one provided by the ABP – has to be considered, in other words, as a new scientific method, so that it can be used even if the rules of the WADA Code do not expressively mention it.

[48] The award is available on-line, at the CAS 'institutional' website (*www.tas-cas.org*), to the following *www.tas-cas.org/fileadmin/user_upload/Sentence20217820_version20internet_pdf* (French).

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On the same opinion was the case CAS 2010/A/2306 Pellizotti vs. CONI (Italian Olympic Committee) and IOC[49].

Franco Pellizotti, an Italian professional cyclist, was part of UCI ABP programme as well.

In December 2009, a Panel of nine experts appointed by the UCI to review the ABP data concluded that «is was highly probable that the rider's (blood, ed.) samples showed that he had taken a prohibited substance or used a prohibited method».

After the athlete provided his response, a Panel of three experts concluded that the athlete's explanation of the values was not satisfactory and recommended the bringing of anti-doping rule violation proceedings against him.

The Italian National Arbitral Tribunal (TNA) considered the allegation 'comfortably' proved, according to art. 3 of the WADA Code ("Proof of Doping").

It held, in particular, that the ABP did not infringe the principle of non-retroactivity, as (once again) it did not introduce a substantive violation, but rather a method of establishing the existence of a violation.

The ABP can be considered a reliable method of detecting doping, even though, in the case at stake, the analyses did not prove the existence on an ADRV's to the required standard under Article 3 of the Code.

UCI appealed such award before CAS, but CAS confirmed the TNA decision of no infringement of the principle of retroactivity (as set out in the 2009 WADA Code), as the introduction of the ABP has to be considered as introduction of a new detection method «rather than any change in substantive law».

Another case was CAS 2010/A/2235 UCI v. Valjavec & Olympic Committee of Slovenia (OCS), award of 21 April 2011[50].

On such case UCI submitted that a CAS panel «should limit itself to check that the Expert Panel considered the correct issues and

[49] The award is available on-line, at the CAS 'institutional' website (*www.tas-cas.org*), to the following *jurisprudence.tas-cas.org/Shared%20Documents/2308,%202335.pdf* (French).

[50] The award is available on-line, at the CAS 'institutional' website (*www.tas-cas.org*), to the following *jurisprudence.tas-cas.org/Shared%20Documents/2235.pdf* (English).

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exercised its appreciation in a manner which does not appear arbitrary or illogical»[51].

The arbitration panel, while recognizing its lack of scientific preparation, rejected this approach, stating that a CAS panel «cannot abdicate its adjudicative role», by inspiring to a well-known ruling from the Supreme Court of the United States[52], and to the well-known principle "*iudex peritus peritorum*"[53].

In particular, the panel has focused on the approach that a judicial body must take on technical advice from experts, by assuming that «a CAS panel shall apply the standard of proof as an appellate body to determine whether the expert panel's evaluation is soundly based in primary facts, and whether the expert panel's consequent appreciation of the conclusion be derived from those facts is equally sound. It will necessarily take into account, inter alia, the impression made on it by the expert witnesses in terms of their standing, experience, and cogency of their evidence together with that evidence' s consistency with any published research»[54].

In addition, it established that «WADA has approved the use of ABP and this has been codified in the current UCI rules», so that «a CAS panel must respect and apply the rules as they are and not as they might have been or might become»[55], and further that «CAS Panel is not called to adjudicate on whether some other or better system of longitudinal profiling could be created»[56].

Another interesting case was CAS 2013/A/3080 Alemitu Bekele Degfa v. Turkish Athletics Federation (TAF) and International Association of Athletics Federations (IAAF)[57].

Alemitu Bekele Degfa is an athlete of Turkish nationality (and of

[51] So para. 78 of the award.

[52] Kumho Tire Co, Ltd. Vs. Patrick Cormichael, in *United States Reports*, 1999, Vol. 526, p. 137 and followings.

[53] So para. 79 of the award.

[54] So the official maxim of the award, point 2.

[55] So the official maxim of the award, point 3.

[56] So para. 81 of the award.

[57] The award is available on-line, to the following *www.doping.nl/media/kb/3017/CAS%202013_A_3080%20Alemitu%20Bekele-Degfa%20vs%20TAF%20&%20IAAF%20(S).pdf* (English); a brief resume of it is available at the TAS-CAS Bulletin, n. 2-2014, on-line to the following *http://www.tas-cas.org/fileadmin/user_upload/Bulletin_2014_2.pdf* (English).

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Ethiopian origin), and an international long-distance runner (specialising in the 3000m and 5000m events).

In August 2009, the IAAF introduced the ABP to its standard blood testing programme.

From that period to July 2010, the IAAF collected three ABP blood samples from her[58].

In September 2010, the IAAF received an anonymous reporting from a Turkish athlete which suggested, inter alia, that Ms. Bekele was engaged in doping practices.

As a result of this information, and the ABP results from Ms. Bekele in 2009 and 2010 (which the IAAF regarded as "highly suspicious"), her name was added in October 2010 to the IAAF's "Registered Testing Pool".

After that, three further ABP samples were collected from the athlete, from July to November 2011.

Her hematological profile, in particular, comprising the results of the first five tests, was identified as being 'abnormal' by the IAAF's adaptive model "with a probability of more than 99%"[59].

The Athlete disputed the abnormalities in her Biological Passport, arguing that such characteristics were due to: a) her training methodology (performed in high altitudes); b) an abortion; c) bouts of malaria - not doping.

The TAF Penal Board referred the evidence to an expert medical panel.

Having received its report, the Penal Board held that athlete had violated the anti-doping rules (in particular: Rule 32.2.b) of the IAAF Competition Rules), imposing, therefore, a sanction of four years ineligibility on the athlete pursuant to Rule 40.6(a), on the grounds that «there were aggravating circumstances in that she had committed the violation as part of a doping plan or scheme»[60].

[58] The last one (collected on July 29, 2010) was taken in the occasion of the European Championships in Barcelona, where Ms Bekele competed in the 5000m, finishing in the gold medal position in a European Championship record time of 14:52:20 minutes.

[59] The Expert Panel (composed by Prof. Yorck-Olaf Schumacher, Dr. Giuseppe D'Onofrio, and Prof. Michel Audran) considered, in particular, that «it was highly likely that her blood profile was the result of the use of a prohibited substance or method» (so para. 15 of the award).

[60] So para. 18 of the award.

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The Athlete appealed the decision before CAS, naming the TAF as Respondent[61], and the IAAF, having become aware of the appeal, asserted the right to intervene as a party[62].

The IAAF, in particular, argued that the reticulocyte percentages in the Athlete's blood were consistent with systematic blood reinfusions and intentional blood doping, and submitted that there were aggravating circumstances which justified the increase of the penalty up to a four-year period of ineligibility.

The CAS upheld Ms. Bekele's appeal just in part, by reducing the athlete's period of ineligibility on a period of two years and nine months (commencing on the date of the award), instead of the four years initially sanctioned.

In doing so, it reasoned, schematically, in the following way:

1. First of all, the Panel observed that, since the purpose of the ABP program is to assess whether or not an athlete has committed an anti-doping rule violation on the basis of a longitudinal profile, «in the majority of ABP cases the relevant authority cannot determine with any precision what type of doping has occurred or when it is alleged to have occurred»[63].

Since the purpose of the ABP program is to provide details of the variations in an athlete's biological parameters over the course of the period monitored, so that these parameters can be assessed to 'indirectly reveal the effects of doping', «multiple values will necessarily be obtained in every ABP case, and the relevant authority and its experts are not able to identify the precise violation that has been committed, concluding that there are aggravating circumstances for multiple violations on the sole basis of the longitudinal variations in an Athlete's ABP is at odds with the concept of aggravating circumstances under Rule 40.6 (yet cited, ed.)»[64];

2. The Panel found that the "unrebutted and strong evidence" demonstrated clearly to its "comfortable satisfaction" the commission of doping offences contrary to the IAAF Competition Rules (i.e. abnormality of the Athlete's Biological Passport with a probability of

[61] pursuant to Article R48 of the Code of Sports-related Arbitration.
[62] pursuant to Articles R41.3 and R54 of the Code (above mentioned).
[63] So para. 54 of the award (first part).
[64] So para. 54 of the award (second part).

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more than 99%), ahead of both the IAAF Indoor World Championships in Doha and the IAAF European Championships in Barcelona in 2010.

However, although it had suspicions that the results shown by the sample collected on 17 August 2009 at the World Championship in Berlin demonstrated a further doping offence, «that suspicion was not enough to comfortably satisfy the Panel as to the Athlete's guilt in relation to that sample»[65].

3. The Panel further considered that any conduct in advance of the taking of tested samples, involving a course of conduct over a considerable period of time, amounts to a doping plan or scheme implying the athlete's knowledge.

In particular, it observed that «whilst this was not a sophisticated conspiracy (such, for example, as that found in CAS 2008/A/1718 to 1724 IAAF v All Russian Athletic Federation and others), this was not a case of an athlete taking a banned substance on a single occasion»[66], although «it was a repetitive and planned application of drugs (rhEPO) or sophisticated, premeditated reinfusion techniques»[67], so that «under these circumstances it is difficult to conceive that (the Athlete, ed.) acted without the help or assistance of others (athlete support personnel, ed.)»[68].

The Panel, moreover, was "comfortably satisfied" that the Athlete «used or possessed a Prohibited Substance or Prohibited Method on multiple occasions, in line with Rule 40.6(a) (of the IAAF Competition Rules, ed.)»[69], which provides, in particular, that such use or possession on multiple occasions constitutes aggravating circumstances which may justify the imposition of a period of ineligibility greater than the standard sanction of two-year ineligibility[70].

In this respect, the athlete had failed to prove to the "comfortable satisfaction" of the Panel that she did not knowingly commit anti-doping rule violations, so that «the Panel found her assertions

[65] So para. 66 of the award (last part).
[66] So para. 68 of the award (first part).
[67] So para. 68 of the award (second part).
[68] So para. 68 of the award (second part).
[69] So para. 69 of the award.
[70] According to anti-doping rules in force at the time (WADA Code 2009).

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that she had never engaged in any doping practice or method entirely unconvincing»[71].

4. Lastly, the IAAF relied upon the fact that a four-year period of ineligibility had been established as the norm in blood doping cases in athletics.

In relation to that, the CAS observed that, in a previous case[72], «the Sole Arbitrator referred to 'Portuguese Athletics Federation v. Ornelas' in which a four-year period of ineligibility had been imposed for blood doping offences apparently committed over a period of one year»[73], and that, however, as pointed out in CAS, 2010/A/2235, UCI v. Valjavec & Olympic Committee of Slovenia (OCS), «albeit in relation to a different set of rules, the rules do not differentiate between various forms of first offence or suggest that blood manipulation attracts 'ratione materiae' a higher sanction than the presence of a prohibited substance. It is the circumstances of the offence, not the commission of the offence itself, which may aggravate»[74].

That said, it observed that «blood doping offences are by their nature repetitive and sophisticated», as «aggravating features which involve a doping plan or scheme and a repetitive and sophisticated use or possession of a Prohibited Substance or Method are likely to be regarded as aggravating circumstances which require a substantial increase over the standard sanction»[75].

In the case at stake, the Panel found that the established culpability of the athlete was related only to a single year and to the targeting of two competitions within that year (though by the repeated use of a Prohibited Substance or Method), infringement that lies «on a substantially lesser scale than that of Ms. Kokkinariou whose career over five of six years appears to have been built on blood doping»[76].

[71] So para. 67 of the award;

[72] In particular, CAS, 2012/A/2773, IAAF vs. Hellenic Amateur Athletic Association and Irini Kokkinariou (especially on para. 75). For a brief resume of it, please refer to the TAS-CAS Bulletin, n. 1-2013, available on-line to the following *www.tas-cas.org/fileadmin/user_upload/Bulletin201_2013.pdf* (English).

[73] So para. 80 of the award (first part).

[74] So para. 80 of the award (second part).

[75] So para. 81 of the award.

[76] So para. 82 of the award (recalling, on the point, what affirmed by CAS, 2012/A/2773,

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Taking into account all these circumstances, the Panel's view was that was not a case in which the period of ineligibility should be increased to the maximum available[77], as «each case has to be considered on its own merits and in the particular circumstances», considering that «the appropriate period of ineligibility» in the case at stake was two years and nine months.

Last cases in which the reliability of ABP as evidence was challenged were CAS, 2015/A/4005-4006-4007-4008-4009-4010, IAAF vs. ARAF, Kirdyapkin, Zaripova, Bakulin, Kaniskina, Borkin, Kanaikin, & RUSADA, awards of 25 April 2016[78].

The appeals concerned one element of decisions issued by the disciplinary committee of the Russian Anti-Doping Agency ("RUSADA") in anti-doping cases brought against six international-level Russian athletes (Olga Kaniskina, Yuliya Zaripova, Sergey Bakulin, Valeriy Borchin, Vladimir Kanaykin and Sergey Kirdyapkin), based on irregularities observed between August 2009 and August 20112 in their Biological Passports.

In particular, the International Association of Athletics Federations (IAAF) claimed that RUSADA had incorrectly applied the applicable anti-doping rules adopted by IAAF (the "IAAF ADR") to implement the provisions of the World Anti-Doping Code, with respect to the disqualification of competitive results (disqualification of results split in different periods).

The IAAF challenged what it felt was a 'selective' disqualification of results, by submitting that all results achieved by the athletes from the date of their first abnormal sample to the date they accepted a provisional suspension should have been disqualified.

In upholding the appeal filed by the IAAF, the CAS, in relation to the validity, in terms of evidence, of the Biological Passport, stated as follows:

IAAF vs. Hellenic Amateur Athletic Association and Irini Kokkinariou, above mentioned).

[77] So para. 83 of the award, where it is also stated that: «To do so would be to suggest that in all cases of blood doping a four-year period of ineligibility would under the rules as they stand be almost de rigueur, when the rules do not make specific provision for a more severe penalty in blood doping cases».

[78] All the awards are available on-line at the CAS 'institutional' website (*www.tas-cas.org*).

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– An athlete who, based on his Athlete Biological Passport (ABP), is found guilty of an anti-doping rule violation and criticizes the reliability of the ABP but does not challenge the respective decision, accepts the conclusion that his ABP constituted sufficient evidence to ground the conclusion that he committed an anti-doping rule violation;

– The criticism as to the reliability of the ABP can be interpreted as aiming to show that insufficient evidence has been submitted to prove that some of the samples included in the ABP of the athlete are abnormal, and therefore to allow the conclusion – from the athlete's perspective – that they should not be taken into account when determining whether the results achieved in the periodconcerning those disputed samples have to be disqualified;

– In the same way, the athlete may invoke any alleged unreliability of the ABP method as a factor to be taken into account when assessing, in general terms, the "fairness" of the disqualification (or of the non-disqualification) of his results.

8. Which lessons can be learned (if any) by the ABP?

First of all, as sharply observed by a doctrine[79], «the problem is that the cheats are always ahead of the testers», and «the detection of doping through a primary strategy of biological analysis is fatally flawed»[80].

Second, the need for an absolute uniformity of collecting procedures at international level[81], which could bring (apart from uniformity) effectiveness and credibility to this instrument.

Third, the need for its maximum sharing, by all the stakeholders involved.

Michael Ashenden, the doping expert who conducted the research first, and who had been acting as an independent reviewer for blood profiles in cycling, in 2012 has resigned from the regulatory body responsible for management of the Athlete Passport Management Unit (ABPU), by disputing a contractual clause (a 'confidentiality

[79] S. Moston, T. Engelberg, *Detecting Doping in Sport*, London, 2017.

[80] *Ibidem*, p. VII of Preface.

[81] From this point of view, it is essential the absolute respect for the Guidelines provided by WADA, by every single NADO.

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clause') barring him from discussing the Passport in public during his role (and up to eight years after) as the reason for his resignation[82].

He believes, in particular, that transparency is essential to gain confidence in the ABP and education of the media and public is a key way in which to do this[83].

Furthermore, on an open letter (dated August 12, 2015)[84] he expressed a particularly severe and critical point of view to the IAAF (in the name of his President, Mr. Sebastian Coe), in its anti-doping approach held up to that point[85].

In our opinion, it's (almost) impossible to disagree with this point of view.

It will be, as ever, the experience of the sporting courts and bodies (mostly, of all the sporting stakeholders) to provide further issues

[82] M. McGrath (Science Reporter of BBC), *Top scientists quits anti-doping body over 'muzzling'*, on *www.bbc.com/news/science-environment-17586597*, April 3, 2012.

[83] in the interview above, he said that «Anti-doping exists to protect clean athletes, not the reputation of the anti-doping movement. When push comes to shove, my actions will always be in the interests of clean athletes, even if that means I ruffle feathers by highlighting some inconvenient truths, and just because I serve on their panel, it doesn't give them the right to silence me».

[84] Available on-line to the following URL: *http://www.sportsintegrityinitiative.com/open-letter-from-dr-ashenden-to-lord-coe/*.

[85] Such a letter reads as follows: «In its 2011 publication, the IAAF estimated that 14% of your elite endurance athletes had blood doped during the 2001-09 era. That's 700 blood dopers. Since 2011, just 63 Passport cases have been pursued by the IAAF. Publicly available documents list 72 positive cases for EPO (including CERA, admissions) in athletics between 2001 and now (2015, ed.).. It is clear from results in the database that serious problems emerged in Russia around 2005. Yet the IAAF chose not to join other sports, such as cycling, cross country skiing, biathlon and speed skating, who had adopted 'no start' rules in an attempt to stem the tide». In suggesting a way that IAAF could carry out (to improve its anti-doping programme), he added further that «WADA's ABP software automatically generates a so-called 'sequence probability' for individual athletes that cfr.ms ideally suited for 'no start' rules. Such an approach would require no additional sample collection or financial outlay, as the IAAF are already collecting blood samples from all competitors at the world championships, and evidently many major marathons», and that «there is also much more that the IAAF could do», by mentioning additional reforms like those carried out by the Major League Baseball (MLB) in 2009 (which created an independent Department of Investigations tasked with broad authority to take action to protect the integrity of its sport) and the outcome of USADA's investigation into Lance Armstrong «to recognize the potential benefit».

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than those carried out so far, in a particularly discussed, complicated and controversial matter which is the anti-doping today.

PAOLO GARRAFFA

*Abstract*

Introduced for the first time in Cycling in 2008, and subsequently adopted in other sports (such as athletics and football), the Athlete Biological Passport ("ABP") today represents the last 'frontier' in the fight against Doping in sports.

Passing through the failure of the WADA's 'testing' approach – as 'direct' detection method of Anti-doping Rules Violations (ADRV's) - the ABP has been considered as an 'indirect' method for ADRV's, even though its first purpose was to monitor some physiological parameters (blood, urine) of athletes during the time, both in and out of competitions.

Another issue (strictly linked to ABP) is represented by the use of one of the most diffused performance enhancing drugs by the athletes for several years: the EPO.

In an era of highly sophisticated scientific techniques, it is reasonable to ask how it has been possible that the detection of EPO was so problematic.

In this script we will (try to) address the intrinsic difficulties arising from the "EPO-test" (a test designed for EPO's detection), the reasons why, in the end, such a method has failed, and the ABP is considered, today, the more effective and trustworthy instrument for ADRV's detection.

Such an instrument has triggered, moreover, a wide-ranging debate amongst the scientific community, also by going through the scrutiny of the highest-profile sports courts, including the CAS of Lausanne.

The purpose of this work is to draw a first balance sheet, by highlighting its advantages and criticalities.

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Sessione III

# NATIONAL AND INTERNATIONAL LEGISLATION SPORTS REGULATION AND CONTRACTS

# Refugee Crisis: The Right to Physical Education of Minor Refugees

SUMMARY: 1. Introduction. – 2. Refugees, Human and Sports Ideals. – 3. Rights of minor Refugees. – 4. International regulations on Physical Education and Physical Exercise of minor Refugees. – 5. The Education of minor Refugees. – 6. Conclusion.

1. One of the greatest challenges faced by all modern societies of the 21st century is the ability to coexist with the different.

Violent movement of populations nowadays is a global phenomenon that requires special consideration. Within such a complex and changing environment, the EU Member States are obliged to give an overall response to the phenomenon, on the one hand serving national interests and on the other hand, ensuring the fair treatment of refugees and immigrants of various forms.

Since the middle of the 20th century, physical education and sport have been used to foster cohesion, solidarity, respect and anti-racism (Moodley, 1995, p. 802).

Athletic education in accordance to the principles of the *International Charter of Physical Education and Sport (*ICPES, UNESCO) can play a key role in the implantation of human values, particularly at a period when armed conflicts endanger the future of numerous societies in different regions of the world[1].

2. The United Nations General Assembly Resolution on the Building of a Peaceful and Better World through Sports and the Olympic

[1] D. PANAGIOTOPOULOS, *Sports Law* I, Systematic foundation-Application, Athens, 2005, referring to F. KIDANE, *Sport and Politics, Diplomacy of an Olympic Truce*, in *Olympic Review*, 28, 1999, p. 48.

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Ideas (20/10/97) has become a springboard for the development of cooperation between governments of the United Nations, the EU, the Council of Europe, the African Friendship Organization, USA and other intergovernmental organizations[2].

Refugees and their children often do not compose a homogeneous group: among them there may be people of different nationalities, different social and cultural characteristics, with different economic and cultural backgrounds and sometimes with significant contrasts among them. There are many matters with difficult solutions that are being considered in this case, mainly regarding their entry since it is refused by many countries while others accept immigrant's influx negative consequences.

The reception provided to refugees and immigrants is imperative at all costs, as they are people who call for International Understanding, Meritocracy-Justice, Equality, because of an immaculate necessity (war or other situation). These are also the Ideals one finds in athletic practices.

3. Children are a vulnerable group of the refugee population and therefore special care is required to manage it. A basic characteristic of the special treatment of refugee children is to defend their rights and their best interests, which is foreseen by the International Convention on the Rights of the Child (1989). The Convention does not distinguish between national and foreign or between lawfully and illegally located children in the territory, «Contracting States are required to respect the rights set forth in this Convention and to guarantee them to every child under their jurisdiction without any distinction of race, color, sex, language, religion, political or other beliefs or of the child or his / her parents or legal representatives, or their national or social origin, their assets, their incapacity, their birth or any other situation» (Convention Article 2, para. 1).

In fact, however, many requirements of the Convention remain unenforceable in Greece for both foreign and domestic minors in violation of Article 4: «Contracting States are required to take all the legislative, administrative and other measures necessary for the im-

[2] *Ibidem.*

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plementation of the rights recognized in this Convention. In the case of economic, social and cultural rights, they take these measures within the limits of their resources and, where necessary, within the framework of international cooperation». and Article 22 provisions: «Contracting States are obligated to take all appropriate measures to ensure that a child who seeks to become a refugee or is considered a refugee under the rules and procedures of the current international or national law, whether alone or accompanied by his/her parents or by any other person, is afforded appropriate protection and humanitarian assistance to enable him / her to enjoy the rights conferred by this Convention and other international organizations for human rights or of humanitarian character, which are part of the contracting States». It is of the utmost importance that all procedures and practices involving children, directly ensure the child's interest (Article 3: principle of safeguarding the best interests of the child), provide opportunities for the child's opinion to be heard according to age and degree of maturity [Article 12: principle of participation (right of the child to express his or her opinion freely and be taken seriously)] and to protect it from all forms of violence or exploitation (Articles 32 and 36: protection from all forms of exploitation).

The obligations of each country, as enshrined in the Convention on the Rights of the Child, have not yet been the subject of a specific legislative approach. The Greek Ombudsman for Children's Rights emphasize that the revised Common European Asylum System lacks the perspective on the rights of the child and express their concern that the new Return Action Plan presented by the European Commission on 1 March 2017 may speed up the use of detention and the forced return of minor refugees. Regarding the current situation of refugee children in Greece, it focuses on the need to promote legislation on guardianship and to ensure unhindered access for all children in the country to health services and the public education system.

4. The right of citizens to physical exercise is enshrined through the *UNESCO International Charter of Physical Education and Sport* which is binding for the UN member states (UNESCO 21.11.1978, Paris), the European Declaration of Sports for All (Conference of European Sports Ministers, Brussels 1975) and the European Sport for All Charter of The Council of Europe. In the *International Char-*

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*ter of Physical Education and Sport*, it is stated that «physical education and sports are important for the perfect development of the personality of every human being and their free use is characterized as a fundamental right» (Art. 1, para. 1). According to the International Charter of Physical Education and Sport are an important dimension of the education and culture of the citizen (the Physical Education and Sport, art. 2, para. 1). Greece undertakes to implement the provisions that guarantee this right. The conditions for its implementation are based on the principle of personal specialization, country specificity and priority to the needs of social groups with special abilities (the Physical Education and Sports, art. 3, para. 1).

Refugee children are a vulnerable group of migrant populations and therefore special care is required to manage them. In addition, it should be understood that refugee children are a potential population of the host country and their actions in the local society will be adjusted to the host environment according to the rules and living conditions of the local population.

Education policies include actions such as support for learning foreign languages, introductory measures, access to employment, education and vocational training, as well as anti-discrimination, policies and measures, all of which aim to increase the participation level of immigrants into society. Through sports (indirectly) and physical education (directly), the aims to be pursued are the free development of personality, the free formation of individual and collective physical and athletic education and action[3]. Under these conditions, through sporting activity a special contribution is achieved to the cultural life of the people and the Nation (Reschke E., 1989) (Panagiotopoulos D., 1992) which is the right of every Greek citizen according to article 5 para. 1. And, of course, it can be extended to anyone who stays in the country under special status.

Education for all children irrespective of discrimination and their residence status has been institutionalized in Greece and their facilitation and access to education levels[4] have been ensured. There is the

[3] D. Panagiotopoulos, *The right to sports and its protection under the Greek Constitution,* in *Revue juridique et économique du sport*, 1993, p. 109 s.

[4] Government Gazette, 6/1063/82763 /D1/2305-2016/Greek Ministry Research and Religious Affairs, Art. 7 of the PD. 200/1998 Government Gazette 161.

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option to enroll in the regular school program, while under the context of intercultural education[5], where there are functional Educational Priority Zones[6].

It should be noted that there is a special provision in Greece for the establishment and operation of theso called *Refugee Reception and Training Structures* (R.R.T.S). Especially, regarding the issue of refugee children's access to education, the Greek Ombudsman for Child's Rights collaborated with State Authorities and stakeholders towards ensuring the protection of their rights.

According to the current Greek Constitution, physical education is part of the Education System as the basic task of the state whose aim ought to be, the physical cultivation, development and moral conformation of young people, aiming at a solid character, a respected person, a well-founded determination and the ability to develop initiatives, the transformation of a person to a personality (D. Panagiotopoulos, 1992).

Therefore the pedagogical goals to ensure that each child can be assured of the development of his/her abilities, respect for his/her personality and physical integrity, within the course of physical education, are highlighted in the Constitution and National Law. In so doing, these provisions constitute an institutional guarantee of the right to free personality development and suggest to the legislator to make arrangements for the establishment of an organized educational and competing activity (D. Panagiotopoulos, 2001).

The European Commission published in 2014 a study showing how sports and physical education support the integration of immigrants across Europe[7] ("Europe 2020", EU's three-year work program on sports, the protection of minors and gender equality).

[5] Law No. 4415/16 (Government Gazette 159 A/6th September 2016 – Correction with Government Gazette 165-A / 8-9-16, No. 2413/96 (Government Gazette-124 A) twenty-five intercultural schools throughout Greece, thirteen elementary schools, eight high schools and four high schools.

[6] Law 3879/10 Government Gazette 163 A/21st September 2010, the Institution of Educational Priority Zones/already introduced since 2010, provides for the inclusion of the Zones in primary and secondary schools, aiming to ensure equal access for all pupils to the educational system.

[7] Projects such as the European Sport Inclusion Network – Promoting Equal Opportunities for Migrants and Minorities through Volunteering in Sport, and Social Inclusion and Volunteering in Sports Clubs in Europe, are funded.

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Nowadays there is still a lack of data regarding the implementation of support policies in the field of physical activity and sporting activities for refugees. So far, there has been no systematic, transnational research focusing on political conditions, financial and social implications and the structural characteristics of sports associations, federations, organizations and other bodies promoting social inclusion and volunteering in sports (EC 24 / 5/2017)

1. More than 4 in 5 (83%) of the first time asylum seekers in the EU-28 in 2016 were less than 35 years old; nearly one third (32%) of the total number were minors aged less than 18 years[8]. A recent UNICEF report estimates the number of minors in Greece at 20.300

| Age Distribution | Number of children | Percentage of children |
|---|---|---|
| 0-3 | 2.223 | 28% |
| 4-5 | 982 | 12% |
| 6-12 | 2.845 | 35% |
| 13-15 | 1.024 | 13% |
| 16-17 | 962 | 12% |
| Total: | 8.036 | 100% |

Throughout the year 2016-2017, The Greek Ombudsman for the Child conducted a series of public interventions aiming at protecting the rights of relocated children, particularly unaccompanied minors, while placing a particular emphasis on their right of access to education. Prior to this the European Network of Ombudspersons for Children conducted a report on Children's Rights on the Move in 2016[9].

The Greek Ministry of Research and Religious Affairs, undertook the initiative, in March 2016, to prepare a plan for the integration of refugee children into the public education system in order to contribute to their wider social environment (47079 / Ministry of Education, Research and Religious Affairs 18 March 2016)[10]. For the up-

[8] Source: *ec.europa.eu/eurostat/statisticsexplained/index.php/Asylum_statistics*.

[9] The full text of the Report, *www.synigoros.gr/resources/160211-ekthesi.pdf*.

[9] Project Evaluation Report on the Integration of Children of Refugees in Education, March 2016-April 2017

[10] Scientific Committee on the Support of Refugee Children – The Refugee Educa-

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coming phase, the Ministerial Committee assessing the inclusion of refugee children in the education system during the school year 2016-2017, highlighted good practices for solutions introduced by teachers in this field[11].

Moreover, at the initiative of the National and Kapodistrian University of Athens within the tasks and activities of the Postgraduate Program “Strategies for Environmental, Disaster and Crisis Management” the importance of sporting action through physical education programs was evaluated in June and July 2017. The pilot evaluation test took place in school classes where summer education programs for refugee children were in progress. To this task the co-operation with the NGO «METAdrasi», responsible for the training programs, was ensured.

The provision of organized athletic training of minors is, without doubt, a good practice. It is proved, in real conditions that it offers an added value to the efforts paid by reception countries, the EU and the International Community. It helps enforcing children’s inalienable rights to life, education, equal treatment, without exclusions and discriminations. In parallel, it can ensure the promotion of global values such as physical education and the ideals of sports and the Olympic ideals of equality and solidarity.

6. The fair treatment of refugees and immigrants of various states requires a comprehensive and holistic response to the phenomenon, while serving the national interests of the host nation.

There is a pressing need for refugees (by war or other cause) to experience International Understanding, Meritocracy-Justice, Equality, Ideals one finds in Athletic practices.

Physical exercise is an internationally established right, through the UNESCO International Charter of Fundamental Rights, which is binding on the UN member countries.

The providing of organized education in gymnastics for minors with special provisionthrough the establishment and operation of the

tion Project. Proposals for the Education of Refugee Children during the school year 2017-2018, Athens.

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Refugee Reception and Training Structures (R.R.T.S) forms the cornerstone for the gratification of the human rights of minor refugees.

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*Abstract*

Sports as one of the fundamental human rights is under the protection and the supervision of the state according to Art.16 para.9 of the Constitution. On the other side, the Local Government (L.G) Operators can create and materialize special sports programs, better than any other government operator, for all those cases of people who are in need of physical exercise. The right to physical activity, applies to all citizens' categories, the immigrants being one of them (Art.121/Presidential Decree 410/1995). How-

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ever, the role of the L.G. in immigrant related matters, still remains restricted, although the Law acknowledges its importance to their incorporation in society. In this thesis, the modus for the L.G. to provide sports services as incorporation measures against the consequences of the immigration problem and their "merging" in the local communities of their residence in our country, is thoroughly investigated. The research is part of the management of the consequences suffered by local societies, caused by the immigration crisis of previous years, mostly due to the war conducted in Syria but also for improved life standards and safety reasons.

The goal of this effort is to trace the opportunities provided to immigrants and especially to school kids, through the sports' programs of the L.G. Operators Organizations.

The purpose of this study is to create an inventory of the educational methods used through specific sport activities, that lead to the smooth embodiment of younger immigrants to the Greek society.

The vision of this effort is the as smooth as possible embodiment of young immigrants by providing them with the opportunity for expression, games, entertainment and sports in their new environment. Thus could be achieved by suggesting sports' programs that encourage creativity, develop imagination and help in the evolution of their socialization and their expression. The children can make good use of their energy, evolve their social skills, manage their emotions and develop a positive attitude towards education and life, thus being easily integrated in today's society. This study uses as its axis on the one hand their smooth embodiment in local societies, and on the other hand the briefing of the citizens for the benefits of the leveled integration of young immigrants.

Moreover through the analysis of the programs created by the L.G. in cooperation with specialized NGOs, we can document the problems that arise, the obstacles created in the integration process, a very difficult process especially for individuals coming from a totally different cultural environment and have experienced the horrors of war, destruction and immigration in tender ages.

Resulting, the research aims in the formulation of "proper practices" suggestions of implementing the sports' and entertainment programs, that target the humanistic management of the secondary impacts of the continuing immigration crisis, by concentrating its interest in young school aged children.

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# The European approach towards personal data protection in sport as a response to the challenges of the 4th industrial revolution

SUMMARY: 1. Introduction. – 2. The scope of personal data processing in sport. – 3. Athletes' rights as data subject. – 4. Responsibilities of sports clubs as data controllers. – 5. Conclusions.

1. A significant feature of modern sport, in the information society and the digital economy, is the risk of losing the privacy of the data subject. This danger is due to widespread access to new technologies, including the Internet, where users' personal data is collected and processed. This risk is also borne by athletes whose personal data, which are in different categories, is collected at many levels; sports clubs, national and international sports federations, or anti-doping organizations, who are the controllers of this data. The problem of data protection in sports has already been noted by the World Anti-Doping Agency where International Standard of Privacy and Personal Information was adopted and where a specialized panel is currently proposing a charter to formally protect the rights of athletes. The priorities include among others the right to privacy protection[1].

In this context the question arises: how can a modern data protection law be applied to sport. In the European Union the latest solutions in this regard should be Regulation (EU) 2016/679 of the European Parliament and of the Council adopted on 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation – hereinafter called GDPR), and repealing Di-

[1] *www.wada-ama.org/en/media/news/2017-03/statement-from-wada-athlete-committee* (1st October 2017).

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rective 95/46/EC[2]. The adopted regulation reinforces the protection of individuals' rights with respect to the processing of personal data and adapts economy and businesses to new challenges resulting from the information society development and digitization[3]. It is to be assumed that this intention also applies to sport. The purpose of this paper is therefore to analyze the new provisions of the GDPR and its application in the context of activities in the sport sector. In particular, attention will be drawn to new rights that GDPR awards to players as data subjects and to new obligations that European sport clubs and associations will have to fulfill as data controllers.

2. Just as in other areas of life, too much interference with privacy may result in the data subject's perception of danger and anguish. The doctrine noted in this regard that in recent years no other area of socio-economic life has become more transparent to the outside world than sport[4]. Personal information of athletes, such as: age, height, weight, information about the disciplinary penalty imposed on him or her, the results of the anti-doping controls are indeed often disclosed to the general public.

There is also a problem of sensitive data processing, i.e. the data on genetic profile, biometric data, or other health data. For the purpose of anti-doping controls sports organizations require the so-called biological passports specifying – determined by repeated testing – a detailed data on many blood parameters which are crucial in the context of a sports form. Such an action constitutes the so-called profiling, bearing the risk of creating categories of athletes, and consequently their discrimination[5].

[2] Regulation of the European Parliament and of the Council (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation) Text with EEA relevance. Official Journal of the European Union L 119/1.

[3] M. Kawecki, *Prawo ochrony danych osobowych jako nowa dziedzina prawa*, in *Europejski Przeglad Sadowy*, 5, 2017, p. 4 s.

[4] K. Vieweg, *The appeal of sports law*, available at: *irut.de/Forschung/Veroeffentlichungen/OnlineVersionFaszinationSportrecht/FaszinationSportrechtEnglisch.pdf*, p. 3, (5th Spetember 2017).

[5] Pursuant Art. 4 GDPR 'profiling' means «any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects

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Profiling is also involved when it comes to maintaining records of training data of an athlete, commonly known as big data[6]. The fact is that modern sports clubs already run extensive data bases containing training data of athletes, which sometimes is qualified as personal data. New technological methods of collecting and processing data create an opportunity to enhance the sporting performance (e.g. through training with a video supervision or putting sensory chips in athlete's clothes) but at the same time they are contradictory to the principle of informational autonomy[7].

In addition, the World-Anti-Doping-Code established and legally validated the practice of collection of geo-location data, which allows tracking of athletes by geolocation for anti-doping control purposes[8]. In this context it becomes a crucial issue to ensure that athletes as data subjects are aware of and have control over the process of collection and processing of their personal data.

It should also be mentioned that data protection problems, such as their uncontrolled leakage, may imply irreparable damage to a club's or sports' association image, and in case of an individual athlete even lead to an identity theft. In practice, sport clubs and federations often underestimate the problem of data security, not taking into account the aforementioned consequences which may result in the loss of privacy.

3. The basic new rule according to which the duties of a data controller are to be fulfilled is the transparency of the information ad-

relating to a natural person, in particular to analyze or predict aspects concerning that natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behavior, location or movements».

[6] A. Börding, M. von Schönfeld, Big Data *im Leistungssport – Datenschutzrechtliche Anforderungen an die Vereine*, in *SpuRt*, 1, 2016, p.7 s.

[7] The informational autonomy means the control over one's personal information, that is to say the individuals' right to determine which information about oneself will be disclosed, to whom and for which purpose, C. de Terwangne, *The Right to be Forgotten and Informational Autonomy in the Digital Environment*, In A. Ghezzi, A.G. Pereira and L. VesniÊ-AlujeviÊ (eds.), *The Ethics of Memory in a Digital Age*, London, 2014, p. 4.

[8] S. Schmidt, F. Hermonies, *Dopingkontrollen und Datenschutz am Beispiel der Mannschafts-Whereabouts im Fußball, Causa Sport: die Sport-Zeitschrift für nationales und internationales Recht sowie für Wirtschaft*, 4, 2009, p. 339 s.

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dressed to the athlete (Art. 12 GDPR). The athlete should in particular receive all information concerning the processing of his data in a simple language in a clear and easily understandable form[9]. Art. 12 Sec. 7 GDPR provides for the admissibility of additional information in standard graphical characters, colloquially called icons, which will clearly illustrate the scope, purposes and method of the intended data processing[10]. The principle of transparent communication relates in particular to information provided to children, including young athletes, who are naturally not entirely aware of the consequences of the data processing. The requirement of transparency in the communication with the data subject relates to the information provided to him or her automatically, immediately upon the appearance of the legal basis of the processing (e.g. contractual), and later upon the request of an athlete. In the latter case, the so-called right of access to data is exercised, implying, inter alia, the possibility to correct data or to stop its processing on request.

GDPR rules expand the information obligations imposed on a sports club or federation as a data controller. The new requirements listed in Art. 13 Sec. 1 GDPR should include the Data Protection Officer's contact details, indication of the legal basis for processing, legitimate interests of the administrator or a third party, when processing is carried out based on art. 6 Sec. 1, point f. It is important for athletes who are internationally active to provide the information about the intention to transfer personal data to third countries or international organizations, and about appropriate guarantees, i.e. whether the Commission has identified the appropriate level of protection or a reference to appropriate safeguards as well as about the possibility of receiving a copy of the data or about the place where the data is

[9] Pursuant Recital 58 of the GDPR preamble «the principle of transparency requires that any information addressed to the public or to the data subject be concise, easily accessible and easy to understand, and that clear and plain language and, additionally, where appropriate, visualization be used. […]. This is of particular relevance in situations where the proliferation of actors and the technological complexity of practice make it difficult for the data subject to know and understand whether, by whom and for what purpose personal data relating to him or her are being collected […]».

[10] M. Krzysztofek, *Ochrona danych osobowych w Unii Europejskiej po reformie. Komentarz do Rozporzadzenia Parlamentu Europejskiego i Rady* (UE) 2016/679, Warszawa, 2016, art. 11-12, p. 117.

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made available – where applicable. In addition, under Art. 13 Sec. 2 GDPR, a data controller should provide the athlete with other relevant information necessary to ensure the fairness and transparency of the processing, in particular such as the retention period and, where this is not possible, the criteria for determining that period, the right to data portability, information on the right to file a complaint with a supervisory authority, the information on whether the data submission is a statutory or a contractual requirement or the condition for the conclusion of the contract and whether a data subject is obliged to submit it and about possible consequences of the lack of data submitting, and the information on profiling. It is also worthwhile to mention the right of an athlete to obtain at his or her request at reasonable intervals, information on himself or herself that is being collected by the sports club or federation (Art. 15 GDPR). Such information is provided at the request of the athlete and is used to verify the compliance of data processing with the law. According to Art. 12 Sec. 3 GDPR the controller, without undue delay, at the latest within one month after the receipt of the request for access to the data, informs the data subject about the processing of his or her data. If necessary, the deadline can be extended by another two months due to the complex nature of the request or a number of requests[11].

From the above deliberations it follows that an athlete should be aware of who is responsible for the accuracy of the processing of his or her data, the purpose for which it was collected, whom it can be transmitted to and how long it will be kept. Only with this information the athlete will be able to verify that the data is being processed according to its purpose, to question its legitimacy and, above all, will be able to exercise his or her rights, i.e. to transmit the data. This is a significant change compared to a previous legal situation in which an athlete might not have been aware of some aspects of the data processing[12].

In such a state of affairs, the athlete's rights are substantially strengthened. On the other hand, for clubs and sports associations as data controllers, the extension of information clauses by the GDPR

[11] M.Krzysztofek, *Ochrona danych osobowych w Unii Europejskiej po reformie*, cit.
[12] *Ibidem*, p. 125.

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means more costly procedures, resulting primarily from the need to create new forms in paper and electronic forms[13].

The right to object to the data processing *sensu largo* has been extended in the GDPR and has gained a new, wider dimension. In addition to the right to erase and to restrict the processing of data that has been available under certain circumstances under Directive 95/46/EC, GDPR has provided the athlete with the right to be forgotten (Art. 17 GDPR), with the right to object to decisions made in an automated manner as well as the right to object to profiling (Art. 21 GDPR). New data subjects' rights are rooted in new data processing technologies, especially in the dangers of processing personal information via the Internet. Data erasure and exercising the right to be forgotten are irreversible. It is important to realize that information about specific actions (e.g. cheating related to doping), photos or statements of an athlete made in an early adolescence can significantly affect his or her life, including employment opportunities, after the end of his or her professional career. The right to be forgotten will be of particular importance in the event of making personal information available as a child without realizing the far-reaching consequences of such a behavior. In accordance with the rule laid down in Art. 17 GDPR sports clubs should erase the data of players who left the club. The cause of their accumulation, which is necessary for data processing for employment and membership purposes, then ceases (Art. 17 Sec. 1 point a GDPR). The same applies to sports associations that should systematically erase their former members from the relevant list. In addition, a sports club will be required to remove data if it is no longer needed for the purpose for which it was collected and processed (Article 5 GDPR and Article 17 (1) and GDPR). According to Art. 17 Sec. 1, point f GDPR the obligation to erase data on the administrator's side will arise, among others when personal data has been collected in connection with the provision of information society services provided directly to the child on the basis of consent to data processing[14]. This is the case, when an online

[13] D. Wocióra (ed.), *Ochrona danych osobowych i informacji niejawnych z uwzgladnieniem ogólnego rozporzadzenia unijnego*, Warszawa, 2016, p. 15.

[14] Information society service' means a service as defined in point (b) of Article 1(1) of Directive (EU) 2015/1535 of the European Parliament and of the Council (1), Cfr.

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store sells a specific item (e.g. sports equipment) or a service (web application) to a juvenile athlete. Under Art. 8 sec. 1 GDPR for information society services offered directly to a child, it is legal to process personal data of a child who is 16 years old. At an earlier stage of life, the consent of a child for information society services cannot be a valid legal basis for data processing[15].

A significant new feature introduced by GDPR is the identification of data erasure requests with the right to be forgotten[16]. As noted in Art. 17 Sec. 2 GDPR a data controller who has made any personal information available on the Internet should inform administrators processing this personal data that the data subject requests that these controllers delete all links to that data, copies of such personal data or its replication. GDPR, however, does not assume the execution of the right to be forgotten in absolute terms. According to Recital 66 of the Preamble, in order to comply with this obligation, the controller should only take reasonable action taking into account the available technologies and resources, including available technical means, to inform processors who process personal data about the data subject's request.

It seems that the request in this respect can be attributed to athletes, especially to those from the highest level of competition, only to a very limited extent, as Art. 17 Sec. 3 point a GDPR excludes

Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (OJ L 241, 17.9.2015, p. 1).

[15] Pursuant Art. 8 Sec. 1 GDPR where the child is below the age of 16 years, such processing shall be lawful only if and to the extent that consent is given or authorised by the holder of parental responsibility over the child. If an athlete as a child consents to the processing of personal data in connection with the provision of information society services, having regard to his or her lack of knowledge of the possible consequences of such a consent, the data subject as an adult shall have the right to request the administrator to erase his or her personal data.

[16] The right from Article 17 GDPR is a consequence of the famous ECJ judgment dated 13.5.2014, C - 131/12, Legalis (Google Spain S.L. and Google Int. Vs. Agencia Espanola de Protection de Datos). ECJ has confirmed that the right to be forgotten in search engines is based on Art. 7 and Art. 9 of the CPP and the right to erase data from Directive 95/46/EC, so the fundamental reform is not necessary. In its judgment, the ECJ primarily focused on the right to erase data from an Internet search engine, not at the source site, which largely fulfills the purpose of this law, M. Krzysztofek, *Ochrona danych osobowych w Unii Europejskiej po reformie*, cit., p. 156 s.

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the application of the right to be forgotten in so far as it is necessary to exercise the right to freedom of expression and information, while Art. 17 Sec. 3 point d to the extent that processing is necessary for archival purposes in the public interest, for scientific or historical purposes or for statistical purposes. Also in the doctrine it is clearly emphasized that the right to be forgotten cannot be used in the extent to which data processing is necessary to exercise the right to freedom of expression and information, and professional sports should be regarded as a kind of public domain[17]. Finding a balance between the right to protect a athlete's personal data and the right to freedom of expression and information may in some cases be difficult. By participating in an organized system of sporting competition, an athlete becomes a publicly known person in respect of which data can be collected and processed for general information purposes, and his sporting accomplishments may serve, for example, for archival or statistical purposes. Besides, under Art. 17 Sec. 3, point b, an athlete cannot benefit from the right to be forgotten insofar as data processing is necessary to meet the legal obligation to be processed under Union law or the law of the Member State to which the controller is subject, or to perform a task exercised in the public interest or in the exercise of public authority entrusted to the data controller. In this context, the athlete's request to remove his or her data and to be forgotten by the Anti Doping Agency will be unsuccessful, in any event, before the statutory defined date of 10 years of data retention period[18].

It should be recalled that under Art. 29 Sec. 2 of the Polish Antidoping Law, for anti-doping control purposes the Agency processesthe athlete's personal data enumerated in points 1-21 in order to fulfill the tasks entrusted to it. In addition, under Art. 17 Sec. 3 point c GDPR the athlete will not be able to use the right to be forgot-

[17] A. Dmochowska, M. Zadrozny, *Unijna reforma ochrony danych osobowych. Analiza zmian*, Warszawa, 2016, p. 43.

[18] Pursuant Art. 29 Sec. 5 The Polish Sports Law Act the Anti-Doping Agency shall retain personal data for the period necessary for the completion of anti-doping control activities but no longer than for a period of 10 years from the date of their receipt. Some personal data (name, gender, name of sport practiced, information about disciplinary penalties for doping in sport) may be retained by the Agency for more than 10 years if it is necessary to set disciplinary responsibility for doping in sport.

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ten insofar as the processing of a particular category of data is necessary for reasons of public interest in the field of public health[19]. This will in particular include any health data of the athlete which processing is necessary for the purposes of health prophylaxis or occupational medicine, to assess the worker's ability to work, medical diagnosis, safeguarding health care or social security (Article 9 sec. 2 point h GDPR). The right to be forgotten also does not apply in cases when data processing is necessary for reasons of public interest in the field of healthcare, such as protection against serious cross border health risks or safeguarding the high standards of quality and safety of healthcare and of medicinal products or medical devices, pursuant to Union law or the law of the Member State providing for appropriate measures to protect the rights and freedoms of data subjects, in particular professional secrecy (Art. 9 Sec. 2 point i GDPR).

Art. 22 Sec. 1 GDPR stipulates that «the data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her»[20]. In practice, the importance of this right for athletes, as for other individuals, is growing with technological development. It has become a widespread practice that the sports clubs collect big data sets, which allow to assess the athlete's athletic and health potential, which may possibly influence his or hers further career perspectives[21]. What's more, in the anti-doping system, health and location data is collected on a legal basis. It can be stated in this regard that athletes are profiled on a scale larger than the average citizen. Automated decisions (e.g., club employment decisions) and profiling of an athlete are permissible under the conditions set out in Art. 22 Sec. 2 GDPR. The first of these conditions allows profiling and making an automated decision – if this decision is necessary to conclude or execute the

[19] Pursuant Art. 9 Sec. 1 GDPR sensitive data constitute: ethnic and racial origin, political views, religious or philosophical beliefs, trade union membership, genetic data, biometrics, health data, sexuality or sexual orientation.

[20] This right was also laid down in the Directive 95/46 and due to technological development its importance has increased considerably in the last decades.

[21] A. Börding, M. von Schönfeld, Big Data *im Leistungssport, Datenschutzrechtliche Anforderungen an die Vereine*, on *SpuRt*, 1, 2016, p. 7 s.

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contract between the data subject and the data controller. The use of automated decision-making in this context in the sports sector is highly undesirable as it would mean treating an athlete in a material way. Also, it has to be kept in mind that automated decision-making involves the risk of confusion. According to the second condition profiling must be permitted by EU law or by the law of the Member State to which the controller is subject and which provides for appropriate means of protecting the rights, freedoms and legitimate interests of the data subject. It should be noted here that profiling in sport is defined as «the program and methods of data collection described in the International Standard for Testing and Investigation and the International Standard for Laboratories». These actions are therefore permitted under the UNESCO Convention on the fight against Doping in Sports dated 11 October 1015 and implemented into the national legal orders of the EU Member States. The third condition allows profiling and making automated decisions if a data subject explicitly gives her or his consent. There are, however, doubts as to whether in face of the high degree of complexity of data processing and the lack of transparency in this regard, the data subject – the athlete in this case – makes a conscious decision to consent to such a process. The high level of dependency from the sports club as an employer as well as the monopolistic structure in the European sports may only put athletes in a more difficult position.

Pursuant Art. 20 Sec. 1 GDPR an athlete has the right to transmit his data between individual administrators (right to data portability). If technically feasible, the athlete also has the right to request that his or her personal data is transferred from the controller directly to another host controller. It can be assumed that the right to transfer the data will increase the athletes' control over the processing of personal data that they are subject to in the automated systems and enable them to transfer it on a larger scale. It should be borne in mind that data transfer rights apply only to the data processed in an automated manner. In the light of Art. 20 Sec. 1, point a. I point b GDPR this right should apply in cases where a data subject has provided personal data with his or her consent or when processing is necessary for execution of a contract. Thus, the following would be for example transmittable: a player's training data, processed

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on the basis of the player's consent, or personal data provided to sign a club's employment contract. The right to transfer data will not be enforceable against controllers processing personal data in the exercise of public duties. Therefore, this right should not apply in cases where processing of personal data is necessary in order to comply with the legal obligation entrusted to the controller or to perform a task performed in the public interest or in the exercise of public authority entrusted to the controller. In professional sport it will not be possible to transfer personal data from Anti-Doping Agency to another institution, except as indicated in the law. The transfer of such data would be a subject to the risk of error and consequent data inaccuracies. In practice, as emphasized in the doctrine[22], the implementation of the right to data transfer may be difficult. As stated in Art. 20 Sec. 4 GDPR data transfer right should not affect the rights and freedoms of others. It will therefore be impossible to provide the data of a requesting athlete, as a part of the statement, which will also include personal data of other athletes. Whenever a data transfer request is considered, the data controller should conduct an impact assessment of the transfer on the rights and freedoms of others, which may be a difficult task to execute.

4. The GDPR introduces a new rule – the principle of a risk-based approach – according to which the duties of a data controller, and therefore a club or sports association, are to be made in proportion to the kind of risks to the data protection resulting from the particular business (Art. 24 GDPR)[23]. A club or sports association being a controller should analyze the areas of its activities, with regard to the risk of personal data privacy loss, and then implement

[22] M. Krzysztofek, *Ochrona danych osobowych*, cit., p. 173 s.; K. Szymielewicz, *Reforma europejskiego prawa o ochronie danych osobowych z perspektywy obywateli – wiÍcej czy mniej ochrony?*, in *Ogólne Rozporzadzenie o ochronie danych. Aktualne problemy prawnej ochrony danych osobowych* (G. Sibiga ed.), Warszawa, 2016, p. 12, comp. A. Dmochowska, M. Zadrozny,*Unijna reforma ochrony danych osobowych*, cit., p. 47.

[23] Pursuant Recital 76 GDPR preamble «the likelihood and severity of the risk to the rights and freedoms of the data subject should be determined by reference to the nature, scope, context and purposes of the processing. Risk should be evaluated on the basis of an objective assessment, by which it is established whether data processing operations involve a risk or a high risk».

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appropriate security measures and monitor their use. The club and the sports association will therefore be required to demonstrate, in the event of an audit, that the security measures they maintain are adequate to the needs of the organization. In this context, it can be assumed that small sports clubs will have fewer responsibilities in this regard than, for example, national sports federations. In addition, under Art. 35 Sec. 1 GDPR data controllers are required to estimate the risks associated with the processing of a particular type of data and assess the impact of processing on the rights and freedoms of the data subject. This assessment is, according to GDPR, required in particular where the controller makes decisions that significantly affect a natural person, processes sensitive data on a large scale, or regularly monitors publicly accessible sites.

The application of this rule is the data controller's obligation to appoint a Data Protection Officer (DPO) whenever the primary activity of the controller or the processor is based on processing operations which require the regular and systematic monitoring of data subjects on a large scale (Article 37 Sec. 1 b); or where the principal activity of the data controller or processor is to process on a large certain categories of personal data and personal data relating to convictions and offenses (Art. 37 Sec. 1 c). It should be assumed that modern, large sports clubs in order not to violate the provisions of the GDPR will be obliged to appoint a DPO. This obligation will undoubtedly apply to national anti-doping agencies. It will also apply to the situation in which the public authority or body performs the processing, except for the courts in the area of their administration of justice (Art. 37 Sec. 1, point a). In other cases the appointment of an DPO is to be optional. Pursuant to Art. 38 Sec. 3 GDPR, the administrator and the processor shall ensure that the DPO does not receive instructions on the performance of the tasks. He or she is not revoked or sanctioned by the administrator or the processing entity for the fulfillment of his or her tasks. The DPO is directly subordinate to the top management of the administrator or the processor. It can therefore be assumed that the introduction of the DPO function is a step towards securing data security and strengthening the rights of the data subjects, including athletes.

Finally, attention should be paid to the principles of privacy by design and privacy by default (Art. 25 GDPR). Under the first rule,

the duty of a club or sports association as a data controller will be expected to implement the appropriate technical and organizational measures such as pseudonymization, already at the planning stage of any business venture. The privacy by default principle should be understood to mean that from the technical point of view the norm should be the default privacy settings of athletes. In particular, pursuant Art. 25 Sec. 2 GDPR the technical and organizational measures implemented by a sport club or association as a controller should ensure that personal data is not shared by default without the intervention of a particular person to undefined number of individuals.

Article 33 GDPR imposes an obligation to notify data protection breaches to the national data protection authority on data controllers[24]. The content of this provision may be presumed to oblige the notification of more serious infringements of the protection of personal data, but it is not clear what the criteria for the risk of violation of the rights or freedoms of natural persons should be[25]. In even more serious cases, where there is a high risk of infringing the rights and freedoms of data subjects, the regulation also requires to report the data protection breach to the data subjects. The notification should be made without undue delay no later than seventy two hours from the event indicating the use of remedies and the potential consequences of the incident. Pursuant Art. 33 Sec. 5 GDPR the duty of the data controller is also to document any violation of personal data protection, its effects and the remedial action taken. It is expected that in practice the so-called incident handling, or how the clubs and sports associations as data controllers respond to the detection of data breaches constitute one of the biggest challenges in implementing the GDPR.

5. Overall the GDPR significantly enhances the rights of the data

[24] Under the provisions of the Telecommunications Law, such an obligation has been imposed since 22.3.2013 on providers of publicly available telecommunications services. On this subject P. Fajgielski, *Zawiadamianie o naruszeniu ochrony danych osobowych*, in *Dodatek do MoP*, 8, 2013, p. 9 s. The provisions of the Regulation therefore extend the scope of the obligation under consideration.

[25] It is noteworthy that failure to notify an infringement of personal data protection may affect the amount of the administrative penalty imposed on a legal entity under Art. 83 (2) (h) of the Regulation.

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subjects, including the rights of the athletes. Based on the assumption that an individual is entitled to know how his or her data is used GDPR expands the catalogue of information to be provided to the athlete and awards him or her new rights such as the right to be forgotten or the right to transfer data to another controller. The regulation also expands the existing rights of an athlete, among others by introducing the obligation to be informed about the right to file a complaint with the supervisory authority and about data retention periods. It can therefore be assumed that an athlete as a data subject, with the powers referred to in Articles 15-22 GDPR can control the processing of data and verify their legality to a greater extent than under the Directive 95/46/EC. It should however be borne in mind that new rights are not granted to athletes unconditionally. For example, enforcing the right to be forgotten will be difficult for public figures such as top-class athletes. Similarly, an athlete cannot benefit from this right insofar as data processing is necessary under Union law or the law of a Member State, i.e. for the purpose of combating doping in sport. In turn, the right to object to decisions made in an automated manner, including profiling, is relativized by allowing such decisions with the consent of the data subject.

For clubs and sports associations, the implementation of new data protection principles will involve financial and organizational expenditures. The latter may involve, among others, the need to establish and to pay the salaries to the DPO, to create or customize IT systems and contracts with athletes. Template solutions developed in other economic areas due to the specifics of sport may prove to be inadequate for the needs of clubs and sports associations. Different activities may also be desirable for smaller clubs and sports associations and for larger ones. It is desirable that specified information security solutions are treated as protecting the club's confidentiality. Adopting high standards in this area can become a showcase for the club as a credible entrepreneur and employer on the sporting market. In this respect, some of the mechanisms provided by the GDPR, such as the obligation to notify the supervisory authority in case of data leaks and the right to be forgotten, remain an organisational challenge. The practical implementation of these duties is unknown at present. It should be expected that any possible irregularities in

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this process will be surely shown by data protection audits in the first period of GDPR application.

Magdalena Kedzior

*Abstract*

The fourth industrial revolution, also known as the digital industrial revolution, has changed the model of conducting businesses in sport. The transformation process assumes that modern, intelligent IT technologies are applied at every stage of a business operation. These characteristics of businesses entities, including sports clubs, determine their competitive advantage in the market. However, digital transformation also entails certain risks to the privacy of data subjects, and thus to athletes.

Facing these developments it seems desirable to assess changes that will result for sport from the regulation of the recent data protection law reform undertaken in the European Union. The reform is intended to improve the functioning of a single European market in the field of personal data protection. These issues are extremely important from a sport business point of view which is almost always associated with the processing of an athlete's personal data. Even the superficial analysis of the new regulation, commonly known as GDPR – General Data Protection Regulation – leads to the conclusion that they will have a significant impact on the obligations of sports clubs and federations on the one hand and on the athlete's rights regarding personal data processing on the other hand. This is of special significance in the realm of sensitive data processing as regards the system of doping controls.

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# Uncertain Brexit Terms threaten Sports Industry

SUMMARY: 1. Introduction. – 2. The impact of the UK withdrawing from the EU in relation to the professional leagues. – 3. The restrictions and ways to avoid them concerning the free movement of players between the UK and the EU. - 3.1. Restrictions to free movement of players. - 3.2. Possible ways to avoid such restrictions. – 4. Conclusions.

1. In the early years of the then European Economic Community and subsequently what is today known as the European Union (EU), no competence or recognition was granted to the field of sport[1]. Such position only began to change in 1974, when the Court of Justice was presented with a preliminary reference[2] concerning a disputed rule change that was trying to be implemented by the International Cycling Union[3]. In delivering its ruling, the Court held that the practice of sport is subject to community law when such practice constitutes an economic activity as defined under Article 2 of the Treaty Establishing the European Community (EC Treaty)[4]. Amongst such sport practices, the Court held that the rules of an international sports federation are subject to community law on the basis of free movement of workers and freedom to provide services[5]. Such position has continued to be upheld by subsequent Court decisions over the years gone by, with such Courts also confirming that

[1] S. GARDINER and others, *Sports Law*, 4th ed., London, 2012, p. 147.
[2] Today this is found under Article 267 of the Treaty of the Functioning of the European Union (2002).
[3] *Walrave v Union Cycliste Internationale* [1974], C-36/74.
[4] *Ibidem*.
[5] S. GARDINER and others, *Sports Law*, cit., p. 149.

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activities of semi-professional or professional footballers are to be also considered as part of such economic activity[6].

A landmark judgment was delivered in 1995 which re-affirmed the position in the *Donà* case and held that the activity of professional or semi-professional footballers constitutes an economic activity irrespective of profits made by the club[7]. Such judgment delivered by the Court of Justice was important because it brought about landmark changes concerning freedom of movement of players who were out of contract with their clubs and whose effects are still being benefited from till this very day.

The guarantee of free movement of workers across borders contained in Article 45 of the Treaty of the Functioning of the European Union (TFEU) is deemed to be one of the four fundamental freedoms that form the core of EU law[8]. Amongst the beneficiaries from such right are athletes and sportspersons who are granted an automatic right to work in any EU member state of their choice[9]. Fundamentally, the Court of Justice held that restrictions on freedom of movement can only be compatible with Community Law only when they can be «justified by compelling reasons of the general interest and comply with the principle of proportionality»[10].

Despite such principle of sporting rules being part of community law so long as they constitute an economic activity, the White Paper on Sports has found that sporting rules can be exempted under the specificity of European sport, which include, amongst others, separate competitions for men and women and limiting the number of participants in competitions[11]. Whilst such principles were confirmed in another landmark judgment delivered by the European Court of

[6] *Donà v Mantero* [1976], C-13/76.

[7] *Union Royale Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman* [1995], C-415/93, para 74.

[8] C. Bernard, *The Substantive Law of the EU: The Four Freedoms*, Oxford, 2016[5].

[9] D. Bain, *Key points for migrant athletes to consider should the UK vote to leave the EU*, in *Law In Sport*, 10 May 2016, <www.lawinsport.com/articles/item/key-points-for-migrant-athletes-to-consider-should-the-uk-vote-to-leave-the-eu>, accessed 1 May 2017.

[10] *Union Royale Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman*, cit., p. 190.

[11] Commission of the European Community, *White Paper on Sport* (Commission of the European Community 2007), 13.

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Justice, such Court ruled that whether a certain sporting rule is compatible with EU law must be decided upon on a case by case basis[12].

Following the triggering of Article 50 of the Lisbon Treaty, the formal process for the United Kingdom's (UK) departure from the EU began. With such commencement came about a level of uncertainty concerning the economic effects that sport would face and the future of the UK professional leagues[13]. This paper attempts at analysing the possible impacts that Brexit will have on the UK professional leagues, with focus on the restrictions to free movement of players and possible ways on how to avoid such restrictions at a time when the UK Government has not yet published any indications towards what its negotiations with the EU will be concerning sporting matters.

Such paper is based on legal provisions and current practice, which is of course subject to possible alterations that would stem out of the political machinery. Although the Union has negotiated twenty-three accession treaties, it has not negotiated a single withdrawal treaty, with precedent therefore being of little, to virtually no, assistance!

2. Whilst the true impact that the UK's withdrawal will have on the professional leagues cannot be pinpointed exactly, certain expected impacts can already be noted. Amongst such impacts, one finds investment and funding opportunities, broadcasting rights, integrity, home talent as well as the free movement of players.

In terms of investment, such impact is already being seen due to the fall that the pound currency took immediately after the Brexit result was made public[14]. Due to the fall in the pound currency, recruiting players from overseas has become more expensive, as was seen in summer 2016 when a world record fee of £89 million was

[12] *David Meca-Medina and Igor Majcen v Commission of the European Committee* [2006], C-519/04.

[13] T. Watkins, A. Bret, *The likely legal consequences of the UK's Brexit on Sport*, (2016) World Sports Advocate.

[14] P. Collinson, R. Jones, *The post-Brexit pound – how sterling's fall affects you and the economy*, in *The Guardian*, 19 August 2016. <www.theguardian.com/business/2016/aug/19/the-post-brexit-pound-how sterlings-fall-affects-the-uk-economy>, accessed 3 May 2017.

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paid by Manchester United for the services of Paul Pogba[15]. In the longer term, large scale projects, such as the development or enhancement of sporting facilities, could possibly be scaled back or put on hold owing to such currency fall and uncertainty from the Brexit effects[16]. On the other hand, such low currency rate could pose as a further incentive for foreign investors to invest in clubs across the UK, thus brining in much needed funds to such clubs to keep their operations running[17]. Related to currency is the fact that the UK professional leagues could face serious issues concerning funding. By being a member of the EU, UK professional clubs benefit from EU programmes such as Erasmus+ Sport and from EU structural funds, which funds help clubs in their sustainable growth. To put things into perspective, during the 2014 and 2015 calls for EU funding, a total of 58 UK organisations applied for such funding from an allocated budget of over _30 million being put at the disposal of all participating nations![18] Should the UK no longer be classified as a "programme country", then such funds will no longer be made available which could have severe impacts on clubs, especially those at the lower end of the financial ladder[19]. At the same time, by no longer being a member of the EU and thus subjected to EU laws, the UK Government can provide more State aid to such clubs which could make up the loss of such EU funds.

Upon the UK's withdrawal, the UK will have a very limited voice and say when it comes to negotiations concerning broadcasting rights of top sporting events broadcasted within the EU. This could have severe implications for UK rights holders' commercial interests as well as professional clubs who also benefit from such commercial

[15] J. Jake, *Paul Pogba joins Manchester United for world-record £89m'*, in *Sky Sports*, 9 August 2016: *www.skysports.com/football/news/11667/10528626/paul-pogba-joins-manchester-united-for-world-record-89m*, accessed 3 May 2017.

[16] T. Watkins, A. Bret, *The likely legal consequences of the UK's Brexit on Sport*, cit.

[17] *Ibidem*.

[18] B. Gittus, *Erasmus+ and the UK sport sector – the chance to collaborate and learn is the real benefit of this EU funding programme*, in *Sports Think Tank*, *www.sportsthinktank.com/erasmus-funding-programme-and-uk.html*, accessed 4 May 2017.

[19] L. Thompson, *What might 'Brexit' mean for the UK sports sector?*, in *Sport+ Recreation Alliance*, 3 Mar 2016, *www.sportandrecreation.org.uk/blogs/leigh-thompson/what-might-brexit-mean-for-the-uk-sports-sect*, accessed 3 May 2017.

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rights[20], especially at a time when the Premier League has just signed a record £5.14 billion TV rights deal[21]. Such impact could also be seen to effect the collective selling of broadcast rights for the Premier League which have recently been agreed upon with the European Commission[22]. Losing out on such lucrative broadcasting rights will surely hit the cash pockets of clubs, who have used such increase in broadcasting revenues to sign highly rated players over the years gone by.

It is expected that following the UK ceasing EU membership, its membership of the European Union Agency for Law Enforcement Cooperation (EUROPOL) will also come to an end. EUROPOL is a European agency which is key for having cross-border cooperation in tackling match fixing, corruption and doping matters, amongst other matters, all of which are key issues that are at the heart of professional leagues[23]. By no longer being a member, the UK will not be able to benefit from such cross-border cooperation and could thus miss out from new developments in attacking the threat posed by doping and match fixing to the professional leagues.

However, not all impacts must be seen in a negative aspect. One possible positivity that could emerge from the impacts caused by Brexit is that the restrictions on freedom of movement will give talented young British players a better chance to flourish in the English leagues, something which at this moment in time they are not able to do owing to stiff competition from their EU and non-EU counterparts. Such a view is shared by some key players involved in UK sports, amongst them Gordon Taylor who is the chairman of the Professional Footballers Association[24].

3. Arguably one of the most significant impact that will be caused by the UK's withdrawal from the EU concerns possible restrictions

[20] *Ibidem.*

[21] BBC, Premier League in record £5.14bn TV rights deal' (*BBC*, 10 February 2015), *www.bbc.co.uk/news/business-31379128*, accessed 3 May 2017.

[22] Shepherd & Wedderburn, *Brexit Analysis Bulletin*, 2015.

[23] L. Thompson, *What might 'Brexit' mean for the UK sports sector?*, cit.

[24] A. Foster, *Brexit: What will happen to foreign footballers when Britain leaves the EU?*, in *Express*, 24 June 2016, *www.expres.co.uk/sport/football/673217/Brexit-what-happens-to-foreign-footballers-if-Britain-leaves-EU-referendum-2016*, accessed 3 May 2017.

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on the free movement of players between the UK and the EU and vice-versa. The principle of freedom of movement has been a beneficial contributor towards the steady growth of the UK's professional leagues; not only to the football leagues, but also to the rugby and cricket leagues, who have benefited from having players showcasing their talent in their leagues and not being classified as non-EU players[25]. Owing to Brexit, landmark principles, such as those established in the *Bosman* ruling, are at threat of no longer being applicable to the UK[26].

Before proceeding further, it must be made clear that during the minimum two year negotiating period[27], freedom of movement, along with its benefits, will continue to apply in the same manner as they currently apply today, alongside all other applicable EU laws[28].

3.1. Owing to the nature of a hard Brexit, players who do not have a UK/EU passport or are married to an EU national, will no longer benefit from having an automatic right to work in the UK and could be potentially classified as being non-EU players. If this is the case, then tough rules would be applicable to them, as currently is the case for non-EU players who wish to play in the professional leagues in England. As a result, football players such as N'Golo Kante' and Anthony Martial[29], as well as rugby professional players such as Derrick Appiah[30], all currently deemed to be EU players under their respective association playing rules, would not meet such stringent criteria should they suddenly become classified as non-EU players, thus not being able to play in the UK. Restrictions would also be imposed on British players who are seeking em-

[25] Shepherd & Wedderburn, *o.c.*

[26] S. Boyes, *Caught Behind or Following-On? Cricket, the European Union and the 'Bosman Effect'*, in *Entertainment Sports Law Journal*, 2005.

[27] Such negotiating period could possibly be extended should Member States agree.

[28] D. Bain, *Key points for migrant athletes to consider should the UK vote to leave the EU*, cit.

[29] E. Aarons, *Brexit vote: what does it mean for professional sport in the UK?*, in *The Guardian*, 24 June 2016, *www.theguardian.com/uk-news/2016/jun/24/brexit-vote-what-does-it-mean-professional-sport-eu*, accessed 3rd May 2017.

[30] S. Mockford, *Brexit: what would it mean for rugby?*, in *Rugby World*, 10 May 2016, *www.rugbyworld.com/news/brexit-mean-rugby-56194*, accessed 3 May 2017.

ployment or are currently employed in foreign leagues, such as Gareth Bale, since they would likely be classified as non-EU players and thus be subjected to needing a work permit, therefore no longer be able to benefit from the *Bosman* effects[31].

In 2003, the Court of Justice went one step beyond that established in the *Bosman* case and held that those countries who have a European Union Association Agreement with the EU, amongst them African countries, can benefit from the principle of freedom of movement, giving rise to what are commonly referred to as *Kolpak* players following such *Kolpak* ruling[32]. Similar outcomes were seen in the later Court of Justice cases concerning *Simultenkov*[33] and *Kahveci*[34], whereby Russia and Turkey respectively had similar agreements like that seen in the *Kolpak* ruling, which benefits are applicable to those workers who are already in the labour market[35]. Upon the UK's exit, the UK professional leagues can no longer benefit from such ruling, with severe consequences likely to be seen in the cricket and rugby leagues who benefit mostly from such type of players, such as South Africans[36]. As a matter of fact, the England and Wales Cricket Board (ECB), estimate that around 6% of their circa 400 professional cricketers will be effected should the *Kolpak* ruling no longer be applicable to the cricket league[37]. Of course, one would expect the UK to negotiate with the aim of having a similar agreement with the EU in order to be able to continue benefiting from having *Kolpak* players playing in their professional leagues.

A possible restriction that could apply with respect to the foot-

[31] *The Blitz Defence*, *'Brexit – Implications on Rugby Player Movements'*, in *The Blitz Defence*, 29 March 2017, *https://theblitzdefence.wordpres.com/2017/03/29/brexit-in implications-on-rugby-player-movements/*, accessed 3 May 2017.

[32] *Deutscher Handballbund eV v Maros Kolpak* [2003], C-438/00.

[33] *Igor Simutenkov v Ministerio de Educación y Cultura, Real Federación Española de Fútbol* [2005], C-265/03 (GC).

[34] *Real Sociedad de Fútbol SAD and Nihat Kahveci v Consejo Superior de Deportes and Real Federación Española de Fútbol* [2008], C-152/08.

[35] K. Pijetlovic, *EU Sports Law and Breakaway Leagues in Football*, 1st edn, ASSER International Sports Law Series, 2015, p. 121 s.

[36] E. Aarons, *Brexit vote: what does it mean for professional sport in the UK?*, cit.

[37] L. Hervey, *Brexit could affect rugby and cricket imports to Britain*, in *Sky Sports News*, 24 June 2016, *www.skysports.com/more-sports/news/12123/10315725/brexit-could-stifle-rugby-and-cricket-imports-to-britain*, accessed 4 May 2017.

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ball league is that British football clubs would no longer be able to benefit from the exception provided for in Article 19 of FIFA's Regulations on the Status and Transfer of Players concerning international transfers of players aged between sixteen to eighteen[38]. This could be seen as having severe consequences for such clubs due to the fact that investing in young talent is often seen as being low-risk and at the same possibly reaping a higher reward in the years to come. This could also have an adverse effect on the UK club's abilities to qualify their EU players as being homegrown for purposes of European competitions[39].

3.2. It is for certain that the British Government will be engaged in deep negotiations with the EU concerning Britain's exit from the EU and its future once it finally leaves the EU. At the top of such negotiation list will be the UK attempting to having a bilateral agreement on free movement between the EU Member States. Primarily, there are two ways on how the UK can go about this. Firstly, the UK could follow what is referred to as the "Norway-type" deal which would still provide access to the free market despite the UK no longer being a member of the EU[40]. Under such type of deal, the UK would have to pay a significant amount of monies to the EU to become a member of the European Economic Area (EEA) and have access to most of the single market[41]. The other way how this can be achieved is by following the Swiss model, whereby the UK would neither be a member of the EU nor the EEA but will instead have hundreds of separate bilateral EU agreements in different sectors such as free movement[42]. Whichever option is chosen, negotia-

[38] C. Couse, J. Cohen, *The potential impact of Brexit on European football*, in *LawInSport*, 24 June 2016, *www.lawinsport.com/features/item/the-potential-impact-of-brexit-on-european-football*, accessed 3 May 2017.

[39] *Ibidem*.

[40] D. Bain, *Key points for migrant athletes to consider should the UK vote to leave the EU*, cit.

[41] Szu Ping Chan, *Brexit: what if the UK left and could be more like Norway?*, in *The Telegraph*, 28 June 2016, *www.telegraph.co.uk/business/2016/03/06/what-if-britain-left-the-eu-and-could-be-more-like-norway/*, accessed 4 May 2017.

[42] *Ibidem*.

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tions will not be easy, with the EU likely to ensure that it is it who emerges as the 'stronger' party post negotiations.

Another possibility concerns the UK negotiating for an extension of the applicability of the current free movement rules as contained under Article 45 TFEU for at least those persons who are already in the country. Should this not be achievable, the UK will have to look at ensuring that its Tier 2 (Sportsperson) visa is made less onerous to ensure that more athletes benefit from such type of visa without any undue delays and not just elite athletes[43]. This is important to ensure that the UK professional leagues do not lose ground against other leagues and lose edge from its attractive competitiveness[44], especially at a time when even the Chinese Super League has suddenly seen a rapid growth in its attractiveness to professional footballers and coaches[45].

Another possibility to avoid such restriction is for the professional leagues to increase their current restrictive quotas concerning non-EU player registrations if such formerly considered EU players are going to now be considered as being non-EU for purposes of such leagues. Such amendment would be necessary since currently such quotas are extremely low and the playing standards, such as total national appearances, success and potential, are too stringent to be met by certain player[46]. Alternatively, the professional leagues could change their respective competition rules whereby athletes having an EU passport are not deemed to fall under the non-EU category for purposes of such competitions. However, this possibility could still give rise to UK Border Agencies control issues, such as the possible need to have a visa to enter the country post Brexit. Such issue can be resolved by having a cooperation between the UK Border Agencies

[43] Gov.uk, 'Tier 2 (Sportsperson) visa' (*Gov.uk*), *www.gov.uk/tier-2-sportsperson-worker-visa/overview*, accessed 4 May 2017.

[44] T. Keel, *Brexit referendum: How football and the Premier League will be hit by Britain leaving the EU*, in *Eurosport*, 24 June 2016, *www.eurosport.co.uk/football/premier-league/2015-2016/brexit-how-the-world-of-sport-reacted-and-what-it-means-for-football-s-premier-league_sto5660544/story.shtml*, accessed 4 May 2017.

[45] S. Price, *Why Chinese clubs are breaking transfer records – and why players are wise to go*, in *The Guardian*, 5 January 2017, *www.theguardian.com/football/these-football-times/2017/jan/05/china-chinese-super-league-oscar-carlos-tevez*, accessed 1 May 2017.

[46] *The Blitz Defence*, cit.

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and the professional league associations in which the latter can grant endorsements to such foreign players, a practice that is already made use of by the Rugby Football Union and such border agency[47].

4. It remains to be seen what the actual full impact of Brexit will be on the UK sport sector, amongst other sectors. Whilst certain impacts can be anticipated from now, changes are not likely to come about for at least a minimum of two years until the negotiations are formally concluded. In the meantime, it is vital for the UK to negotiate with the EU directly and not with Member States individually. It is expected that such negotiations will be far from a smooth ride, with EU Commission President Jean Claude Juncker already hinting that such 'divorce' will not be amicable[48]. Without a shadow of doubt, the UK will fight for its best common interests to be defended, despite its future currently in a cloud of uncertainty.

As has been seen above, there are negative impacts that arise due to Brexit, such as loss of EU funds, broadcasting right implications and loss of revenue, investment opportunities being shelved and not being able to co-operate on matters concerning match fixing and doping. However, positives can also be seen such as ensuring that home grown talent have a greater chance of succeeding at the higher levels in the professional leagues.

The principle of free movement remains a grave concern to the UK, with impacts possibly applying not only to players seeking new pastures outside of the UK, but also to players seeking to ply their trade in the UK. No doubt that such fundamental principle will be at the forefront of the UK's negotiations on Brexit. How they will go about this remains purely speculative for the time being, with possibilities including attempting to extend the applicability of such principle as is, or else the UK negotiating its membership to become a member of the EEA. Special agreements such as that applicable to *Kolpak* players could also prove to be beneficial to the UK to con-

[47] Shepherd & Wedderburn, cit.

[48] C. Cooper, *Brexit will not be 'an amicable divorce', says Jean Claude Juncker*, in *Independent*, 25 June 2016, *www.independent.co.uk/news/uk/politics/brexit-latest-eu-referendum-juncker-article-50-when-will-uk-leave-not-an-amicable-divorce a7102561.html*, accessed 4 May 2017.

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tinue benefiting as much as possible from the principle of free movement.

Professional league associations will no doubt be following negotiations closely and monitoring any developments that will come about over the months and years ahead. Such associations must be prepared to carry out the necessary changes to their competition rules, such as allowing flexibility for Tier 2 (Sportsperson) visas, to ensure that their leagues remain highly competitive.

Owing to all the matters discussed above, one cannot say for certain whether the changes to come about because of such exit will have a positive or negative effect, both domestically as well as within the EU. Negotiations will be long and complex, however for the love of sport one sincerely hopes that a beneficial deal can be reached whereby freedom of movement can continue to be benefited by as many athletes as possible.

Robert Dingli

*Abstract*

This paper seeks to analyse the potential threats that the sporting industry currently faces following the United Kingdom's (UK) decision to leave the European Union (EU). Whilst of course there currently exists no concrete information on what any potential impacts or restrictions might be, and such changes are not expected for at least another year (when negotiations are meant to be concluded), certain analysis and forecasts can already be drawn.

The sporting sector is a rapidly growing sector in terms of commercial value and one whose prosperity is significantly under threat unless the right decisions are made to guarantee the continued flourishment of such sector.

Such paper adopts as its methodology a desk based approach towards conducting the necessary research for such paper and attempting to fuse together principals of EU sporting law towards the situation at hand concerning Brexit's impacts on the sporting sector.

Amongst the expected impacts from the UK's withdrawal of the EU are issues concerning investment and funding opportunities, integrity as well as the free movement of players. This paper will be seeking to analyse such impacts in significant detail and attempt to find the necessary solutions or actions that can be taken in order to mitigate such effects.

Whilst there is no hard and fast correct answer towards tackling such

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matter, the author of this paper hopes that the content is informative towards practitioners and students alike concerning the potential impacts of Brexit on the sporting sector. This paper also aims to help the UK government towards arriving at a respectable conclusion in its negotiations with the EU concerning Brexit and the sporting sector.

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# Relevant Aspects Concerning the Legal Protection of Sports Creations in the European Union

Summary: 1. Copyright. A short overview. – 2. The Vocation of Sports creations. – A. Bern Convention. – B. European legislation. – C. Classifications of Sports Activities. – D. Sport and intellectual property. – E. Copyright. Protection in Sport. Amoral Right to authorship.

1. All efforts made to identify the general framework with regards to the foundation of copyrighting the institutions of the Roman law, or of the Greek Law shall be in vain[1]. The seeds of copyright regulations can only be glimpsed after the discovery of the printing press by Gutenberg, «which [was] immediately appreciated and [spread] throughout the civilized world with a prodigious speed»[2]. From this moment on, all those who directly or indirectly obtained a legitimate profit from intellectual activity felt the need to appeal to social protection. On the other hand, the authorities became concerned about the legal and economical implications of this 'revolution' and tried to subdue the «shine of this glorious and terrible meteor» by combining the «protection measures» with threats and prohibitions in favour of against the writers, printers and booksellers»[3]. At the end of the 17th century the idea of intellectual property was born and at the beginning of the 18th century the first theoretical concerns regarding copyright law itself were raised. «Although the unauthorized use of a foreign work was already qualified as theft, the act of steal-

[1] Y. Eminescu, *Dreptul de autor. Legea nr. 8 din 14 martie 1996 (Copyright. Law No 8 of 14 March 1996 – commented)*, p. 18 s., with reference to A. Breulier, *Du droit de perpetuité de la propriété intellectuelle*, Paris, 1855, p. 17 s., and E. Ulmer, *Urheber und Verlagrecht*, 3. Aufl., Berlin-New York, 1980, p. 50 s.

[2] E. Ulmer, *Urheber und Verlagrecht*, cit., p. 51.

[3] A. Breulier, *Du droit de perpetuité de la propriété intellectuelle*, cit., p. 23.

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ing was punished merely by a moral condemnation. However, the idea that the work as such remained the property of the author, even after the sale of copies, has been established since that period»[4]. In France, the Decree of 10 July 1793 represented «the first regulation of copyright» applicable to all categories of works[5]. The presenting report that accompanied the decree introduced stated that «among all types of properties, the most likely to encounter opposition is, undoubtedly, that of the yields of the human genius; and it is no wonder that it was necessary to recognize this property and to adopt a positive law in order to ensure the free exercise thereof»[6]. Soon after, based on the French example from, copyright has become a part of the legislative framework in England, the U.S.A., and Germany and later in 1837 in Prussia[7].

In Romania, the first law that regulated the protection of literary and artistic works was the Press Law of 13 April 1862. On 28 June 1923 the Law on literary and artistic property entered into force, and it was considered to be one of the most complete and modern regulations of copyright.

2. After a short overview of the social and historical context in which the idea of copyright was born and its legislative consecration took place, we find A. Kéréver's statement to be very synthetic: «copyright was born through the concerted action of a technological revolution (the invention of the printing press), a cultural revolution (the emergence of a consumer culture), a politico-philosophical revolution (the awareness of the rights of the individual, the ideology of freedom and equality before the law), as well as an economic revolution (the emergence of capitalism and the market economy)»[8].

Taking into account the above mentioned facts, knowing the im-

[4] Y. Eminescu, *Dreptul de autor*, cit., p. 20, with reference to E. Ulmer, p. 54 s.

[5] *Ibidem*, with reference to A. Breulier, *Du droit de perpetuité de la propriété intellectuelle*, cit., p. 30.

[6] Y. Eminescu, *Dreptul de autor*, cit., p. 20.

[7] *Ibidem*, p. 22.

[8] *Ibidem*, p. 4, with reference to the work of the Brussels Congress, *Proceedings of the international Colloquium Author's Rights without author*, published by INTERGU (Internationale Gesellschaft fur Urheberrecht), Bruxelles, 1993, p. 25.

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portance of sports activities as social phenomenon and as cultural elements, based on the premise that every person has the right to take part in the cultural life of their community and at the same time that each has the right to the protection of their moral and material interests arising from the production of their scientific, literary and artistic works, we analyze the vocation of sports creations with regards to the protection ensured by copyright belonging to natural persons, and in certain conditions, to legal persons[9], summed up as follows:

A. In general terms resulting from the provisions of the Bern Convention as they are included in the various national legislations, the subject matter of copyright law is compounded of *literary, artistic* and *scientific works*, regardless of their form of expression, their value or their destination. Following the analysis of the legal provisions in force, three essential conditions, of copyright protection can be discerned, namely: 1. the work must be the result of a creative activity (of the spirit - *author's note* A.V.); 2. to have a concrete form of ex-

[9] Y. EMINESCU, *Dreptul de autor*, cit., p. 57, with reference to AILLI, Anuaire/1, p. 329. At a session in Geneva (2 to 13 July 1990), the representative of the AIPPI, Rherry Mollet-Vieville emphasized the position of the Committee of Experts on the quality of the subject of copyright, showing that this quality can only belong to natural persons, and that a legal person is unable to acquire the exercise of this right unless it acquires it from the holder, who is a natural person. One exception is accepted, however, that of collective works in which the contribution of the various individual authors is anonymous or when different authors are impossible to identify. Despite the fact that in previous laws to the harmonization of the European Communities, there were cases in which copyright was allocated to legal persons (and which in their doctrine have been explained and documented differently), our legislation was consistent with the *principle of the true author*, according to which since the creation of the work is an intellectual activity, this shows that only a natural person, the only one that is likely to have such an activity, may be an author (Y. EMINESCU, *Dreptul de autor*, cit., p. 55). The doctrine made the distinction between two categories of objects of copyright: original or primary topics and derived or secondary topics (V. LONGHIN, *Regarding the object of copyright* in *Justi¸ia nou„*, 1957, 6, p. 1028 s.). Law No 8 of 14 March 1996 on copyright and related rights, published in the Official Gazette of Romania, Part I, no. 60 of 26 March 1996 expressly solves the problem of the quality of legal object of copyright in the case of legal persons, establishing that legal persons, like natural persons who do not have the status of author, may qualify under the law, for the protection granted to the author (Article 3, Paragraph 2).

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pression, perceptible for the senses; 3. to be likely to be brought to the knowledge of the public[10].

1. In order for this first condition to be deemed fulfilled, «the author must not be limited to a mechanical execution of the work by the usual technical means and without a contribution of their own as regards the substance of ideas which represent the work in question»[11]. In the doctrine this condition is usually called *originality.* E. Ulmer prefers to use the term *individuality* of the work, in order to avoid any misinterpretation, which should mistakenly lead to the idea of absolute novelty, «The work must bear the imprint of the author's personality, of their individuality»[12]. The Court of Justice of the European Union has consecrated this interpretation by the *Painer*[13] ruling, saying that a portrait photograph can, under Article 6 of Directive 93/98, be protected by copyright if such photograph is an intellectual creation of the author reflecting his personality and expressing his free and creative choices in the production of that photograph. This aspect is for the national court to determine in each case[14].

This interpretation is difficult to reconcile with the much more reduced originality standard of the common law regimes, known as the «skill and labour» standard, a reason why – leaving aside the imminence of the BREXIT – it might be recommended to reconsider the English standard[15].

2. In order for a work to be copyrightable, the work should take *a fixed form, perceptible to the senses.* Consequently, copyright is born at the moment when the work takes the form of a manuscript, sketch, theme, painting or another concrete form. This does not mean – except for the works of plastic art which are inextricably linked to the material support – that «the work must in all cases be fixed on a material support»[16].

[10] Y. Eminescu, *Dreptul de autor*, cit., p. 76 s.
[11] *Ibidem*, p. 77.
[12] E. Ulmer, *Urhever und Varlagrecht*, cit., p. 119 s.
[13] The Ruling of 1 December 2011, *Painer*, C-145/10, EU:C:2011:798.
[14] *Painer n*, pct. 94.
[15] Cfr. also V. Elam, *Sporting events as dramatic works in the UK copyright system*, in *Entertainment and Sports Law Journal*, 2015, 13, par. 3, with reference to the Court Ruling of 16 July 2009, *Infopaq International*, C-5/08, I:C:2009:465.
[16] Y. Eminescu, *Dreptul de autor*, cit., p. 79.

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3.The third condition of a work to qualify for protection is to be *likely to be made public* by reproduction, execution, exposure, representation or any other means. This condition is in fact closely linked to the previous one, «which explains why some authors only mention two conditions of copyright protection»[17] instead of three. For instance, the German doctrine sets only two requirements for protection, namely individual creation and a fixed form that is objectively perceptible.

B. The majority of national laws do not include a list of works protected under copyright law – they just make reference to the three major categories of doctrinal classification, namely: literary, artistic and scientific works. More recent legislations, such as the Romanian law currently in force, provide a non-exhaustive list of protectable works similarly to the list of the Bern Convention. Several European legislations provide for the protection of *sports creations*, *choreographic works*, *pantomimes and circus shows.* In some cases, the artistic works include sports *creations, pantomimes, circus shows* and *choreographies.* For instance, article 2 of the Portuguese Code of Copyright and Related Rights[18], after generally pointing to the three types of works, namely literary, scientific and artistic, which due to the generous formulation may include «sport creations» as well, expressly refers to «choreographic works or mime which are expressed in written or in any other form»[19]. A similar example can be found in Article 10-11 of the Spanish Law on Intellectual Property[20]. The general definition of paragraph 1 of Article 10 is followed by a non-exhaustive list. Letter (c) of the same article enshrines the «dramatic and dramatic-musical works, choreographic works, pantomimes and theatrical works

[17] *Ibidem*.

[18] *Code of Copyright and Related Rights* (as amended up to Law No. 16/2008 of April 1, 2008). The text can be found on the WIPO website: *http://www.wipo.int/wipolex/en/details.jsp?id=7793* (last visited: 28 August 2017).

[19] Article 2 letter *d*) of the Portuguese Code.

[20] Law on Intellectual Property, regularizing, clarifying and harmonizing the Applicable Statutory Provisions (approved by Royal Legislative Decree No. 1/1996 of April 12, 1996, and amended up to Law No. 12/2017 of 3 July, 2017). The text can be found on the WIPO website: *http://www.wipo.int/wipolex/en/details.jsp?id=17102* (last visited: 28 August 2017).

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in general»; Article L122-2, point 4 of the French Intellectual Property Code[21] also considers «choreographic works, circus shows, pantomimes, which are fixed in written or in another way. Similarly to other continental legislation the Romanian Law No. 8/1996 on Copyright and Neighbouring Rights[22] protects as the subject matter of copyright law the «original works of intellectual creation in the literary, artistic, or scientific field, regardless of their manner of creation, specific form or mode of expression and independently of their merit and purpose»[23] including choreographic and mimed works, as well[24].

C. The European doctrine and case law reflect the concerns regarding the vocation to protection of sports creations. The Swiss literature[25] has analyzed the essential conditions on which the vocation to protection of the sports creation could depend. Thus, with regards to the relationship between sport and copyright, it is considered that the condition of the *creation of the mind*, that is the expression of human thinking as opposed to natural or merely technical creations independent of the intellectual activity of the human mind, shall not be determined by its size (quantitative terms). In other words, not only the masterpieces enjoy copyright protection, but also the less significant creations. The essential condition for a work[26] to be considered a *creation of the mind* is *originality*, which results in a distinctiveness from what has been known till then. A new *combination* of already known elements may also be considered a *creation of*

[21] The text can be found on the WIPO website: *http://www.wipo.int/edocs/lexdocs/laws/fr/fr/fr485fr.pdf* (last visited: 28 August 2017).

[22] The English version of the text can be found on the WIPO website: *http://www.wipo.int/wipolex/en/details.jsp?id=5195* (last visited: 28 August 2017).

[23] Article 7.

[24] Article 7 letter *d*).

[25] F. Vouilloz, *Sportul i0drepturile de autor (Sports and Copyright)* in Macolin, EFSM-Macolin (Switzerland), 52, 12 (Dec.), 1995, p. 14 s.

[26] *The Work*, according to Article 2, Paragraph 1 of the LDA (the Swiss Federation's Copyright Law), is defined as «an artistic or literary creation of the spirit (spiritual creation - *Author's note*), with individual character, irrespective of its value or destination», and to which the obligation to be fixed to a material support is not imposed. According to this legislation, the protection of copyright is done without any formality, without any registration and/or inscription of the *copyright* sign.

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*the mind.* By originality we understand the specific, individual and personal touch of the author.

There are different classifications of sport activities[27]. According to a tripartite classification[28], sport activities can be divided into adversarial sports hereinafter referred to as «head-to-head» sports, aesthetic or choreographic competitive sports and non-competitive sports.

The first category comprises football, basketball, box, shooting, *etc*. This category is characterized by increased competitiveness, which involves a high degree of improvisation of the athletes. Even though there is a game plan, victory often depends on the momentary inspiration and spontaneous action of the athlete and as a result, these sports are devoid of predictability[29]. At the same time, in case of adversarial sports, technical rules greatly restrain the creativity of the athletes[30], limiting their body movements since usually the movements can be executed in only one functional way to achieve the desired effects[31]. Although, in certain cases sports belonging to this group leave room for the imagination of the athlete, usually the sole purpose of this creativity is obtaining an advantage over the opponent[32]. Therefore, the creativity of the athletes in adversarial sports is subject to functionality, to the purpose of winning the game and it is not concerned with the aesthetic or artistic features of the game that characteristic to literary or artistic works. For these reasons, we consider that these sports do not meet the conditions for copyright protection.

The second category includes aesthetic sports, based on choreography, such as figure skating, acrobatic gymnastics, ballroom dancing, synchronized swimming, *etc*. In the case of these sports, although the aim is the victory of the athlete or the team, the actors of the game are not in direct competition with one another in the sense that the performance of an athlete or a team is not influenced directly by

[27] V. P. Mezei, *Copyright Protection of Sport Moves*, in E. Bonadio, N. Lucchi (eds.): *Non-Conventional Copyright*; Edward Elgar (Forthcoming) on *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2925195* (last visited: 22 July 2017), p. 5-6.

[28] V. Elam, *Sporting events as dramatic works*, cit.

[29] *Ibidem*, par. 10.

[30] *Ibidem*, par. 72-73.

[31] P. Mezei, *Copyright Protection of Sport Moves*, cit., p. 9.

[32] *Ibidem*, p. 10.

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the activity of the opponents[33]. More than that, the final manifestation is executed in accordance with a well-defined scenario, previously created, composed of practiced movements, targeted for routine, thus excluding unpredictability and improvisation[34]. Even though the rules of the game limit the freedom of movement of these athletes, as well, in particular through the inclusion or exclusion of mandatory figures into or from their repertoire, the victory of the athlete depends to a large extent on the artistic component consisting of the novelty of the choreography, the mode of execution of the movements, the artistic and musical interpretation, the visual effect created through the clothing, *etc*. We believe, together with other authors[35], that the choreography of an athlete may be eligible for copyright protection. We also agree with those conclusions of a research, which state that the atomic elements of sport, such as the independent figures, certain movements, even if they are new or original, cannot be the subject matter of copyright protection, not even if they are elements of copyright protected choreographies[36].

The third category is the category of non-competitive sports, based on a routine, such as yoga, Pilates, Aerobics, *etc*. These sports have a functional purpose, namely the maintenance of physical and mental health. For this reason, *i.e.* the lack of artistic purpose and since the singular elements of the sport cannot be considered independent works we believe that this category is also excluded from copyright protection.

As a conclusion, it is certain that, not all movements of the body of a sportsman, such as a skier, for instance are determined by spiritual activity prior to the competition. Unlike choreography, not even a well-planned football a match with a prefigured tactic could be considered a thought-out work. But, taking into account the fact that there are sports creations which have the characteristics of choreography or pantomime works, such as synchronized swimming, acrobatic gymnastics, free routines of gymnastics, competitive aerobics,

[33] V. Elam, *Sporting events as dramatic works*, cit., par. 8.

[34] *Ibidem.*

[35] Cfr., V. Elam, *Sporting events as dramatic works*, cit., par. 9 s.; P. Mezei, *Copyright Protection of Sport Moves*, cit., p. 12.

[36] P. Mezei, *Copyright Protection of Sport Moves*, cit., p. 15.

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*etc.*, these could meet the necessary requirements for copyright protection.

The Italian case-law seems to exclude any copyright protection of sports competitions. On the contrary, the German Federal Court decided that a figure skating show could qualify for protection, since it contained operetta elements. The Court of Appeal of Paris assimilated in matters of social security the toreadors to artists, not athletes[37] and considered that a movement that combines a plunge with rolls, carried out on a spring net is a pantomime and thus, constitutes a work of the mind, which can be protected by copyright by virtue of creation; the notion of pantomime includes therefore all the «arts expressed by the body», including mime and gymnastics figures (in a broad sense, not circumscribed only to the sports gymnastics - *author's note*).

D. The international conventions on copyright do not exclude *de iure*, the vocation to copyright protection of sports creations, but on the contrary, they provide the general framework for the protection of all works, meaning that the broad definitions theoretically might include sports creation, as well. Article 2 (1) of the Bern Convention[38] enshrines the *principle of the protection of all works* in the literary, scientific and artistic field regardless of their type or form of expression. The general definition is followed by a non-exhaustive list of works, including *choreographic works.* While the Rome Act (which is still binding on Romania) conditioned the protection of certain works, such as live performances including choreographic works, by fixation, the Paris Act suppressed this condition and allowed national legislators to decide whether to impose such condition[39]. According to Article 2 of the Convention Establishing the

[37] The ruling of the Court of Appeal in Paris on 22 June 1983, Dalloz, 1984. I.R., p. 490.

[38] By Law No 152, promulgated by Decree No 1312 of 24 March 1926, published on 22 September 1962, our country acceded to the Bern Convention, in the revised form adopted in Berlin in 1908, with effect from 1 January 1927, and by the law promulgated by Decree No 1471 of 1935, published in the Official Gazette No. 123 of 31 March 1935, Romania ratified the reviewed form drafted in Rome on 2 June 1928 with effect from 6 August 1936.

[39] Y. Eminescu, *Dreptul de autor*, cit., p. 319.

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World Intellectual Property Organization the term *intellectual property* shall include – with respect to copyright – the rights relating to literary, artistic and scientific works, performances of performing artists, phonograms, and broadcasts and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields. The above mentioned long yet not exhaustive lists stand for a generous definition of the subject matter of copyright protection.

E. In favour of the opinion according to which certain sports creations can be the subject matter of copyright protection the dimensioning of sports as a cultural phenomenon can also be useful. The legal consecration of the cultural character of sport has already occurred on 19th December, 1954, when the Council of Europe adopted the European Cultural Convention «designed to foster among the nationals of all members, and of such other European States as may accede thereto, the study of the languages, history and civilisation of the others and of the civilisation which is common to them all»[40]. A Division of Sport was created as part of the *Direction of Education, Culture and Sport* within the *General Secretariat of the Council of Europe.* For the proper conduct of the future operations, for the European integration in the field of sport and, last but not least, the for the «harmonization of the sports laws of the European countries», the European Sports Committee was founded, whose members are the Member States of the Council of Europe and of the European Cultural Convention.

At the end of the data submitted and discussed, we believe that in the case of certain sports, such as ballroom dancing or artistic gymnastics, based on the existence of choreography, their choreographies may be categorized as works protected by copyright law, if they fulfil the general conditions of such protection.

In this case, the author of sports creation would acquire all the patrimonial and extra-patrimonial rights of authors, which in case of the Romanian legislation are listed by Law no. 8 of 1996 as amended till September 4th 2017. Furthermore, in case the author sustains a loss caused by the infringement of their right to enjoy their work in a

[40] Preamble of the European Cultural Convention, Paris, 19.XII.1954.

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form permitted by law the author has the right to file a *civil, administrative or criminal* action, respectively, according to article 138^7 of Law no. 8. With regards to civil actions, the most widely spread action used in respect of copyright infringements, the right owner has two possibilities, namely to invoke contractual or tort liability. In addition to the civil action based on tort liability, we should also note that, at least theoretically, the author of the sports creation would have the option to file an action for *unjust enrichment* or for *undue payment*. The competent authority in the judgment of the disputes relating to copyright is the responsibility of the courts. In certain cases, the violation of copyright may constitute a crime which shall be sanctioned by filing a *criminal action*[41].

The rights of the authors of the sports creations could be included in the category of *neighbour in correlated rights* (similarly to the rights of performing artists and performers, producers of phonograms and videograms, as well as those of the broadcasters)[42]. Thus, the rights of authors of sports creations, namely their *moral right to authorship*, and *the intangibility of interpretation or execution* would also be expressly recognized by the majority of the laws «given that it was also the object of the Act of Rome, of the Bern Convention»[43].

In addition to the unchallenged benefits of the protection of choreographies by copyright there are some inconveniences, such as the usefulness of the imposition of such a protection, having regard to the self-adjusting character of sport, the limits of the protection, taking into account the fine line between individual figures or movements not subject to protection and sequences of a choreography, the issue of the justified term of protection, who the rights holders are, *etc*. For these reasons we believe it is necessary to initiate more detailed and specialized research in this field, with the purpose of studying and evaluating the necessity of including certain sports creation

[41] For further details cfr. A.V. Voicu, *R„spunderea civil„ delictual„ cu privire special„ la activitatea sportiv„*, Bucure?ti, Ed. Lumina Lex, 1999 (Cap. VIII - Ipoteze particulare de cauzare de prejudicii în activitatea sportiv„, Sec?iunea 4 - Considera?ii privind protec?ia juridic„ a crea?iilor sportive în domeniul sportului), p. 263 s.

[42] C. Colombet, *Les droits voisins*, in *Droit d'auteur et droits voisins*, Colloque de l'IRPI, Librairies techniques, 1986, p. 125 i0urm.

[43] Y. Eminescu, *Dreptul de autor*, cit., p. 169.

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in the subject matter of copyright protection and the possible development of balanced rules that would take into consideration the various interests of the different right holders, and last, but not least, paying attention to the specificity of the two areas, namely sport and copyright.

Alexandru-Virgil Voicu,
Réka Kis

*Abstract*

The Court of Justice of the European Union decided in Football Association Premier League and others that «sporting events cannot be regarded as intellectual creations classifiable as works within the meaning of the Copyright Directive. That applies in particular to football matches, which are subject to rules of the game, leaving no room for creative freedom for the purposes of copyright»[44]. The present study shall analyze the conditions of an intellectual creation qualifying for copyright protection and argue for a more nuanced opinion than that expressed by the Court in the afore-mentioned ruling.

[44] The ruling of the Court of 4 October 2011, in the case *Football Association Premier League and others*, C-403/08, EU:C:2011:631, point 98.

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# Il riparto di giurisdizione tra giudice amministrativo e giudice sportivo dopo il Nuovo Codice di 'Giustizia sportiva' alla ricerca della tutela degli interessi giuridicamente rilevanti

Sommario: 1. Premessa: la ribadita autonomia dell'ordinamento sportivo dall'ordinamento dello Stato: dalla Costituzione al nuovo codice della 'Giustizia sportiva', passando per la l. n. 280 del 2003. – 2. Il legislatore ordinario del 2003 e la giurisdizione esclusiva del giudice amministrativo: spunti e profili critici. – 3. La giurisprudenza costituzionale e i limiti del riparto di giurisdizione tra giudice amministrativo e giudice sportivo: il caso della sentenza n. 49 del 2011 della Corte costituzionale. – 4. Riflessioni conclusive. Il confine dinamico tra giustizia sportiva e giurisdizione amministrativa alla ricerca di nuovi equilibri.

1. La presente relazione si riferisce ad un problema individuato esattamente nei seguenti termini: «Ci si può chiedere quale rapporto sussista ancora oggi tra l'ordinamento statale e l'ordinamento sportivo e, conseguentemente, dopo le recenti riforme sulla giustizia sportiva, quale possa essere l'anello di congiunzione, di equilibrio tra il giudice sportivo e il giudice amministrativo ai fini della tutela degli interessi». Ed allora non si può tralasciare ancóra una volta, come premessa, una pur breve notazione sulla nozione di ordinamento giuridico e sulla pluralità delle articolazioni in cui esso si suddivide, risultando ovviamente preclusa una trattazione piú analitica, ultronea perché inefficace a spiegare le finalità del mio intervento in questo Convegno. Innanzitutto, è noto, l'ordinamento giuridico designa una serie di regole e di norme ma non è composto solamente da esse; presuppone necessariamente l'organizzazione e la struttura, «che riducono ad unità i molteplici rapporti sociali»[1].

[1] T. Martines, *Diritto Costituzionale. Quattordicesima edizione interamente riveduta* da Gaetano Silvestri, Milano, 2017, p. 13. Sull'ordinamento giuridico vedi Santi Romano,

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Ne segue che se il diritto è un fenomeno sociale, frutto di un collegamento tra il fenomeno giuridico e ogni gruppo sociale, si esclude automaticamente che vi sia un solo ordinamento giuridico, quello statale[2]. Ogni comunità sociale crea un ordinamento giuridico autonomo, diverso da quello dello Stato che costituisce una simbiosi tra norme, organizzazione e pluralità di soggetti e interessi coinvolti in quella società giuridicamente organizzata[3]. Di qui la identificazione tra gruppi sociali diversi e pluralità degli ordinamenti giuridici ma, essendo il diritto un fenomeno tendente all'unitarietà e all'ordinato svolgimento della vita sociale, si capirà l'importanza di creare, tra i possibili ordinamenti giuridici, quello avente la posizione di preminenza, che gli consentirà di regolare, secondo le leggi da esso emanate, i rapporti con i gruppi sociali minori e i rapporti interindividuali. Cosí, la storicità e la positività del diritto come il risultato dell'evoluzione storica della necessità di una tutela degli interessi generali, ha fatto sí che questo gruppo sociale dominante fosse lo Stato moderno. I passaggi storici e l'evoluzione giuridica, sviluppatasi tra i secoli XVIII e XIX, hanno costituito le premesse per un concetto di Stato preminente sugli altri gruppi sociali e ciò per la presenza di due elementi: la politicità e la sovranità. La prima sta ad indicare che l'ordinamento dello Stato assume tra le proprie finalità la cura di tutti gli interessi generali che riguardano l'intera collettività stanziata su un determinato territorio[4].

Cosí intesa la politicità tende ad assoggettare alle proprie regole tutti gli ordinamenti preposti alla cura di interessi particolari perseguiti dalle collettività esistenti all'interno dello Stato[5]. La seconda evoca l'idea di supremazia (da *superanus*, ciò che sta al di sopra di tutto) rispetto a tutti gli altri poteri costituiti al suo interno e la sua indipendenza rispetto ai poteri esterni[6]. Questa indipendenza dai poteri esterni è solo dello Stato e non anche degli enti politici non sovrani

*L'ordinamento giuridico*, Firenze, 1951, *passim*; M.S. Giannini, *Gli elementi degli ordinamenti giuridici*, in *Riv. trim. dir. pubbl.*, 1958, p. 219.

[2] T. Martines, *Diritto Costituzionale*, cit., p. 13.

[3] *Ibidem*.

[4] A. Barbera, C. Fusaro, C*orso di diritto costituzionale*, 3ª ed., Bologna, 2016, p. 44 s.

[5] *Ibidem.*

[6] *Ibidem.*

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(ad es. i comuni), la cui libertà di curare gli interessi della collettività stanziata sui loro territori dipende dal grado di autonomia attribuita agli enti stessi dalla Costituzione[7] e non da una totale indipendenza di tali enti da tutti gli altri poteri pubblici. Ne deriva, quale corollario, che la posizione di preminenza dell'ordinamento giuridico ha un suo significato solo se rapportata agli altri ordinamenti giuridici[8].

La sistematica giuridica tende ad accogliere il principio della pluralità degli ordinamenti giuridici, l'ordinamento statale e gli altri ordinamenti. Rispetto all'ordinamento statale, gli altri ordinamenti possono essere: a) originari o derivati, a seconda che trovino il titolo della loro validità in se stessi ovvero nell'ordinamento statale, b) leciti o illeciti, i primi ammessi dall'ordinamento statale, i secondi considerati come fatti antigiuridici ma ugualmente considerati ordinamenti perché in possesso dei tipici elementi costitutivi: la pluralità di soggetti, il sistema normativo e l'organizzazione delle istituzioni[9].

La teoria generale del diritto ammette che tra due ordinamenti uno possa trovarsi in uno stato di subordinazione o di inferiorità rispetto all'altro, che è ad esso superiore. Si può cosí parlare di relazione fra l'ordinamento statale e gli altri ordinamenti quando il primo consideri gli altri giuridicamente rilevanti. Un ordinamento può essere rilevante per un altro a diversi titoli e con diverse figure. Può darsi l'ipotesi di un ordinamento che, in forza della sua superiorità, determini, in via diretta o indiretta, il contenuto che deve avere un altro[10].

Lo Stato, per esempio, influisce sull'ordinamento sportivo sia costituendolo immediatamente con proprie leggi o anche regolando l'autonomia di esso, in modo che, quando stabilisce le condizioni, dalle quali fa dipendere la validità delle esplicazioni di questa autonomia, fra tali condizioni ne pone alcune che concernono il contenuto che deve avere l'ordinamento sportivo[11].

[7] *Ibidem.*

[8] T. Martines, *Diritto Costituzionale*, cit., p. 27. Sulla pluralità degli ordinamenti giuridici, F. Modugno, *Pluralità degli ordinamenti giuridici*, in *Enc. dir.*, XXXIV, Milano, 1985, p. 1 s; W. Cesarini Sforza, *La teoria degli ordinamenti giuridici e il diritto sportivo*, in *Foro it.*, 1933, I, c. 1381; M.S. Giannini, *Ancora sugli ordinamenti giuridici sportivi*, in *Riv. trim. dir. pubbl.*, 1996, p. 671.

[9] T. Martines, *Diritto Costituzionale*, cit., p. 27.

[10] Santi Romano, *L'ordinamento giuridico*, Firenze, 1966, p. 132 s.

[11] Id., *L'ordinamento giuridico*, cit., p. 132.

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In buona sostanza, l'ordinamento statale si pone quale fonte immediata della rilevanza giuridica del contenuto e della validità dell'ordinamento sportivo. La dottrina individua un rapporto misto tra i due ordinamenti originari (statale e sportivo) con la peculiarità che «l'ordinamento sportivo, pur operando nell'àmbito degli ordinamenti statali, mantiene una normazione propria, esclusiva sui giochi e sugli atleti»[12].

Partendo proprio dal concetto che i connotati essenziali degli ordinamenti sono quelli della plurisoggettività, della legislazione (presenza di norme interne emanate dagli organi preposti all'ordinamento speciale e rese effettive da un sistema di sanzioni) e dell'organizzazione, considerato che questi sono presenti anche negli ordinamenti sportivi, nulla vieta di considerare questi ultimi come ordinamenti originari, spontanei e del tutto indipendenti dagli ordinamenti statali[13].

Fin dagli anni quaranta del secolo scorso e, successivamente con le Olimpiadi invernali di Cortina (1956) e le Olimpiadi di Roma (1960), il fenomeno sportivo ha fatto leva sulla nozione di autonomia per affermare l'unitarietà del diritto sportivo e rimuovere gli ostacoli che potrebbero essere frapposti alla sua uniforme applicazione, attuando cosí l'art. 18 della Costituzione. La negazione dell'assunto che vede nello Stato il «monopolista della produzione normativa» avalla la tesi dell'autodichia degli organi di giustizia sportiva e individua nell'ordinamento sportivo un vero e proprio ordinamento, originario e dotato di autonomia normativa[14].

Emerge in tale maniera uno dei dati caratterizzanti l'attuale sistema giuridico legato allo sport che supera l'iniziale indifferenza «sta-

[12] F. MODUGNO, *Giustizia e sport: problemi generali*, in *Riv. dir. sport.*, 1993, p. 327 s.

[13] ID., *Giustizia e sport: problemi generali*, cit., p. 327, secondo il quale «Sono da escludere radicalmente, per l'assetto e la configurazione che è venuto ad assumere il fenomeno sportivo negli ultimi decenni, le ipotesi estreme sia di un ordinamento sportivo (*rectius*, degli ordinamenti sportivi: ogni gioco, ciascuno sport dà vita ad un proprio ordinamento, cioè ad un'organizzazione stabile ed una normazione propria che disciplina l'attività dei soggetti sportivi e le regole del gioco) del tutto assorbito nell'ordinamento statale con penetranti ricaduta anche sui sistemi giudiziari sportivi».

[14] P. SANDULLI, *I rapporti tra giustizia sportiva e giustizia ordinaria*, in P. SANDULLI, M. SFERRAZZA, *Il giusto processo sportivo. Il sistema di giustizia sportiva della Federcalcio*, Milano, 2015, p. 3 s.

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tale»: l'autonomia normativa. Secondo dottrina autorevole «l'autonomia normativa è quindi, oggi, per definizione, propria di soggetti non sovrani. Essa si definisce come il potere attribuito ad enti non sovrani di emanare norme giuridiche equiparate alle norme dell'ente sovrano. E, pertanto, dal punto di vista delle fonti, sono "fonti di autonomia" gli atti degli enti non sovrani mediante i quali si pongono queste norme; e dal punto di vista della normazione sono "norme di autonomia" le norme poste da questi atti normativi.

Tutto ciò in sede di teoria generale. In ordine ai singoli diritti positivi, si richiedono però ulteriori precisazioni. I soggetti attributari di poteri di autonomia normativa, in quanto questo è un potere di eccezione, devono essere indicati tassativamente. In secondo luogo, in quanto essi emanano proposizioni giuridiche aventi la natura e l'efficacia di norme giuridiche, danno effettivamente leggi a se stessi, secondo il valore formale originario del vocabolo autonomia. Ma in quanto le norme che essi emanano fanno parte del diritto positivo vigente proprio dello Stato, esse non possono essere "autonome" nel senso del valore sostanziale originario del vocabolo, ma devono subordinarsi al sistema del diritto che entrano a comporre»[15]. Se l'autonomia deve essere intesa come potere di autonormazione per la regolazione dei propri interessi, condizionato alle norme imperative dell'ordinamento statale, dove il potere diventa discrezionale, pur nei limiti della legalità statale, non possiamo negare la presenza di un tale assetto come elemento della «legittimazione» giuridica dell'ordinamento sportivo[16].

Dal canto suo, l'evoluzione giurisprudenziale ha aiutato molto nell'elaborazione di concetti utili a consentire il rafforzamento dell'autonomia dell'ordinamento sportivo da quello statale. La definitiva consacrazione in termini di giuridicità dell'ordinamento sportivo si deve, innanzitutto, alla evoluzione della legislazione in materia di sport, che si è succeduta fino ai giorni nostri: disposizioni settoriali che però hanno avuto il merito di preludere ad una riforma organica nel 2003 (d.l. 19 agosto 2003, n. 220, (Disposizioni urgenti in materia spor-

[15] M.S. Giannini, voce *Autonomia (Teoria gen. e dir. pubbl.)*, in *Enc. dir.*, IV, Milano, 1959, p. 356 s.

[16] G. Zanobini, *Autonomia pubblica e privata*, in *Studi in onore di F. Carnelutti*, IV, Padova, 1950, p. 182.

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tiva), convertito dalla legge 17 ottobre 2003, n. 280, in forza del quale si sottolinea l'autonomia dell'ordinamento sportivo nazionale, quale articolazione dell'ordinamento sportivo internazionale facente capo al Comitato Olimpico Internazionale, rispetto all'ordinamento della Repubblica, fatti salvi i casi di rilevanza per l'ordinamento giuridico statale di situazioni giuridiche soggettive connesse con l'ordinamento giuridico. Tra gli interventi normativi piú significativi, *ante* 2003, finalizzati ad assicurare la funzionalità operativa del Comitato Olimpico Nazionale e a disciplinare i contenuti contrattuali patrimoniali, e non dei rapporti tra società ed atleti, si ricordano la legge 16 febbraio 1942, n. 426 che ha disciplinato la costituzione e l'ordinamento del Comitato Olimpico Nazionale; il d.P.R. 2 agosto 1974, n. 530, recante «Norme d'attuazione» della legge 16 febbraio 1942, n. 426, sull'istituzione e l'ordinamento del Comitato Olimpico Nazionale italiano, legge 23 marzo 1981, n. 81, recante «Norme in materia di rapporti tra società e sportivi professionisti», d.P.R. 28 marzo 1986, n. 157, in tema di «Nuove norme di attuazione della Legge 16 febbraio 1942, n. 426», recante costituzione e ordinamento del Comitato Olimpico Nazionale Italiano (CONI); la legge 21 gennaio 1992, n. 138 «Disposizioni urgenti per assicurare la funzionalità del Comitato olimpico nazionale italiano (CONI)», l'art. 157 del d.lg. 31 marzo 1998, n. 112 in tema di competenze delle autonomie locali in materia di sport stabilisce il principio di decentramento delle attività sportive nell'ottica di una migliore funzionalità e sinergia tra le esigenze territoriali decentrate e le dinamiche sportive[17].

[17] Può essere utile richiamare fin d'ora alcuni saggi interessanti in materia di diritto sportivo, tra cui: F. Fracchia, voce *Sport*, in *Dig. disc. pubb*., XIV, Torino, 1999, p. 471 s.; F.P. Luiso, *La giustizia sportiva*, Milano, 1975; E. Fortuna, *Illecito penale e illecito sportivo*, in *Mass. Cass. pen.*, 1981, p. 934 s.; S. Felicietti, M.R. San Giorgio, *Ordinamento sportivo e giudice amministrativo*, in *Corr. giur*., 2011, 5, p. 696 s.; L. Di Nella, *Il fenomeno sportivo nell'ordinamento giuridico*, Napoli, 1991, *passim*; M.S. Giannini, *Prime osservazioni sugli ordinamenti giuridici sportivi*, in *Riv. dir. sport*, 1949, p. 10 s.; Id., *Gli elementi degli ordinamenti giuridici*, in *Riv. trim. dir. pubbl*., 1958, p. 219; G. Napolitano, voce *Sport*, in *Diz. dir. pubbl*., VI, Milano, 2006, p. 5678 s.; R. Perez, *Disciplina statale e disciplina sportiva nell'ordinamento dello sport*, in *Scritti in onore di Massimo Severo Giannini*, I, Milano, 1988, p. 507; U. Gualazzini, *Premesse storiche al diritto sportivo*, Milano, 1965; A. De Silvestri, *Il discorso sul metodo: osservazioni minime sul concetto di ordinamento sportivo*, in *Giustiziasportiva.it*., 2009, p. 1 s.; P. Sandulli, *I limiti della giurisdizione sportiva*, in *Foro amm. T.A.R.*, 2008, p. 2088 s.; A. Cariola, *I*

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Tuttavia, nonostante il profluvio di leggi, rimanevano incertezze sulla organicità della materia dello sport, per cui si auspicava, da piú parti, un intervento chiarificatore del legislatore, che non solo ponesse fine alle enormi interferenze dell'ordinamento statale nei confronti di quello sportivo ma introducesse effettività della tutela ed efficienza della giustizia sportiva. E ciò in un contesto piú generale di miglior coordinamento con il sistema processuale statale, in termini di perfezionamento degli interventi deflattivi del contenzioso e di tecniche di accelerazione e semplificazione dei diversi giudizi, sportivi e statali[18].

La disciplina sulla giustizia amministrativa è oggi organicamente contenuta nel d.l. 19 agosto 2003, n. 220 (in G.U. n. 192 del 20 agosto 2003), coordinato con la legge di conversione 17 ottobre 2003, n. 280 (in G.U. n. 243 del 18 ottobre 2003), recante «Disposizioni urgenti in materia di giustizia sportiva», il quale prevede istituti e strumenti processuali che consentono una tutela piena ed effettiva degli atleti, delle federazioni sportive e delle associazioni. La legge in questione ha recepito l'assetto normativo sin qui stratificato e alcuni indirizzi giurisprudenziali sedimentati sul rapporto tra ordinamenti spor-

*rapporti tra giurisdizione sportiva e statale: è possibile un ritorno al privato*, in *Foro amm. C.d.S.*, 2010, p. 2257 s.; N. Paolantonio, *Ordinamento statale e ordinamento sportivo: spunti problematici*, in *Foro amm. T.A.R.*, 2007, p. 1152 s.; C. Franchini, *La libera circolazione dei calciatori professionisti: il caso Bosman*, in *Gior. dir. amm.*, 1996, p. 5; A. Manzella, *L'Europa e lo sport: Un difficile dialogo dopo Bosman*, in *Riv. dir. sport.*, 1996, p. 409 s; M. Sferrazza, *Spunti per una riconsiderazione dei rapporti tra ordinamento sportivo e ordinamento statale*, in *Giustiziasportiva.it*, 2009, 2, p. 10 s.; M. Clarich, *La sentenza Bosman: verso il tramonto degli ordinamenti giuridici sportivi*, in *Riv. dir. sport*, 1996, p. 393; E. Lubrano, *Ordinamento sportivo e giustizia statale*, in Aa.Vv., *Lo Sport e il diritto*, Napoli, 2004; A. Romano, *Introduzione*, in Aa.Vv., *Diritto amministrativo*, Bologna, 2005, p. 5 s.; M. Sanino, F. Verde, *Diritto sportivo*, Padova, 2015; E. Lubrano, *La giurisdizione amministrativa in materia sportiva dopo la legge n. 280/2003*, in *La giustizia sportiva: analisi critica della legge n. 280/2003*, a cura di P. Moro, A. De Silvestri, E. Crocetti Bernardi, E. Lubrano, Forlí, 2004, *passim*; I. e A. Marani Toro, *Problematica della legge n. 91/1981*, in *Riv. dir. sport.*, 1983, numero speciale 30; A. Manzella, *La giustizia sportiva nel pluralismo delle autonomie*, in *Riv. dir. sport.*, 1993, p. 2 s.; E. Manfredi, *Osservazioni sui rapporti tra ordinamento statale e ordinamento*, in *Foro Amm. T.A.R.*, 2006, p. 2971 s; E. Lubrano, *L'ordinamento giuridico del giuoco del calcio*, Roma, 2004; A. Marani Toro, voce *Sport*, in *Noviss. dig. it.*, XVIII, Torino, 1971, p. 50; M. Sanino, *L'organizzazione dello sport in Italia*, in *Riv. amm.*, 1985, p. 115 s.

[18] Cosí, I. Pagni, *La giurisdizione tra effettività ed efficienza*, in *Dir. proc. amm.*, 2016, fasc. 2, p. 401.

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tivi e ordinamento statale, sottolineando la c.d. "pregiudiziale sportiva", in virtú della quale l'esercizio dell'azione dinanzi ai giudici statali è possibile solo nelle ipotesi in cui il giudizio sportivo sia stato preventivamente promosso in tutti i gradi previsti da tale sistema. Di qui le conseguenti problematiche della possibile violazione del diritto alla tutela giurisdizionale statale dei diritti e degli interessi legittimi dei soggetti tesserati che hanno subíto l'applicazione di gravi sanzioni sportive.

2. Il tema della giustizia sportiva, entrato quasi «a gamba tesa» nel vocabolario del giurista, ha ormai acquisito una nuova vitalità e un'indiscutibile importanza nell'ordinamento statale. Esso prende le mosse da un lento riconoscimento, sia del diritto comunitario che del diritto nazionale. La relazione tra l'Unione europea e lo sport è stata spesso complessa, data l'iniziale indifferenza giuridica che i Trattati di Roma attribuivano all'organizzazione sportiva nell'àmbito del processo d'integrazione europea. Ciò perché in un contesto comunitario di obiettivi di politiche pubbliche incentrate sul mercato unico lo sport non era contemplato, in quanto non configurabile come attività economica[19]. Successivamente, il proliferare di politiche comunitarie volte ad un maggior coordinamento ed integrazione tra il sociale e gli aspetti economici in virtú dell'evolversi del professionismo nelle diverse discipline sportive provenienti dagli stati membri, ha fatto sí che il fenomeno sportivo assumesse rilevanza sotto vari profili; economico, della necessità di tutela del diritto di libera circolazione dei lavoratori sportivi con conseguente riconoscimento dell'autonomia delle organizzazioni sportive, dell'attività benefica per la salute. Di qui l'intrapresa, da parte dell'Unione europea, della strada del sostegno ai piani d'azione e di programmazione all'utilizzo dello sport come strumento di sviluppo delle politiche dell'UE.

I numerosi indirizzi europei di proposizione agli Stati membri di politiche di cooperazione nel campo sportivo per rafforzare il sostegno dell'attività motoria nelle istituzioni scolastiche hanno indotto il diritto comunitario ad occuparsi dell'attività sportiva in prima per-

[19] P. De Caterini, *Le società sportive nella prospettiva del mercato unico europeo*, in *Società sportive e ordinamento giuridico*, Siena, 1994, p. 45 s.; J. Tognon, *Diritto europeo dello sport*, Padova, 2008, p. 31.

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sona prevedendo norme programmatiche sulla possibilità di istituire un'autonoma disciplina dell'organizzazione in materia di istruzione e sport. L'art. 165 (ex art. 149 del Trattato CE) sottolinea l'importanza dello sport nelle politiche comunitarie, sostenendo che «l'Unione contribuisce allo sviluppo di un'istruzione di qualità incentivando la cooperazione tra Stati membri e, se necessario, sostenendo ed integrando la loro azione nel pieno rispetto della responsabilità degli Stati membri per quanto riguarda il contenuto dell'insegnamento e l'organizzazione del sistema di istruzione, nonché delle loro diversità culturali e linguistiche.

L'Unione contribuisce alla promozione dei profili europei dello sport, tenendo conto delle sue specificità, delle sue strutture fondate sul volontariato e della sua funzione sociale ed educativa.

L'azione dell'Unione è intesa:

a sviluppare la dimensione europea dell'istruzione, segnatamente con l'apprendimento e la diffusione delle lingue degli Stati membri;

a favorire la mobilità degli studenti e degli insegnanti, promuovendo tra l'altro il riconoscimento accademico dei diplomi e dei periodi di studio;

a promuovere la cooperazione tra gli istituti di insegnamento;

a sviluppare lo scambio di informazioni e di esperienze sui problemi comuni dei sistemi di istruzione degli Stati membri;

a favorire lo sviluppo degli scambi di giovani e di animatori di attività socioeducative e a incoraggiare la partecipazione dei giovani alla vita democratica dell'Europa;

a incoraggiare lo sviluppo dell'istruzione a distanza;

a sviluppare la dimensione europea dello sport, promuovendo l'equità e l'apertura nelle competizioni sportive e la cooperazione tra gli organismi responsabili dello sport e proteggendo l'integrità fisica e morale degli sportivi, in particolare dei piú giovani tra di essi».

Volendo assumere, invece, una prospettiva di osservazione nazionale, va richiamata la Costituzione che, fino al 2001, pur non contenendo alcun riferimento specifico allo sport, né sotto l'àmbito della tutela degli interessi e dei diritti fondamentali della persona né sotto il profilo della disciplina legislativa ripartita tra Stato e Regioni, riconosceva implicitamente l'importanza dell'organizzazione sportiva, con le disposizioni costituzionali di cui all'art. 2 (riconoscimento dei diritti inviolabili dell'uomo, sia come singolo sia nelle formazioni so-

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ciali ove si svolge la sua personalità), art. 32 (tutela del diritto alla salute) e art. 18 (libertà di associazione)[20]. Successivamente, con la riforma costituzionale del 2001 (legge cost.) che ha stabilito un diverso riparto di competenze legislative Stato-Regioni, la materia dell'ordinamento sportivo è entrata nelle materie sottoposte alla legislazione concorrente Stato-Regioni, con attribuzione al primo della competenza a disegnare i princípi fondamentali della materia, mentre alle Regioni spetta di attuare tali princípi, adattando la loro legislazione alle condizioni particolari e ai loro interessi[21].

All'indomani della riforma costituzionale, dottrina e giurisprudenza si sono interrogate sul significato da attribuire all'ordinamento sportivo sotto il profilo dell'individuazione degli organi di giustizia sportiva, in armonia con la previsione del diritto costituzionalmente garantito di agire in giudizio per la tutela dei propri diritti e interessi innanzi ai giudici dello Stato. Anche l'ordinamento sportivo, come tutti gli ordinamenti giuridici, consiste nell'esistenza di un congruo numero di soggetti, legati dall'osservanza di regole normative e discipline specifiche e, quindi, anche di istituzioni ed organi preposti alla decisone di controversie insorte tra i soggetti del proprio ordinamento. Un elemento costituivo dell'ordinamento sportivo è quindi la presenza di un complesso sistema processuale, retto da una molteplicità di fonti, sia interne al sistema che eteronome, cioè di derivazione statale.

Come si è avuto modo di vedere, e di capire dalla breve analisi precedente, l'ordinamento giuridico sportivo si regge sul c.d. Principio di autodichia, vale a dire sulla c.d. «giurisdizione domestica» consistente nella potestà riconosciuta agli organi della giustizia sportiva di giudicare sulle controversie tra soggetti del proprio ordinamento dove sono notevoli i contrasti attinenti all'interpretazione e all'applicazione dei princípi e delle regole sportive.

L'art. 1, comma 14, del decreto legislativo 8 gennaio 2015, n. 15, detta una disciplina di "indirizzo", specificando che «la Giunta na-

[20] Cosí G. Liotta, L. Santoro, *Lezioni di diritto sportivo*, 3ª ed., Milano, 2016, p. 14, secondo i quali «il vecchio testo dell'art. 117 Cost. ricollegava alcuni profili attinenti al fenomeno sportivo nelle materie della polizia urbana e rurale, l'istruzione professionale e l'assistenza scolastica, lavori pubblici, turismo e industria alberghiera».

[21] T. Martines, *Diritto Costituzionale*, cit., p. 722.

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zionale del C.O.N.I. debba individuare i criteri generali dei procedimenti di giustizia sportiva alla luce del principio secondo cui, per la risoluzione delle controversie attinenti allo svolgimento dell'attività sportiva, gli affiliati e i tesserati sono obbligati a rivolgersi agli organi di giustizia sportiva»[22].

Un simile stato di cose ha suscitato una particolare attenzione di dottrina e giurisprudenza soprattutto sulla necessità di distinguere, nelle questioni attinenti all'àmbito sportivo, situazioni di tutela di interessi e diritti riservate al sistema sportivo e situazioni di tutela di diritti fondamentali e interessi legittimi rientranti nell'ordinamento giuridico statale. In questo contesto, le difficoltà interpretative nascono dal fatto che non risulta agevole definire quando le controversie che hanno ad oggetto l'applicazione e l'interpretazione delle regole tecniche, che sono regole del gioco, restino confinate entro l'ordinamento sportivo senza invadere le situazioni giuridiche soggettive tutelate dallo Stato.

Opinioni dottrinali e indirizzi giurisprudenziali sul punto non hanno chiarito, affermando, in alcune ipotesi, il difetto assoluto di giurisdizione del giudice amministrativo per insussistenza di un interesse legittimo tutelabile (come nelle ipotesi di regole tecniche violate da un arbitro, ritenute sanzionabili all'interno della sfera discrezionale dell'ordinamento sportivo), in altre ipotesi, soprattutto in materia di violazione di precetti sportivi, suscettibili di sanzione disciplinare, la rilevanza per l'ordinamento statale delle lesioni dei diritti soggettivi e degli interessi legittimi derivanti dall'inflizione della suddetta sanzione. Al termine di un lungo percorso durante il quale non sono mancate accese polemiche di dottrina e giurisprudenza sugli effettivi confini di operatività tra ordinamento sportivo e ordinamento statale, è stata emanata la legge 17 ottobre 2003, n. 280, di conversione del decreto legge 19 agosto 2003, n. 220, recante «Disposizioni urgenti in materia di giustizia sportiva»; legge di intervento a largo raggio che ha tentato di definire in maniera compiuta i confini tra la giustizia statale, soprattutto amministrativa, e quella sportiva[23]. Si tratta di una legge organica che stabilisce un primo inquadramento della

[22] Sul punto, ampiamente e con estrema chiarezza, G. Liotta, L. Santoro, *Lezioni di diritto sportivo*, cit., p. 284.

[23] *Ibidem*, p. 285.

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giustizia sportiva nell'ordinamento italiano. La giustizia sportiva risente della sua origine, dell'essere stata pensata e disciplinata come un contenzioso solo «interno», dell'essersi evoluto per piú di mezzo secolo in carenza di una disciplina organica e completa a causa della persistente (ritenuta) indeterminatezza delle situazioni soggettive ivi tutelabili.

L'art. 1, comma 1, stabilisce il principio generale dell'autonomia ordinamentale dello sport in quanto impegna la Repubblica a riconoscere e a favorire l'autonomia dell'ordinamento sportivo nazionale quale articolazione dell'ordinamento sportivo internazionale. Il secondo comma implica la preminenza, nell'àmbito del principio generale di autonomia tra i due ordinamenti, dell'ordinamento giuridico statale che potrà effettuare una serie di interventi diretti a dare attuazione ai princípi costituzionali del diritto di azione e di difesa, di modo che la persona umana possa godere delle tutele giudiziarie previste per i propri diritti ed interessi. Lo Stato interviene nei casi di rilevanza per l'ordinamento giuridico della Repubblica di situazioni giuridiche soggettive connesse con l'ordinamento sportivo. La legge si pone, in tal modo, quale fonte intermedia fra la Costituzione e le fonti del diritto sportivo, tentando di operare una mediazione tra i diritti e gli interessi tutelati a livello ordinamentale nazionale e gli interessi tutelati nell'ordinamento sportivo. L'art. 2, comma 2, specifica in prescrizioni operative l'autonomia dell'ordinamento sportivo, stabilendo che «in applicazione dei princípi di cui all'articolo 1, è riservata all'ordinamento sportivo la disciplina delle questioni aventi ad oggetto:

a) l'osservanza e l'applicazione delle norme regolamentari, organizzative e statutarie dell'ordinamento sportivo nazionale e delle sue articolazioni al fine di garantire il corretto svolgimento delle attività sportive;

b) i comportamenti rilevanti sul piano disciplinare e l'irrogazione ed applicazione delle relative sanzioni disciplinari sportive».

Secondo parte della dottrina, le materie predette sarebbero del tutto indifferenti per l'ordinamento statale, mentre per altri sarebbero rilevanti per l'ordinamento giuridico nazionale nel caso in cui le stesse materie incidano sui diritti fondamentali dell'uomo[24].

[24] *Ibidem*, p. 329.

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A prescindere dalle diverse impostazioni dottrinali, l'art. 2, comma 2, impone, forse in maniera un po' affrettata, il c.d. «vincolo della giustizia sportiva» secondo il quale «nelle materie di cui al comma 1, le società, le associazioni, gli affiliati ed i tesserati hanno l'onere di adire, secondo le previsioni degli statuti e regolamenti del Comitato olimpico nazionale italiano e delle Federazioni sportive di cui agli articoli 15 e 16 del decreto legislativo 23 luglio 1999, n. 242, gli organi di giustizia dell'ordinamento sportivo».

Il successivo art. 3 della legge contiene una disposizione normativa di chiusura del sistema di giustizia sportiva, affermando che «Esauriti i gradi della giustizia sportiva e ferma restando la giurisdizione del giudice ordinario sui rapporti patrimoniali tra società, associazioni e atleti, ogni altra controversia avente ad oggetto atti del Comitato olimpico nazionale italiano o delle Federazioni sportive non riservata agli organi di giustizia dell'ordinamento sportivo ai sensi dell'articolo 2, è devoluta alla giurisdizione esclusiva del giudice amministrativo. In ogni caso, e fatto salvo quanto eventualmente stabilito dalle clausole compromissorie previste dagli statuti e dai regolamenti del Comitato olimpico nazionale italiano e delle Federazioni sportive di cui all'articolo 2, comma 2, nonché quelle inserite nei contratti di cui all'articolo 4 della legge 23 marzo 1981, n. 91».

Data la complessità interpretativa della legge, in questa sede intendo semplicemente formulare alcune sommarie considerazioni, suggerite da una prima lettura. La legge, come già anticipato, si divide in due parti: nella prima viene riconosciuta l'autonomia dell'ordinamento sportivo rispetto all'ordinamento giuridico statale e vengono stabiliti i rapporti che devono intercorrere tra i due ordinamenti; nella seconda si traggono le conseguenze in ordine ai rapporti tra la giustizia sportiva e la giurisdizione statale. Questo secondo aspetto è ora di approfondire, dopo aver lungamente disquisito sul primo. L'art. 3 della legge, che stabilisce in maniera inequivocabile la c.d. pregiudiziale sportiva «esauriti i gradi della Giustizia sportiva, ferma restando la giurisdizione del giudice ordinario per i rapporti patrimoniali tra le società sportive e gli atleti è possibile adire il giudice statale. Il percorso giurisdizionale dinanzi agli organi di giustizia sportiva viene intrapreso indipendentemente dalla incisione dei diritti soggettivi o interessi legittimi, stante anche la difficoltà di individuarli nella materia sportiva.

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La prescrizione normativa è chiara al riguardo e non ammette soluzione alternativa: per poter esercitare il diritto di azione *ex* art. 24 cost. è necessario esperire, oltre alle impugnazioni proposte innanzi alle federazioni sportive, anche tutti i mezzi di tutela dinanzi agli organi di giustizia collocati presso il CONI. Il d.l. n. 220 del 2003 individua nel percorso preventivo della giustizia sportiva una condizione per l'accesso alla giurisdizione amministrativa e quindi una condizione di procedibilità del giudizio amministrativo.

La giustizia sportiva è cosí tradizionalmente costruita come una condizione per l'esercizio della funzione giurisdizionale amministrativa davanti al TAR Lazio. Una volta esauriti tutti i gradi di giustizia sportiva il vincolo di giustizia non è piú operativo e non è piú consentita altra limitazione all'accesso alla giurisdizione statale[25].

Il sistema in esame non precisa però quale sia l'organo di giustizia sportiva di chiusura e non è facile individuarlo da un'interpretazione sistematica dello stesso. L'art. 13 del nuovo codice della giustizia sportiva (deliberazione n. 1532 del Consiglio Nazionale CONI resa il 10 febbraio 2015, approvato con decreto Presidenza del Consiglio dei Ministri del 3 aprile 2015) prevede la figura del giudice sportivo (giudice sportivo nazionale, giudice sportivo territoriale e Corte sportiva di appello che giudica in seconda istanza sui ricorsi avverso le decisioni del giudice sportivo nazionale e dei giudici sportivi territoriali).

Il giudice sportivo è chiamato a decidere sostanzialmente su eventi occorsi in gara, sulla regolarità delle quali occorre decidere con urgenza per conferire certezza alle classifiche e ai risultati. Gli artt. 24 e 25 del nuovo codice impongono l'obbligo, per ogni federazione, di istituire giudici federali per il primo e secondo grado (Tribunale federale e Corte federale di appello) che sono competenti su tutti i fatti rilevanti per l'ordinamento sportivo in relazione ai quali non sia stato instaurato né risulti pendente un procedimento dinanzi ai giudici sportivi nazionali o territoriali (c.d. competenza residuale dei tribunali federali).

Avverso tutte le decisioni non altrimenti impugnabili nell'àmbito dell'ordinamento federale ed emesse dai relativi organi di giustizia, ad

[25] M. Sanino, *Giustizia sportiva*, Padova, 2016, p. 154.

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esclusione della materia del *doping*, è proponibile ricorso al Collegio di Garanzia dello Sport[26].

Tale ricorso, che ha sostituito il TNAS e l'Alta Corte di Giustizia Sportiva, è qualificabile come strumento di impugnazione straordinario. Tale funzione è assimilabile alla funzione della Corte di Cassazione in quanto giudice di mera legittimità.

Il Collegio assicura l'esatta osservanza e l'uniforme interpretazione delle regole disciplinari dello sport per garantire l'unità delle decisioni degli organi della giustizia sportiva. In pratica, il Collegio di Garanzia dello Sport svolge una funzione di garanzia oggettiva che trascende la singola controversia per realizzare l'interesse generale alla unificazione della giurisprudenza creata dai giudici sportivi. La *summa divisio* delle competenze degli organi della giustizia sportiva propende per l'accoglimento della tesi che individua nella decisione del Collegio di Garanzia dello Sport l'organo giudiziario che esaurisce tutti i gradi della giustizia sportiva.

Confermata la giurisdizione ordinaria in tema di rapporti patrimoniali tra società sportive e atleti e la riserva di giustizia sportiva, l'art. 3, comma 1, del d.l. n. 220 del 2003 ha attribuito al TAR del Lazio le vertenze in odine agli atti del CONI e delle federazioni, a prescindere dalla lesione di diritti soggettivi o interessi legittimi. Precisamente, il TAR Lazio ha la competenza esclusiva per i giudizi di primo grado, ivi compresa l'emanazione delle relative misure cautelari.

La legge n. 280 del 2003 ha istituito, quindi, una nuova ipotesi giurisdizione esclusiva del giudice amministrativo poi recepita dall'art. 135, comma 1, lett. *g* del d.lg. n. 104 del 2010 che fa rinvio all'art. 133, lett. *z*, avente ad oggetto le controversie sugli atti del Comitato olimpico nazionale italiano o delle federazioni sportive non riservate agli organi di giustizia dell'ordinamento sportivo ed escluse quelle inerenti i rapporti patrimoniali tra società, associazioni e atleti. La giurisdizione esclusiva del giudice amministrativo nasce storicamente dall'ambiguità di alcune materie che prestano contemporaneamente

[26] Sul punto D. Lupo, M. Rossetti e A. Sirotti Gaudenzi, *Il nuovo codice della giustizia sportiva. Disciplina e commento*. Prefazione di Riccardo Agabio, Rimini, 2015, *passim*.

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tutela sia a situazioni di diritto soggettivo che di interesse legittimo (es. la materia del pubblico impiego).

Si può affermare, in sintesi, che la definizione di «esclusiva» della giurisdizione amministrativa sta ad indicare che in alcune materie il legislatore ha preferito, per la peculiarità dell'interesse pubblico perseguito o per l'importanza costituzionale della materia, escludere in quel settore la competenza del giudice ordinario.

Le controversie sugli atti del CONI e delle federazioni sportive non riservate al giudice sportivo vertono su «un intreccio di posizioni giuridiche nell'àmbito del quale risulti difficile individuare i connotati identificativi delle singole situazioni soggettive»; intreccio rafforzato dalla rilevanza sociale ed economica delle discipline sportive nel nostro Paese. Non solo ma gli atti impugnati del CONI e delle federazioni hanno ad oggetto una materia, «che, in assenza di tale previsione, comporterebbero pur sempre, in quanto vi opera la pubblica amministrazione-autorità, la giurisdizione generale di legittimità»[27]. Il che significa che, anche per la inclusione di materie nella giurisdizione esclusiva, il dato determinante è costituito dalla sussistenza (nella materia) del potere (autoritativo) del CONI e delle federazioni[28].

L'art. 135 del codice del processo amministrativo, nell'àmbito della cognizione della giurisdizione esclusiva del giudice amministrativo, stabilisce la competenza funzionale inderogabile del Tribunale amministrativo regionale del Lazio in materia di impugnazione degli atti del CONI e delle federazioni sportive anche in relazione alle eventuali misure cautelari. Qui l'inderogabilità della competenza consegue alla peculiarità e delicatezza degli interessi tutelati nella materia sportiva[29] nel senso che l'osservanza della regola della competenza è ritenuta condizione imprescindibile di un retto funzionamento della giurisdizione amministrativa in un àmbito specifico di materia[30].

[27] Corte cost., 6 luglio 2004 n. 204, in *Foro amm. C.d.S.*, 2004, pp. 1895, 2475, con note di F. Satta, C.E. Gallo e D. Siclari.

[28] F.G. Scoca, *Osservazioni eccentriche, forse stravaganti, sul processo amministrativo*,?in *Dir. proc. amm.*, 2015, 3, p. 847 s.

[29] Corte cost., 22 aprile 1992, n. 189, in *Giust. civ.*, 1992, I, p. 1655.

[30] A. Levoni, *Competenza nel diritto processuale civile*, in *Dig. disc. priv.*, *Sez. civ.*, III, Torino, 1988, p. 130 s.; T. Segrè, *Della competenza per materia e valore*, in *Comm. cod. proc. civ.*, diretto da E. Allorio, I, Torino, 1973, p. 288; C. Mandrioli, A. Car-

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ll problema della attribuzione della competenza funzionale in materia sportiva al TAR del Lazio risponde all'esigenza non irragionevole di assicurare la concentrazione presso lo stesso giudice di tutte le controversie che investono le modalità di esercizio dei poteri sportivi che hanno attinenza con organizzazioni internazionali, onde assicurarne vasti àmbiti di tutela sovranazionali. La Corte costituzionale ha infatti affermato che si «deve ribadire quanto già in passato ripetutamente affermato», e cioè che spetta «al legislatore un'ampia potestà discrezionale nella conformazione degli istituti processuali, col solo limite della non irrazionale predisposizione di strumenti di tutela, pur se tra loro differenziati» discrezionalità di cui il legislatore fruisce anche «nella disciplina della competenza»[31].

Sotto questo profilo, la competenza funzionale del TAR del Lazio in materia sportiva trova la sua ragion d'essere proprio nelle esigenze di funzionalità e semplicità giustiziale, tradotte in un'ottica di immediatezza della risposta dell'ordinamento giuridico a sanzioni sportive di competenza statale.

In questa prospettiva, pertanto, deve essere ribadito quanto già affermato dalla giurisprudenza costituzionale, come in casi eccezionali possa consentirsi l'esercizio di poteri derogatori della normativa primaria solo a condizione che si tratti «di deroghe temporalmente delimitate, non anche di abrogazione o modifica di norme vigenti»[32] e sempre che tali poteri «siano ben definiti nel contenuto, nei tempi, nelle modalità di esercizio»[33] non potendo, in particolare, il loro impiego realizzarsi «senza che sia specificato il nesso di strumentalità tra lo stato di emergenza e le norme di cui si consente la temporanea sospensione»[34].

Anche in materia di controversie sportive (l. n. 280 del 2003) è

ratta, *Diritto processuale civile*, I, *Nozioni introduttive e disposizioni generali*, 25ª ed., Torino, 2016, p. 288 s.

[31] Cosí, da ultimo, Corte cost., 27 ottobre 2006, n. 341, in *Giur. cost.*, 2006, 5, p. 3377, con nota di F. Fiorentin e, nello stesso senso, tra le tante, Corte cost., 6 luglio 2004, n. 206, in *Giust. civ.*, 2004, I, p. 2537, con nota di R. Giordano.

[32] *Ex multis*, Corte cost., 14 aprile 1995, n. 127, in *Riv. giur. amb.*, 1997, p. 258, con nota di A. Morrone.

[33] Corte cost., 9 novembre 1992, n. 418, in *Foro it.*, 1993, I, c. 2139.

[34] Corte cost., 26 giugno 2007, n. 237, in *Dir. proc. amm.*, 2008, 2, p. 476, con nota di F. De Leonardis.

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fatto salvo, in ogni caso, quanto eventualmente stabilito dalle clausole compromissorie tra i tesserati, le società, le federazioni e il CONI previste dagli statuti e dai regolamenti del Comitato olimpico nazionale italiano e delle federazioni sportive di cui all'articolo 2, comma 2, nonché quelle inserite nei contratti di cui all'articolo 4 della legge 23 marzo 1981, n. 91. Come è noto, la clausola compromissoria ha ad oggetto (*ex* art. 808 c.p.c.) controversie future, «cioè non ancóra sorte allorché la convenzione di arbitrato viene stipulata: si pattuisce la via arbitrale per l'eventualità di una controversia tra le parti»[35].

In questo, come in ogni altro caso, anche se il Collegio arbitrale dovesse decidere su controversie concernenti diritti soggettivi devoluti originariamente alla giurisdizione esclusiva del giudice amministrativo, la competenza in materia di impugnazione dei lodi arbitrali sarebbe sempre della Corte d'Appello territorialmente competente. L'art. 12 del codice del processo amministrativo, infatti, prevede che le controversie su diritti soggettivi devolute alla giurisdizione del giudice amministrativo sono risolte con arbitrato rituale di diritto ai sensi degli artt. 806 ss. del codice di procedura civile[36].

Da rilevare una tesi giurisprudenziale contrastante che la decisione

[35] F.P. Luiso, *Diritto processuale civile*, V. *La risoluzione non giurisdizionale delle controversie*, 9ª ed., Milano, 2017, p. 124 s.

[36] Cons. St., Sez. V, 19 giugno 2003, n. 3655, in *Riv. arb.*, 2003, p. 731, con nota di M. Vitale; Cass., Sez. un., 10 dicembre 2001, n. 15608, in *Foro it.*, I, 2002, c. 1738; in *Giur. it.*, 2002, I, 1, c. 1715; Cons. St., Sez. V, 28 giugno 2004, n. 4791, in *Foro amm. C.d.S.*, 2005, p. 447, con nota di M. Vaccarella e Cass., Sez. un., 3 luglio 2006, n. 15204, in *Foro amm. C.d.S.*, 2006, 11, p. 2998 (s.m.), che in massima stabilisce che «L'impugnazione di lodi arbitrali rituali pronunciati nell'àmbito di controversie riconducibili alla sfera dell'art. 6, comma 2, l. 21 luglio 2000 n. 205, cosí come quella di ogni altro lodo arbitrale rituale, deve essere proposta dinanzi alla corte d'appello nella cui circoscrizione è la sede dell'arbitrato, ai sensi dell'art. 828 c.p.c., costituente l'unica disposizione diretta alla determinazione del giudice cui spetta giudicare su detta impugnazione, dovendo pertanto escludersi che la giurisdizione in tali ipotesi competa al Consiglio di Stato, inteso quale giudice non solo dell'appello contro la pronuncia del giudice amministrativo di primo grado, ma anche dell'impugnazione del lodo arbitrale ad esso alternativo. Quando accoglie l'impugnazione, il giudice ordinario, siccome giudice naturale dell'impugnazione del lodo, ha anche il potere-dovere, salvo contraria volontà di tutte le parti, di decidere nel merito, ai sensi dell'art. 830, comma 2, c.p.c., a nulla rilevando che la controversia sarebbe stata affidata, ove non fosse stata deferita in arbitri, alla giurisdizione esclusiva del giudice amministrativo». G. Leone, *Elementi di diritto processuale amministrativo*, 4ª ed., Padova, 2016, p. 452.

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della Camera di conciliazione e arbitrato dello sport istituita presso il CONI (ora Collegio di Garanzia dello Sport) rappresenta la decisione di ultimo grado della giustizia sportiva, che, benché emessa con le forme e le garanzie tratte dal giudizio arbitrale, non costituisce un vero e proprio lodo arbitrale ed è pienamente sindacabile dal giudice amministrativo, non applicandosi la limitazione dei motivi di impugnazione a quelli di nullità del lodo *ex* art. 829 c.p.c.).

In questo caso non sussiste nell'ordinamento sportivo un obbligo di accettazione della decisione della Camera arbitrale (c.d. vincolo di giustizia di cui all'art. 27 dello Statuto della FIGC) e tanto osta alla configurabilità di una vera e propria clausola compromissoria, dovendosi altrimenti dubitare della legittimità costituzionale di un arbitrato obbligatorio (ciò non toglie che, se dovesse attenuarsi in futuro tale vincolo, il Consiglio di Stato potrebbe rimeditare la propria giurisprudenza, «ammettendo tale natura, quantomeno in relazione a veri e propri diritti soggettivi delle società sportive azionabili in giurisdizione esclusiva al di fuori dei casi delle controversie, devolute al giudice ordinario e relative ai rapporti patrimoniali tra società, associazioni ed atleti»). E se è vero che la legge n. 280 del 2003 ha rafforzato l'obbligatorietà del giudizio camerale (tanto che, in base alla comunicazione della Corte Federale della FIGC n. 16/ Cf del 16 aprile 2004, i rimedi innanzi alla Camera di Conciliazione costituiscono l'ultimo grado della giustizia sportiva) ciò è sul presupposto di una natura del procedimento e dell'atto che ne assicuri la conformità al diritto costituzionale, altrimenti risolvendosi la norma nella legittimazione *ex post* di una forma di arbitrato obbligatorio. Tuttavia, la natura amministrativa della decisione non comporta l'ammissibilità, nella specie, dell'impugnativa dei provvedimenti camerali per vizi propri (che non deve ritenersi ammissibile al di fuori della deduzione, non avanzata nella specie dall'appellante, di un autonomo interesse strumentale alla rinnovazione del giudizio camerale[37].

3. La legge n. 280 del 2003 è stata negli ultimi tempi spesso al centro di aspri dibattiti dottrinali e giurisprudenziali sulla possibilità

[37] Cons. St., Sez. VI, 9 febbraio 2006, n. 527, in *Guid. dir.*, 2006, 14, p. 98, con nota di S. Mezzacapo. Sul punto, A. Melone, *Le modifiche del 2016 al Code TAS*, in *Riv. arb.*, 2016, 3, p. 439.

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che una controversia, originata da una sanzione disciplinare, e quindi appartenente alle materie riservate all'ordinamento sportivo, possa essere sottoposta al giudice statale, laddove la stessa sanzione venga a ledere posizioni giuridiche soggettive dei destinatari di tali provvedimenti (diritti soggettivi o interessi legittimi). Il dibattito, mai sopito, prende le mosse dalla famosa vicenda di "calciopoli", svoltasi nel corso della stagione calcistica 2005/2006. In quell'occasione, in presenza di sanzioni disciplinari inflitte dalla Federazione gioco calcio, il TAR del Lazio ha affermato la propria giurisdizione sui ricorsi presentati avverso tali sanzioni disciplinari, ritenendo che tali sanzioni non si limitassero a produrre effetti giuridici nell'ordinamento sportivo ma refluissero anche nell'ordinamento giuridico statale. Questo impianto interpretativo, pur trovando avallo nella giurisprudenza successiva ha subíto un arresto del giudice amministrativo d'appello che ha sottolineato la sola valenza interna dei comportamenti disciplinari dei tesserati della Federcalcio.

Secondo la recente dottrina[38] la materia, ormai divenuta magmatica e poco elastica, è stata portata al vaglio dei giudici di legittimità delle leggi, a séguito di rimessione da parte del TAR Lazio della questione di legittimità costituzionale dell'art. 2, commi 1 e 2, della legge n. 280 del 2003 per pretesa violazione degli artt. 24, 103 e 113 della Costituzione.

Il quesito riguardava un dirigente della federazione della pallacanestro che aveva fatto ricorso al TAR contro l'inibizione allo svolgimento di ogni attività endofederale per due anni, poi aumentati a tre anni e quattro mesi nella sentenza di appello, successivamente confermata davanti alla Camera di conciliazione ed arbitrato per lo sport[39].

La Suprema Corte, pur sostenendo che le questioni di carattere disciplinare sono specificamente riconosciute come materia oggetto di riserva in favore dell'ordinamento sportivo, ritiene che esse non devono considerarsi tipiche di tale ordinamento, perché possono assu-

[38] F. Valerini, *Scudetto all'Inter e niente risarcimento per la Juve*, TAR Roma, Sez. I, 6 settembre 2016, n. 9563, in *Dir. giust.*, 2016, 40, p. 16: «I rapporti tra l'ordinamento sportivo e quello statale sono regolati dalla l. n. 280 del 2003 che riserva alla "giurisdizione sportiva" le questioni tecniche e disciplinari escludendone la rilevanza per il mondo del diritto "statale" (ad eccezione del caso di radiazione)».

[39] G. Liotta, L. Santoro, *Lezioni di diritto sportivo*, cit., p. 331.

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mere un rilievo effettivo anche nell'ordinamento statale, venendo a ledere diritti soggettivi o interessi legittimi.

Per questi motivi, in caso di effettiva lesione di tali situazioni giuridiche soggettive, deve essere riconosciuta la tutela risarcitoria innanzi al giudice statale[40]. In altre parole, è sempre ammissibile una domanda al giudice statale volta ad ottenere il risarcimento del danno e non la caducazione del provvedimento disciplinare, stante l'autonomia dell'ordinamento sportivo rispetto all'ordinamento statale. Sulla questione del risarcimento del danno da illegittimo provvedimento sanzionatorio la Consulta stabilisce la competenza del giudice amministrativo in relazione alle sanzioni disciplinari inflitte a società, associazioni e atleti in via incidentale e indiretta.

Ciò al solo fine di pronunciarsi sulla domanda di risarcimento dei danni proposta dal destinatario della sanzione[41], il quale dovrà provare la sussistenza di tutti gli elementi previsti dall'art. 2043 c.c., dunque, non solo il c.d. danno ingiusto, il rapporto di causalità rispetto alla condotta, ma anche il fatto doloso o colposo[42]. La Corte costituzionale ha dunque rilevato che la mancanza di un giudizio di annullamento non comporta la compromissione del principio di effettività della tutela, previsto dall'art. 24 cost. essendo comunque consentita una diversificata modalità di tutela giurisdizionale, statuendo sul punto testualmente: «[…] È sicuramente una forma di tutela, per equivalente, diversa rispetto a quella in via generale attribuita al giudice amministrativo (ed infatti si verte in materia di giurisdizione esclusiva), ma non può certo affermarsi che la mancanza di un giudizio di annullamento (che, oltretutto, difficilmente potrebbe produrre effetti ripristinatori, dato che in ogni caso interverrebbe dopo che sono stati esperiti tutti i rimedi interni alla giustizia sportiva, e che costituirebbe comunque, in questi casi meno gravi, una forma di intromissione non armonica rispetto all'affermato intendimento di tutelare l'ordinamento sportivo) venga a violare quanto previsto dall'art. 24 Cost. Nell'àmbito di quella forma di tutela che può essere definita come residuale viene, quindi, individuata, sulla base di una

[40] M. Sanino, *Giustizia sportiva*, cit., p. 130 s.

[41] G. Liotta, L. Santoro, *Lezioni*, cit., p. 31.

[42] P. Sandulli, *I rapporti tra giustizia sportiva e giustizia ordinaria*, cit., p. 41 s.

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argomentata interpretazione della normativa che disciplina la materia, una diversificata modalità di tutela giurisdizionale. […]»[43].

Il suddetto orientamento giurisprudenziale[44] è stato poi confermato diverso tempo dopo sul caso Moggi, il quale aveva impugnato una sanzione di Euro 50.000 e la sanzione di inibizione per cinque anni dai ranghi federali, comminategli per illecito sportivo.

Il Consiglio di Stato non ha riconosciuto la competenza del giudice amministrativo in tema di impugnazione delle sanzioni disciplinari ma solo domande risarcitorie nel caso di specie non proposte. Il giudice amministrativo d'appello ha cosí dichiarato inammissibile il ricorso di primo grado (compreso il ricorso per motivi aggiunti) per difetto di giurisdizione[45]. Anche piú di recente la giurisprudenza amministrativa ha affermato la propria giurisdizione al fine di pronunciarsi sulla domanda risarcitoria proposta dal destinatario della sanzione, «nonostante la riserva a favore della "giustizia sportiva", delle sanzioni disciplinari inflitte a società, associazioni ed atleti, in via incidentale e indiretta»[46].

Piú di recente il Consiglio di Stato ha confermato la propria giurisdizione in materia risarcitoria, escludendola, invece, nel merito della domanda demolitoria del provvedimento sanzionatorio emanato dagli organi di giustizia sportiva, «evidenziando che l'illegittimità del provvedimento impugnato è condizione necessaria, ancorché non sufficiente, per accordare il risarcimento del danno, con la conseguenza che l'infondatezza della domanda di annullamento determina inevitabilmente il rigetto di quella risarcitoria»[47].

Negli ultimi tempi gli interventi della giurisprudenza amministrativa hanno sempre di piú ristretto l'àmbito risarcitorio del giudice amministrativo in materia di sanzioni disciplinari sportive ai soli danni da lesione del diritto o dell'interesse fondamentale che sin *ab initio* si era domandato evidentemente invano al giudice sportivo, in

[43] Corte cost., 11 febbraio 2011, n. 49, in *Giust. civ*., 2012, 11-12, I, p. 2519.

[44] Si veda la giurisprudenza citata in G. Liotta, L. Santoro, *Lezioni*, cit., p. 332.

[45] *Ibidem*.

[46] Cons. St., Sez. VI, 24 gennaio 2012, n. 302, in *Foro it*., 2012, 4, III, c. 213.

[47] Cons. St., Sez. V, 25 luglio 2014, n. 3958, in *Foro amm*., 2014, 7-8, p. 2001, e la giurisprudenza citata da P. Sandulli, *I rapporti tra giustizia sportiva e giustizia ordinaria*, cit., p. 41 s.

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quanto la tutela risarcitoria del giudice amministrativo è strumento sussidiario di protezione di beni giuridici indisponibili che non abbiano ricevuto reale protezione ad opera di quest'ultima e deve corrispondere, nei limiti della tutela per equivalente, alla ragione oggettiva dell'originario processo sportivo e dev'essere finalizzata a un ristoro del diritto o dell'interesse fondamentale che sin *ab initio* si era domandato evidentemente invano al giudice sportivo di salvaguardare»[48].

4. Quale sarà il futuro dei rapporti tra giudice amministrativo e giudice sportivo?

È inutile fare delle profezie utilizzando un'inesistente «palla di vetro» giurisdizionale ma si ritiene necessaria una maggiore integrazione funzionale tra gli ordinamenti, sportivo e giuridico statale, non foss'altro per adeguarci ad una progressiva unitarietà ed europeizzazione degli stessi. Da un punto di vista funzionale, quindi propenderei per una soluzione di continuità tra giustizia sportiva e giustizia statale. Infatti, se gli atti emanati dal sistema sportivo, pur avendo rilevanza interna, possono anche incidere su diritti soggettivi, su diritti fondamentali e sugli interessi legittimi del destinatario come cittadino dell'ordinamento dello Stato non si vede il motivo di attendere l'esito dell'esaurimento dei gradi di giustizia sportiva per proporre domanda di tutela giurisdizionale davanti ai giudici nazionali.

L'esistenza di un ordinamento sportivo come ordinamento settoriale distinto da quello statale postula sí una necessaria indipedenza di giudizi ma, ai sensi degli artt. 24, 103 e 113 cost. richiede un potenziamento dell'effettività di tutela giurisdizionale del cittadino in generale e dell'atleta in particolare. All'art. 24 cost., soprattutto, è ricondotto il criterio dell'«effettività» della tutela giurisdizionale, in base al quale ogni situazione giuridica riconosciuta sul piano sostanziale deve godere di una piena tutela sotto il profilo processuale. La norma costituzionale deve fungere da valore-guida per qualsiasi interpreta-

[48] M. Bombi, *Il Consiglio di Stato mura la richiesta della pallavolista* in Cons. St., Sez. V, 22 giugno 2017, n. 3065, in *Dir. giust.*, 2017, 110, p. 6. Per l'ipotesi di diniego di risarcimento del danno perché è stata accertata la legittimità del provvedimento del Commissario Straordinario della FIGC adottato in data 26 luglio 2006, si veda l'articolo di F. Valerini, *Scudetto all'Inter e niente risarcimento per la Juve*, cit., p. 16.

zione delle «giurisdizioni» e dei loro istituti[49], dove anche la massima strumentalità tra diritto sostanziale e processo risulta cosí compenetrata da costituire un compendio unificato diretto a tutelare le aspirazioni di giustizia del singolo, cittadino o atleta. Di contro, per il principio di semplificazione processuale, se occorre ricorrere alla clausola compromissoria «statutaria» prevista dall'ordinamento sportivo intesa quale strumento non giurisdizionale di risoluzione delle controversie lo si faccia ponendo regole concrete, effettive, capaci di costituire una valida soluzione alternativa alla tutela giurisdizionale dello Stato e non una mera applicazione di una clausola di stile contrattuale[50].

Occorre, quindi, far sí che venga riconosciuto anche nell'ordinamento sportivo un sistema giurisdizionale di regole e di princípi ispirato al «giusto processo» nazionale, in modo tale da coniugare effettività ed efficienza delle tutele giurisdizionali, anche con interventi deflattivi piú chiari e specifici, che pongano al centro del sistema stesso le posizioni individuali degli atleti[51]. Da qui l'inevitabile scelta degli operatori della giustizia nello sport di dirigersi verso un percorso che consenta il definitivo consolidamento della situazione sostanziale dedotta in giudizio, sia essa diritto o interesse non importa, e una decisione caratterizzata da stabilità, certezza, affidabilità temporale, coniugate con valori di sistema della celerità e giustizia[52].

In conclusione, rimane aperto il problema di una legge quadro idonea a recuperare l'unitarietà del sistema sportivo in coerenza con i princípi giuridici vigenti nell'ordinamento dello Stato, affinché con una variegata gamma di regole comuni, non dettate da situazioni con-

[49] A. Travi, *Lezioni di giustizia amministrativa*, 12ª ed., Torino, 2017, p. 65; P. Pozzani, *Premesse per uno studio sulla pregiudizialità amministrativa*, in *Dir. amm.*, 2016, 3, p. 365, dove si afferma che «Il principio di giustiziabilità sancito dalla Carta costituzionale agli artt. 24 e 103 e dall'ordinamento comunitario assicura piena tutela del soggetto nei confronti della pubblica amministrazione affidando, in particolare, al giudice amministrativo il sindacato sugli interessi legittimi e sui diritti soggettivi qualora sia previsto dalla legge».

[50] F.P. Luiso, *Diritto processuale civile*, V., cit., p. 253.

[51] I. Pagni, *La giurisdizione tra effettività ed efficienza*, in *Dir. proc. amm.*, 2016, 2, p. 401 s.; F.G. Scoca, *Osservazioni eccentriche, forse stravaganti, sul processo amministrativo*,?in *Dir. proc. amm.*, 2015, 3, p. 847 s.

[52] I. Pagni, *La giurisdizione tra effettività ed efficienza*, cit., p. 420 s.

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tingenti ed emergenziali, si possa restituire chiarezza e «certezza del diritto» all'autonomia della giustizia sportiva[53].

Gerardo Soricelli

*Abstract*

Le ragioni dell'incertezza sui criteri di riparto di giurisdizione tra giudice sportivo e giudice amministrativo hanno spinto il legislatore del 2003 (legge n. 280 del 2003) a ricercare un punto di equilibrio e di confronto tra le stesse giurisdizioni. Il contributo cerca di disegnare una linea di confine piú marcata tra le due giurisdizioni attraverso il rafforzamento dell'autonomia dei due ordinamenti: sportivo e statale.

The uncertainty reasons on the allocation criteria of jurisdiction between a sports judge and administrative judge pushed the legislator in 2003 (law n. 280 of 2003) to look for a point of balance and comparison among the same jurisdictions. The written try to draw a more marked boundary line between the two jurisdictions through reinforcement of the autonomy of the two systems: sport and state.

[53] P. Sandulli, *La responsabilità sportiva nel calcio*, in P. Sandulli, M. Sferrazza, *Il giusto processo sportivo*, cit., p. 289 s.; F.G. Scoca, *Osservazioni eccentriche, forse stravaganti, sul processo amministrativo*, cit., p. 847 s.; R. Conti, *Il principio di effettività della tutela giurisdizionale ed il ruolo del giudice: l'interpretazione*, in *Pol. dir.*, 2007, 3, p. 412.

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# Common and Conflicting Interests of Athletes and Sport Organizations from a German Legal Point of View

Summary: 1. Introduction. – 2. Systematization of Conflicts. – 3. Fair Balancing of Interests as a Legal Tool to Solve Conflicts. – 4. Practical Consequences. – 5. Conclusions.

1. Athletes are – or at least they should be – the most important persons in sport. Due to the process of commercialization and professionalization, combined with a growing interest of the media, it is clear that they often share conflicts with their clubs and national and international sport organizations. These conflicts can cause decisions of so-called sport courts, (real) courts of arbitration and courts of justice. Anticipated conflicts are regulated in athletes' contracts and in the rules and regulations of the sport organizations.

Firstly, I will try to put the variety of conflicts in a systematic order (see 2). Then I will going to describe the German approach of judicial control, namely the applications of the principle of proportionality, requiring the balancing of interests (see 3). Some remarks regarding the practical consequences will be closing my presentation (see 4).

2. A threefold approach can help to systemize the conflicts between the athletes on the one hand and the clubs and sport organizations on the other.

The first approach differs to the areas of life. These are

– training,
– competition,
– profession,
– free time.

Of course, some conflicts are part of more than one area of life. Consuming cocaine, *e.g.*, in the free time is also important for the

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areas of training and competition (Andreas Goldberger case, Luca Paolini case).

V. Diagram 1 at the end.

The second approach is linked to the conflicting partners. Putting the athlete in the middle, there are at least 23 potential conflicting partners.

V. Diagram 2 at the end.

The third approach is – depending on the level of professionalization and commercialization – the differentiation with regard to the type of conflict:

– selection, nomination (*e.g.* for the national team or the Olympics),
– training (rights, duties, details),
– medical support (including free choice of doctors),
– physiotherapeutic support,
– equipment (right and/or duty to use, details),
– advertisement (right, duty; right not to advertise),
– ownership of sport sponsoring rights,
– doping control (acceptance of rules and regulations),
– remuneration of money spent for sport activities (*e.g.* travel costs, equipment),
– duty to inform or not to inform,
– right and duty to participate in competitions,
– financial participation (*e.g.* joining bonus regarding events organized by the sport organizations),
– use of social media (details).

3. Most of the conflicts mentioned above are regulated by national and international sport organizations – often focusing their own interests and prevailing those of the athletes.

The central question is whether the relevant clauses in the rules and regulations and in the athletes' contracts are valid. The approach of the German courts of justice and of the most legal writers is to allow judicial control with regard to the clauses and to the facts on which the decision of the sport organization is based. Sport organizations have a monopolistic position and they are regarded to be socially and economically powerful[1].

[1] Cfr. K. Vieweg, *The Appeal of Sports Law*, p. 17 s. *http://vg04.met.vgwort.de/na/*

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Benchmark of the judicial control is the principle of good faith (*Grundsatz von Treu und Glauben*) in sec. 242 of the German Civil Code (*Bürgerliches Gesetzbuch – BGB*). This finally means that the validity of the rules and regulations are tested by weighing the legally protected interests of the athletes and those of the sport organization. The determination and the weighing of interests must comply with the principle of proportionality. This approach of «practical concordance (*praktische Konkordanz*)» was developed by Konrad Hesse[2], a chairholder and judge at the Federal Constitutional Court, in order to solve the tension between conflicting fundamental rights of the parties concerned. Applying this approach, a fair solution of conflicts can be achieved by the courts of justice in the world of sport.

4. The general situation is as follows: The interests of the athletes and those of the sport organizations are partly identical and partly conflicting. Regarding the promotion of the specific sport in general and the success in competitions, *e.g.*, they are identical. However, in marketing affairs, *e.g.*, they often lead to conflicts.

With view to sponsoring the interest of the sport organizations is to offer the whole sport – including events, name, and (popular) athletes – to the sponsee in order to promote a positive image transfer to him and to receive a maximum amount of money. The interests of the athlete, if he or she is well known and has a market value of his or her own, is controversial. At least he or she is interested in self-determination regarding the details of advertising. Weighing the conflicting interests with view to the principle of proportionality the following aspects are important: The intensity of how the right of personality is affected, how the money is shared between the sport organization and the athlete and which advantages the athlete gains from activities of the organization (*e.g.* medical care, equipment and clothing, use of facilities, training support).

To avoid conflicts the fair balance of interests is crucial. This includes a «*do ut des*-approach», and particular respecting the mutual

*b5c4789650e646749cbbdabd55227af2?l=http://www.irut.de/Forschung/Veroeffentlichungen/OnlineVersionFaszinationSportrecht/FaszinationSportrechtEnglisch.pdf*.

[2] K. Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, 20th ed., Heidelberg, 1999, par. 72.

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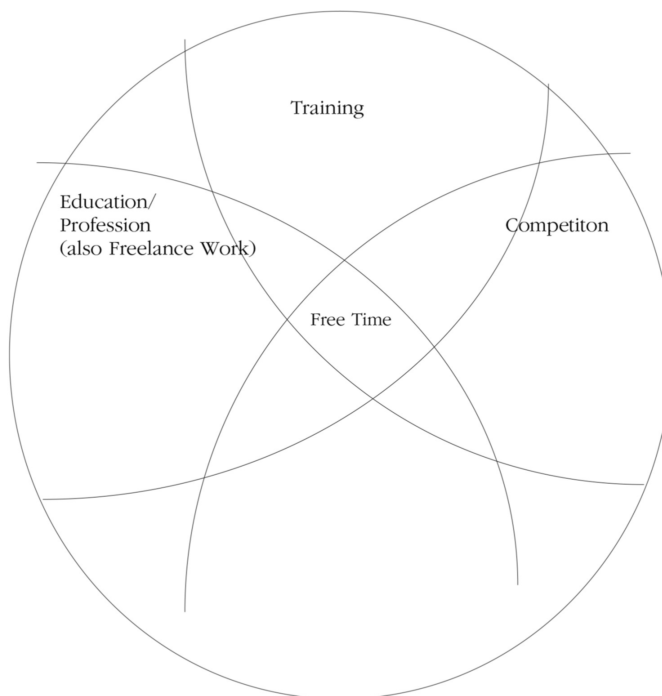
Diagram 1 - *Athletes – Areas of Life*




duties to promote, to take care and to inform the other part. It is helpful to communicate in time in order to find a solution regarding the fair sharing of advertising rights.

Athletes' contracts can cover all these items. They should be written not only by the sport organization but together with the representatives of the athletes. It is recommendable to keep them open for individual solutions to fit them to the specific situation of individual athletes.

5. Conclusions

a) The interests of the athletes and of the sport organizations are partly identical and partly conflicting. A precise analysis of the interests can be a starting point for a fair legal solution.

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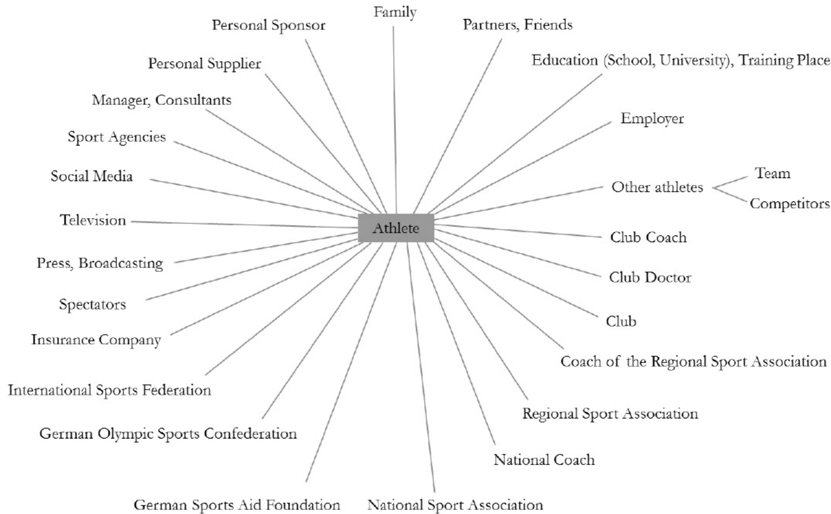
Diagram 2 - Athletes – Real and Legal Relationships




b) The rules and regulations of the sport organizations and the athletes' contracts should be drafted with the participation of the representatives of the athletes and with view to the extent of the judicial control by the courts of justice.

c) In German law the judicial control takes the monopolistic position of the sport organizations in account and applies the principle of good faith as the relevant benchmark. That means in the end the application of the principle of proportionality and the balancing of bot, the identical and the conflicting interests, protected by the fundamental rights of the athlete and the sport organization.

d) The outcome of this process of balancing interests depends on the details of the specific situation.

KLAUS VIEWEG

*Abstract*

The article compares the interests of the athletes with those of the sport organizations and shows how conflicts can be solved.

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# Appointment of Temporary Administration in the Hellenic Football Federation Greek Government - FIFA Intervention

Summary: 1. Introduction. – 2. The nature of the Sports Federation. – 3. Hellenic Football Federation-Legislative Intervention. – 4. Appointment of a Normalization Committee to HFF. – 5. Conclusion.

1. A Sport Federation is a legal entity governed by private law, operating within the domestic legal order, and is structured vertically under a strict hierarchical and centralized structure based on the principle of exclusive representation.

The degree to which Central Administration intervenes in the existence and activities of the sports system and the institutions within it can be divided into the following categories: direct State intervention, indirect State intervention and the liberal system of organization of the institution of sports where the law allows sports associations to regulate sports matters entirely[1].

2. At a national level, a Sport Federation's principal objective is the cultivation and development of a sport or of a sports sector through sports clubs that cultivate the same sport or the same sports sector on a national level[2]. In Greece sports federations are under State supervision and protection within the specific constitutional provision of Articles 16 par. 9[3]. On the basis of the provisions of the

[1] D.P. Panagiotopoulos, *Sports Law, Lex Sportiva-Lex Olympica Theory & Praxis*, Revised, Athens, 2017, ed. revised, p. 72.

[2] Id., *Αθλητικό Δίκαιο, Συστηματική Θεμελίωση-Εφρμογή*, Nomiki Vivliothiki Publications, 2005, p. 283.

[3] Article 16, par. 9, Constitution of Greece: «Athletics shall be under the protection and the ultimate supervision of the State», F. Spiropoulos, X. Kontiadis, X. An-

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Greek Constitution, the Sports Law defines that the sport federation is the highest association governing sports clubs that practice the same sport or are active in the same sports sector throughout the country, internationally represents that specific sport, and is associated with the corresponding international sport federation (Article 16 par. 9 of the Constitution of Greece).

International sports federations impose observation of their rules on the domestic ones, thus creating the *Lex Sportiva*, which is introduced in domestic law. In its internal administration, its relations with the clubs and third parties, a national sports federation is a private law entity governed by the special provisions of the Sports Law in force[4].

Thus, the sports federation, at the national level, holds responsibility for national, state or non-state supervision of sport as well as responsibility for all technical arrangements in the country where international competitions or Olympic Games are held according to the International Olympic Committee and the relevant competencies of the International Sports Federations.

3. Internally, national sports federations, such as the HFF, invoke *Lex Sportiva's* international sports rules, such as FIFA regulations, as a legal alibi for imposing these *Lex Sportiva* rules through the back door, so governments often retreat, even violating constitutional provisions such as those regarding the Supervision and Protection of Sport through lawful funding liabilities.

FIFA and UEFA, which demand autonomy for their member federations, threatened to suspend Greece due to government interference in EPO affairs. In the past, extraordinarily FIFA has been involved in the manner of threatening the suspension of Greek teams from international meetings, adopting EPO's alibi, thus creating serious problems for Greece. In this way, FIFA clearly poses an issue to world governments and, in the context of globalization, raises the

THOPOULOSM e G. GERAPETRITIS, *ΣΥΝΤΑΓΜΑ-Κατ'άρθρο ερμηνεία*, Athens-Thessaloniki, 2017, p. 102 s.

[4] D.P. PANAGIOTOPOULOS, I. MOURNIANAKIS, *Suspension of governing bodies: analysis*, in *World Sports Law Report*, 2006, 4, 7, p. 8 ss. and in *Sport und Recht*, in *Verbandsautonomie und staatliche Regulierung*, 2006, p. 189 s.

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following questions: which legal order governs international sporting activity and what is the role of the governments?

Due to the pressure exerted by the international football federation on the sole application of FIFA rules, the Deputy Minister of Sports adopted new to the Sports Law, in order to avoid exclusion of its athletes from all the world championships and championships that FIFA supervises. Thus, the Deputy Minister of Sports added the transitional provision of paragraph 12 of Article 29 of Law 3479/2006 according to which: «Specifically regarding football, all matters related to the operation and organization of the Hellenic Football Federation sport and its members are regulated autonomously by the HFF and its bodies, according to its charter and its regulations, as well as those specified by the European and International Football Federation, even if different regulations are provided for under Law 2725/1999, as in force, and under the athletic legislation in general».

Following the misguided and unreasonable absolute autonomy established by the administration in HFF (article 29 par. 12 of Law 3479/2006), dramatic situations and highly unusual phenomena developed in Greece so raising the need to restore legitimacy to professional sporting activities.

At the 20th World Congress of IASL, it was underlined that «following the implementation of the Football Act in 2006, sports federation officials, as well as referees, board members and football clubs were accused before the Greek Courts with charges of establishing a criminal organization and bribery»[5].

Such arrangements concerning football adopted under legislative authorization, as in the case of Article 29 par. 12 of Law 3479/2006, were contrary to the relevant provisions of the Constitution. Therefore, it became imperative for the Greek State to reinstate-introduce the HFF to a position of internal legitimacy, in accordance with the provisions of Sports Law (Law 2725/1999) and the provisions of Civil Law governing associations. Thus, under Article 15 of Law 4326/2015[6],

[5] D.P. Panagiotopoulos, A. Patronis, *Disciplinary Penalties to People Involved in Professional Sport. Consequences – Enforceability*, in *International Sports Law Review Pandektis*, 2015, 11, 1-2, p. 189 s.

[6] Article 15, par. 2, LAW 4326/2015: «Football issues about the organization and operation of the football federation are governed by the Hellenic Football Federation (HFF),

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the legislative intervention abrogated paragraph 12 of article 29 of Law 3549/2006 and ensured that, henceforth, the HFF would be subject to the Constitution, the provisions of the Sports Law and the Laws of the State.

4. Last year, following the financial scandals and its operational problems, HFF took the decision to organize elections in accordance with its own statutes and not in accordance with the provisions of the Sports Law[7], which appointed one representative[8] from each football association rather than three, as defined by the statute of the HFF, which based itself on the amended law.

At the end of October 2016, a football association filed an appeal before the HFF arbitration tribunal, requesting the HFF General Assembly's decision to call elections be declared void. The HFF arbitration tribunal decided[9] to annul the planned general assembly and to appoint an interim committee empowered for the next two months to organize elections within the year, because the decision of HFF to organize a General Assembly for elections was invalid as it was contrary with the new Sports Law (Article 15 of Law 4326/2015).

Following the HFF arbitration tribunal's decision, the FIFA Council, in accordance with article 8 par. 2 of the FIFA Statutes[10], decided to cancel the HFF General Assembly's decision and to appoint a normalization committee whose tasks were to run the HFF's daily affairs, to revise its relevant regulations in order to bring them in line with FIFA's own, to continue discussions with the sporting author-

in the framework of its self-governing operation in accordance with its statutes and regulations, which must be in line with the Constitution, the applicable legislation, […] and in accordance with the regulations of the World and European Football Federation».

[7] D.P. Panagiotopoulos, *Αθλητικό Δίκαιο, Συστηματική Θεμελίωση-Εφρμογή*, cit., p. 308.

[8] Article 24, par. 6, Law 2725/1999, D.P. Panagiotopoulos, *Αθλητικός Κώδκας, Τόμος* I, Athens, 2009, p. 46.

[9] Decision 120/2016 HFF arbitration tribunal, available on the website: *http://www.epo.gr/News.aspx?a_id=46839&NewsType=21* (access: 9 September 2017).

[10] Article 8, par. 2, FIFA Statutes: «Executive bodies of member associations may under exceptional circumstances be removed from office by the Council in consultation with the relevant confederation and replaced by a normalization committee for a specific period of time», available on the website: *http://resources.fifa.com/mm/document/affederation/generic/02/78/29/07/fifastatutsweben_neutral.pdf* (access: 10 September 2017).

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ities regarding amendments to the Laws of the Greece and to organize the elections of the new HFF Board Members[11].

It should be pointed out that the HFF arbitration tribunal did not have the authority to appoint a temporary administration, since in Greek Law, a temporary administration is appointed solely by the judge of the contract, the political judge, under Article 69 of the Civil Law.

With respect to applicable Greek Sports legislation and public order, FIFA's intervention is beyond the legal framework and raises important legal problems, such as the reduction of an entity's authority, which exists as a legal entity and operates within the national legal order.

In addition, there is a brutal interference by a foreign individual, FIFA, which annuls existing rules of law in a state and limits its national sovereignty in this area, which is unthinkable even in international law.

In order to facilitate FIFA's appointment of a normalization committee to HFF, in collaboration with the Deputy Minister of Sport, the Greek legislator amended the Sports Law with a special provision (Article 5 Law 4431/2016), which stipulates that: «The Deputy Minister of Sports submitted to Parliament the amendment (Article 5 Law 4431/2016), according to which, in extraordinary and exceptional situations, specific bodies are appointed by the relevant international federation and, with immediate effect, replace the constitutional bodies of the federation for a limited period of time, and based upon a strictly defined mandate, by way of derogation from the provisions of Law 2725/1999 and the statutes of the federation. The above amendment to Sports Law proves statement of the State's intention to legalize the facilitation of FIFA's intervention through its legalization.

In order to facilitate the work of the normalization committee, appointed by FIFA, the Greek legislator added paragraph 12 to Article 24 Law 2725/1999 with the article 1 Law 4479/2017. Article 1 Law 4479/2017 defines that the provisions of HFF's Statute are ap-

[11] Decision of the FIFA Council «Nomination of a normalization committee», available on the website *http://www.epo.gr/media/files/FIFA_UEFA/FIFA_LETTER_HFF_NORMALISATION_COMMITTEE_20161014.pdf* (access: 1 September 2017).

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plicable exceptionally, with respect to the convocation, the operation of HFF's General Assembly including conducting elections.

A provision[12] was incorporated in HFF's revised Statute whereby a monitoring committee shall be established by FIFA to ensure oversight of HFF's operations and processes for at least 12 months following HFF elections, and the relevant FIFA authority shall define the said monitoring committee's terms of appointment [being objective, members, terms of reference and mandate]».

FIFA appointed a normalization committee to HFF in order to organize HFF elections by May 31 2017 at the latest. However, HFF elections for the new Board Members took place at the end of August 2017 after the amendment of HFF's Statute at the end of June 2017, which provided that each football association shall have one vote, as with the Super League football clubs, thus reducing the electorate from 181 to 71 voters, and that HFF would remain under FIFA oversight even after the election of the new HFF Board for at least one year.

Football club associations filed a lawsuit against HFF's elections before the Civil Court of Athens, in which it was argued that the convergence of HFF's General Assembly and the provisions of HFF's Statute according to the term of office of ordinary judges were unlawful. However, the lawsuit was dismissed as it was considered that there was no need to order injunctions.

5. Sports federations are private law entities, based on the principle that they are the unique supreme sports authorities in every sport, giving them a monopoly and dominant position, governed by national laws.

The amendment to the Sports Law, as adopted by the Greek Deputy Minister of Sport, under which FIFA appoints specific governing bodies within the national sports federation so overriding the federation's statutory bodies, derogates from the Greek Constitution and the Greek Sports Law 2725/1999, reduces the prestige of the HFF as an institution with self-governing presence in the field of the

[12] Article 82, HFF revised Statute (31 July 2017), available on the website: *http://www.epo.gr/media/files/KATASTATIKO_KANONISMOI/KATASTATIKO_EPO_2017.pdf* (access 1 September 2017).

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national legal order and alters the content of the Constitutional provisions, given that the sports federation is mandated to serve the national and public interest through sport!

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ZOGRAFENIA KALLIMANI

*Abstract*

The aim of this study is to determine the crucial issues covering the independence of sports federations, especially the independence in the decision-making process of the bodies that govern football and the implementation of FIFA Statutes in Greek National Law.

Sports federations are private law entities, which are controlled by the State, as laid down in law, on the basis of the principle that they are the unique sports authorities in every sport, thus granting them a monopoly and dominant position. On a higher level, the International Sports Federations are generally associations of a non-profitable purpose, governed by national laws. In Greece sports federations are under State supervision and protection within the specific constitutional provision of Article 16 par. 9.

At this point, it is interesting to take a brief look at the regulatory framework of the Hellenic Football Federation (hereinafter: HFF) and Greek National Law by virtue of the provisions of the Greek Law 3549/2006 and the applicable Law 4326/2015, according to which the HFF manages its affairs independently and without influence from third parties and in accordance with the regulations of the World and European Football Federation and the applicable Greek Law.

Last year after the financial scandals and the operational problems, FIFA decided to cancel the decision of the HFF's Arbitral Court and appoint its own temporary normalization committee to run the HFF and to organize federation elections. The Deputy Minister of Sports submitted the amendment (Article 5, Law 4431/2016) to Parliament, according to which in extraordinary and exceptional circumstances, specific bodies are appointed by the relevant international federation and replace the constitutional bodies of the federation for a limited period of time, by way of derogation from the provisions of Law 2725/1999 and the statutes of the federation.

The purpose of this article is to examine if the above legal provisions are lawful within the framework of the Greek legal order.

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# Sports Legislation in Africa
# Regulation versus Development in Kenya's and Africa's Law[1]

Summary: 1. Introduction. – 2. Background. – 3. Theoretical and Conceptual Framework. – 4. Sports Law Regime in Kenya. - 4.1. Legal Framework. - 4.1.1. The Constitution. - 4.1.2. The Sports Act, No. 25 of 2013. - 4.1.3. Anti-doping Act, No. 5 of 2016. - 4.1.4. Betting, Lotteries and Gaming Act Chapter 131 of the Laws of Kenya. – 4.1.5. International Sports Law. - 4.2. Institutional Framework. - 4.2.1. Registrar of Sports. - 4.2.2. Sports Disputes Tribunal. - 4.2.3. National Sports Fund. - 4.2.4. Kenya Academy of Sports. - 4.2.5. Sports Kenya. - 4.2.6. State Department of Sports. - 4.3. Intellectual Property Rights in Sports. - 4.4. Regulation versus Development. – 5. Legal Issues in Sports and their position in Africa. - 5.1. Select African Studies. - 5.2. Sports Arbitration and Alternative Dispute Resolution. – 6. Sports Legislation in Comparative Jurisdictions. - 6.1. Europe. - 6.2. The United States of America. - 6.3. Germany. – 7. Proposals for Reform of the Legal Framework. - 7.1. Restructuring of the legal, policy and institutional Framework. - 7.2. Promotion of a sports culture. - 7.3. Incentives. - 7.4. Educational System. - 7.5. Mentoring of African Sports Law Practitioners. – 8. Conclusion.

1. The sports industry has grown to become a big commercial enterprise in the world. The commercialization of sports has made the world sport to now constitute more than three per cent of the world trade[2]. The concept of sport has transcended the context of mere leisure and entertainment to become a significant revenue stream and a major contributor to economies all over the world. It has also led to increase in competition, regulation and disputes in sports[3].

[1] The author is grateful for the research assistance offered by Rebecca Wanyama Advocate, Deborah Kyalo and Esther Kibore.

[2] C. Gardiner, J. O' Learly, R.B. Welch, and N. Sand, *Sports Law*, Oxford, 2012, p. 210.

[3] R. Cloete, *Introduction to Sports Law in South Africa*, Durban, 2005.

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A number of jurisdictions in Africa have made legislation relating to sports and related activities. However, these laws mostly relate to regulating sporting activities rather than the development of sports due to the fact that majority of these laws are made in a bid to meet international obligations. They are therefore hardly customised to the various local interests.

This paper highlights some of the setbacks brought about by the system of sports law in Kenya that mirrors other African jurisdictions. At the end, the paper will propose legal reforms to curb the problems.

2. Most sport disciplines only developed in their current form in the 19th and 20th century, though many trace their origins from more primitive sports and pastimes of ancient times[4]. Sports bodies were started and later on international entities of sports were established[5].

At around 2000 BCE, Egypt had a number of sports and gradually laws and regulations were well-developed to regulate these sports[6]. Sports were first instituted formally in Greece in 1500 BCE and the first Olympic Games were recorded in 776 BCE in Olympia. A law was enacted to regulate the Olympics and ensure discipline among the participants[7].

The British people claim advancement of rules and regulations of different types of sports which were largely supported by the vast British Empire and were regulated from the onset. Through European colonialism, games spread around the world[8].

Legislative regulation in the modern world can be traced as far as in the 17th Century with the enactment of the Gambling Act in 1664.

[4] D. Mclean, A. Hurd, *Early History of Recreation and Leisure*, in *Kraus' Recreation and Leisure in Modern Society*, *Rev. Ed.*, Sudbury, MA, 2011, available at www.jblearning.com/samples/0763749591/49591_ch03_mclean.pdf, accessed on 25/8/2017.

[5] B. García, *From Regulation to Governance and Representation*: *agenda-setting and the EU involvement in sport*, in *Entertainment and Sports Law Journal*, 2007, 5, 1, p 12.

[6] P. Negi, *Ancient Egyptian Sport*, available at https://www.quora.com/What-do-we-know-about-popular-sport-games-in-ancient-Egypt (2014), accessed on 25/8/2017.

[7] *History of Sport*, Module Manual 2017, The Independent Institute of Education, available at https://portal.iie.ac.za/Student%20Manuals/HISP5111_History…Sport/…/STManual.pdf accessed on 25/8/2017.

[8] *Ibidem.*

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The English institutions devised rules and regulations which now began to be applied to the wider game, with governing bodies in England being set up for a number of sports[9]. By 1914, a number of legislations regulating sports were in operation in Britain[10]. The British codified rules began to spread across the world in the late 19th and early 20th centuries through colonialism[11].

The USA made her own legislation to govern sporting activities and by mid 20th century, it had achieved much[12].

At independence, the priority issues on which the Kenyan Government focused its attention were eradication of poverty, improvement of healthcare facilities and expansion of education. Sports were not seen as an instrument of state development but rather as a form of recreation, an activity for children in schools and not an activity with career prospects.

It took Kenya quite long to establish any legislation to specifically govern sports and even worse, to develop sports. The 21st Century has seen the country enact more legislation including the recent Sports Act[13] and the Anti-doping Act[14] which are more regulatory as opposed to promoting development of sports.

3. There has been in the recent past, a growing need to develop methods for determining the economic effects of legal decisions and an ability to understand the content and implication of proposed economic solutions to legal problems[15]. When Calvin Woodward noted that the law and economics had been separated, and it was high time that they were brought back together, he bestowed a duty on lawyers

[9] M. Donovan, G. Jones and K. Hardman, *Physical Education And Sport In England: Dualism, Partnership And Delivery Provision*, 2006, available at *https://hrcak.srce.hr/file/6627*, accessed on 25 August 2017.

[10] *Ibidem.*

[11] A. Vermeersch, *The Future EU Sports Policy: Hollow Words on Hallowed Ground*, in *The International Sports Law Journal*, 2009, p. 3.

[12] *The Age of Imperialism (1870-1914)*, available at *https://www.tamaqua.k12.pa.us/cms/lib07/PA01000119/.../TheAgeofImperialism.pdf*.

[13] *Sports Act*, Act No. 25 of 2013, Laws of Kenya.

[14] *Anti-Doping Act*, Act No. 5 of 2016, Laws of Kenya.

[15] C. Woodward, *The Limits of Legal Realism: An Historical Perspective*, in *Virginia L. Rev.*, 1968, 54, p. 689.

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to ensure that this was done in order to achieve the collective aspect of justice[16].

Richard Posner provides a survey of legal problems, and the general inter-relationship of legal and economic analysis. His analysis stems mainly from the fundamental postulates of neoclassical economics. According to him, an economic analysis of law demonstrates that the objective of the promotion of efficiency results in law satisfies the positivist criteria for law. Such a law is to operate on incentives, it is to have a rational structure, it must be public to be effective, and it requires fact-finding machinery. This theory is premised on two assumptions one being that markets operate very inequitably if left alone. The other assumption is that regulation of these markets by the government is virtually costless[17]. Posner bases his argument on two theories – the first one being the «public interest» theory. On this, economic regulation is supplied in response to the demand of the public for the correction of inefficient or inequitable market practices[18].

In this paper, we use the theory of economic analysis of law to measure the efficiency of sports legislation. The efficiency, for the purposes of this paper, is measured on the parameters of the development of sports as opposed to the mere use of governmental power to control sporting activities in a manner that may even have a negative impact on sports. Efficiency would be exhibited if a larger proportion of the populace is involved in sports and if sporting activities are beneficial to larger sections of the population.

4. – 4.1. – 4.1.1. The Constitution provides for promotion of sports and sports education as a function of the National Government[19]. The County Governments are in control of cultural activities including sports[20]. It has no express provisions on the development of sports.

[16] *Ibidem*, p. 739.

[17] R. Posner, *Economic Analysis of Law*, New York, 1973.

[18] Id., *Theories of Economic Regulation*, in *The Bell Journal of Economics and Management Science*, 1974, 5, 2, p. 335.

[19] Fourth Schedule, Part 1 (17) of the Constitution of Kenya, 2010.

[20] *Ibidem*, part 2 (4) (h).

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4.1.2. The main objective of this Act is to harness sports for development, encourage and promote drug-free sports and recreation. It also provides for the establishment of sports institutions, facilities, administration, management, and regulation of sports in the country among other related issues. Our thesis is that emphasis is heavy on administration and management and light on development.

4.1.3. This law was enacted to provide for the implementation of the United Nations Educational, Scientific and Cultural Organization Convention against Doping in Sport. It regulates sporting activities free from the use of prohibited substances and methods with the aim of protecting the health of athletes[21]. The Act also provides for the establishment and management of the Anti-Doping Agency, its powers, functions and management[22].

4.1.4. The main objective of this law is regulation of betting and gaming premises, the imposition and recovery of a tax on betting and gaming and for the authorization of public lotteries[23]. The law has no direct reference to sports.

In the recent past tremendous growth in the betting industry has had an impact on sports development. Many sports betting companies have come up including Sportpesa[24], Betin, and Betway, and have played a big role in the creation of awareness on sports to Kenyans.

Further, some of the sport betting companies have been involved in sponsorship of sports organisations as well as major leagues in the country. For instance, Sportpesa has sponsored a number of clubs, teams, and leagues in the East African region[25].

4.1.5. The main aim of International sports law (*Lex sportiva*) is

[21] Section 4 of the Anti-Doping Act, No. 5 of 2016.

[22] *Ibidem*, Section 5, 2A.

[23] Preamble, Betting Lotteries and Gaming Act, Cap. 131 Laws of Kenya.

[24] Bizna Reporter, *Sportpesa: A Trailblazing Sporting Success*, in *Bizna Kenya* (3rd August, 2016). Accessed at *https://biznakenya.com/sportspesa-a-trailblazing-sporting-success/*, on 28th August, 2017.

[25] I. Cynthia, *Sportpesa Pledges to Invest heavily in Development of Sports in Tanzania*, in *The Star*, 17th May, 2017. Accessed at *www.the-star.co.ke/news/2017/05/17/sportpesa-pledges-to-invest-heavily-in-development-of-sports-in_c1558073*, on 28th August, 2017.

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to prevent unfair treatment of athletes and clubs, specifically with regards to contractual disputes. Nafziger suggests that the three main areas that a fully developed body of *lex sportiva* could benefit Court of Arbitration for Sports (CAS) decisions are the efficiency of the legal process, the predictability of expectations, and the equal treatment of similarly situated parties[26].

One of the interests of the court is to develop a jurisprudence that can be used as a reference by all actors of world sport, thereby encouraging the harmonization of the judicial rules and principles applied within the sports world[27]. As the sports field grows in Africa, there is need to have a sports jurisprudence that is specific to African circumstances.

Most international sports organizations such as International Olympic Committee and Fédération Internationale de Football Association (FIFA) have acquired an international personality through customary practice which have a legislative function[28].

James Nafziger says that in international sports the Olympics, competitions are between individuals or teams and not countries. *Lex Sportiva* is therefore tailored around individual regulation and development of individual participants in sports[29]. The Olympic Charter sets out rules that enhance the development of both the sporting activities related to Olympics and the participants[30].

4.2. – 4.2.1. Among other things, it aims at the promotion of sports through formation and implementation of policies, programmes and projects for improved livelihood of the Kenyan people[31].

4.2.2. It is established under the Sports Act[32] Sports Kenyais man-

[26] J.A.R. Nafziger, *Lex Sportiva and Cas*, in *The Court of Arbitration for Sport 1984-2004*, eds. I. Blackshaw *et alii*, The Hague, 2006, p. 432.

[27] CAS 1998/200, *AEK Athens and SK Slavia Praha-footbal/UEFA*.

[28] D.P. Panagiotopoulos, *Lex Sportiva-Lex Olympica and International Sports Law*, in *Sports Law; Structures, Practice, Justice Sports Science and Studies*, Beijing-Athens, 2013, p. 25.

[29] J.A.R. Nafziger, *The Nationality Issue in International Sports Law*, in *Sports Law; Structures, Practice, Justice Sports Science and Studies*, Beijing-Athens, 2013, p. 32.

[30] *Ibidem.*

[31] *http://www.sportsculture.go.ke/, accessed on 25/8/2017.*

[32] Act No. 25 of 2013, Laws of Kenya.

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dated to promote, co-ordinate and implement grassroots, national and international sports programs for Kenyans, to manage and maintain the sports facilities. It also establishes, manages, develops and maintains the sports facilities, among other functions[33].

4.2.3. The Fund[34], managed by a Board of Trustees, consists of monies from all the proceeds of any sports lottery, investments and any other payments required by the Act. It also pays out financial support for sports persons and sports organisations and any other payments required under the Act[35]. The Fund is still young and has had no impact in Kenya.

4.2.4. The academy is established under Section 33 of the Sports Act and is managed by a Council. Its core functions include to establish and manage sports training academies, organize sports courses for technical and sports administration personnel, promote research and development of talent in sports, in collaboration with institutions of higher learning, national sports organisations and other stakeholders.

4.2.5. It is established under Section 55 of the Sports Act. The Tribunal determines appeals against decisions made by national sports organisations[36].

4.2.6. The Sports Act establishes the office of the Registrar of Sports for purposes of registration, licensing, and regulation of sports and related activities as well as organisations. The office also arbitrates registration disputes arising between sports organisations[37].

4.3. Sports practitioners all over the world have been able to generate enormous revenues from the exploitation of aspects of intellectual property rights[38].

[33] *Ibidem*, Section 4(a)(b)(c).
[34] Section 13 Sports Act, Act No. 25 of 2013, Laws of Kenya.
[35] *Ibidem.*
[36] Section 58, Sports Act, Act No. 25 of 2013, Laws of Kenya.
[37] Section 45, Sports Act, Act No. 25 of 2013, Laws of Kenya.
[38] Ugochukwu Johnson Amadi, *Intellectual Property Rights in Sports: A Trick or*

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Trademarks are utilized in sports to protect the jerseys worn by their individual teams and other items that may be associated with or bear the trademark or logos[39].

In the promotion and marketing of sporting events and/or competitions copyright is inadvertently created. The artistic designs and the literature contained in promotional literature for sports events are subject matter of copyright[40].

Patents have been varyingly awarded for sporting equipment and kits[41].

Personality rights are used to protect individual's name, image, likeness, unique personality traits and/or any other aspect relating to his/her personal identity of sportspersons[42].

4.4. Kenyan laws are more focused in regulation. The legal regime, however, pays little attention to development of the same.

Sports are incorporated into the education system only for recreational purposes. They are undertaken after the conventional. This happens only two to three days a week. Further, competitive sporting activities in learning institutions are placed second to curricular activities.

The establishment of the Kenya Academy of Sports was intended to farther development of sports. It has, however, failed to achieve its goals as it was not launched until 2015, despite the Act establishing it being enacted in 2013[43].

Lack of motivation is another major setback to development of sports in Kenya. Kenyan sportspersons are paid way less than their counterparts from other countries. This has seen a rampant case of athletes renouncing their Kenyan citizenships for those of other countries for financial reasons. The law is yet to address this problem.

*Two Nigeria Can Learn from the Global Game*, in *African Sports Law and Business Bulletin*, 2017, 1, p. 1.

[39] *Ibidem*, p. 3.

[40] *Ibidem*.

[41] *Ibidem*, p. 6.

[42] *Ibidem*, p. 7.

[43] Muigai Kiguru, *Cabinet Secretary Wario Launches Kenya Academy of Sports*, in *The Star*, (24th January, 2015). Accessed at *www.the-star.co.ke/news/2015/01/24/cabinet-secretary-wario-launches-kenya-academy-of-sports_c1072301*, on 27th August, 2017.

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A conducive environment is always important in the quest to develop all aspects of a society. The hefty taxes imposed on betting institutions in the recent past have hindered the development of sports in Kenya[44].

5. – 5.1. Having hosted several international sports, South Africa embarked on developing its legal framework to back these successes[45]. The implication is that there is a legal basis upon which the initiative of promoting and developing sport and recreation and the coordination of the relationships between relevant agencies can be carried out. Roles are clearly mapped out and funding can be properly channelled. Sports disputes are settled by Department for Sport and Recreation[46].

There is a shortage of laws on sports development in Nigeria. The federal laws which have a bearing on sport are the National Institute for Sports Act[47] which establishes the National Institute for Sports which ensures advanced learning in specialized areas of sport development. The Nigeria Football Association Act[48] is elaborate on sports development, but it is only limited to football.

The above framework is deficient because it does not develop a statutory body with a primary duty of sports development and it does not provide a mechanism for dispute resolution[49].

5.2. Most sports codes prescribe in their regulations that disputes be resolved. Arbitration brings in the aspect of expertise when determining sports disputes. However, parties are required to include an arbitration clause in their specific contracts to have their disputes

[44] D. Kuwalimwa, *Sportpesa to Withdraw Sports Sponsorships in 2018*, in the *Daily Nation* (Friday 23rd June, 2017). Accessed at www.nation.co.ke/sports/football/SportPesa-to-withdraw-sports-sponsorship-in-2018/1102-3983722-uablgyz/index.html, on 28th August, 2017.

[45] K. Omuojine Esq., *The legal Framework for Sports Development in Nigeria*, in *African Sports Law and Business Bulletin*, 2013, 1, 2.

[46] J.A.R. Nafziger, *Lex Sportiva and Cas*, cit.

[47] Cap. N52, Vol. 14, Laws of the Federation of Nigeria 2004.

[48] Cap. N110, Vol. 12, Laws of the Federation of Nigeria 2004.

[49] K. Omuojine Esq., *The legal Framework for Sports Development in Nigeria*, cit.

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resolved through ADR the failure of which parties can still take their matters to court[50].

It is therefore incumbent upon the sports organisations in Africa to ensure that all their disputes are referred to a tribunal so as to enhance sports development.

6. – 6.1. Sports laws in Europe focus on regulation and development and commercialisation of media rights[51]. The European Union (EU) has worked towards establishing a sound legal regional law on sports. It has made strides in aligning the sports policy in Europe.

The EU has antitrust rules which are useful in determination of sport disputes. The antitrust rules prohibit anti-competitive agreements and practices[52].

Further, it has enacted legislation on Sports betting regulation whose aim is not to forbid sports betting, but rather to monitor its availability to the general public and generally aims at public protection[53].

There is the Anti-Doping Regulations whose aim is combating doping in recreational sport for participants in the member states. The Free Movement Policy allows sports people and goods for sporting purpose to move freely within the EU member states. There is also a policy on innovation and excellence in sports. There is a legislation which encourages physical and sporting activities among children. Finally there is the legislation on fighting against hooliganism which promotes sustainable and peaceful sports among other development based legislations[54].

The European Union legal regime therefore focuses more on de-

[50] *Xxcel Africa Limited T/A Mathare United Football Club (MUFC) v Kenyan Premier League Limited (KPL) & another* [2017].

[51] Keane Legal Website, *European Sports Law*, accessed at *www.keanelegal.com/european-sports-law-2/*, on 26th August, 2017.

[52] A. Vermeersch, *The Future EU Sports Policy*, cit., p. 3.

[53] M. Kedzior, *Sports Betting in the European Union*, in *Sports Law; Structures, Practice, Justice Sports Science and Studies*, cit., p. 186.

[54] Summaries of EU Legislation on Sports, available at *http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=legissum:150601_1*, accessed on 28th August, 2017.

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veloping sports within the member states rather that just mere regulation[55].

6.2. The USA sports laws encompass both the amateur and professional sports focusing more on development of sports in addition to regulation[56]. The Amateur Sports Act of 1978 guarantees due process and fairness for athletes. This ensures that the rights of the athletes are duly protected against exploitation by institutions[57].

It has enacted laws and by-laws in regards to the areas of ethical conduct, amateur eligibility, financial aid, recruitment, gender equity, championship events, and academic standards.

6.3. In Germany, the Constitution and the Civil Law stipulate that the citizens have the right to participate in sports competitions. It has developed its own sports regulations which encourage people to participate in national and international competitions through sponsorship and promotion[58]. There are also tax exemptions for non-profit sport organisations and this is an incentive for more participation in sports[59].

7. – 7.1. Each country should have a legal framework that governs sporting activities. The statute should establish independent organization that manage, coordinate and develop sports in the country. It should not only focus on the regulation of sports but also its development. Further, there is need to have a sports tribunal in every country. It is also important to have a provision that requires all parties to refer their disputes to arbitration.

7.2. This paper proposes a legal framework which promotes a sport culture. This could be done by way of giving broad access to

[55] *https://www.coe.int/t/…/6720-0-ID8704-Autonomy%20of%20sport%20assemble.pdf*, accessed on 25th August 2017.

[56] A. Gurovits, *The Sports Law Review*, 2016, available at *www.pinheironeto.com.br/Documents/Artigos/TheSportsLawReview_2ed.pdf*, accessed on 25th August 2017.

[57] The Amateur Sports Act of 1978.

[58] C. Alex, *Sports Law in Germany*, 2016, available at *https://www.lawyersgermany.com/sports-law-in-germany*, accessed on 25th August 2017.

[59] *Ibidem.*

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sports through community-based, parent-supported sports leagues for young children as in America and India[60].

7.3. It is important to improve infrastructure by increasing the number of facilities and increase the accessibility and quality of the existing infrastructure[61]. A simple tournament is not completely effective but having well organized and consistent competitions over a long period of time will allow for better development and talent spotting[62].

7.4. Reforms to accommodate sporting activities in a way that does not interfere with the learning in schools should be developed[63].

7.5. There is an acute shortage of sports law professionals in Africa because those that practice sports law do so either as a very insignificant part of their practice or just as a way of social responsibility.

8. It is evident that the Kenyan legal regime has made efforts to legislate on sports. A number of laws have been enacted and reformed to this effect. Legal mechanisms have been put in place to try and establish, and manage sports, sports persons, sports organisations, as well as other related sporting activities. All this has been done in an attempt to comply with the international obligations.

Unfortunately, the laws made have paid attention only to regulation. The development aspect has been neglected.

Sports are an essential part of any society. Therefore, development of sports translates into the general development of the social and

[60] *https://www.quora.com/How-can-the-sporting-culture-in-India-can-be-improved-what-are-some-innovative-measures-that-can-be-done-to-make-India-a-giant-in-sports-as-well*, accessed on 25th August 2017.

[61] Sidbreakball, *10 ideas for improving standard of sports in India* (18th January 2013), available on *www.sportskeeda.com/general sports/10-ideas-for-improving-standard-of-sports-in-india*, accessed on 25th August 2017.

[62] *Ibidem.*

[63] T. Mutegi, *Factors Affecting Coverage of Syllabus in Secondary Schools In Kenya: A Case Study of Lang'ata District Schools in Nairobi County*, Dissertation, Management University Of Africa, 2014.

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economic aspects of the society. It is important that African countries pay more attention to development, alongside regulation, as they develop their sports legal regime.

Njaramba Gichuki

*Abstract*

Sports Law (and its jurisprudential basis) is not well developed in Africa. There has been the enactment of sports legislation in various African countries in the last decade but mainly to meet certain international obligations. The laws tend to mainly buttress the role of the state in the regulation of sporting activities without necessarily enabling the development of sports (and sports law).

The lack of a developed sports law regime hinders the practice of sports law nationally and the participation of African lawyers in international sports disputes resolution. This, in turn, impacts negatively on the general development of sports. This necessitates the re-examination of the relevant legislation and practice matters.

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# The Principles of Non-Criminal Liability Caused by Sport Activities in Iran

SUMMARY: 1. Introduction. – 2. The Terms of Non-Criminal Liabilities of Sport Accidents. – 3. The Principle for Perceiving Accidents Caused by Sport as no crime. - 3.1. The Lack of *Mens Rea* (Guilty Intent). - 3.2. Victim Consent. - 3.3. Permissions of Law – Custom. – 4. Conclusion.

1. The chronology of approving laws on sport accidents in Iran implies that there was no law before 1973 and judges, in the case of accidents caused by sport activities, decided according to criminal law and their own perception of these existing law and in some cases, they enforced intense punishments against athletes. While, Iranian courts perceived behaviors as crimes which were not opposed to the ethics and this perception was in contrary to sport purpose.

In 1973, the legislator focused on social realities and sport which was supported by the general public. In the Penal Code, does not consider accidents caused by sport activities as crimes provided that the sport regulations were not violated.

2. Accidents caused by sport activities are not perceived as crimes, if the sport regulations are observed. Athletes activities are perceived as sport activities, if:

1-1- They are acted by athletes.

1-2- They are acted during sport activities.

1-3- That activity, according to the sport, is a part of sport activities.

1-4- The sport is recognized.

3. To enforce a punishment, it is obligatory to establish a crimi-

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nal liability, but, sometimes, for the legislator, based on interests, committing some acts does not establish criminal liabilities.

In this case, the external factors, if there are, result in justifying an act by the legislator which is perceived by law as crimes.

Causes that make the lack of criminal liability are principally different such as the self-defense and sport, that make the lack of criminal liability of the perpetrator.

The question is what is the main reason for perceiving accidents caused by sport activities as no crime? To justify the principles for perceiving injuries caused by sport activities as no crimes, several reasons can be expressed:

3.1. *Mens rea* (guilty Intent) is «awareness of committing an act, which the legislator has commanded or forbidden, by a perpetrator». Someone has attempted to perceive accidents caused by sport activities as unpunishable ones in terms of the lack of guilty intent. It was posed, in 1912, in a French court. According the governing body opinion, common type of crime, battery which is punishable through criminal law, is derived from a revenge feeling. If a fighter, during a match, is devoid of such a feeling (Abdul Hossein Aliabadi, *Criminal Law and Adaptive Criminal Law*, vol. 1, p. 251), this theory can be criticized as such, however, an athlete may lack of a revenge feeling at first, but, we see that players, in practice, especially if they feel to defeat, they change their own fighting methods and they, intentionally, inflict battery. On the other hand, perpetrator knows her/his act correctly and completely. Fighters, from the begging, knows, they, with pass starting, inflict batteries each other and that they do not want to revenge each other has no effect on the act.

3.2. It, sometimes, may happen that a victim, at will and through different motives, accepts to suffer an act which is considered by law as a crime.

In this case, is the perpetrator liable? In this case, there is a general principle «a victim consent is not effective in crimes such as murder and battery which hit life, health and integrity and does not justify the persons' criminal act or criminal omission an act» (Houshang Shambiati, *The General Criminal Law*, vol. 1).

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Caradoso, as an American lawyer, in this regard, said: «a coward can stay at home».

In fact, a person who defeat in sport activities, cannot principally object harmful results have been resulted within the framework of regulations. In this regard, the court of Oregon, in 1962, had judged that: «football is a sport with physical battles. It demands players' continuous and frequent battles with even more power. […] Physical battles, bruises and fractures are inevitable accidents of football match. Players should accept the risk of assaults, fractures and injuries with consent (Walter Jr. Champion, *Principles of Sports Law*, p. 19). The French law affirmed the principle of a victim consent ineffectiveness in order to protecting national interests (Abdul Hossein Aliabadi, *ibidem*, p. 247).

Also, professor Demog believes that a fighter who commit an act or a process, can be acquitted by a victim consent (*ibidem*, p. 251).

Some other lawyers, to justify accidents caused by sport activities, have still cited to consent and do not consider such activities as crimes through four conditions:

A: The community (custom) recognized these sports.

B: They are played by mutual consent.

C: There are no intent of battery and murder.

D: All regulations of a sport have been observed.

These comments have been criticized:

Firstly: Not only an individual but also a community have been injured by a crime and when a crime occurred, a community is the main injured not a victim. Thus, a victim consent has principally no effect on a guilt and cannot be accepted as one of the causes of legitimacy. In matches and sports, whenever one of the participants violated the rules of match or sport, and this caused to injure one another, she/he is liable and guilty and she/he will get a legal punishment sentence (Mohammad Baheri, *The General Criminal Law*, p. 254).

Secondly: «A victim consent is not established» (Reza Noorbaha, *The General Criminal Law*, p. 230).

Thirdly: As it is mentioned: «A victim consent has no effect on the nature of a crime, except in exceptional cases (Mohammad Ali Ardabili, *The General Criminal Law*, p. 74).

Waber, also, has stated that the above focus is not acceptable re-

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garding the legitimacy of fighting disputes. Because, it considers a victim consent ineffective whether a committed crime is light or heavy (Abdul Hossein Aliabadi, *ibidem*, p. 251).

Nevertheless, unlike Oregon supreme court dictum, participating in a football match which necessarily entails physical battles does not mean to be consent with battles which are forbidden according to that sport regulations.

3.3. The real reason for no punishing athletes who commit batteries during these sports and through sport activities is legal permission. Law and custom which prescribe and even encourage violent sports, thus, it has permitted assaults and some of them.

Indisputable law and custom have permitted such sports, but when they encourage them, it is because of preserving national interest which has made them legitimate.

4. How to acquit in sport exercises is based on legal permission not on a victim consent. The Iranian Penal Code, through complying the Constitution which considers sport as one of the most principal means for educating an eminent human with transcendent human values and free and liable human, does not consider accidents caused by sport activities as crimes.

Of course, it is depended on that athletes do not intent to inflict battery or murder and in addition, they observed all regulations of a specific sport.

NADER SHOKRI

*Abstract*

In Iran legal system, according to the article 158 in the Islamic Penal Code of Iran approved 2013, sport activities and accidents caused by them are not considered as crimes, provided that the causes of the accidents do not include the sport regulations violations and these regulations are not contrary to the Islamic law.

Given the above legal clause, this question is raised: Is the non-criminal liability conceived as justificatory reasons and excusatory conditions of criminal liability? Why liability is excused, if there is any of the above? In the other words, in this paper, it is attempted to say that which characteristics

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this sport has, in which the legislator has not considered it as a crime in the Islamic Penal Code of Iran?

Justificatory reasons of a crime are the external factors that cause the legislator, no longer, describes a criminal act as criminal and indeed, legitimize it. While, excusatory conditions of criminal liability are internal factors which excuse criminal liability by maintaining criminal description and complete fulfilment of a crime due to certain conditions of a perpetrator of a crime.

Liabilities of accidents caused by sport activities apply to justificatory reasons and athlete, if there are provisions in the law, has not liability, if a crime occurs.

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# Sports Right
# How to Write into PRC Sport Law[1]

SUMMARY: 1. Introduction. – 2. Sports Rights Writing into Sports Law: Mode and Choice. - 2.1. The National Fitness Regulations Model. - 2.2. The International Sports Charter Model. - 2.3. The States Constitutional Model. - 2.4. The States Sports Law Model. – 3. Sports rights written into PRC sport law: Assessment and Choice. – 4. Conclusion and suggestion.

1. Sports right is a fundamental right of human beings, however, this has not yet been clearly recognized in Chinese legislation.

– Recently, the revision work of «the Sport Law of People's Republic of China» is in full swing, how to write sports rights to this law, as undoubtedly an important task.

2. – 2.1. In 2009, China's «National Fitness Regulations» provides that «citizens have the right to participate in national fitness activities in accordance with the law. Local people's governments at all levels shall ensure the right of citizens to participate in national fitness activities according to law».

– It made a useful exploration of the model how write the sports right to China law. Accordingly, the following aspects of concern:

– Firstly, from the right subject, this article is limited to «citizens», legal persons (including countries) and other organizations are not included.

– Secondly, from the point of the right fulfill condition, this article give a restriction of «according to the law».

– Thirdly, from the nature of the content of the right, this article

[1] From Powerpoint.

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provides that citizens enjoy the 'participation' of the national fitness activities, that is, the right to participate in fitness activities.

Finally, from the object of rights, this article provides that citizens enjoy the right to participate in 'national fitness' activities. If the legislation is to increase the point of view of physical activity, I agree with the expression of sports fitness.

2.2. European Sport for All Charter: Article 1: Every individual shall have the right to participate in sport.

– International Charter of Physical Education, Physical Activity and Sport: Article 1 – The practice of physical education, physical activity and sport is a fundamental right for all.

– Olympic Charter: The practice of sport is a human right is one of the Fundamental Principles of Olympism.

– While, international documents provide a good model for the normative expression of sports rights.

– One of the essential conditions for the effective exercise of human rights is that everyone should be free to develop and preserve his or her physical, intellectual and moral powers, and that access to physical education, physical activity and sport should consequently be assured and guaranteed for all human beings.

2.3. This research has gathered of 192 UN members' constitution or basic laws, we found out that there are 74 constitutions include sports provision.

– The popular model of sport provision of constitution is general set the state obligation of encourage, support, promote the sport development.

– The especially thing is sport as a right have been confirmed by 41 countries.

– Specifically related to family education, sports facilities, sports news reports, health protection, economic support, tax incentives, special groups of special protection and so on.

2.4. The study found that more than 70 countries around the world have developed special legislation on sports, has collected 42 sports law text, found that 25 from them have a special article on the «sports rights» or «right relate to sports».

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– In these sports law, around the type, scope, content, relationship and so on of sports right have their own style, the provisions of sports right are crazy grow like the mushrooming after the rain.
– These all kinds of sports rights, is bound to bring a variety of interests for the participants of sports, and ultimately will promote the development of national sports.
– Obviously, it is not the name, attitude, but the face to the problem and practice, to solve the sports problem of strategy and methods.
– Perhaps the full text does not have a sports rights of the word sports law text, but everywhere full of various sports rights and protection. This fact does exist and is happening.

3. After a detailed reference and comparative analysis of the four patterns of the law provision of sports rights, we can finally evaluate and choose these four models, and assessed such options whether suitable for PRC Sport Law.

Table 1 - *The Assessment of Sports Rights write into Sports Law*

| | **Option1** Model of NFR | **Option2** Model of ISC | **Option** Model of SC | **Option** Model of SSL |
|---|---|---|---|---|
| Coherence | Laws and regulations can be consistent | Consistent with international treaties, no domestic law reference | The presumed rights will be consistent with the 1995 Sports Law | Lack of consistency |
| Risks | Can not accommodate most of the content of sports rights, not yet out of date. | Easy to and international regulations, practice convergence; has 30 years of experience in the implementation of reference, to avoid detours. | Ignoring the needs of sports practice may make the law a void. | Widely defined sports rights, may be repeated or conflict with other laws; generalization of sports rights, from the social and economic reality. |
| Cost | Repeat the specified indirect costs | Limited research, conference and demonstration costs | Loss of opportunity cost | Limited research, conference and demonstration costs |
| Overall Assessment | Not a viable option | Right choice | Second best | Not a viable option |

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– The research indicates that the clause about fitness right in *The National Fitness Regulations* narrow the subject, scope and object of the rights, distort the origin and foundation of the right.

– The right provision in The International Charter of Physical Education, physical activity and Sport supply the practice demand, many international sports organization documents adopt this pattern, include IOC.

– Many state's constitutional law confirmed sports right mainly by the presumption way, it is the same way to the current PRC Sports Law.

– Many state's Sports Law list a series of sports right, obviously, it is depart from the actual situation in China.

4. Through writing the terms of the sports rights into the law, set series requirements and obligations of the state, to protect the rights of people or citizens.

– Now the situation is not optimistic, from the national standpoint, the protection of sports rights is still mainly flexible.

– It is certain that, by recognizing that sport is part of human or civil rights, it enhances the visibility of sport in law and decision making, and the right to sport has gained greater social attention.

– Finally, this study suggests *The PRC Sports Law* can set an article as the following: Everyone has the right access to physical education and sports. The state guarantee human's sports right in accordance with the law.

Thank you.

HUA-RONG CHEN

*Abstract*

If sport is part of human or civil rights, it enhances the visibility of sport in law and decision making. The right to sport has gained greater social attention and the problem is how write the sports right in Chinese legislation where Sports right has not yet been clearly recognized. The author suggests that *the PRC Sports Law* can set the following article: "Everyone has the right access to physical education and sports. The state guarantee human's sports right in accordance with the law".

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# Latvian Sports Law: Role of Sports Federation Council of Latviain achieving the objectives of 'Sporta likums'

SUMMARY: 1. Introduction. – 2. The structure and objectives. – 3. The main functions. – 4. Conclusion.

1. The objective of Latvian Sports Law «Sporta likums» (hereinafter referred to as "Sports Act") is to specify the general and legal basis for sports organization and development, mutual relationship of sports organizations, State and local government institutions and basic tasks in sports development, and the basis for the financing of sport, as well as the principles that shall be observed when taking part in the international sports movement. Sports Act names several stakeholders that are taking part in pursuing stated goals. One of them is «Latvijas Sporta feder,ciju padome» (hereinafter referred to as «Sports Federation Council of Latvia»), an independent sports association of 88 sports federations recognized by the regulatory enactments of the Republic of Latvia.

According to the article 10 (6) of Sports Act the activities of the sports federations recognized by Latvia shall be coordinated, their shared interests represented and implemented by Sports Federation Council of Latvia.

A decision regarding the recognition of a sports federation, refusal to recognize it or a decision regarding withdrawal of the status of a sports federation shall be also taken by the Sports Federation Council of Latvia, where the procedure for the recognition of a sports federation shall be determined by the Cabinet of Ministers[1]. Also Sports Act states that Sports Federation Council of Latvia shall

[1] Sporta likums. Article 10.[1] (2) *https://likumi.lv/ta/id/68294-sporta-likums*, accessed 25th August 2017.

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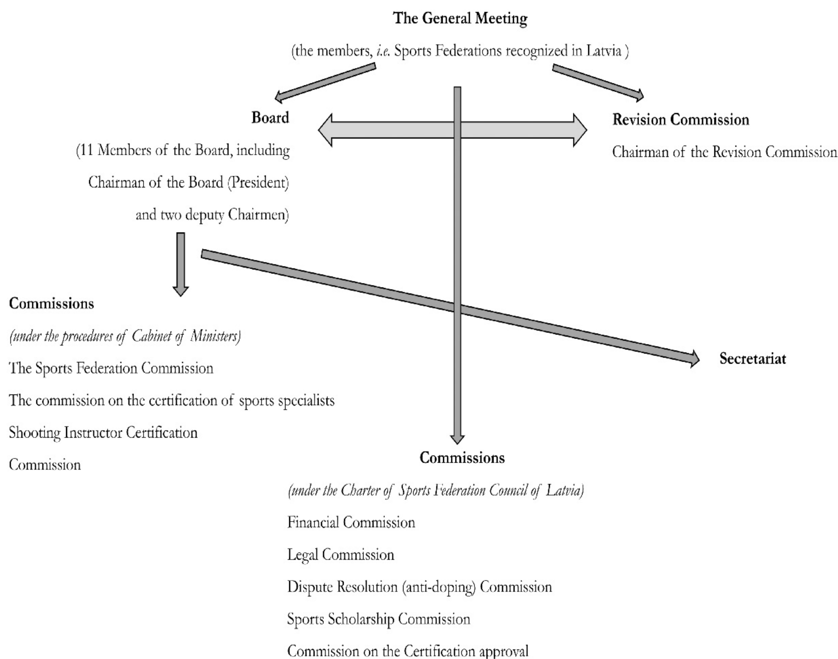
control the field of activity of the recognized sports federations and shall be entitled to issue administrative provisions (administrative act).

The aim of the article is to examine the association Sports Federation Council of Latvia and to analyse its role in reaching the objectives and goals proclaimed in Sports Act, its functions and importance for the Latvian sports law.

2. Being an independent association of recognized under the Latvian law Sport Federations since March 24, 1992, Sports Federations Council of Latvia has its own logo-

Sketchily the structure of Sports Federation Council of Latvia can be reflected as follows:

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3. In order to fulfil the very first goal stated in the Charter of the Sports Federation Council of Latvia, the work of the association has to comply with Latvian law on the recognition of sports federations.

According to the article 10 (3) of Sports Act a sports federation is an association, which is composed of sports clubs and other legal persons the work of which is associated with a specific type of sport or field of activities, and the purpose of which is to manage and coordinate the work in the relevant type of sport or field of activities, as well as to represent such type of sport or field of activities in the relevant international sports organisations. A sports federation may represent several types of sport or fields of activities.

For the comparison, Latvian neighbour Lithuania also has included a definition of a sports federation in the article 26 of Republic of Lithuania Law on Physical Education and Sport which is considered to be more general and abstract: «Sport (sport branch) federation means a non-governmental sports organization that takes care of the development of a sport within a certain territory (a city, country, continent, world) or sport-related activities (sports medicine, sports journalism, *etc.*)».

Article 10.[1] of Sports Act sets the criteria and procedures for the recognition of Sports Federations under which a sports federation shall be recognised if it meets the following criteria:

1) the objective of activity specified in the statutes of the sports federation is the development of the relevant type of sport (the relevant types of sport) or the field of activity in the State;

2) sports competitions are organised in the type of sport represented (types of sports represented) by the sports federation or in the field of activity thereof;

3) the term of office of the executive body specified in the statutes of the sports federation does not exceed four years;

4) the members of the sports federation are only legal persons;

5) the head of the sports federation is a citizen of the Republic of Latvia;

6) merchants in the sports federation form not more than a half of the total number of the members of the sports federation;

7) the sports federation observes the requirements of anti-doping in the activity thereof; and

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8) the information regarding the sports federation and the events organised by it is available on the Internet.

As it was stated above, Sports Federation Council of Latvia, based on the procedures for the recognition of a sports federation laid down by the Cabinet of Ministers (executive power in Latvia), shall make a decision regarding the recognition of a sports federation, refusal to recognise it or a decision regarding withdrawal of the status of a sports federation. Sports Act empowers Sports Federation Council of Latvia to issue administrative provisions (administrative act[2]) in order to fulfil these specific tasks. Appeal of a decision regarding the recognition of a sports federation, refusal to recognise it, or a decision regarding withdrawal of the status of the recognised sports federation does not suspend the operation thereof.

Sports Federation Council of Latvia also holds and manages the register of the recognized sports federations, whereas the content of the information to be included in the register of recognised sports federations and procedures for updating thereof is determined by the Cabinet of Ministers.

The field of activity of the recognised sports federations shall also be controlled by Sports Federation Council of Latvia according to the specified procedures of the Cabinet of Ministers.

The procedures of the Cabinet of Ministers mentioned through the text and issued pursuant to the article 10.[1] (2) (3) (4) of the Sports Act where adopted on December 8, 2009 and are named as follows: Regulation No. 1396, Procedures for the Recognition of Sports Federations and the Control of the Recognised Sports Federations (hereinafter «Regulation»).

Regulation prescribes:

1) the procedures for the recognition of sports federations;

2) the procedures for the control of the activity in the field of sports of the recognised sports federations; and

3) the content of the information to be included in the Register of Sports Federations and the procedures for updating thereof.

[2] According to Section 1 (3) of Administrative Procedure Law an administrative act is a legal instrument directed externally, which is issued by an institution in an area of public law with regard to an individually indicated person or individually indicated persons establishing, altering, determining or terminating specific legal relations or determining an actual situation.

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According to the article 10 of the Regulation, if the sports federation is recognised, the Sports Federation Council of Latvia shall issue a Sports Federation Recognition Certificate to the relevant sports federation. Whereas, a decision regarding refusal to recognise a sports federation shall be taken if:

– a sports federation has already been recognised in the relevant type of sports or field of activity;

– the sports federation does not comply with the criteria for the recognition of a sports federation specified in the Sports Act;

– the sports federation has not submitted the updated information within 10 working days after receipt of the request to do so;

– the Board of the Sports Federation Council of Latvia has taken a decision regarding recognition of one sports federation in the case where several sports federations have submitted a submission regarding the recognition in one type of sports or field of activity, in which a sports federation has not been recognised yet. In this case the Sports Federation Commission shall provide a substantiated opinion indicating the considerations of suitability.

4. Based on the stated above, author concludes that Sports Federation Council of Latvia is one of the most important sport bodies in the country. It carries out crucial administrative functions in order to implement the goals and objectives stated in the Sports Act. Being a first step on the way of the creation and development of new sport federations and monitoring the activity of already recognized sport federations, it contributes to the development of Latvian sport. As far as all the main procedures which Sports Federation Council of Latvia adheres to are prescribed by the Cabinet of Ministers, author presumes that it can be characterized as an executive body. Although it should be mentioned that a separate body with such functions is not something very original, as according to article 15 of already mentioned Lithuanian Law on Physical Education and Sport, the recognition of national and regional (sport branch) federations is given to governmental organization named The Department of Physical Education and Sports. But author does not undertake to assert that these two organizations are identical in functions and structure.

MARINA KAMENECKA-USOVA

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*Abstract*

The objective of Latvian Sporta likums (hereinafter referred to as «Sports Act») is to specify the general and legal basis for sports organization and development, mutual relationship of sports organizations, State and local government institutions and basic tasks in sports development, and the basis for the financing of sport, as well as the principles that shall be observed when taking part in the international sports movement. Sports Act names several stakeholders that are taking part in pursuing stated goals. One of them is «Latvijas Sporta feder,ciju padome» (hereinafter referred to as «Sports Federation Council of Latvia»), an independent sports association of 88 sports federations recognized by the regulatory enactments of the Republic of Latvia.

According to the article 10 (6) of Sports Act the activities of the sports federations recognized by Latvia shall be coordinated, their shared interests represented and implemented by Sports Federation Council of Latvia. A decision regarding the recognition of a sports federation, refusal to recognize it or a decision regarding withdrawal of the status of a sports federation shall be also taken by the Sports Federation Council of Latvia, where the procedure for the recognition of a sports federation shall be determined by the Cabinet of Ministers. Also Sports Act states that Sports Federation Council of Latvia shall control the field of activity of the recognized sports federations and shall be entitled to issue administrative provisions.

The aim of the expected article is to analyze the role of Sports Federation Council of Latvia in reaching the objectives and goals proclaimed in Sports Act, its functions and importance for the Latvian sports law.

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# Obstacles and legal strategies of sports marketing development in Iran

SUMMARY: 1. Explanation of the relationship between law and marketing mix. – 2. Literature review. – 3. The Purpose of the Study. - 3.1. The Secondary Purposes. - 3.2. The Significance of the Study. – 4. The Research Methodology. – 5. Population and Statistical Sample. – 6. Data Analysis Method. – 7. Research findings. – 8. Discussion and conclusion.

1. The four elements of marketing lead to supplying the needs and requests of consumers and can be as a mixture, too. However, for achieving the marketing goals, these elements should be fully coordinated with each other. It is clear that planning for any of these components should be within the framework of the law. For example, deceptive selling techniques such as dumping may have short-term benefits but it won't continue in long-term and should be within the framework of the law. The deal sides should be committed to their commitments before, during and after selling. Of course, there should be an obligatory mechanism for maintaining the competitive power. Regarding the points mentioned, in this research, we will examine the legal obstacles and solutions for development of sport marketing in Iran.

Now, what is considered as sport marketing in Iranian sport society is limited to ticket selling, the sponsors support of some football clubs and to some extent, the small amount of TV broadcasting right. Examining the current conditions show that the marketing activities in Iranian sport industry is not paid much attention. The researches on this area emphasizes on the creation of powerful and specialized marketing committees across federations, league organization and clubs and compilation of marketing plans in the committees.

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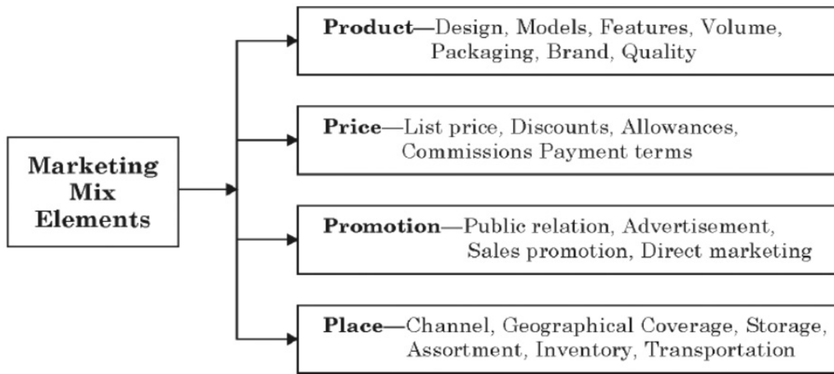
Figure 1 - *Marketing Mix*




2. Now, in developed countries, sport is regarded as an important industry and an effective factor on the development of national economy and as one of the biggest and revenue generating industries of 21st century. Asgarian (2010) points out that following the investment in sport, direct and indirect employment rate rises and this leads to an increase in tourist attraction and physical and mental health of society trough holing international competitions. Also, according to the findings of other researches, physical infrastructures and investments in this area has a positive relation with sport economy. Also, E. Khosravi Zadeh *et alii*[1] have found a mutual relation with sport and economic structures so that economic and social development affects the promotion and development of sport across the society and paying enough attention to physical education and sport in basic, public and athletic levels is an important factor in employing healthy and happy human resources and as a result, economic and social flourishing. Investment is a very important and pervasive issue in which the capital goods are used in production of other goods and services. Mullajafari points out that many people in some societies consider sport as consumer good and they ignore its importance in production and

[1] E. KHOSRAVI ZADEH, A. BAHRAMI and A. AQEDADI, *Barriers to Investment and Private Participation in Sports in Markazi Province*, in *Sports Management Studies*, 2014, 24, p. 207 s.

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economic growth and development and better distribution of revenues[2]. The main obstacle of investment in sport sector of countries is that the returnable benefits of this investment are not observed directly. Having a positive attitude toward sport and related affairs will provide them with profuse benefits directly and indirectly. Salari states that and effective way for development of sport is sport marketing[3]. Federations and sport organizations should act like business organizations. Therefore, if the sport federations don't have income will face with difficulties in their path. Elahi (2008) showed that the obstacles of economic development in Iranian football industry includes investment and financial support, related institutions, government supports, supporters, media broadcasting, human resource, sport spaces and facilities, legal, scientific and research[4]. Moradi Chaleshteri *et alii*[5] classified the effective structural obstacles of foreign investor attraction in 6 categories which include: economic variables, legal, managerial-human resources, marketing report, encourage-support and cultural-social and there was a positive and meaningful relationship between these factors and foreign investor attraction. Regarding the economic obstacles, the findings of Moradi research show that the obstacle such as a strongly governmental structure, highness of investment risk, small size of the market, introversion and not having interaction with global markets in the country's economy have imposed a strong obstacle against foreign investor attraction in the economic structure on the country and its industries such as football industry. In terms of legal factors, the findings showed that the articles 81 and 139 of Constitution, the existence of legal paradoxes, and the existence of legal obstacles of Principle 44 in this area such as the con-

[2] A. Mullajafari, *Consideration of the role of the transfer of public sports facilities to the private sector on the development of sport in Tehran Province in pursuance of Article* 88, Master's thesis, Payam Noor University, Faculty of Humanities, 2011.

[3] M. Salari, *Effective factors on private sector investment in sports facilities construction in Kerman*, Master's thesis, Urmia University, Faculty of Physical Education and Sport Science, 2012.

[4] L. Simkin, *Barriers impeding effective implementation of marketing plans - a training agenda*, in *Journal of Business & Industrial Marketing*, 2002, 17, 1, p. 8 s.

[5] J. Moradi Chalesteri, M.R. Moradi, N.Q. Soheila, Norouzian Qahfarhi and M. Jamali Gole, *Investigating structural barriers affecting the attraction of foreign investment in the Islamic Republic of Iran football industry*, Research on *Sport Management and Motor Behavior*, 2016, 3, 2, p. 191 s.

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flicts in the law of encouraging and supporting the foreign investors have caused football industry among other industries not to be benefitted from the increasing effects of foreign investments. Saatchian & Elahi (2014) say that marketing obstacles of attraction and development of football supporters are public relations, insufficient advertisement in media, insufficient festivals, ceremonies, conferences and press programs, inexistence of support laws in this area, (space component) not having exclusive stadium, inappropriate welfare facilities, low capacity of the stadiums, inappropriate social environment, (pricing components) equal pricing, no discount, predictability of competitions and a fix rate for all of the games, (distribution channel component) difficulty of ticket availability, inappropriate sport calendar, inappropriate temporal programming, (market powers component) governmentality of clubs, not assigning the clubs shares to supporters, not selling the tickets online, (the component of product, quality and process) weakness of teams, low technical quality, no presence of women, low rate of significant coaches and players presence.

Mohammad Kazemi[6] stated that in the product agent, the transfer of premier League's equities; in the component of the location, the impossibility of the presence of families with each other; in the price factor, the same ticket rate for the fans; in the promotion factor, the lack of dedicated satellite networks with club's name is barriers to the development of the country's football industry. Khosrowmanesh[7], Ehsani *et alii*[8], Soutali *et alii* (2005)[9] showed in their research that the management barriers, structural barriers, media and

[6] M. Kazemi, Reza. Freelancer, Fereydoon. M. Khabiri, Muhammad (1387), *Investigating the price element of sport marketing mix in the Iranian professional football league and comparing the current situation with the South Korean and Japanese leagues*, in *Journal of Sport Sciences*, Faculty of Physical Education and Sport Sciences, Tarbiat University, 2010, p. 121.s

[7] R. Khosrowmanesh, *Analysis of financial support management in Tehran clubs*, Master's thesis, Faculty of Physical Education, University of Teheran, 2009.

[8] M. Ehsani, Z. Abouddara and M. Eghbali, *Investigating the Causes of Non-Sponsors' Support to Professional Sports in Ladies of Isfahan*, in *Journal of Sport Sciences*, 2008, 3, 12.

[9] R.M. Soutall, M.S. Nagel and J. Le Grande, *Build it and they will come? The Women's United Soccer Association: A collision of exchange theory and strategic philantrophy*, 2005.

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legal obstacles are the reasons of sponsors' absence. Ghasemi *et alii* showed that the barriers to sports marketing were legal, structural, managerial, environmental and economic, respectively[10]. Therefore, eliminating such a barrier requires redefining and modifying strategic and operational planning and carrying out economic, financial, legal and legal reforms in organizations of the country & environmental-internal factors which are related to exercise environment themselves, and are consisted of obstacles such as social barrier – sociocultural & legal management eliminating require effective management of sport marketing, identify ways to promote clubs and professional leagues and appropriated managements and planning for the competitions. In Article 2 of the country's trading law, which is named a commercial transaction, there is no name of professional sports club which is necessary, according to the law, to determine the subject of a professional club. In the next step, the clubs' regulations and club statutes should be comprehensively defined, referring to all the club's legal conditions. Elahi *et alii* (2009) introduced the lack of explicit sponsorship laws and intellectual property rights as one of the obstacles to attracting sponsors in football. The lack of copyright laws and intellectual property rights will prevent commercial companies from having the incentive to enter soccer. Saatchian and Elahi (2014) stated that the existing media laws, regulations, facility laws and government laws are obstacles to the attraction and development of supporters (fans) in the Premier League clubs. Moradi Chalesteri *et alii* presented one of the obstacles to attraction foreign investors in the country's football as legal factors, and suggested that appropriate legal and legal policies and regulations be drawn up by the country's sports planners, and the presence of foreign investors in the country's sports industry should not be spent on using a word in comprehensive exercise plan. For example it is required that this field of policy should be consistent with the activities of multinational corporations[11]. The most important obstacles and problems of entrepre-

[10] R. Ghasemi, M. Javadipour and A. Tahfar, *Identification of Barriers to Iranian Sport Marketing from the Perspectives of Iran's Sports Leaders*, in *Management of Sport*, 2014, 7, 6, p. 829 s.

[11] J. Moradi Chalesteri, M.R. Moradi, N.Q. Soheila, Norouzian Qahfarhi and M. Jamali Gole, *Investigating structural barriers*, cit.

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neurship in sport are the lack of formalization of the office of entrepreneurship and employment in the provincial chart of organization, the lack of sufficient financial resources to support the private sector, not paying low interest loans and not increasing the time of repayment of facilities in the sports sector. In fact, one of the most important weaknesses and threats is instability in the economy the lack of money and the distribution of capital prevent the development of sporting, recreational and leisure establishments. Gershasebi Nia (2012) states that the positive role of these rights in the economies of developing countries cannot be ignored, and the pressure of developing countries to accede to intellectual property rights agreements. These countries must comply with the relevant laws tailored to their social and economic conditions in order to maximize their productivity. Almasi (2011) explains the principles governing effective rules in the economic analysis of law; legitimate pathology in any society can be regulated density (inflation), the number of law enforcement agencies, the setting of costly and non-standard laws such as abandoned laws contradictory rules or omission laws useful rules also affect the system of economic, market and non-economic markets (such as the legal market) to the extent of the existence of destructive and costly rules. From the perspective of the economic analysis of law, the law is regarded as a general and capital asset. Inefficient or non-productive production will result in no increase in social costs, less general welfare and a lack of legal security. Among the existing indicators, the index of the requirement to implement the contracts of the Freezer Institute was selected for contract institutions and the property rights protection index of the Heritage Foundation for property rights institutions. On the other hand, Vafa and *alii* examined the barriers to the development of infrastructure investment in the country and addressed the most important obstacles: legal barriers, allocation and attraction of investment, lack of attention to legal infrastructure, legal barriers to registration of companies, the stability of the rules, the lack of transparency of the law, the lack of investment security, sanctions laws, international banking laws, and world trade law have been identified as the most important legal obstacles to the successful implementation of infrastructure investments[12]. Also,

[12] M. Vafa, Z. Memar and A. Gholamreza, *A study on the barriers to the devel-*

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various studies have examined the barriers between the relationship between the university and the industry, all of them have considered the legal obstacles in this regard and are one of the biggest obstacles to the relationship between industry and society. Among them, Dastom *et alii* (2013) express, in assessing and prioritizing barriers to university and industry relations; legal barriers, cultural barriers, demand-driven university projects, inefficiencies in internship, inappropriateness of academic disciplines with the needs of industries the most important factors in this field. According to Zahedi and Mohammadi's research, new rivals are entering the tourism industry every day[13]. Therefore, the formulation of brand and property laws spiritual sports tourism places as a legal issue can involve the development of the tourism industry sports. According to Salimi *et alii* research, the most important barriers to the development of sponsorship of private companies from sporting championship are the existence of major issues in the field of intellectual property rights and copyright in the country, the absence of government financial benefits for sponsors and the absence of supportive laws from sponsoring companies[14].

Abbas Lo[15] (2013) explores the legal and economic substrates for attracting foreign investment and proposing a suitable strategy for Iran, He proposes that implementing the liberation policy and privatization with presence of foreign investors to win their trust, labor laws amendment and related laws, official interpretation of the under-discussion of the constitution principles, the establishment of insurance companies and the provision of laws in accordance with updated international standards, the creation proper laws on the stock

*opment of infrastructure investment in the country*, in *Quantitative studies in management*, 2014, 5, 2, p. 1 s.

[13] M. Zahedi, A. Mohammadi, *The Role of Intellectual Property Rights in Supporting the Tourism Industry*, in *Quarterly Journal of Private Law*, 2015, 13, p. 87 s.

[14] M. Salimi, M. Sultan Hosseini and D. Nasr Esfahani, *Prioritize the barriers to developing private sponsorship of championship sport based on the conclusion of the results of MADM methods using the POSE integration technique*, in *Sports Management Studies*, 2013, 21, p. 149.

[15] M. Abbas Lo, H. Negandi Manesh, *Examining the legal and economic context of attracting foreign investment and providing a suitable strategy for Iran*. Economics, Work and Society, Day1392 Numb, 164, from 47 to 57 Monthly Social, Economic, Scientific and Cultural Workers and Society - No. 164 - December 2013.

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market and the like, removal of legal barriers in intellectual property rights, *etc.* should be done.

3. The study of barriers and legal solutions for sports marketing development in Iran.

3.1. Identification of the barriers of sports marketing development in Iran.
Identification of the legal strategies of sports marketing development in Iran.

3.2. It should not be forgotten that the knowledge of sports marketing, especially rule and regulation in sport marketing in Iran is nascent, and marketing activities in Iranian sports are more traditional and taste-based than regular, co-ordinated and scientific, and in the academic section legal sport marketing has not been addressed. Also, there is no discussion of legal policy issues in marketing, and in particular sports marketing. These challenges have led the researcher to develop a legal policy model for sports marketing components and to present a comprehensive image of barriers, solutions, challenges and legal issues of sports marketing in the country. On the other hand, the role of applied legal research in the comprehensive and sustainable development of sport is so prominent and undeniable that undoubtedly can be considered as a driving force for development in all domains. Sport development and monetization practices and generally marketing in this sector are not excludable of this formula. Another point that adds to the importance of the issue is how to adopt large-scale legal policymaking in strategic decisions and market planning for and regulatory development in sports marketing section. Considering the current state of the country, the need for such research is become increasingly apparent.

4. The method of this study is qualitative the type of basic theory (Grand theory). The choice of qualitative method was due to the following reasons: to provide a thorough and deep examination in changing conditions for the researcher, the lack of a model in this area, or the existence of new models not contributing the subject. Understanding the processes' occurrence and the factors affecting

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them that were far more important than the measurement of the amount and amount of «products» and the specialty of the subject and the possibility of commenting on by few specialized experts (Bazargan, 2013, p. 89). Qualitative research for understanding and explaining social phenomena uses data from interviews, documentation, observations, and *etc*. The first phase of the research was conducted in a library and described and analyzed the related to barriers and strategies of sport marketing in Iran. In the second phase, a deep semi-structured interview with well-known elites was used to find barriers and effective strategies for sport marketing in Iran. Five essential steps – but not necessarily sequential – that were used in the data processing were: selecting participants, collecting data, organizing data, analyzing data, and creating a theory (model) (Strauss & Corbin, 2007).

5. The statistical population of this research includes all the experts in three areas of scientific, executive and sport in the sport marketing. These included 14 faculty members and experts in the field of marketing and industry including sports. That was selected based on their executive background and records. In this way, these people were fully acquainted with law and marketing. In the following, in sample selection two methods of snowball and purposeful sampling were used. Sampling was continued until new information was not received. At the end, 16 qualitative interviews were conducted from the elite group.

6. In qualitative studies, information analysis can be done during the collection process, because the final analysis is hard and difficult. Most studies introduce paradigmatic encoding model for analyzing data generated by the Grand theory, which is presented in the form of a three-step systematic encoding sequence, including: open, axial, and selective coding, results in the creation of a template. In an open coding, the researcher with open minds deals with the naming of concepts. In the next stage which is called the axial encoding, the code distinguishing process will be get out of open mode and get more selective. The third stage involves selective encoding. At this stage, the researcher develops a theory between the categories obtained in the pivotal coding model. In fact, this stage is integrating

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and improving process of the theory. Finally, using the fundamental data-processing analysis, the operation of summarization, categorization, and conclusion of findings will perform. In this way, the specific sampling decisions are made during the research (Strauss & Corbin, 2007). And it requires the simultaneous chainsaw data collection and analysis. The judging criterion for the stop time of theoretical sampling is the theoretical adequacy of the categories or theory, which means it is ensured that nothing remains in the category and its enough (Bazargan, 2013). For this purpose, the researcher by conducting semi-structured interviews, while introducing the sample model, conducts interviews with sample groups, which will result in encoding and extracting results.

7. Table 1 shows the characteristics of the contributing people in the interview.

Table 1 - *Details of the participants in the interview*

| Variable | | number |
|---|---|---|
| Interview Group | Academic | 6 |
| | Executive | 4 |
| | Sports | 4 |
| Sex | Man | 9 |
| | Female | 5 |
| education | Masters | 3 |
| | MA | 5 |
| | P.H.D | 6 |
| Total | | 14 |

To do qualitative analyses, at first we tried to read through the text of the interviews and to make a general understanding of the terms and concepts in the text. Then with ATLAS TI software 42, code was detected and tagged, the desired codes were converted to six themes and they were categorized into two categories based on semantic similarity. Also the number of repetitions of codes taking into accounts the frequency of each code in the total analysis was 244 repetitions.

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Table 2 – *Details of qualitative findings*

| Row | Floor | Theme | Sub theme (code) |
|---|---|---|---|
| 1 | obstacles | Internal legal barriers | Barriers to the allocation of foreign capital |
| 2 | | | Legal barriers to attraction |
| 3 | | | Lack of attention to legal infrastructure |
| 4 | | | Legal barriers to registration of companies |
| 5 | | | Instability of the rules |
| 6 | | | Lack of transparency rules |
| 7 | | | Insecurity rules |
| 8 | | | Absence of intellectual property laws |
| 9 | | | Failure to recognize television broadcasting rights |
| 10 | | Foreign legal barriers | Sanctions rules |
| 11 | | | International Banking Laws |
| 12 | | | World Trade Laws |
| 13 | | | Failure to interact with global markets |
| 14 | | Administrative barriers | Absence of specialized units |
| 15 | | | The poor implementation of existing rules |
| 16 | | | The lack of a competitive media environment |
| 17 | solutions | Legal | An attempt to eliminate economic sanctions by the government |
| 18 | | | The optimal management of existing financial resources and the creation of long-term financial and non-financial financial resources by the government for investors |
| 19 | | | Determine the exact nature of the sports clubs |
| 20 | | | Comprehensive rules and standards of protection |
| 21 | | | Developing and enforcing copyright laws, intellectual property and advertising with strong enforcement |

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*Segue:* Table 2 – *Details of qualitative findings*

| | | |
|---|---|---|
| 22 | | Avoiding monopoly in the media to increase competition in the market |
| 23 | | Develop sponsorship laws for sponsors and clubs and sports producers |
| 24 | | Reduce risk costs for investors |
| 25 | | Create the requirements of the field of sports economics and develop it |
| 26 | | Creating business thinking in the media following government budget cuts |
| 27 | Cultural Or Legal culture | Institutionalizing a culture of respect for the rights of others within the sports community |
| 28 | | Developing appropriate legal programs to inform society about the economic potential of sport |
| 29 | | Developing the same legal standards and programs to create a culture of economic stability |
| 30 | | The culture of lawmakers in society, managers, players and members of clubs, federations and sports marketing activists |
| 31 | | Promoting the culture of orthogonal rights among the people of society and various institutions by the state |
| 32 | Executive (Organizational) | Creating Coherent Organizational Rules |
| 33 | | The use of trained and experienced managers |
| 34 | | Identify the needs of different market groups and pay attention to them to provide services to them |
| 35 | | Creating a Market Information System and Creating Coherent Membership Terms |
| 36 | | Establishing a qualified legal entity in sports organizations and delegating authority to it |
| 37 | | Outsourcing marketing activities to specialized departments |
| 38 | | Establishing a strong legal relations unit in sports organizations |

*Segue*

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*Segue:* Table 2 – *Details of qualitative findings*

| | |
|---|---|
| 39 | Create a specific marketing segment in an organizational structure |
| 40 | Teach leaders who are familiar with the sports industry |
| 41 | Training the various sports fields of the country to enter the legal environment of the sport |
| 42 | Creation of private and satellite networks for the broadcast of live sports competitions |

Table 3 - *Primary codes Matrix*

| code | Abundance | | | | | | | | | | | | | | Contributor |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | **1** | **2** | **3** | **4** | **5** | **6** | **7** | **8** | **9** | **10** | **11** | **12** | **13** | **14** | |
| 1 | * | | | * | * | | | * | * | | | | * | * | 7 |
| 2 | | | * | | | | | | | | | | | * | 4 |
| 3 | * | | * | | * | * | | | * | * | * | | | | 8 |
| 4 | | * | * | * | * | | | * | * | | | | | * | 7 |
| 5 | | * | * | | * | | * | | | * | * | * | * | | 11 |
| 6 | | | | * | | | | * | | | | | | * | 3 |
| 7 | * | | | | * | | | | * | | | * | | | 4 |
| 8 | | | * | | | | * | | | * | * | | * | | 5 |
| 9 | | * | * | | * | * | | | * | | | | | * | 7 |
| 10 | * | * | | * | | | * | | | | | | * | | 6 |
| 11 | | | * | | * | * | | * | | * | * | | | * | 9 |
| 12 | * | * | | * | * | * | | | * | | | * | * | * | 10 |
| 13 | | | * | * | | | * | * | * | | | | * | | 8 |
| 14 | | | * | | * | | | | | * | * | | * | | 7 |
| 15 | * | | * | | | * | * | * | | * | * | * | | * | 8 |
| 16 | | * | | * | | | | | * | * | * | | | * | 7 |
| 17 | * | * | | * | * | * | | | * | * | * | | * | | 9 |
| 18 | | | * | * | | | * | * | | | | * | * | * | 9 |
| 19 | * | * | | | | | | | * | | | | | | 3 |
| 20 | | | | | * | | | | | * | * | | | | 3 |
| 21 | | | * | | | * | | | | | | | * | | 3 |
| 22 | | | | | | | | * | * | * | * | | * | | 5 |
| 23 | | * | * | | * | | | | | | | * | | | 4 |

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*Segue:* Table 3 - *Primary codes Matrix*

| | | | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 24 | | | | | | | * | | | | | | * | | 3 |
| 25 | * | | * | | | * | | | * | | | | * | | 5 |
| 26 | | | | | | | | * | | | | | * | | 3 |
| 27 | | * | * | | | | | | | * | * | | | | 4 |
| 28 | | | | * | | * | * | * | | | | | | | 7 |
| 29 | * | | * | * | * | | | | | * | * | * | | | 6 |
| 30 | | * | | * | * | | | * | * | | | * | * | * | 8 |
| 31 | | | * | | | | * | * | | * | * | | | | 6 |
| 32 | * | | | * | | | * | | | | | * | | * | 4 |
| 33 | * | | * | | * | | | | * | | | * | | | 5 |
| 34 | | | * | * | | | | | * | | | | | * | 5 |
| 35 | | | | | * | * | * | | * | | | * | * | | 7 |
| 36 | | * | | * | | | | * | | * | * | | * | * | 8 |
| 37 | | * | | | * | * | | | | | | | | | 3 |
| 38 | | | * | | | | * | | * | | | * | | * | 5 |
| 39 | * | | | | | * | | | | * | * | | | | 3 |
| 40 | | * | | * | * | | | * | | | | | * | | 6 |
| 41 | * | | | | | | * | | | * | * | * | | * | 5 |
| 42 | | | * | | * | | | * | | | | | * | | 4 |
| Contributor | 14 | 14 | 20 | 16 | 19 | 12 | 13 | 15 | 17 | 16 | 12 | 12 | 18 | 16 | 244 |

Table 4 - *Relevant codes for the implementation of sports marketing development strategies*

| Sub theme (code) | theme | class | row |
|---|---|---|---|
| Financial independence of sports clubs | | Economic consequences | |
| Increasing tax revenues from clubs | | | |
| Benefit from all stakeholders of funds | | | |
| ….. | | | |
| Sport Development | | | |
| The development of the technical capability of producing sports products | | Non-economic consequences | |
| …… | | | |
| Advancement of Media Techniques | | | |

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8. This study examined the quality of barriers and legal strategies for sports marketing development in Iran. The findings of the research showed that the current state of sport marketing in Iran is not suitable and there are many barriers to the perspective of the participants which has led to this unfavorable situation. Internal legal barriers, foreign legal barriers and administrative barriers are three major obstacles to the development of Iranian sports marketing. Internal legal barriers stem from policies and macro policies and are more important and determinative than next barriers. These barriers are often created or developed by other barriers. For example it can be said that the lack of transparency in the rules of governing sports organizations can lead to the emergence of managers and unskilled people in sports organizations, and obviously these people will not be able to take appropriate and useful measures in the development of sports marketing. Another example is the sports broadcast television series. In other words the lack of laws in this area and the lack of independent media that make it possible to create a competitive environment are affected by the country's massive media policies which in turn has led to the lack of development of sports marketing.

Considering the various obstacles that have led to the lack of development of sports marketing in Iran, in order to eliminate the current situation and move towards the development of sports marketing in addition to the need to remove existing barriers solutions should be considered for implementation. In simple terms during different years various barriers have led to the lack of formation of sports marketing in Iran in line with other countries but removing barriers alone is not enough to eliminate the existing situation and expand the marketing of sport and it is necessary to implement solutions. Three groups of legal, cultural and administrative (organizational) were obtained in the field and suggest that legal solutions while removing legal barriers also provide for other measures. But one can say that one of the most important solutions is cultural solutions (legal culture). That is the lack of confidence in the economic capabilities of the sports industry and the lack of appropriate culture in society for fair use of sport industry opportunities is one of the most important factors in the development of sports marketing in Iran. In such a situation it is necessary for the various stakeholders

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of the sports industry to become familiar with their rights and to respect the rights of others. In such circumstances the balanced development of sports marketing in Iran could be hoped that the players in the industry would benefit from it.

Implementation strategies are related to the sports organization's tasks that should be considered. In simple terms in today's competitive world Sports organizations along with other organizations have to compete with modern and scientific marketing tools to survive in the marketplace. Today success of marketing programs is not a coincidence and a chance and it should be used to develop coherent organizational rules of trained and experienced managers. In this regard the creation of a qualified legal entity in sports organizations and the conferral of the right to do so or outsourcing marketing activities to specialized departments can be viable solution.

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Gholamali Kargar

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*Abstract*

The main purpose of this study was to investigate obstacles and legal strategies of sports marketing development in Iran. Laws and regulations can fulfill marketing activities by responding to the needs of those people and organizations that are engaged in sports transaction, production, storage and financial issues. Recognizing the legal and facilitative obstacles for regulating these activities in Iran's sports marketing are some of the gaps in the literature in this field which necessitated the present researchers to carry out this study. Legal policies can follow the end of creating a competitive environment in marketing, the correct application of which can result in benefits such as protecting consumer's rights, having equal access to markets by different competitors, and protecting societies' interests. The present study follows a qualitative ample-based approach. To collect the required data, some semi-structural interviews were carried out. By employing snow ball sampling, fourteen experts in sports marketing regulations were selected and interviewed. According to the findings of this study, the main legal obstacles for the development of sports marketing in Iran are not recognizing the laws of spiritual property, not recognizing the rights to TV broadcasting, the inexistence of laws which support sports products, the inexistence of technical marketing units in a large number of sports organizations, and the inappropriate implementation of the existing laws and regulations. The present study suggests some strategies which necessitate the creation and compilation of some laws and standards which can vividly codify all domains related to P4 (Product, Price, Promotion and Place) in sports marketing, sports products and the establishment of marketing institutions. There is a need for some new laws which can remove the proviso problems associated with previous regulations, expedite the future processes involved in sports marketing and simultaneously protect the rights of consumers, producers, and distributers.

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Sessione IV

# DOPING AND SPORTS VALUES FAIR PLAY VIOLATION

# Etica sportiva tra banalizzazione* e mercificazione. Alcune osservazioni critiche

Sommario: 1. Introduzione. – 2. Banalizzare il corpo, banalizzare lo sport. – 3. *Doping*: problematica cogente. – 4. *Caring* e fraternità. – 5. Prospettive.

1. Il tentativo proposto tende a sottolineare come una generale *banalizzazione* dell'idea di sport sempre piú dilagante nella contempo-

* L'espressione "banalizzazione" può essere considerata una derivazione della formula "banalità" utilizzata da Hannah Arendt per il suo celebre volume La banalità del male (Feltrinelli, Milano, 1963). Come è noto, *La banalità del male* è una riflessione sull'olocausto, incentrata e sviluppata attorno alla vicenda legata al processo ad Adolf Eichmann (1906-1962), tenuto a Gerusalemme, ad opera di un tribunale israeliano. Per l'occasione, l'autrice non si limita solamente ad una ricostruzione di quanto emerso durante il processo, ma amplia il discorso sulla storia dei fatti principali dell'olocausto. Tuttavia, il suo testo non vuole essere una ricostruzione tout court della storia degli eventi della Germania Nazista, bensí, punta i riflettori sul ruolo di un uomo all'interno dell'organizzazione dell'olocausto. Ad emergere è, quindi, il "profilo" di Eichmann. Vale a dire lo stereotipo dell'uomo "medio", statisticamente individuato, idealizzato dagli schemi dell'economia liberale capace, appunto, di fare male. A rendere piú atroce il tutto è proprio la banalità: una semplificazione o meglio una quotidianizzazione del male compiuto dall'uomo medio portata a paradigma dello stesso. Ecco che, allora, la "banalità del male" assume le forme dell'ordinarietà. Il "mostro" non è la persona che si presenta con caratteri inumani, che vuol far del male agli altri, bensí – come il gerarca nazista preso in considerazione – è l'uomo comune che compie quotidianamente in maniera ordinaria delle mostruosità senza rendersi conto di fare del male proprio perché rientrante nell'ordinarietà del quotidiano. Ciò che rende mostruoso il quadro di riferimento risulta essere proprio l'ovvietà con cui viene accompagnata la banalizzazione nel comportarsi negativamente. È – proprio – il male "banale". Ora, il punto sta nel verificare l'ipotesi circa un possibile accostamento di tale paradigma interpretativo ad un certo processo in atto all'interno della dimensione sportiva. Se, la deriva comportamentale negativa con cui viene vissuta l'esperienza sportiva contemporanea – dove spicca una certa ordinarietà nel compiere atti "scorretti" a piú livelli – sia almeno simile alla banalizzazione individuata dalla filosofa tedesca. Seppur con tutte le differenziazioni del caso, è chiaro, oramai, che le problematiche di cui soffre il mondo sportivo risultano essere la spia evidente di come, anche in questo spaccato sociale, sia pre-

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raneità, a causa di vari motivi, *in primis* economici e commerciali, risulti essere il principale fattore di una piú grave *banalizzazione* della riflessione etica intorno al fenomeno sportivo[1].

In tale perverso processo, la prospettiva etico-filosofica[2] viene ritenuta scomoda, in quanto capace di porre sul tavolo il *dover essere* della dimensione sportiva, la quale nega se stessa, ogni volta che si piega ad essere considerata strumento per altri obiettivi. Cosí, paradossalmente, in piú di una occasione, anche l'*etica sportiva* scade per essere utilizzata quale *etichetta* identificativa del "buon prodotto sportivo" da vendere. Una vera e propria scorciatoia di comunicazione e/o di *marketing*[3].

Il processo di *banalizzazione* dell'etica sportiva è rilevabile anche mediante un'ulteriore spia d'emergenza: la piú generale *banalizzazione* dell'idea di corpo. Una deriva con cui viene accompagnato, oggigiorno, un fatuo culto della corporeità e che risulta prodromo di una piú grave *mercificazione* del corpo stesso, causa di significative conseguenze di carattere etico.

D'altronde, come è noto, l'attività sportiva è stata utilizzata quale metafora della vita. Per Paolo di Tarso, la vita è uno sforzo, è una speranza verso «una corona incorruttibile» da guadagnare dopo gli affanni terreni[4]. Per Thomas Hobbes, la vita è una gara, un rischio,

sente una ordinaria banalizzazione di comportamenti, atteggiamenti, azioni negative tanto che il gesto sportivo positivo – *fair play* ad esempio – risulti essere l'eccezione piuttosto che la regola. Eccoci, dunque, di fronte ad un chiaro e manifesto paradosso. Ciò che dovrebbe rappresentare l'ordinarietà – un atteggiamento realmente sportivo – diventa una rarità, e un comportamento che, al contrario, dovrebbe apparire un'anomalia diviene "normale", addirittura "banale". I piani dell'ordinarietà e della straordinarietà risultano, pertanto, ribaltati. Durante una competizione sportiva comportarsi correttamente appare, cosí, un'eccezione, e agire scorrettamente significherebbe essere "normali".

[1] Su tale processo mi permetto di rinviare ad un mio precedente intervento, *Per un'etica dello sport oggi*, in AA.VV., *Le scienze dello sport. Il Laboratorio atriano. Atti del Convegno: Atri 14-15 maggio 2012*, Roma, 2012, p. 17 s.

[2] Per un approfondimento di taglio etico-filosofico, in àmbito sportivo, si tengano in considerazione, oltre i lavori collettanei, citati successivamente, riferibili al "laboratorio atriano", anche i volumi: F. RAVAGLIOLI, *Filosofia dello sport*, Roma, 1990; H.L. REID, *The Philosophical Athlete*, Durham, 2002; E. ISIDORI, H.L. REID, *Filosofia dello sport*, Milano, 2011.

[3] A tal proposito possiamo, a ragione, parlare di *mercificazione* di tutto quello che riguarda il fenomeno sportivo.

[4] Si veda in proposito, un ulteriore mio contributo, *Per una rinnovata consapevo-*

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è una corsa mediante la quale sublimare le proprie passioni[5]. Proposte antitetiche le quali scorgono nell'attività sportiva il modo piú completo per rappresentare la propria visione della vita, dell'uomo, e, quindi, del corpo umano.

2. Per chi si occupa di Etica sportiva – come me, ormai da vari anni – non può passare inosservato il dato per cui è l'essere umano, che si confronta nella competizione, si allena per superare i propri limiti, studia nuove tecniche per migliorarsi, si intristisce se perde, gioisce se vince. E tale condizione passa inesorabilmente mediante la relazione imprescindibile con il proprio corpo. A questa modalità è necessario fornire contorni piú precisi proprio nello sforzo di svelare quale angolatura debba essere assunta per analizzare attentamente in che rapporto stiano l'uomo, che pratica sport, e il proprio corpo[6].

E, se restringiamo il campo almeno due sono le strade principali percorribili. Una legata ad un piano descrittivo d'analisi, l'altra ad uno prescrittivo.

La prima, frutto di un'impostazione materialistico-meccanicistica[7],

*lezza del corpo. L'uomo tra etica e sport*, in AA.VV., *Corpo, politica e territorio. Luoghi e non luoghi della corporeità*, a cura di F. Ricci, Roma, 2011, p. 11 s.

[5] Cfr. T. HOBBES, *Rassegna delle passioni rappresentate in una corsa*, Parte I, Cap. IX, paragrafo 21, in ID., *Elementi di legge naturale e politica*, a cura di A. Pacchi, Firenze, 1972, p. 75. Per un approfondimento della metafora sportiva hobbesiana rimando ad alcuni miei contributi pubblicati negli ultimi anni: *Thomas Hobbes – A Page in the History of Sport Philosophy. A Race as a Metaphor*, in *Hobbes Studies*, 21, 1, 2008, p. 84 s.; *Thomas Hobbes - A page in the history of sport philosophy: Metaphor of a race*, in *Philosophic Reflections in Sport. A Collection of Essays*, edited by Milan Hosta, International Institute for Sustainable Development, Policy, and Diplomacy in Sport, Ljubljana, 2010; *Hobbes e la metafora della corsa*, in G. SORGI, *Quale Hobbes? Dalla paura alla rappresentanza*, Roma, 2014 (Nuova edizione ampliata), p. 229 s.

[6] Per una riflessione sulla corporeità nel periodo classico, in relazione all'attività ludico-sportiva, si vedano: A. RIGOBELLO, *"Epimeleia", cura dell'anima e cura del corpo*, in AA.VV., *Ripensare lo sport. Per una filosofia del fenomeno sportivo*, a cura di G. Sorgi, Rimini, 2010, p. 163 s.; F. RICCI, *L'etica agonale dell'uomo greco. Il corpo a corpo dell'esistenza*, *ivi*, p. 169 s.; ID., *Il corpo come variabile ideologica. Atletismo e personificazione del potere nelle ideologie del XX secolo*, in G. SORGI (a cura di), *Le scienze dello sport: il Laboratorio atriano*, cit., p. 125 s. Rispetto all'attività del "laboratorio atriano" si veda la ricostruzione proposta da L. GASBARRO, *Filosofia e sport. La peculiarità del laboratorio atriano*, in M. PASINI (a cura di), *Lo sport nelle scienze sociali: da chimera a realtà*, in *M@gm@*, 11, 1, Gennaio-Aprile 2013.

[7] Circa l'influenza e l'intento meccanicistico di Hobbes, tra gli altri, cfr. A. NEGRI,

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palesa come sia possibile intendere il proprio corpo quale strumento da utilizzare per raggiungere obiettivi precisi come la vittoria a qualunque costo. Sulla base di tale impostazione, estremizzando il discorso, è possibile giustificare la convinzione che il proprio corpo sia una vera e propria macchina sulla quale intervenire per operare miglioramenti *tecnologici*.

L'altra strada, frutto di un'impostazione personalistica[8], pone l'attenzione sul dato per cui l'atleta è *persona* dal momento in cui gli elementi fisici, psichici, sensoriali sono coordinati e inseriti in contesti funzionali in modo che ogni elemento corrisponda al tutto e il tutto a ciascun elemento. Tale eventualità presenta come centro catalizzatore l'*interiorità*. Cosí, mediante la propria *personalità* l'atleta edifica una sfera particolare che gli consente di capire come, nella sua unicità, egli sia l'insieme di *corpo* e di *spirito*.

Uno dei principali punti di distinzione tra piano descrittivo e piano prescrittivo d'analisi sembra chiarito.

Il dato da cui partire per un possibile tentativo di arginare, su un piano etico-sociale, la *banalizzazione* dell'idea di corpo non può che essere l'uomo stesso, il quale si rivela *persona* pure nella sua particolare dimensione di atleta. La complessità umana viene, infatti, alla luce, anche in questo peculiare momento, ponendo in secondo piano le letture particolaristiche e riduzionistiche dell'essere umano, che lo impoveriscono limitandosi ad un dettaglio e frantumandone la ricchezza globale. Ingigantire un dettaglio, come per esempio il solo corpo e dimenticare il resto, significa rendere l'uomo deforme. Un atleta credibile, invece, è l'essere umano che opera sia fisicamente che spiritualmente. Tiene un agire consapevole, libero e volontario che non si ferma ad azioni finalizzate al miglioramento della sola forza fisica, ma che si concretizza per mezzo del confronto nella piú generale riflessione intorno a ciò che sia migliorabile e a cosa non lo sia. L'agire sportivo si caratterizza per la peculiare opera di conoscenza di se stessi iniziando proprio dal corpo e scegliendo tra le due

*Hobbes: Stato come macchina e Stato come organismo*, in G. Sorgi, *Hobbes e la fondazione della politica moderna*, Milano, 1999, p. 661 s.

[8] Sulla visione antropologica personalistica si rimanda, fra i molti, a M. Scheler, *La posizione dell'uomo nel cosmo*, Milano, 1970; R. Guardini, *Mondo e persona*, Brescia, 2002; E. Coreth, *Antropologia filosofica*, Brescia, 2004.

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opzioni prima esposte: concepire il proprio corpo quale strumento-macchina da *sfruttare* oltre ogni limite, oppure vivere il proprio corpo quale luogo di riconoscimento e di conoscenza di se stessi.

Comunque, la scelta fondamentale da compiere – anche durante una normale azione come quella ludico-sportiva – cela al proprio interno il quesito fondamentale che ci accompagna da millenni: chi siamo? E, la risposta da offrire non può evitare di prendere in considerazione finanche la nostra idea di corpo.

Pertanto, pure la riflessione intorno all'attività sportiva svela quanto sia necessario ridisegnare alcuni princípi antropologici per mezzo dei quali riscoprire la validità dell'essere *persona* mettendo, perché no, lo sport al servizio dello sviluppo personale, del miglioramento dell'uomo, come essere-in-relazione con se stesso e con gli altri.

In questo senso, l'attività sportiva può rappresentare, quindi, un cammino di autoconsapevolezza e di educazione integrale dell'individuo, che chiama in causa la costituzione intersoggettiva della persona, tesa tra l'autoaffermazione individuale, la dimensione pubblica e la dimensione spirituale. Pertanto, l'accoglimento di una idea piena di uomo dovrebbe comprendere anche, e forse soprattutto, una rinnovata *coscienza* del corpo.

3. Ma limitiamo il campo ad una problematica oggi molto pressante. La tematica *doping* svela un campo di indagine ove le premesse antropologiche di tipo materialistico-meccanicistiche trovano, malauguratamente, una pericolosa evoluzione qualora messe in relazione con l'intenzione di affidare allo sport una valenza umana prescrittiva.

La possibilità di individuare l'attività medico-farmacologica in àmbito sportivo, quale tecnologia da applicare al corpo umano, mostra la profonda contrapposizione tra due concezioni di atleta: l'*atleta/macchina*[9] e l'*atleta/persona*[10].

Concepire l'atleta come uomo slegato dal suo corpo, prevedendo

[9] Su tale caratterizzazione antropologica dell'atleta si rimanda a quanto già da me rilevato nella *Prefazione* a M.A. Bertman, *Filosofia dello sport: norme e azione competitiva*, a cura di G. Sorgi, Rimini, 2008, p. 13 s.

[10] Sulla condizione dell'*atleta-persona*, cfr. L. Gasbarro, *Alcune riflessioni in merito ad un'etica dello sport professionistico*, in Aa. Vv., *Le luci dello sport. Una lettura prismatica del fenomeno,* a cura di A. Di Giandomenico, Roma, 2011, p. 199 s.

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su di esso interventi correttivi estranei al semplice allenamento, fornisce, dal punto di vista teorico, la liceità dello sviluppo di pratiche farmacologiche finalizzate al miglioramento della prestazione.

Un parallelo, su questo aspetto, potrebbe essere suggerito dalle competizioni tra autovetture. La tecnologia applicata per rendere piú performante l'azione delle automobili impegnate nelle corse viene regolamentata in maniera scrupolosa al fine di determinare limiti oltre i quali è vietato andare o entro i quali è possibile intervenire. L'elemento umano incarnato nel pilota e nella sua capacità di guida deve necessariamente collegarsi allo strumento/macchina modellato su interventi tecnologici necessari al proprio miglioramento[11].

Ora, se consideriamo come la scienza medica e farmacologica abbiano già concretizzato le proprie conoscenze, tese al potenziamento della prestazione per mezzo di farmaci del tutto innocui nei confronti dell'atleta che ne faccia uso, tutto si traduce in una giustificazione piú ampia dello stesso accostamento medico-sanitario all'uso di *doping*. Si cade, cosí, in un presupposto discutibile: l'uomo è una macchina. Con ciò si offre una base ideologica per qualcosa, la pratica dopante, che, al contrario, non ha riscontro in un discorso che, invece, presupporrebbe l'uomo-persona, come essere in relazione con gli altri suoi simili e soprattutto con se stesso[12].

Approfondiamo ora tale passaggio. L'atleta, prima di scegliere i mezzi utili al raggiungimento di un determinato obbiettivo sportivo, deve aver già individuato il proprio *traguardo*. Altrimenti qualunque scelta operata riguardo agli strumenti da utilizzare risulterebbe vana e inutile. Prima di conoscere i mezzi efficaci e idonei per raggiungere un determinato obiettivo, dunque, l'atleta dovrebbe aver chiaro non solo logicamente, ma anche consapevolmente, quale sia il fine che ha intenzione di raggiungere. Allargando il discorso: quale è allora il fine dello sport? L'uomo concepito come una macchina è in

[11] Cfr. M.A. Bertman, *Filosofia dello sport: norme e azione competitiva*, cit., p. 121 s.

[12] In proposito si tengano presenti le osservazioni di John Hoberman quando sottolinea come lo sport nella sua declinazione moderna, segnata da una ricerca esasperata del miglioramento delle *performance*, sia il portato di una specifica cultura i cui valori derivano in larga parte dalla sfera della tecnologia: ciò avrebbe trasformato il corpo dell'atleta in un autentico laboratorio di ricerca e sperimentazione (J.M. Hoberman, *Sport and the Technological Image of Man*, in W.J. Morgan, K.V. Meier (eds.), *Philosophic Inquiry in Sport*, Champaign IL, 2001, p. 202 s.).

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grado di definirlo? È possibile rispondere in maniera affermativa limitatamente ad un fine che può essere individuato, solo, nella vittoria, cioè nel raggiungere il massimo risultato possibile in grado di confermare l'estrema efficacia del funzionamento dei propri ingranaggi, unico e fondante motivo di azione della macchina stessa. Una macchina se funziona (se è utile per la vittoria), allora, ha ragione di esistere, altrimenti no. Ma quali sono i mezzi *giusti* per il raggiungimento di tale meccanico obiettivo? L'uomo, meccanicamente inteso, è in grado di discernere ciò che sia giusto da ciò che non lo sia? Un essere umano concepito con i presupposti del meccanicismo mostra un limite fondamentale: essere incapace nel valutare come "giuste" o "ingiuste" le proprie azioni. Se non nell'unica possibilità di verificarne l'efficienza, assecondando il ritmo che sorregge i suoi ingranaggi, anche a discapito dell'altro: sia questo l'atleta concorrente (pilota) sia l'atleta compagno di squadra. Il che altererebbe negativamente il sistema di relazioni *intra* e *inter*personali su cui si fonda una pratica ludico-sportiva[13].

Proprio sul sistema di relazioni incide, al contrario, la considerazione che si ha dell'*atleta/persona*. Mediante l'accoglimento del presupposto che vuole lo sportivo come *persona* è possibile riconoscere la valenza della prospettiva che si riesce a dare al relazionarsi positivamente con gli altri. Concependo, invece, l'atleta come *macchina*, tale possibilità svanisce. E la strada aperta è quella della relativizzazione dell'etica stessa: ciascun individuo ha la possibilità di stabilire un criterio/parametro per l'individuazione dei mezzi e dei fini del proprio agire sportivo. Ciascuno, cosí, ha alcuni collegamenti etici di riferimento e agisce di conseguenza anche a danno dell'altro. Sia esso l'avversario, il compagno di squadra, l'arbitro, il tifoso. Il ricorso al *doping* diviene uno dei tanti strumenti che ognuno ritiene opportuno utilizzare per raggiungere lo scopo rappresentato dalla vittoria. Diversamente, riconoscere all'uomo la capacità di discernere la legittimità o meno dei fini della propria azione e di indicarne altri, diversi

[13] Cfr. le opportune riflessioni in A. Di Giandomenico, *Bioetica e doping*, in Aa.Vv., *Ripensare lo sport. Per una filosofia del fenomeno sportivo,* cit., p. 235 s.; Id., *Doping: una questione bioetica?*, in *Le luci dello sport. Una lettura prismatica del fenomeno*, cit., p. 215 s.; Id., *Minors and Doping,* in *International Sports Law Review Pandektis*, 11, 3-4, 2016, p. 294 s.

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dalla vittoria stessa[14], significa concepire l'individuo/persona con una capacità raziocinante che va al di là del perseguire il proprio personalistico piacere. In questo caso, l'interesse personale si nobiliterà all'interno di quello dell'intera comunità, facendo cadere le premesse individualistiche e prettamente utilitaristiche che muovono l'atleta/macchina.

4. Vorrei ora recuperare alcuni spunti, condivisi con il collega Martin A. Bertman[15], che mi sembrano centrare taluni motivi fondanti il discorso qui da noi proposto.

«*Sport is a competitive, cooperative, and physical game which celebrates and asserts our biological humanity, in a rationally emotive celebration of vitality*»[16]. Con questa definizione Bertman chiude la sua riflessione «*Sport come simbolo della società e il carattere della scelta*»[17]. Un titolo impegnativo che necessita un chiarimento di fondo. Innanzitutto, rispetto al *soggetto* considerato all'interno dell'analisi qui proposta, in due azioni da lui stesso compiute: vivere in società e praticare uno sport. L'uomo, secondo il filosofo statunitense, si rende conto che l'appagamento e il proprio benessere sono strettamente connessi alla lotta di ognuno per l'affermazione della propria identità individuale nella comunità di riferimento. Tale impostazione non solo rende necessaria all'interno della società l'esistenza di regole certe, ma, altresí, che vi sia, proprio in virtú di tali precetti, un equilibrio stabile tra *competizione* e *cooperazione* fra gli individui. Tuttavia, per Bertman, questa è una stabilità aleatoria. In quanto tale *lealtà civica*, seppur formalizzata dall'esistenza di regole uniformi, risente della "guerra"[18] interiore che ciascun in-

[14] Tra questi possiamo ricordare il conoscere se stessi, il miglioramento della prestazione, l'entrare in relazione positiva con gli altri.

[15] Si veda M.A. Bertman, *Filosofia dello sport: norme e azione competitiva*, cit.

[16] M.A. Bertman, *Sport as Symbol of Society and the Character of Choice*, in Id., *Philosophy of Sport: Rules and Competitive Action*, a cura di G. Sorgi, Rimini, 2008, p. 103. (Riportiamo, di séguito, la traduzione di tale passaggio: «Lo sport è un gioco competitivo, cooperativo e fisico che celebra e fa valere la nostra umanità biologica, in una celebrazione razionalmente emotiva di vitalità», M.A. Bertman, *Filosofia dello sport: norme e azione competitiva*, cit., p. 120).

[17] *Ivi*, p. 111 s.

[18] Cfr. G. Borghi, *Per un'etica dello sport*, in Aa. Vv., *Per un'etica dello sport*, a cure di G. Sorgi, Università degli Studi di Teramo, dispense a.a. 2003/2004.

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dividuo combatte con se stesso, riguardo proprio il rispetto delle norme interne ed esterne.

Lo sport, invece, può essere "suggerito", secondo il nostro collega, come "simbolo"[19] dell'ordine sociale per la sua strutturazione fondata su una maggiore stabilità normativa che rende concreto e funzionale il rapporto competitivo-cooperativo tra i partecipanti alla pratica sportiva. Lo strutturarsi su solide regole costitutive[20] fa sì che l'attività sportiva in sé venga considerata piú solida, e non come avviene nella società mediante alcune usanze interiorizzate o meno dall'individuo quali la lealtà, l'amicizia civica, la cooperazione. Allora, la *lealtà civica* individuata nella società, nello sport è indicata come *sportività*. L'equilibrio piú stabile riscontrato nello sport, però, non si affida soltanto alle regole costitutive, ma ad un concetto che merita un'ulteriore riflessione. Il *caring* (atteggiamento altruista), infatti, è l'elemento che, secondo noi, tra la competizione e la cooperazione suscita particolare interesse[21].

Nella visione di Bertman, tale elemento può essere definito come una particolare forma di *amicizia* e, piú specificatamente, in tema sportivo, in «an individual's loyalty to a specific sport or athlete or team (just as patriotism is distinct from the civil laws of a nation but arises to embrace them)»[22]. Allo sport è possibile riconoscere, dunque, qualcosa di piú dell'essere un'esperienza ludico-gioiosa grazie alla quale vengono fissate, in una particolare struttura regolativa, le emozioni. La profondità dell'amore rilevato nella pratica sportiva va oltre una "semplice" sportività facendo sorgere una norma valida per i comportamenti delle persone. Testimonianza di ciò è il trionfare dell'amore indicante, secondo Bertman, «that no circumstance destroies

[19] M.A. Bertman, *Filosofia dello sport: norme e azione competitiva*, cit., p. 112.

[20] Circa il concetto di regole costitutive si veda A.G. Conte, *Filosofia del baro*, in *Rivista Internazionale di Filosofia del diritto*, 80, 2003, p. 679 s. Cfr. in proposito G. Franchi, *Wittgenstein e le filosofie novecentesche del giuoco sportivo*, in Aa.Vv, *Ripensare lo sport. Per una filosofia del fenomeno sportivo,* cit., pp. 33 s. a cura di G. Sorgi.

[21] M.A. Bertman, *Sport as Symbol of Society and the Character of Choice*, in Id., *Philosophy of Sport: Rules and Competitive Action*, cit., p. 97.

[22] *Ibidem*. (Anche per tale passaggio, riportiamo la traduzione: «[…] una lealtà individuale verso uno specifico sport o un particolare atleta o una determinata squadra», M.A. Bertman, *Filosofia dello sport: norme e azione competitiva*, cit., p. 113).

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the quality of the actor's intention to do the good»[23] anche per mezzo della pratica sportiva.

La tematica posta dal filosofo statunitense, come quella del *caring* o dell'*amore,* solleva, tuttavia, una questione di fondo in merito alla chiave di lettura da applicare ad una prospettiva d'analisi descrittiva. Tale impostazione, determinata da un'angolatura contrassegnata da riferimenti hobbesiani, sembra non sostenere lo sviluppo di un tema – quello del *caring*, appunto – piú adatto ad una impostazione che tenga conto di una figura umana diversa da quella distinta da elementi inimicali e di scontro. Una strada percorribile può risiedere, allora, nel tentare un orientamento diverso, piú in linea con i presupposti di un possibile percorso etico di uno sport che voglia definirsi mediante un paradigma differente.

In tal senso, sembra opportuno far riferimento alla considerazione del concetto di *fraternità*[24] che, in qualche misura, può accostarsi al *caring* e che già era stata, per me, fonte di riflessione in merito ad una possibile lettura dello sport quale fenomeno pacifico[25].

I punti di contatto tra tali due concetti sono per certi versi naturali se si presuppone un'indagine prescrittiva del fenomeno sportivo. Innanzitutto ponendosi nella prospettiva di delineare il *dover essere* dell'atleta e della comunità di cui egli è parte integrante identificando il passaggio, da una visione "atomistica" dell'ordine sociale della pratica sportiva, a una concezione "organica e istituzionale", che abbia come fondamento il rapporto con l'altro[26].

Sergio Cotta scrive nel 1979 «il prender coscienza di sé finito ma

[23] M.A. Bertman, *Sport as Symbol of Society and the Character of Choice*, in Id., *Philosophy of Sport: Rules and Competitive Action*, cit., p. 100. (La cui traduzione è: «[…] che nessuna circostanza può intaccare o addirittura distruggere la qualità dell'intenzione dell'attore a fare il bene», M.A. Bertman, *Filosofia dello sport: norme e azione competitiva*, cit., p. 117).

[24] Cfr. P. Crepaz, A. Hechenberger, *È possibile la fraternità nello sport?*, in *Nuova Umanità*, 28, 6, 2006, 168, p. 743 s. Sul concetto di *fraternità*, tra gli altri, si veda A.M. Baggio, *Il principio dimenticato. La fraternità nella riflessione politologia contemporanea*, Roma, 2007, con i contributi di Rocco Pizzimenti, Massimiliano Marianelli, Piero Coda, Giuseppe Savagnone, Daniela Ropelato, Alberto Lo Presti, Filippo Pizzolato, Vicenzo Buonomo, Marco Aquini, Pasquale Ferrara.

[25] *Sport e pace alla luce della fraternità*, in G. Sorgi, *Ripensare lo sport. Per una filosofia del fenomeno sportivo*, cit., p. 17 s.

[26] Cfr. S. Cotta, *Prospettive di filosofia del diritto*, Torino, 1979.

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connesso con gli altri finiti, significa che l'io non è tale in quanto in sé e per sé, bensì in quanto ente-in-relazione [...]. Il con-esserci, nel suo significato piú profondo, si rivela dunque non un semplice esserci accanto e nemmeno soltanto un esserci per mezzo dell'altro, ma esser-con-l'altro, dove il con non ha un mero significato di compagnia, bensì di compartecipazione ontologica»[27].

Se si accoglie tale impostazione, il quesito da porsi non è piú tanto sul modo in cui lo sport possa accettare concetti quali la fraternità o il *caring*[28]. Il salto che si deve compiere è riferibile al tentativo di decodificare la carica che lo sport oggettivamente possiede, nella quale parte attiva sono proprio le componenti interne dell'agire umano e, quindi, anche dell'agire sportivo quali la fraternità o il *caring*. Elementi capaci di accrescere la carica dell'agire stesso, mantenendolo su di un piano che sia sempre piú aperto all'altro, facendolo sfuggire dal pericolo di scadere in forme di slealtà e di inimicizia.

I presupposti di natura filosofico-sociale per interpretare la vita e le dinamiche sportive in relazione agli elementi del *caring* e della fraternità risultano, allora, principalmente due. Il primo coglie il soggetto come persona, valorizzandone primariamente il luogo piú inviolabile che è la coscienza. Una concezione che individua nell'uomo la reale possibilità di funzione critica, di discernimento e di giudizio secondo i princípi di libertà, responsabilità e giustizia. Valori che Bertman recupera quando tratteggia la scelta umana in termini di responsabilità. Il secondo elemento presupposto è individuato nella comunità concepita non come semplice somma dei suoi singoli componenti, ma come un tutto, che cresca, maturi dalla reciproca relazione dei suoi protagonisti orientati al bene comune.

Cerchiamo, ora, di approfondire tali premesse. Il rapporto/confronto tra uomini, durante l'atto ludico competitivo, è uno dei momenti cruciali, nei quali l'agire umano si manifesta all'interno della prestazione sportiva e su cui si può innestare l'idea dello sport qualificato dall'agire del *caring*. Recuperando i presupposti individuati,

[27] *Ivi*, p. 108 s.

[28] Si veda a proposito G. Franchi che parla di un'opportunità insita nello stesso sforzo cognitivo di delineare un dover essere del mondo sportivo che include l'idea di uomo «nella forma piú differenziata, piú compiuta», in G. Franchi, *Appunti di Etica sociale dello Sport*, Roma, 2007, p. 15.

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non sfugge la responsabilità che sul protagonista, l'individuo-sportivo, si determina e, contemporaneamente, la possibilità che lo stesso soggetto può cogliere. Un comportamento sportivo, esclusivamente relegato al mero rispetto delle regole, seppur formalmente corretto e finalizzato al raggiungimento della vittoria, può bloccare/cristallizzare l'individuo-sportivo ad un livello primario di «differenziazione»[29]: essere, cioè, uno-atomo nella comunità, slegato dal complesso. E ciò è rilevabile anche nel quotidiano vivere in comunità quando un buon cittadino si attiene al rispetto formale delle regole. Vale a dire quando un cittadino seppur vivendo nella piena legalità non partecipa ontologicamente alla vita della società coltivando positivamente il rapporto con l'altro.

Nella relazione sportiva tale possibilità è sempre presente e fruibile. L'occasione che si ha di riconoscere se stessi, ma contemporaneamente l'altro, l'avversario, il compagno di squadra, il tifoso come essere di pari dignità[30], anche grazie alla concretizzazione dei medesimi concetti di fraternità o *caring*, apre una dimensione alla quale la persona può adire in vista di un completamento interiore. Il che si tradurrebbe nell'affidare concretamente allo sport qualcosa di piú dell'essere semplice gioco sportivo grazie al quale vengono fissate in una particolare struttura regolativa le emozioni.

5. Se, allora, tentassimo di concludere compiutamente il nostro discorso, dovremmo sottolineare come l'*opera di decodificazione* del concetto di *fraternità* comporti sia l'individuazione di piú efficaci percorsi utili per illustrare i molteplici aspetti della *fraternità* all'interno di ogni singola disciplina sportiva, sia la progettazione di *percorsi culturali inerenti lo sport,* che sappiano rivelare la fraternità, tali da svelarla completamente[31]. Questo è il cómpito piú difficile, ma per tale

[29] Come è noto il concetto di «differenziazione» giunge nella sociologia positivista dell'ottocento dalle scienze naturali, ed è sviluppato da Spencer, Durkheim e Simmel. È applicato anche all'àmbito spirituale da Alois Dempf e soprattutto da Eric Voegelin. In tema sportivo, il concetto è ripreso e sviluppato da G. Franchi, *Appunti di Etica sociale dello Sport*, cit.

[30] Armando Rigobello parla di «riconoscimento pratico» della dignità umana in sé e negli altri. Cfr. A. Rigobello, *"Epimeleia", cura dell'anima e cura del corpo*, cit., p. 163 s., in Aa.Vv., *Ripensare lo sport. Per una filosofia del fenomeno sportivo,* a cura di G. Sorgi.

[31] Si pensi anche al tema economico. Concetti quali «giusta retribuzione» e «giusto

motivo piú stimolante. La sfida è questa. Difatti per il dato antropologico personalistico, la *fraternità* non rappresenta un valore esterno rispetto al quale la realtà sportiva deve inchinarsi. È essa un valore interno a tutto l'agire umano e, quindi, anche all'agire sportivo. È un valore che dà senso a princípi base, quali l'uomo, il rispetto delle regole, il talento. La *fraternità* costituisce, in questo senso, *un nuovo punto di vista*, delle *lenti cognitive* con cui scrutare e analizzare la realtà sportiva *per rifondarla* vivendola per mezzo di una concezione di vita intrisa di una rinnovata energia di azione. Lo stesso piano regolamentare e di rispetto delle regole se ne gioverebbe.

Come già accennato in precedenza, mediante una condivisione di senso all'interno della comunità sportiva, ricavata da una *fraternità* intesa quale caldo ideale umano, si renderebbe il "consenso" verso le regole, non piú frutto di una sterile normazione per superare la contrapposizione amico/nemico, ma una concreta possibilità di apertura alla società nella sua complessità[32].

Su questa scia, risulta interessante proporre un capovolgimento di visuale: non bisogna partire dal singolo per "costruire" il suo rapporto etico col gioco, la sua correttezza nei confronti delle regole, bensì – al contrario – bisogna partire dal "tutto" del gioco per giungere al giusto ruolo che il singolo deve avere in esso.

Pertanto, ribadiamo, è necessario passare da una visione *individualistica* e *atomistica* dell'ordine e delle pratiche sociali ad una con-

prezzo» sfuggono per ora a indicazioni concettuali che aprano la strada ad un'etica economica riferita allo sport e che risulterebbe, oltre che sul piano teorico, anche su quello concreto, una decodificazione del concetto di *fraternità* utile ad ovviare a problemi cogenti presenti e futuri. Sul punto cfr. A.F. Utz, *Etica economica*, Cinisello Balsamo, 1999, p. 280.

[32] «Tutto ciò, se inteso in modo adeguatamente corretto, permette e addirittura richiede un'interpretazione teologica. Il gioco è quindi l'anticipazione di una forma di vita sperata che, nella sua natura pacificata, non dovrebbe essere monotona per mancanza di vivaci conflitti e che nella sua vivacità e audacia non dovrebbe mai essere ostile [...]. In ogni caso questa speranza e la sua anticipazione operano nel processo storico come perenne cómpito e dovere. Ci sono modi sempre nuovi per realizzare ciò che si è sperato e immetterlo nella realtà come possibilità di vita pacifica, di un pacifico confronto o addirittura di un pacifico scontro. Ma anche tali attuazioni della speranza, e non solo il gioco, rimarranno dal canto loro sempre anticipazioni e dovranno sempre attendere il compimento che ci viene promesso dal cielo». B. Welte, *L'esistenza nel simbolo del gioco*, in Id., *Filosofia del calcio*, cit., p. 61.

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cezione *organica* e *istituzionale*[33], in cui il rapporto con l'altro è fondamentale per il singolo e, solo grazie ad esso, egli può perfezionare il proprio essere e – al contempo – la pratica di vita di cui è parte.

Una tale concezione, va ripetuto, non si basa, in prima battuta, su valori umanitari, su una visione filantropica e solidarista che si innesta dal di fuori in un mondo dominato da pulsioni egoistiche e distruttive. Si tratta, piuttosto, di riconoscere, grazie alla relazione con gli altri sportivi, la *fioritura* e il pieno sviluppo dell'uomo sportivo e del suo mondo, inteso come *ottimo gioco* o *sport di alto livello*[34].

Quando si prende atto che si può diventare ciò che si desidera essere (cioè un buono sportivo o anche il migliore) solo per mezzo dei propri compagni e degli avversari, che formano una comunità di gioco, allora si supera la visione meramente giuridico-formale del modo corretto di giocare e si penetra in una concezione *sostanziale* del gioco, di natura *sociale*, perché è come se il gioco fosse un *intero*, un *tutto* e i giocatori le sue *parti*[35], che si relazionano organicamente tra loro mediante ciò che li ricomprende in sé, come un "bene comune"[36]. Ciascuno sportivo è sempre in crescita, perché è

[33] Il principio metafisico secondo il quale l'intero o tutto (*to olon*) precede le parti è presente fin dall'opera di Platone e Aristotele. Sul piano della filosofia sociale e dello stato la Scolastica medievale, in particolare con Tommaso d'Aquino, sviluppa questo principio nel concetto di "bene comune", che però entra in crisi con l'affermarsi, nel Trecento, del volontarismo e del nominalismo (Ockham) che conducono, in epoca moderna, al pensiero individualistico in ogni àmbito della vita e della cultura "la parte precede l'intero". Una reazione all'individualismo inizia con l'idealismo tedesco agli inizi del XIX secolo, con la scuola storica del diritto, con il romanticismo; prosegue nel Novecento con le teorie istituzionaliste (O. von Gierke, S. Romano, M. Hauriou), con il neoromanticismo (O. Spann), con la psicologia della *Gestalt* e, soprattutto nel cattolicesimo, con il recupero del pensiero di Tommaso nella dottrina sociale della Chiesa (dalla enciclica *Rerum novarum* del 1891). Cfr. G. Sorgi, G. Franchi, *Verso una nuova etica dello sport*, in Aa.Vv., *Ripensare lo sport. Per una filosofia del fenomeno sportivo,* a cura di G. Sorgi, cit., p. 146, nota 12.

[34] Cfr. *ivi*, p. 146 s.

[35] *Ivi*, p. 147.

[36] A.F. Utz spiega il concetto di "bene comune" proprio grazie ad un esempio tratto dal mondo dello sport: in una partita di calcio ogni giocatore (portiere, difensore ecc.) ottimizza la propria personale prestazione solo attraverso il bene dell'intera squadra: «La parte tende all'intero, proprio perché è una parte. Ciò significa che egli tende all'intero attraverso il "suo" modo, che non è quello degli altri. E nonostante ciò egli tende a qualcosa di comune». A.F. Utz, *Sozialethik – Mit internationaler Bibliographie – I. Teil: Die Prinzipien der Gesellschaftslehre*, Heidelberg, 1958, p. 152.

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orientato verso un ideale di gioco, incarnato dai suoi modelli di giocatore; d'altro canto, egli stesso, migliorando nella pratica, diventa – a sua volta – modello di comportamento per chi è meno bravo e per le generazioni future che si impegneranno nella stessa attività. Al di là del pur necessario egualitarismo giuridico, l'intrinseca socialità del gioco inserisce tutti in un flusso relazionale mai del tutto paritario, in cui si è sempre – allo stesso tempo – allievi e maestri[37]. Questo è l'aspetto che possiamo definire pedagogico della struttura del gioco.

In un'etica sociale dello sport fondata ontologicamente, ad esempio, l'atto antisportivo, come può essere anche l'utilizzo di *doping*, rivolgendosi contro la corretta forma di relazione con l'altro, lede non soltanto i regolamenti che ne prescrivono il divieto, ma la comunità in cui i membri di una stessa squadra – anche gli avversari –, trovano la propria ultima ragion d'essere, e quindi la comunità e il mondo sportivo nel suo insieme, che vive per mezzo di queste sotto-comunità. Cioè, una lesione dello sport nella sua totalità si ripercuoterebbe alla fine anche sull'autore dell'atto antisportivo, appunto quale sua *parte*: se non si vive bene il flusso relazionale in cui si trova ogni sportivo, non solo non si cresce e non si migliora, ma si avvilisce l'intera pratica e l'intera cultura sportiva.

Solo una tale concezione di sport contiene in sé strutturalmente quegli elementi di pacificazione, di fraternità, di solidarietà a cui lo sport non può e non deve rinunciare.

Pena il suo snaturarsi. E, diventare, cosí, qualcos'altro.

Giuseppe Sorgi

*Abstract*

Il saggio mira a evidenziare la banalizzazione della riflessione etica sul fenomeno sportivo, al cui interno la prospettiva filosofica, che sottolinea il piano del dover essere, è stata considerata come qualcosa di fastidioso. Il saggio analizza sia la prospettiva descrittiva che quella prescrittiva. Per la prima il corpo è una macchina nella quale è possibile intervenire tecnologicamente, con conseguenze inevitabili sul piano del doping. La seconda pro-

[37] Si veda il mio, *Allievo maestro. Una relazione che apre all'altro*, in Aa.Vv., *Dona virtù e premio… Scritti in onore di Serenella Armellini*, a cura di A. Di Giandomenico, Roma, 2013, p. 251 s.

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spettiva pone l'attenzione sull'atleta come persona. Infine il saggio mira a ribadire come la riflessione filosofica spinga a ridisegnare alcuni principi antropologici da tener presenti per riscoprire la validità del potenziamento dell'uomo come essere relazionale. In tal senso l'attività sportiva può rappresentare la strada per l'autoconsapevolezza e per l'educazione integrale che chiama in causa la costituzione intersoggettiva della persona, oscillando tra l'autoaffermazione individuale, la dimensione pubblica e la profondità spirituale.

This paper aims at highlighting how, among the various problems that plague the sports phenomenon, there is also a sort of trivialization of the ethical reflection. Over the last period, in fact, always with greater emphasis, the philosophical perspective has been regarded as somewhat "annoying" or "uncomfortable", just because it is able to put on the table the "ought to be" of the sports dimension.

But we have limited the field to only two perspectives, one linked to a descriptive plan, the other one to a prescriptive plan. The first one, as a result of the materialistic-mechanistic approach, reveals how it is plausible to interpret your body as a device to be used to achieve specific goals such as victory at any cost. Taking it to the extremes, it is conceivable to justify, on the basis of this kind of approach, the belief that a body is a real "machine" on which it is possible to operate "technological improvements" that will result in an illogical lawfulness of resorting to doping practices. The second one, as a result of a personal approach, puts the attention on the athlete condition as a person and presents the interiority as a catalyst center declaring the key point of being sporting in the athlete consciousness. Also with respect to the possible use of doping.

Ultimately, our aim will be to reiterate how a philosophical reflection recalls the attempt to redesign some anthropological principles to use for rediscovering the validity of man improvement, such a being-in-relationship, with himself and with the others. In this sense, sports activity should represent a path of self-awareness and integral education that calls into question the intersubjective constitution of a person, hovering between individual self-affirmation, public dimension and spiritual depth.

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# Il giudizio per la repressione del doping in Italia
# Il sistema e le problematiche

Sommario: 1. Il fenomeno del doping. – *a*. la normativa comunitaria. – *b*. la normativa nazionale. – 2. La competenza del C.O.N.I. – 3. Il codice sportivo antidoping. – 4. Gli organi di giustizia antidoping. – 5. La procura nazionale antidoping. – 6. Il Tribunale Nazionale Antidoping – giudizio di primo grado. – *a.* Il procedimento di archiviazione. – *b*. Il giudizio dibattimentale di primo grado. – *c.* La fase istruttoria. – *d*. La fase decisionale del giudizio di primo grado. – 7. Le impugnazioni. – *a*. Il gravame avverso le decisioni del comitato per le esenzioni terapeutiche. – *b*. Il riesame dei provvedimenti della procura antidoping in materia di mancata comunicazione o di mancato controllo. – *c*. Il ricorso avverso i provvedimenti di sospensione cautelare. – 8. Il giudizio d'appello. – 9. Il dibattimento in secondo grado. – 10. Il giudizio di revisione. – 11. Alcune osservazioni conclusive in tema di onere della prova e diritto alla difesa

1. L'art. 1 della legge italiana del 14 dicembre 2000, n. 376, con il secondo comma, chiarisce che integra *doping*[1] «la somministrazione o l'assunzione di farmaci o di sostanze biologicamente o farmacologicamente attive, l'adozione o la sottoposizione a pratiche mediche non giustificate da condizioni patologiche ed idonee a modificare le condizioni psicofisiche o biologiche dell'organismo, al fine di alterare le prestazioni agonistiche degli atleti».

Il fenomeno del doping nello sport ha assunto, nel corso della seconda parte del ventesimo secolo, aspetti e dimensioni di estrema gra-

[1] Il termine doping utilizzato comunemente in Italia (vedi *Il vocabolario della lingua italiana*; *Il conciso*, edito dall'Istituto della Enciclopedia Italiana, Roma, 1998) è di derivazione inglese, in quanto origina dal verbo (*to*) *dope:* "trattare con stupefacenti". A sua volta l'inglese *to dope* deriva dal termine *dop*, utilizzato da una popolazione dell'Africa Australe, i Cafri, per indicare una bevanda fortemente stimolante, nel tempo, diffusasi anche in Gran Bretagna.

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vità, non solo nell'àmbito dello sport professionistico, ma anche presso i dilettanti e gli amatori[2]. La gravità di ciò è evidente a causa delle ripercussioni che l'utilizzo di tali pratiche determina sulla salute degli atleti e/o degli *ex* atleti, oltre ad alterare il risultato sportivo a causa dell'assunzione di prodotti che innalzano la soglia di percezione della fatica.

*a. La normativa comunitaria*

Già nel 1967[3] il Comitato dei ministri del Consiglio d'Europa adottava una risoluzione finalizzata a stigmatizzare la assunzione «di sostanze estranee all'organismo o di sostanze fisiologiche in qualità o per via anomala al solo scopo di influenzare artificialmente ed in modo sleale la prestazione sportiva».

Pochi anni dopo, nel 1975[4], veniva approvata la Carta Europea dello sport, che all'art. 5 prevede che «devono essere adottate misure per salvaguardare lo sport e gli sportivi da ogni sfruttamento a fini politici, commerciali o finanziari e da pratiche avvilenti ed abusive come l'uso di droghe».

Nel maggio del 1999, ad Olimpia, in Grecia[5], si tiene la prima conferenza europea sullo sport dalla quale emerge l'esigenza di dar vita ad una piattaforma comune contenente l'individuazione di prodotti dopanti e dunque vietati. Pochi mesi dopo a Losanna si svolge la prima Conferenza mondiale sul doping, promossa dal Comitato Internazionale Olimpico (C.I.O.) dalla quale scaturisce la proposta della costituzione della Agenzia Mondiale *Antidoping*, meglio nota con la sigla WADA, che viene istituita il 10 novembre 1999 come fondazione privata di diritto elvetico[6].

Principale funzione della Wada è quella della pubblicazione, ogni anno, di una lista delle sostanze e dei metodi proibiti nella pratica sportiva.

[2] Vedi, al riguardo, L. Musumarra, *Il rapporto di lavoro sportivo*, in Aa.Vv., *Il diritto dello sport*, Firenze, 2004, p. 221; M. Sanino, *Giustizia Sportiva*, Padova, 2016, p. 355.

[3] Con la risoluzione del 29 giugno 1967.

[4] Il 20 marzo 1975 a Bruxelles.

[5] Il luogo è evocativo del ritorno alle regole dell'etica sportiva che determinava al tempo delle antiche olimpiadi, nell'Ellade, un periodo di non belligeranza.

[6] Cfr. il sito *www.wada-ama.org*.

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*b. La normativa nazionale*

In Italia, la l. 28 dicembre 1950, n. 1055, per la prima volta si è occupata della tutela sanitaria delle attività sportive, ma essa considerava esclusivamente le attività agonistiche. Invero, i primi controlli *antidoping* furono svolti dalla Federazione Medico Sportiva nel corso della XVII Olimpiade dell'era moderna che si è svolta a Roma[7].

Nel 1971, a séguito della materiale costituzione delle regioni, con la l. n. 1099[8], veniva a queste trasferita la tutela sanitaria delle attività sportive. Di tale norma è necessario ricordare che essa, per la prima volta, con gli artt. 3 e 4, ha qualificato come illecito penale la detenzione, la somministrazione e l'utilizzo di sostanze che possono risultare nocive per la salute e che vengano assunte per modificare artificialmente le energie naturali degli atleti.

La l. n. 689 del 1981, ha depenalizzato, tra gli altri, il ricorso al doping limitandone l'assunzione ad una mera sanzione amministrativa, con l'evidente risultato di far venir meno l'attenzione sul tema dell'alterazione delle prestazioni sportive.

Al fine di ovviare alla intervenuta depenalizzazione relativa all'assunzione di sostanze dopanti una parte della giurisprudenza[9] ha ritenuto di poter applicare, al riguardo, la legge del 13 dicembre 1989, n. 401, dettata, però, per combattere le frodi sportive. L'estensione artificiosa di tale normativa ha sollevato perplessità in dottrina[10]. Infine, con la normativa intervenuta a séguito della l. n. 376 del 2000 la materia ha trovato la sua attuale regolamentazione dal punto di vista della legislazione statale[11].

È interessante rilevare che la l. n. 376 del 2000 assume come punto di partenza il dettato dell'articolo 32 della nostra Carta costituzionale, prendendo come base il diritto alla salute tutelato dal precetto costituzionale. Con la normativa in parola viene istituita (art. 3) la Commissione per la vigilanza ed il controllo sul *doping* e per la tu-

[7] Sul punto v. D. Maraniss, *Roma 1960, le olimpiadi che cambiarono il mondo*, traduzione di D. Giusti, Milano, 2010.

[8] L. 26 ottobre 1971, n. 1099.

[9] Cfr. Cass. pen., 26 marzo 1996, in *Riv. dir. sport*, 2001, p. 181; Trib. Roma, 21 febbraio 1992, *ivi*, 1992, p. 123.

[10] V., sul punto, L. Musumarra, *Il rapporto di lavoro sportivo*, cit., p. 228.

[11] Sul punto vedi R. Calderone, *Il difficile cammino della legislazione nazionale per individuare e reprimere il reato di doping*, in *Guida dir.*, 2011, n. 6.

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tela della salute nelle attività sportive[12], che, in virtú della sua composizione, integra valido momento di raccordo e coordinamento della normativa italiana statale con quanto realizzato dall'Unione Europea ed in campo piú specificamente sportivo dal C.I.O.; anche se è necessario ricordare che non tutto ciò che è considerato uso di sostanze dopanti, in base agli elenchi della WADA, integra un ipotesi di reato penale[13].

2. A séguito della revisione della normativa costituzionale avviata dalla Commissione bicamerale nel 1996[14], conclusasi con un nulla di fatto sotto il profilo delle modifiche al testo normativo[15], ma idonea a realizzare approfondite riflessioni sul decentramento dei poteri, sono state dettate le leggi delega n. 59 e n. 127 del 1997 (e successivamente, nel 2001, sono intervenute parziali modifiche del titolo quinto della Costituzione); in tale àmbito l'art. 11 della l. 15 marzo 1997, n. 59[16] ha previsto il riordino delle norme che regolano il Comitato olimpico nazionale italiano[17].

Pertanto, il 23 luglio 1999[18] veniva emanato il decreto legislativo n. 242[19], che ridisegnava le funzioni del CONI ribadendo la sua natura di ente avente personalità giuridica di diritto pubblico, posto sotto la vigilanza del Ministero per i beni e le attività culturali (art. 1). Dopo la emanazione della l. n. 280 del 2003, nella prima parte di questo studio ampiamente esaminata, si è avvertita l'esigenza di chiarire i compiti della Giunta nazionale del CONI, in materia di giu-

[12] La Commissione, istituita presso il Ministero della salute, è composta da due membri nominati dal Ministero della Salute, due membri nominati dal Ministero della attività culturali, due membri nominati dalla conferenza delle regioni e delle provincie autonome, due membri dal CONI, uno dagli atleti, uno dai preparatori tecnici ed allenatori, uno dagli Enti di promozione sportiva, avvalendosi, altresí, dell'opera di specialisti.

[13] Cfr. Cass. pen., 20 marzo 2002, n. 11227, in *Guida dir.*, 2002, p. 86.

[14] V. AA.VV., *La riforma della Costituzione nei lavori della bicamerale,* Napoli, 2000.

[15] Il testo dei lavori della bicamerale è stato approvato e licenziato dalla Commissione il 4 novembre 1997.

[16] In G.U. del 18 marzo 1997, n. 63, G.U. 56.

[17] Da realizzarsi nel termine di 12 mesi dalla entrata in vigore della legge n. 59 del 1997, avvenuta il primo aprile 1997, termine ulteriormente prorogato.

[18] In G.U. del 29 luglio 1999, n. 176.

[19] Successivamente integrato, dopo la emanazione della l. n. 280 del 2003, dal d.lg. n. 15 del 2004, in G.U. 27 gennaio 2004, n. 21.

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stizia sportiva, aggiungendo la lettera h *bis*) con la quale vengono individuate le regole del "giusto processo sportivo" cosí puntualizzate:

«1. Obbligo degli affiliati e tesserati, per la risoluzione delle controversie attinenti lo svolgimento dell'attività sportiva, di rivolgersi agli organi di giustizia federale;

2. Previsione che i procedimenti in materia di giustizia sportiva rispettino i princípi del contraddittorio tra le parti, del diritto di difesa, della terzietà e imparzialità degli organi giudicanti, della ragionevole durata, della motivazione e della impugnabilità delle decisioni;

3. Razionalizzazione dei rapporti tra procedimenti di giustizia sportiva di competenza del C.O.N.I. con quelli delle singole federazioni sportive nazionali e delle discipline sportive associate».

Alla luce di questi princípi lo Statuto del CONI, adottato dal Consiglio nazionale il 26 febbraio 2008, affermava la centralità dello stesso Comitato nella lotta al «(art. 6, lett. *i*), centralità mancata attraverso la istituzione del Tribunale nazionale *antidoping*»[20]. L'art. 13 dello Statuto, sostanzialmente riconfermato dall'attuale testo, adottato dal Consiglio nazionale l'undici giugno 2014, cosí afferma: «Con provvedimento del Consiglio Nazionale è istituto il Tribunale Nazionale *antidoping* quale organismo di giustizia per le decisioni in materia di violazione delle Norme Sportive *antidoping* del CONI o delle disposizioni del Codice Mondiale Antidoping WADA.

La composizione e il funzionamento del Tribunale Nazionale *Antidoping* sono regolamentate e disciplinate dalle vigenti Norme Sportive *antidoping* del CONI, secondo il principio di autonomia e indipendenza dell'Organo».

Come è facile rilevare in base al testo del comma 1 del sopra riportato articolo dello statuto del CONI vi è una piena e sostanziale consequenzialità tra le norme adottate dal medesimo CONI in materia e le disposizioni del WADA, di carattere internazionale e sovranazionale.

Anche in considerazione di tale riaffermato collegamento sono state varate, alla fine del 2014, ed in vigore dal gennaio 2015, le norme del codice sportivo *antidoping*.

[20] Vedi, sul punto, la puntuale ricostruzione di F. Tortorella, *La celebrazione dello "spirito umano", nella decisione del Tribunale nazionale antidoping*, in *Riv. dir. econ. sport*, 2008, p. 95.

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3. Chiarisce il preambolo alle norme sportive *antidoping*, approvate dalla Giunta del CONI del 18 novembre 2014[21], che il codice sportivo *antidoping* (CSA) e i disciplinari tecnici (DT) attuativi del Codice mondiale *antidoping* (codice WADA) e degli standard internazionali, «costituiscono le uniche norme nell'àmbito dell'ordinamento sportivo italiano che disciplinano la materia dell'anti*doping* e le condizioni cui attenersi nell'esecuzione dell'attività sportiva».

Il primo articolo del codice sportivo *antidoping* delimita il campo di operatività di esso dando la definizione di *doping*, il quale viene inteso come «la violazione di una o piú norme contenute nei successivi articoli 2 e 3» dello stesso codice.

Dunque, è dall'analisi di detti articoli che occorre muovere per individuare esattamente i comportamenti degli atleti idonei a determinare la violazione della normativa *antidoping*, cosí come mutuata dal codice WADA.

Invero, la regola, dettata dall'art. 2, impone a «ciascun atleta di accertarsi di non assumere alcuna sostanza vietata» in quanto esso sarà ritenuto responsabile «per il solo rinvenimento nei propri campioni biologici di qualsiasi sostanza vietata, metabolita o marker». Il punto, 2.1.1., dell'art. 2, ricorda anche che «ai fini dell'accertamento della violazione delle norme sportive *antidoping* non è necessario dimostrare il dolo, la colpa, la negligenza o l'uso consapevole da parte dell'atleta», ma opera, in materia, una sorta di presunzione di colpevolezza, circostanza questa che pone l'atleta in notevoli difficoltà difensive in quanto, come chiarisce il successivo punto 2.1.2., tale presunzione costituisce prova sufficiente di violazione della normativa *antidoping* riscontrandosi «la presenza del campione biologico di una sostanza vietata o dei suoi metaboliti o marker". Inoltre, "la mera presenza di un qualsiasi quantitativo di sostanza vietata, dei suoi metaboliti o marker, nel campione biologico dell'atleta, costituisce di per sé una violazione delle N.S.A., fatta eccezione per le sostanze per le quali la lista (WADA) indica specifiche soglie di tolleranza" (punto 2.1.3).

È evidente, dall'analisi delle norme in esame, l'esclusiva responsabilità dell'atleta nell'accertarsi di non assumere alcuna sostanza vietata o di non utilizzare alcun metodo proibito.

[21] In vigore dal primo gennaio 2015.

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Il punto 2.2.2. specifica, in modo estremamente chiaro, che saranno puniti anche i tentativi in quanto il *doping*, in virtú della sua potenziale nocività, deve essere sanzionato anche se ci si trova soltanto in presenza di un 'tentativo' di assunzione; anche se in questa ultima ipotesi – come è evidente – non può integrare l'inversione dell'onere della prova in precedenza riscontrata.

Anche la mera elusione (o il rifiuto) di sottoporsi al prelievo di campioni biologici comporta violazione della normativa anti*doping* (punto 2.3.). Nell'àmbito del tentativo di sottrarsi ai controlli, la normativa, in esame, contempla la reiterata mancata reperibilità dell'atleta (per gli sportivi che debbono sottoporsi ai controlli fuori dalle competizioni). Invero, l'atleta che si sottragga ai controlli o non comunichi i propri recapiti, per un diffuso lasso di tempo, deve essere considerato punibile per violazione delle norme sul *doping* (2.4).

Anche la "manomissione" è punita come pratica vietata, per manomissione la normativa intende tutte quelle attività volte ad "intralciare intenzionalmente l'operato di un addetto al controllo *antidoping*, fornire informazioni fraudolente ad una organizzazione *antidoping* ovvero intimidire o tentare di intimidire un potenziale testimone" (2.5).

Oltre all'uso anche il solo possesso, da parte dell'atleta, di qualsiasi sostanza vietata comporta la violazione della normativa *antidoping*; cosí come il possesso operato dal personale di supporto all'atleta (punto 2.6.1 e punto 2.6.2): ciò sia nel corso delle competizioni, che lontano dalle gare (per i soggetti che vengono sottoposti a controlli costanti, anche durante la fase di preparazione: ad esempio, ciò avviene per i ciclisti e per i tesserati dalla FIDAL).

L'unica possibilità di evitare la sanzione è quella di dimostrare che il possesso sia finalizzato ad uso terapeutico, ma questa circostanza è legata alla concessione della esenzione, regolata dall'art. 14 del CSA, per gli atleti di àmbito nazionale e dall'art. 15 dello stesso codice, per gli atleti di àmbito internazionale. Poiché la richiesta di esenzione deve, in base agli articoli richiamati, essere operata preventivamente al possesso delle sostanze appare evidente che la mancata tempestiva richiesta di esenzione ad opera degli atleti o del loro personale di supporto non può che comportare la sanzione derivante dalla lesione della normativa contenuta nel CSA.

Analogamente è sanzionato chi ha fornito consulenza professio-

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nale ad atleti e sia soggetto alla giustizia sportiva; mentre se si tratta di professionisti non soggetti al vincolo della giustizia sportiva, nei loro confronti opera, esclusivamente, la normativa statale penale in base al dettato dell'art. 9 della legge 14 dicembre 2000, n. 376[22].

Infine, l'art. 3 del CSA prevede la sanzione della omessa denuncia da parte di tesserati di circostanze rilevanti ai fini dell'accertamento di fatti di *doping* relativi all'operato di altri atleti (punto 3.2).

4. Sulla base delle esigenze di tutela discendenti dalla normativa in parola viene individuata dal CONI una specifica competenza in materia di *doping* e prendono vita la Procura Nazionale *Antidoping*, con competenza su tutti i tesserati delle Federazioni associate al CONI ed il Tribunale *Antidoping*, formato da due sezioni (art. 24 CSA): la prima con competenze a giudicare per tutte le violazioni delle norme sportive anti*doping* poste in essere da atleti non inseriti nel RTP della Federazione internazionale di appartenenza o che siano atleti di livello internazionale, nonché per le violazioni della NSA poste in essere da altri soggetti tesserati e non tesserati.

La seconda opera come giudice del gravame in merito alle decisioni rese dalla prima sezione (art. 24.3), mentre le decisioni della seconda sezione, emesse in primo grado, possono essere impugnate innanzi al Tribunale Arbitrale dello Sport (TAS) di Losanna.

5. La Procura *antidoping*, sedente presso il CONI, è investita del potere di promuovere l'azione disciplinare che viene esercitata per mezzo del deferimento quando le analisi istruttorie medico-sportive hanno evidenziato un esito avverso (la presenza nei risultati della analisi di una sostanza vietata) o un esito atipico (circostanza questa che prescrive però una ulteriore verifica prima di disporre il deferimento).

Il deferimento viene avviato dall'ufficio della Procura *antidoping* (UPA) a séguito della acquisita notizia di violazione della normativa *antidoping*: l'ufficio convoca l'interessato per sentirlo personalmente contestandogli gli addebiti e chiedendo a lui giustificazioni.

L'indagato in questa fase del procedimento potrà farsi assistere da un legale; inoltre, se l'atleta è minore alla sopra descritta fase proce-

[22] In G.U. del 18 dicembre 2000, n. 294.

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dimentale dovranno necessariamente essere presenti gli esercenti la potestà genitoriale (art. 22.3).

La mancata presenza o la non collaborazione dell'indagato non comporta alcuna sospensione della procedura (art. 22.5); di contro, l'indagato può chiedere il rinvio dell'audizione per specifiche motivazioni da inviare almeno due giorni prima della data prevista dall'ufficio della procura per l'audizione.

Inoltre, la procura *antidoping* ha il potere di convocare «qualunque altra persona, anche non tesserata, ritenuta interessata e/o informata sui fatti».

Se nel corso delle indagini dovessero individuarsi responsabilità nei confronti della persona convocata in quanto informata sui fatti nei suoi confronti «i relativi addebiti verranno (ad essa) immediatamente contestati» con la conseguente interruzione dell'audizione per consentire al nuovo indagato l'esercizio del proprio diritto alla difesa, anche attraverso la nomina di un difensore (art. 22.8).

Nel corso della fase procedimentale delle indagini l'indagato può esercitare il suo diritto alla difesa attraverso la produzione di memorie e la richiesta alla Procura di «ammissione di mezzi istruttori» (art. 22.10).

Al riguardo deve essere chiarito che non solo la richiesta di nuova audizione è data all'atleta indagato, ma egli può portare all'attenzione della Procura i risultati delle proprie indagini relative anche ai prelievi ed alle modalità delle analisi susseguenti ad essi, nonché suggerire i nominativi di alcuni testimoni da ascoltare: ciò in quanto la Procura *antidoping*, è chiamata ad indagare sul caso ricercando anche le ragioni dell'innocenza dell'incolpato.

Al termine di tale fase, di natura pregiudiziale, la Procura *antidoping*, può disporre il deferimento dell'indagato con atto motivato corredato del fascicolo relativo alle indagini svolte o, in alternativa, richiedere alla competente sezione del Tribunale *antidoping* l'archiviazione sulla base di articolate e motivate ragioni.

La copia del provvedimento sia di deferimento, che contenente la richiesta di archiviazione viene trasmessa all'indagato o al suo difensore, se nominato (art. 22, punto 12). Il deposito del provvedimento e del relativo fascicolo, vanno comunicati, a cura dell'ufficio della Procura *antidoping*, alla Federazione internazionale o nazionale di appartenenza dell'atleta (o del tesserato) ed alla WADA, le quali in

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quanto parti del successivo giudizio (sia tendente all'archiviazione, che all'accertamento della colpevolezza) potranno estrarne copia presso la competente sezione del Tribunale *antidoping*.

Nei casi in cui vi siano, al riguardo, richieste dell'autorità giudiziaria in genere da parte di una delle procure della Repubblica, che sta indagando sul caso, l'ufficio della Procura *antidoping* «trasmette copia del provvedimento e dei relativi atti dell'istruttoria» (art. 22.13).

Va, infine, ricordato che il codice regola la prescrizione dell'azione disciplinare con l'art. 23 nel quale si legge che «non può essere avviata alcuna azione contro un atleta o altra persona per la violazione di una norma *antidoping* contenuta nelle norme sportive *antidoping* (N.S.A.) se tale azione non viene avviata entro dieci (10) anni dalla data in cui si presume sia stata connessa la violazione».

6. Il potere di attivare il Tribunale *antidoping* compete alla Procura *antidoping*, presso il CONI, la quale con propri motivati provvedimenti, emessi al termine della fase procedimentale, di natura amministrativa, dispone il deferimento dell'atleta o di altro soggetto, che ha violato la NSA, oppure propone al Tribunale l'archiviazione del procedimento a suo tempo aperto.

Il Tribunale decide in merito a tali istanze in base alla competenza sancita dall'art. 24 CSA distribuendo i giudizi tra prima sezione, per gli atleti di valenza nazionale e seconda sezione, per gli atleti di interesse internazionale, il cui nominativo è contenuto negli elenchi RTP.

Al riguardo, l'art. 25 del CSA chiarisce che sono parti del giudizio *antidoping* in primo grado, oltre all'indagato ed alla Procura *antidoping*, anche la WADA e la Federazione internazionale per la quale è tesserato l'indagato.

Se l'indagato è un tesserato di un ente di promozione sportiva (EPS), la Federazione internazionale non è parte del giudizio, attesa la rilevanza, solo nazionale, del vincolo assunto dell'atleta, che è possibile definire come un "amatore".

*a. Il procedimento di archiviazione*

Come ricordato in precedenza il giudizio di archiviazione viene istaurato su proposta della procura, indirizzata alla competente sezione del TNA, la quale, in assenza di contraddittorio fra le parti in

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udienza (ma è ipotizzabile che le parti legittimate possano far pervenire al Tribunale le proprie memorie), può disporre nel seguente modo:

1) accoglie l'istanza e dispone l'archiviazione del caso;

2) rigetta la richiesta e rinvia alla procura per un supplemento di indagine indicando all'ufficio inquirente le ulteriori indagini che ritiene necessarie;

3) rigetta la richiesta della procura e fissa l'udienza dibattimentale dando disposizioni all'ufficio della procura di formulare l'imputazione.

Avverso il provvedimento del Tribunale *antidoping*, qualunque sia il contenuto, non è previsto alcun reclamo ad opera delle parti (art. 26 CSA).

*b. Il giudizio dibattimentale di primo grado*

Nel termine di 40 giorni dal deferimento o, nel caso in cui non sia stata accolta l'istanza di archiviazione a norma di quanto disposto dalla lettera *c)* dell'art. 26 CSA, da tale provvedimento, la sezione competente del Tribunale *antdoping* fissa l'udienza di trattazione.

La data dell'udienza deve essere comunicata alle parti almeno 20 giorni prima ad opera della segreteria del Tribunale.

Le parti almeno 10 giorni prima della udienza possono depositare una propria memoria e produrre le prove e formulare (a pena di decadenza) le istanze istruttorie. La memoria, oltre ad essere depositata presso la segreteria del TNA, dovrà essere, nel medesimo termine di 10 giorni notificata alla procura ed alla Federazione nazionale con le modalità previste dall'art. 42, punto 1, del CSA[23], mentre le comunicazioni alla WADA ed alle Federazioni internazionali competono alla segreteria del TNA.

Il mancato rispetto del termine perentorio di dieci giorni determinerà la inammissibilità della produzione. La scadenza del termine

[23] Le comunicazioni dell'UPA, salvo quanto previsto dal successivo articolo 42.2., e di entrambe le sezioni del TNA avvengono alternativamente tramite raccomandata a/r, fax, telegramma, corriere o posta elettronica nelle seguenti modalità: per persone fisiche, nel domicilio eletto ai fini del procedimento stesso ovvero, in mancanza, presso quello risultante dal verbale di prelievo *antidoping*, nonché quello dichiarato agli atti del tesseramento presso la FSN/DSA/EPS di appartenenza; nel luogo di residenza, ovvero quello indicato dall'Autorità giudiziaria per i soggetti non tesserati; per le società, presso la sede legale dichiarata agli atti di affiliazione presso la FSN/DSA/EPS di appartenenza.

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non comporta alcuna remissione anche in caso di spostamento dell'udienza; spostamento richiesto motivatamente dalle parti o disposto d'ufficio (per ragioni logistiche o organizzative) dal TAS (art. 27, punto 7).

L'incolpato può, se lo ritiene, rinunciare alla udienza dibattimentale ed in questa circostanza il TNA decide in camera di consiglio senza la presenza delle parti sulla base delle produzioni depositate dalle stesse (27.8). Se l'incolpato chiede, invece, la trattazione del giudizio la stessa avviene, per ragioni di riservatezza, in camera di consiglio, a meno che le parti non ne chiedano la trattazione pubblica e la eventuale registrazione.

In udienza pubblica o in camera di consiglio l'incolpato può farsi assistere da un difensore e, se necessario, da un interprete. Il minore deve essere presente in giudizio attraverso l'esercente della potestà genitoriale (è sufficiente che la funzione sia svolta anche da uno solo dei genitori).

Poiché il giudizio è informato alle regole generali di lealtà e correttezza, proprie di ogni rapporto sportivo, la mancata presenza del tesserato incolpato, senza giustificato motivo, «può costituire comportamento valutazione da parte del consiglio giudicante ai fini del decidere» (art. 28.1.4), mentre la Procura *antdoping* interviene, sempre, in giudizio con un proprio componente, la Federazione internazionale e la WADA possono intervenire, in udienza, a mezzo dei rappresentanti, muniti dei poteri (art. 28.1.6).

L'udienza è diretta dal presidente della sezione competente del TNA il quale può interrogare liberamente le parti e muovere contestazioni all'incolpato. Il giudizio si introduce con una sintetica relazione del presidente o del relatore espressamente incaricato dal presidente (art. 28.1.7). Dell'udienza, sia che essa si svolga in camera di consiglio o che avvenga con modalità pubblica, viene steso un sintetico verbale a cura della segreteria del TNA.

*c. La fase istruttoria*

Analogamente a ciò che avviene negli altri giudizi, ispirati ai princípi del giusto processo sportivo, contenuti nel decreto legislativo n. 242/1999 (cosí come integrato dal decreto legislativo n. 15/2004), nella procedura in esame, il potere di assumere le prove, se ritenute ammissibili e rilevanti, compete al collegio nella sua interezza in quanto

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non è prevista la nomina di un componente istruttore cui delegare la fase istruttoria; pertanto, sarà un provvedimento collegiale a determinare l'ammissione o il rigetto di mezzi di prova e di istanze istruttorie (art. 28.2.1). Inoltre, il collegio può fruire, se lo ritiene opportuno, dell'opera di un consulente tecnico d'ufficio.

È evidente che, analogamente a ciò che accade nel processo civile, nelle ipotesi in cui venga nominato il CTU sarà il collegio a dover dettare i quesiti cui l'ausiliare sarà chiamato a fornire risposta tecnica; in tale ipotesi, istaurandosi nel giudizio un sub procedimento finalizzato ad acquisire i risultati della consulenza le parti potranno avvalersi dell'opera di propri periti.

Deve essere, infine, ricordato che al collegio, nel giudizio di primo grado, sono espressamente demandati, «i piú ampi poteri di istruttoria e lo stesso può altresí incaricare l'ufficio della procura di effettuare specifici accertamenti o supplementi mirati d'indagine» (art. 28.2.3).

*d. La fase decisionale del giudizio di primo grado*

Al termine dell'udienza dibattimentale viene data alle parti lettura del dispositivo, sulla stessa lunghezza d'onda delle decisioni emesse nel rito del lavoro (artt. 429 e 431 c.p.c.).

Tuttavia, specifiche ragioni di riservatezza, derivanti dalla delicatezza della materia trattata, possono suggerire, al presidente il differimento della pronuncia o la disposizione di una comunicazione scritta del dispositivo alle parti in via riservata.

La normativa del CSA indica, come opzione preferenziale, la regola del deposito contestuale della parte motiva della decisione in uno con la lettura del dispositivo; tuttavia, qualora ciò non sia possibile poiché la stesura della motivazione si presenta articolata e complessa, si può far ricorso alla sola lettura del dispositivo riservando il deposito della sentenza, nella sua interezza, ad un successivo termine, indicato all'atto del deposito del dispositivo, non superiore a trenta giorni.

La decisione, una volta depositata, può prevedere la condanna della parte privata, ove soccombente, anche al pagamento di sanzioni economiche nonché le spese processuali, in base al dettato di una specifica tabella economica[24].

[24] In *www.coni.it.*

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L'analisi del dettato dell'art. 29 del codice sportivo *antidoping*, rubricato "la decisione", non può esimerci dal soffermarci sull'ultimo punto di esso, il numero 5, che qui testualmente si richiama: «Secondo quanto stabilito all'articolo 13.3 del Codice Mondiale *Antidoping*, in tutti i casi in cui il TNA non decida, in un termine ragionevole, se sia stata o meno commessa una violazione della normativa *antidoping*, la WADA può appellarsi direttamente al TAS come se l'Organismo giudicante avesse accertato la mancata violazione della normativa *antidoping* e che pertanto la WADA ha agito in modo ragionevole, le spese legali sostenute dalla WADA saranno poste a carico del CONI-NADO».

Dalla lettura dell'articolo in esame emerge il concetto di *"ragionevole durata"* del giudizio *antidoping*. Tale concetto, entrato a far parte esplicitamente dalle norme in tema di tutela dal 1999, attraverso la legge costituzionale n. 2, del 1999, investe anche la giustizia sportiva non solo nazionale, come appare dal testo novellato del decreto legislativo n. 242 del 1999 (art. 7)[25], ma anche internazionale in base a quanto prescrive il codice mondiale *antidoping*, cosiddetto codice WADA (art. 13.3.).

Tale concetto di ragionevole durata dei processi giustifica in base alla norma in esame del CSA una sorta di sussidiarietà, esercitata dalla WADA, che considerando il tempo irragionevolmente trascorso come una sorta di silenzio, integrante una decisione di proscioglimento, propone una sorta di gravame al TAS (giudice di appello per le decisioni della sezione seconda del TNA), che non può che suscitare negli interpreti non poche perplessità.

La prima considerazione è legata all'ingerenza esercitata dall'organismo internazionale su quello nazionale che non è in linea con le regole del giusto processo sancito dall'art. 7, lettera h *bis*), del decreto legislativo n. 242/99, regole che prescrivono un doppio grado di giudizio da esercitarsi in sede nazionale e che garantiscono l'autonomia dei giudici anche in presenza di tempi troppo lunghi dei giudizi.

La seconda è che non essendo prevista una regola analoga per i giudizi che si celebrano innanzi alla prima sezione si determina una

[25] Lo si ricorda, i temi del giusto processo sono stati introdotti nel decreto c.d. «Melandri» dal d.lg. n. 15 del 2004, che ha integrato l'art. 7 inserendovi il punto *h bis).*

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evidente ed illegittima disparità di trattamenti tra atleti di rilevanza internazionale (inseriti nei controlli RTP) ed atleti nazionali.

La terza perplessità deriva dalla circostanza che non è prevista una rigorosa motivazione ai fini della esperibilità di questo istituto.

Poiché con la riforma del codice di giustizia sportiva è stata istituita la procura generale dello sport presso il CONI è auspicabile che tale cómpito sollecitativo delle attività del TNA venga assegnato a detto organismo.

7. La terza sezione del nuovo codice sportivo *antidoping* regola le impugnazioni approntate dall'ordinamento rispetto alle diverse procedure poste in essere esse sono:

I – Il gravame avverso le decisioni del comitato per le esenzioni terapeutiche (art. 30).

II – Il riesame dei provvedimenti della procura *antidoping* in materia di mancata comunicazione o di mancato controllo (art. 31).

III – Il ricorso avverso i provvedimenti di sospensione cautelare (art. 32).

*a. Il gravame avverso le decisioni del comitato per le esenzioni terapeutiche (art. 30)*

La prima procedura esaminata dalla sezione relativa alle impugnazioni del codice sportivo *antidoping*, descritta nell'articolo 30, non riguarda un giudizio di gravame, bensì prende in esame il procedimento relativo ad una ipotesi di reclamo (*rectius*: riesame) avverso il diniego posto in essere dal comitato per l'esenzione ai fini terapeutici (CEFT) con il quale il medesimo comitato, che è organo amministrativo e non giurisdizionale del CONI ed è composto esclusivamente da medici, ha rifiutato l'autorizzazione richiesta preventivamente (art. 14.5 del C.S.A.) di fare uso di sostanze inserite negli elenchi WADA a fini terapeutici.

Avverso il provvedimento di diniego è possibile proporre ricorso scritto entro il termine perentorio di 10 giorni dal momento in cui è stato comunicato il diniego. Il ricorso che deve essere corredato da un fascicolo contenente la documentazione medica prodotta dal CEFT, va proposto alla seconda sezione del Tribunale *antidoping* e nello stesso termine di 10 giorni notificato al comitato.

Avverso la decisione di rigetto dei ricorsi l'atleta può proporre ri-

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corso al TAS, mentre nel caso di accoglimento è il Comitato che può agire innanzi al Tribunale arbitrale per lo sport di Losanna (art. 30.8).

*b. Il riesame dei provvedimenti della procura antidoping in materia di mancata comunicazione o di mancato controllo (art. 31)*

Anche il procedimento sussunto nel capo delle impugnazioni del CSA e contenuto nell'art. 31 ha poco a che vedere con le impugnazioni trattandosi di un reclamo operato dall'atleta avverso i provvedimenti assunti dall'ufficio della procura in materia di inadempienza per "*mancata comunicazione*" ovvero per "*mancato controllo*" (art. 31).

In questa ipotesi l'atleta, nel termine perentorio di 10 giorni dalla comunicazione del provvedimento, può interporre reclamo alla seconda sezione del T.A.S. La richiesta di riesame va notificata nel medesimo termine alla procura, che ha 5 giorni di tempo per trasmettere il suo fascicolo. Anche questa procedura è camerale e si conclude entro 14 giorni dalla richiesta dell'atleta con un provvedimento inappellabile che può revocare il provvedimento dell'ufficio della procura che ha dato vita al procedimento contenzioso, ovvero con il rigetto dell'istanza di riesame con la convalida del procedimento emesso dall'UPA.

*c. Il ricorso avverso i provvedimenti di sospensione cautelare (art. 32)*

Infine, con l'articolo 32 de codice sportivo *antidoping*, vengono dettate le regole relative ai reclami avverso le misure cautelari previste dall'art. 21 CSA.

Con questo articolo si chiude il trittico di norme che pur essendo state qualificate come impugnazioni riguardano altre ipotesi di tutela offerte alle parti delle vertenze relative al doping.

Invero il reclamo avverso la sospensione cautelate è proposto dall'interessato, nel termine perentorio di 10 giorni, alla sezione del TNA che non ha emesso il provvedimento gravato.

L'udienza relativa al reclamo, che si celebrerà dopo che la competente sezione del TNA ha acquisito dall'altra sezione il fascicolo d'ufficio, ma, comunque, nel termine di 10 giorni dalla ricezione della documentazione relativa al reclamo. Di tale udienza la segreteria del TNA da tempestiva comunicazione al reclamante ed all'ufficio della procura.

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L'udienza si svolge in camera di consiglio cui può partecipare la parte (se minore l'esercente la potestà genitoriale) il proprio difensore, il rappresentante dell'ufficio della procura e, se necessario l'interprete.

I provvedimenti cosí resi non sono ulteriormente reclamabili, ma le misure cautelari, nel nostro caso sempre strumentali al giudizio, perdono la loro efficacia al momento della pronuncia di merito che decide la vertenza (art. 215 CSA).

8. Gli articoli che vanno da 33 al 37 del codice sportivo *antidoping* regolano, invece, il giudizio di appello e rientrano nell'àmbito di una impugnazione propriamente detta.

Il regime di questa fase di gravame si presenta, però, in modo assai contorto.

Invero, il punto 1 dell'art. 33 specifica che «avverso le decisioni adottate dalla seconda sezione del TNA quale giudice di primo grado – ai sensi dell'art. 24.2 del CSA – è ammesso appello al tribunale arbitrale dello sport (TAS) di Losanna, nel rispetto della sua normativa, entro il termine perentorio di trenta giorni dalla data di ricevimento della decisione fatti salvi i diversi termini concessi alla WADA nelle ipotesi disciplinate dall'art. 13 del codice WADA»[26].

Alla luce di questa previsione, dunque, gli appelli da proporsi nei confronti delle decisioni del TNA che riguardano gli atleti di rilievo internazionale, anche se cittadini italiani, non si svolgono innanzi ad un giudice sportivo italiano e vengono, invece, regolati in un procedimento arbitrale posto in essere da un organismo privato di diritto svizzero, creato dal C.I.O. nel 1983[27], senza che venga garantita la possibilità di un doppio grado di giudizio in sede nazionale.

[26] Art. 13 - Appelli «1. Per le Norme sportive *antidoping* italiane la materia degli appelli è definita dall'Articolo 13 del Codice. È possibile presentare appello al Tribunale Arbitrale dello Sport (TAS) solo dopo avere completato il procedimento innanzi al GUI. Il GUI è: a) organo di primo ed unico grado per i soggetti non tesserati alle FSN ed alle DSA e per gli atleti di livello internazionale o nei casi di doping relativi a competizioni inquadrate in un evento sportivo internazionale; b) organo di secondo grado per gli atleti di livello nazionale e gli altri tesserati. 2. È fatto obbligo alle F.S.N. ed alle D.S.A. osservare il presente articolo e provvedere agli atti necessari per la massima divulgazione, con particolare riguardo agli Atleti, al Personale di supporto degli Atleti ed alle Società sportive».

[27] Vedi sul punto, oltre a quanto si dirà nel capitolo successivo, anche l'ampia e pun-

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Se si fa riferimento ai criteri generali di giustizia sportiva, indicati dalla lett. h *bis)* dell'art. 7 del d.lg. n. 242 del 1999, cosí come integrato dal d.lg. n. 15 del 2004, è possibile rilevare che quella normativa prevede «che i provvedimenti in materia di giustizia sportiva rispettino i princípi [...] della impugnabilità delle decisioni», impugnabilità che deve realizzarsi in un contesto generale gestito dal CONI, con le proprie delibere, le quali sono sottoposte all'approvazione del Ministero per i beni e le attività culturali (art. 1, d.lg. n. 242, 1999). Tale schema, nel caso di specie, è disatteso e la soluzione offerta dall'art. 33.1 del codice sportivo *antidoping*, varato dal CONI nel novembre 2014, non appare in linea con le previsioni normative del decreto legislativo cosiddetto "Melandri".

Sarebbe auspicabile la creazione di una Corte d'Appello *antidoping* in grado di giudicare in fase di gravame su tutte le decisioni del TNA, siano esse emesse dalla prima come dalla seconda sezione, offrendo cosí una piena e paritaria tutela sia agli atleti aventi valenza internazionale, che per quelli di rilievo esclusivamente nazionale, nel rispetto del principio di eguaglianza garantito dall'art. 3 cost.

Al riguardo specifica l'art. 33, punto 2: «avverso le decisioni di primo grado adottate dalla prima sezione del TNA. Ai sensi dell'art. 24.1 del CSA – è ammesso appello in forma scritta dinanzi alla seconda sezione del TNA». Ed il punto successivo prosegue specificando che «Costituiscono oggetto di appello tutte le decisioni o i provvedimenti: di richiamo con nota di biasimo, di squalifica, di inibizione ovvero di proscioglimento, archiviazione, assoluzione, prescrizione dei termini, inammissibilità, non luogo a procedere e comunque ogni altro provvedimento emesso in primo grado».

Dall'elencazione contenuta nel punto sopra riportato del codice sportivo *antidoping* emerge anche il catalogo delle condanne che il TNA può emettere e che vanno da quelle non afflittive, come il richiamo, fino alla sanzione massima dell'inibizione; inoltre, dalla casistica contenuta nell'art. 33.3 del CSA si può rilevare la possibilità per la parte legittimata e soccombente (la regola della soccombenza, come in ogni fattispecie impugnatoria, anche nel presente caso consente il gravame) di proporre impugnazione avverso le decisioni che

tuale monografia di A. MERONE, *Il tribunale arbitrale dello sport*, Torino, 2009, in particolare p. 44.

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determinano il proscioglimento, l'archiviazione, l'assoluzione, la prescrizione, l'inammissibilità, il non luogo a procedere.

Il potere di interporre gravame è dato oltre che all'atleta, quando condannato, nei casi di proscioglimento all'ufficio della procura, la federazione internazionale di competenza, l'organizzazione nazionale *antidoping* del paese di residenza dell'atleta, la WADA (organizzazione mondiale *antidoping*), il C.I.O. ed il comitato paraolimpico, per i soggetti con questo tesserati (art. 3.5). Sorprende che in questa ipotesi che, come si è visto, riguarda gli atleti di rilievo nazionale, non sia stato legittimato all'impugnazione il CONI.

Il giudizio d'appello, costruito dalla normativa in esame, si presenta come una sorta di *revisio prioris istanzae* e non ha i caratteri del nuovo giudizio. In tale ottica l'art. 33, al punto n. 4, del C.S.A. chiarisce che «nel procedimento di appello non possono proporsi domande e/o eccezioni nuove. L'appellante può chiedere l'ammissione di nuove prove soltanto se dimostra di non aver potuto produrle nel giudizio di primo grado per cause a lui non imputabili. Il Collegio giudicante può ammettere tali nuove prove se le ritiene indispensabili ai fini della decisione, consentendo alle altre parti di contro dedurre, nonché ha ampia facoltà di cognizione del caso anche oltre quanto emerso nel giudizio di primo grado».

Ci si trova, in sostanza, in presenza di un giudizio modellato su quanto previsto dal codice di rito civile, in particolare dall'art. 345, anche se in tema di ammissione delle prove non si è considerata la modifica apportata dalla l. n. 134 del 2012 ed è rimasto il riferimento al potere del collegio relativo all'ammissione delle prove ritenute indispensabili.

La proposizione del gravame non ha efficacia sospensiva sulla decisione di primo grado che (se di condanna) è sempre provvisoriamente esecutiva (art. 33.9).

L'appello da proporsi con ricorso scritto, che va notificato a tutte le parti sostanziali che dovevano essere presenti nel giudizio di primo grado, deve essere posto in essere dalla parte soccombente entro il termine perentorio di 15 giorni dal ricevimento della decisione di primo grado[28].

[28] Unica eccezione è costituita da speciali termini concessi dalla WADA come chiarisce l'art. 33.10.

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La mancata proposizione del gravame, entro il termine perentorio sopra precisato, determina l'impossibilità di impugnare la decisione di *prime cure* del giudice sportivo italiano, la WADA, se soccombente, per il suo ruolo di massimo garante della regolarità delle competizioni può interporre gravame contro tale decisione direttamente al TAS (art. 33.8)[29].

Il procedimento d'appello, deve essere introdotto da un atto di parte che sia basato su specifiche doglianze e corredato dal provvedimento gravato (art. 33.12), nonché dal versamento per l'atleta[30] dei diritti amministrativi che costituiscono, per la giustizia sportiva, tributo analogo al contributo unificato[31] e la relata attestante l'avvenuta notifica a tutte le parti sostanziali del giudizio.

Si è già ricordato in precedenza che il requisito essenziale per impugnare una decisione, in presenza di una qualsiasi pronuncia giurisdizionale, anche della giustizia sportiva, è quello della soccombenza. Pertanto, perché in un giudizio sia presente una impugnazione incidentale è necessario che ci si trovi in presenza di una ipotesi di soccombenza parziale in cui non vi sia, per alcuna delle parti, piena corrispondenza tra il chiesto e il pronunciato. Appare evidente che la presenza di un appello incidentale legittima una modificazione *in peius* della sentenza gravata (art. 34.3).

9. A séguito della instaurazione del giudizio di gravame il giudice competente, vale a dire la seconda sezione del TNA, acquisisce direttamente dal giudice di *prime cure* (la prima sezione) il fascicolo d'ufficio e fissa entro il termine di quaranta giorni dall'acquisizione dei documenti l'udienza di trattazione (art. 35.2). Della data di udienza deve essere data comunicazione, dalla segreteria della sezione, alle parti che nel termine di almeno dieci giorni prima dell'udienza possono presentare una prima memoria e successivamente, nel termine di almeno cinque giorni prima dell'udienza, possono depositare una ulteriore memoria di replica. Appare evidente che la prima memoria

[29] Tale impugnazione va effettuata nel termine di ventuno giorni dallo spirare del termine dato alle altre parti legittimate ad impugnare (art. 33.11).

[30] L'UPA, la WADA e la Federazione internazionale non sono tenuti al versamento dei diritti.

[31] La quantificazione dell'importo dei diritti amministrativi è presente sul sito *www.coni.it*.

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è offerta alle parti convenute in fase d'appello (se non impugnanti incidentali), mentre la seconda consentirà alla parte appellante di controbattere alle tesi del o degli appellati (art. 35.4 e art. 35.5).

Oltre tali scritti difensivi alle parti del giudizio di gravame non è data la possibilità di altro scritto difensivo (art. 35.7).

Può, per specifiche e motivate ragioni, essere consentita alle parti la richiesta di spostamento dell'udienza di trattazione: detto rinvio, se accolto, non comporta lo slittamento dei termini per il deposito delle memorie, se già scaduti (art. 35.8).

Analogamente a quanto già esaminato per il primo grado, di norma, l'udienza del giudizio d'appello avviene in camera di consiglio, salvo che le parti (ogni parte) richiedano l'udienza pubblica, richiesta che deve essere vagliata dalla corte competente alla luce delle ragioni di riservatezza che la delicatezza della materia trattata suggerisce (art. 46 CSA).

La pubblicità del dibattimento può essere decisa anche d'ufficio se ne ricorrono le ragioni.

Il giudizio d'appello di svolge, come chiarisce l'art. 36 CSA, in modo analogo a quello di primo grado ed anche in questa fase può essere nominato un consulente tecnico d'ufficio dal collegio (art. 36.6).

Anche nel giudizio d'appello l'esito dello stesso viene comunicato con lettura del dispositivo e contestuale deposito della parte motiva della decisione, sempre che la particolare complessità della questione trattata non suggerisca il differimento del deposito della motivazione entro un termine di trenta giorni della lettura del dispositivo.

Il collegio può: 1) accogliere il gravame proposto dall'appellante riformando la decisione gravata in tutto o in parte (art. 37.6); 2) respingere l'impugnazione confermando la decisione resa in *prime cure*; 3) rimettere al giudice di *prime cure* per violazione del contraddittorio, per nullità, per ragioni di competenza.

Avverso la decisione, cosí resa, non è ammesso alcun ulteriore mezzo di impugnazione. Tuttavia, l'art. 33, punto 15, del CSA afferma che "Avverso le decisioni di secondo grado adottate dalla seconda sezione del TNA la WADA e la Federazione internazionale possono presentare appello al tribunale arbitrale dello sport (TAS), in conformità a quanto previsto agli articoli 13.2.1 e 13.2.3 del codice WADA".

Tale potere consentito soltanto alla WADA ed alle federazioni in-

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ternazionali appare quanto meno discutibile e non in linea con i dettami del giusto processo sportivo contenuti nel decreto legislativo n. 242/1999, novellato dal decreto legislativo n. 15/2004, che prescrivono la parità delle armi tra le parti del giudizio.

10. Chiarisce l'art. 38 del codice sportivo *antidoping* che è ammessa in favore del soccombente, dell'ufficio della procura, dell'organismo mondiale WADA e della federazione internazionale, la revisione della decisione resa dal TNA in primo o in secondo grado nei casi tassativi previsti dal punto 1 dell'articolo in parola. Detti casi sono i seguenti: a) se dopo la pronuncia sono sopravvenute o si scoprono nuove prove che, sole o unite a quelle già valutate, dimostrano che la decisione debba essere modificata; b) se si dimostra che la decisione fu pronunciata in conseguenza di falsità in atti o in giudizio o di un altro fatto previsto dalla legge come reato.

Competente per decidere sulla revisione è lo stesso giudice sportivo che ha emesso il provvedimento che si lamenta viziato entro il termine mobile di quindici giorni decorrente «dalla data di conoscenza della falsità in atti o in giudizio ovvero dalla formazione delle nuove prove».

L'istanza di revisione deve contenere le specifiche motivazioni sulle quali la stessa è basata, nonché la prova che della circostanza su cui si fonda la richiesta revocatoria della pronuncia gravata, la parte che agisce, ha avuto conoscenza solo nei quindici giorni antecedenti alla presentazione del ricorso di revisione.

Proposta la domanda, il procedimento vede svolgere, in camera di consiglio, la fase rescindente del giudizio mirante a valutare l'ammissibilità della impugnazione straordinaria. Superata tale prima fase, se l'istanza è ritenuta ammissibile, cioè se si è riscontrata la correttezza temporale dell'azione promossa e la rilevanza delle doglianze avanzate ai fini revocatori, il giudice competente dispone la fissazione dell'udienza pubblica per dare avvio alla fase rescissoria (cioè sostitutiva) della pronuncia oggetto della revisione (art. 38.4). Di contro, la decisione integrante la pronuncia di inammissibilità della domanda di revisione può essere, ulteriormente, impugnata, innanzi alla seconda sezione del TNA, se si trattava di dar vita alla revisione di una pronuncia della prima sezione ovvero davanti al TAS nei casi in cui l'istanza revocatoria riguarda decisioni della seconda sezione (art. 38.5).

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Oltre alle perplessità suscitate da tale doppia ipotesi di tutela, operata con riti e modalità diverse, di cui si è già detto in precedenza, è necessario ricordare che quando una istanza di revisione, avanzata da un atleta, porta al suo proscioglimento allo stesso vanno restituiti i titoli sportivi, i premi ed anche le somme da lui eventualmente corrisposte a titolo di sanzione economica (art. 38.7).

11. Poiché il procedimento che si svolge innanzi al tribunale sportivo *antidoping* è sempre promosso a séguito di un atto di deferimento della procura *antidoping* (non sono ammesse azioni di accertamento negativo, poste in essere dagli atleti), alla stessa compete «l'onere di provare se sia stata commessa una violazione delle norme sportive *antidoping*» (art. 40.1). In questa circostanza il grado di prova richiesto dal codice sportivo *antidoping* «è superiore alla semplice valutazione delle probabilità, ma inferiore all'esclusione di ogni ragionevole dubbio» (art. 401).

In tal modo, entrano nel processo sportivo *antidoping* criteri ermeneutici della prova diversi da quelli utilizzati dal giudice statale sia nel rito civile, che in quello penale. La ragione di tale diversità deve essere ricercata nella specificità del bene della vita tutelato, che, nel nostro caso, ha valenze etiche (quella della regolarità delle competizioni sportive), nonché nella tutela dei diritti personalissimi (il diritto alla salute), tali da poter ragionevolmente far abbassare il livello delle prove, calcolandole al di sopra di una semplice prospettazione, in quanto l'impianto accusatorio deve essere circostanziato e supportato da un valido ed univoco quadro probatorio, non semplicemente probabilistico.

Del resto, anche per ciò che concerne l'inversione dell'onere della prova, in capo all'atleta, la misura della prova richiesta appare meno elevata di quanto non avvenga innanzi al giudice statale, poiché "il criterio di valutazione sarà basato sulla valutazione della probabilità" (art. 4.1, ultima parte).

Inoltre, al fine di omogeneizzare i criteri che presiedono i giudizi in presenza di tipologie e tecniche diverse, l'art. 40 detta alcuni criteri cui i giudici sportivi *antidoping* debbono attenersi nella valutazione di prove e presunzioni che è opportuno ricordare: «i metodi analitici o i valori decisionali che sono stati approvati dalla WADA, previo consulto con la comunità scientifica competente, e che sono

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stati oggetto di revisione paritaria sono da ritenersi scientificamente validi. Un Atleta o altra persona che intenda opporsi alla presunzione di validità scientifica è tenuta, quale condizione essenziale per tale opposizione, a notificare anticipatamente alla WADA l'opposizione e i motivi alla base della stessa» (art. 40.2.1).

Da questa prima previsione emerge l'esistenza di una "presunzione di legittimità" in merito ai metodi analitici ed ai valori decisionali approvati dalla WADA. Tale presunzione è, comunque, controvertibile, ma compete all'atleta (o a chi è legittimato ad opporsi) fornire prova adeguata, supportata anche da una perizia tecnica di parte, idonea a contestare le procedure di conservazione dei campioni biologici. Va ricordato, al riguardo, che si presume che i laboratori accreditati dalla WADA abbiano svolto le procedure di analisi e conservazione dei campioni biologici conformemente agli *standards* internazionali della WADA. L'Atleta può confutare tale presunzione dimostrando che vi è stata una violazione della procedura internazionale posto in essere che potrebbe, ragionevolmente, aver compromesso l'esito delle analisi.

Invero, se l'Atleta dimostra che si è verificata un'inosservanza di uno standard internazionale (o di altra norma *antidoping*), tale da causare l'esito avverso delle analisi, spetta al CONI-NADO[32] dimostrare, invece, che tale inosservanza non ha determinato alcuna causa immediata e diretta, né alcun presupposto della violazione della normativa *antidoping*. (40.2.3). Invero, l'inosservanza di qualsiasi altro standard internazionale o altro regolamento *antidoping* che non abbia un riscontro analitico di positività (o altra violazione del regolamento *antidoping*) non invalida di per se i risultati. Se l'Atleta (o altra persona legittimata) dimostra il verificarsi dell'inosservanza di uno standard internazionale o di un altro regolamento, l'onere di dimostrare che tale inosservanza non ha determinato il riscontro analitico di positività spetta al CONI-NADO. I fatti accertati a mezzo di un verdetto emesso da una corte o da un ordine professionale, avente competenza disciplinare (che non sia oggetto di appello in corso) sono da considerarsi prova piena contro l'Atleta o altra persona nei con-

[32] Il CONI nella sua veste di ente nazionale al quale compete la massima autorità e responsabilità in materia di attuazione ed adozione del programma mondiale *antidoping* WADA, viene anche definito, dal codice sportivo *antidoping*, CONI-NADO.

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fronti dei quali è stato emesso il verdetto relativo a tali fatti, salvo che gli stessi dimostrino che il verdetto ha violato i princípi della "giustizia naturale", come la definisce il testo dell'art. 10.2.4 del CSA.

Cercando di comprendere quali siano questi princípi è ipotizzabile che si sia inteso far riferimento alle regole del giusto processo contenute nell'art. 111 della nostra Carta costituzionale, che per ciò che concerne il giudizio sportivo sono contenute nel punto contraddistinto della lettera h *bis*), dell'art. 7, d.lg. n. 242 del 1999, modificato dal d.lg. n. 15 del 2004.

Come si vede le prove, le presunzioni e l'inversione dell'onere della prova, in questo rito, sono trattate dalla normativa in modo particolarmente dettagliato e l'esercizio delle modalità di difesa deve necessariamente tenere conto dei limiti e delle opportunità che la normativa, in esame, offre.

Piero Sandulli

*Abstract*

Il saggio mira principalmente ad analizzare il giudizio per la repressione del doping in Italia, la policy e i suoi problemi. Dopo una veloce analisi del fenomeno del doping descrive le procedure del giudizio (primo grado presso il Tribunale antidoping nazionale, Appello presso la seconda sezione del Tribunale antidoping nazionale, per gli atleti di interesse nazionale, o presso la Court for Sport in Lausanne, per gli atleti di valore internazionale). Osservazioni critiche conclusive riguardano le prove e il diritto di difesa con particolare attenzione all'art. 111 cost. L'A. ritiene che l'esercizio del diritto di difesa, cosí come regolato, prenda sufficientemente in considerazione tutti i limiti e le opportunità.

The main aim of this study is to analyze the judgment for repression of doping in Italy, the policy and its problems. In particular, after a brief analysis of doping phenomenon (also in the light of the EU law and National regulations), the study concerned about describing the procedure of sporting judgment, both, in first grade, in front of the National Anti-doping Tribunal, and, in Appeal, in front the Second Section of the National Anti-doping Tribunal, for the athletes of national interest, or in front of the Court for Sport in Lausanne, for the athletes of international value. Some conclusive and critical observations were offered to the reader on the topic of burden of proof and right of defence, with particular reference to due process

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regulation in according to art. 111 of the Italian Constitution, quoted as well by the art. 7, letter h bis), d.lg. n. 242/1999: as discussed in the present analysis, proofs, presumptions and reversal of the burden of proof in sporting judgment are regulated by a particularly detailed law, so the exercise of the right of defence should give sufficient consideration all the limits and the opportunities offered by this regulation.

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# Tra consuetudini e formalismo: dal ‘*ludus*’ agli sport. Problemi e prospettive

Sommario: 1. Introduzione. – 2. Consuetudine e formalismo. – 3. Dal gioco allo sport. – 4. L’esempio del calcio. – 5. Problemi e prospettive.

1. Come è noto, nel dibattito filosofico sulla definizione della concezione del diritto si è assistito, nel corso degli ultimi secoli, ad un confronto che ha avuto come snodo fondamentale il momento in cui il dilemma fra diritto naturale e diritto positivo ha subìto una significativa evoluzione a favore del secondo.

Non sarà nostro principale cómpito indagare, come, quando e perché sia avvenuto il passaggio da una concezione consuetudinaria e giusnaturalistica del diritto ad una positivistica e formalistica che ha dominato a partire dal XIX sec. e che continua a produrre i suoi effetti fino ad oggi[1]. Tuttavia, è interessante astrarre, da tale mutamento storico-dottrinario, una categoria interpretativa utile ad approfondire l’ipotesi per cui se l’esigenza principale, maturata nel campo filosofico-giuridico, per soddisfare la quale è stata intrapresa la codificazione del diritto naturale sia la stessa necessità che nella formazione dello sport ha dato l’*incipit* alla sua regolamentazione e alla sua formalizzazione[2].

[1] Lo scenario è vasto come infinita risulta la produzione critica su di esso. Per un’introduzione ragionata sull’argomento ci limitiamo ad indicare: G. Fassò, *Storia della filosofia del diritto*, Bologna, 1968. Piú recentemente cfr. M. Barberis, *Giuristi e filosofi. Una storia della filosofia del diritto*, Bologna, 2011; Id., *Introduzione allo studio del diritto*, Torino, 2014. Interessanti possono risultare pure gli studi di P. Grossi, *Prima lezione di diritto*, Roma-Bari, 2003; Id., *Ritorno al diritto*, Roma-Bari, 2015; C. Faralli, *La filosofia del diritto contemporanea.* I *temi e le sfide,* Roma-Bari, 2005; Ead., *Le grandi correnti della filosofia del diritto. Dai greci ad Hart,* Torino, 2014.

[2] Per una definizione di sport su basi contrattualistiche si rimanda a M.A. Bertman,

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In altre parole, la chiave teorica che si vuole porre in evidenza ed eventualmente utilizzare per la presente indagine circa le norme regolamentari di uno sport è quella relativa alla formazione e alla trasformazione del concetto di diritto. Se tale *metamorfosi* è avvenuta, o sta avvenendo ancóra, mediante un processo interno ad esso, seguendo un percorso orizzontale, secondo logiche ed esigenze interne alla pratica ludica, oppure abbia seguíto, o segua, un itinerario diverso, dall'alto verso il basso, mediante un processo scaturito dall'esterno dell'oggetto *sport*.

2. Se torniamo per un momento alla storia del diritto, l'origine del passaggio, dal diritto consuetudinario a quello positivo[3], è legato alla formazione dello Stato moderno sorto dalla dissoluzione della società medioevale. Quest'ultima è una società decentrata, costituita da una pluralità di raggruppamenti sociali ciascuno dei quali presenta un proprio ordinamento giuridico: c'è, dunque, una pluralità di fonti del diritto e di ordinamenti giuridici, e il diritto si presenta come un fenomeno prettamente *sociale*[4].

Con la formazione dello Stato moderno[5], la società assume invece

*Filosofia dello sport: norme e azione competitiva*, a cura di G. Sorgi, Rimini, 2008, p. 40; G. Sorgi, *Hobbes e la metafora della corsa*, in Id., *Quale Hobbes? Dalla paura alla rappresentanza*, nuova ed. ampliata, Roma, 2014, p. 229 s.

[3] Come è ben noto, l'espressione piú compiuta del positivismo giuridico si ha nell'età contemporanea con il normativismo. Hans Kelsen è il teorico della dottrina pura del diritto, cfr. H. Kelsen, *La dottrina pura del diritto*, Torino, 1966. Per uno sguardo d'insieme sull'evoluzione del fenomeno si segnalano, tra gli altri, N. Bobbio, *Il positivismo giuridico. Lezioni di filosofia del diritto*, Torino, 1996; U. Scarpelli, *Cos'è il positivismo giuridico*, Napoli, 1997.

[4] Tale impostazione dottrinale, nota principalmente come teoria istituzionale, ha avuto come principali sostenitori M. Hauriou, *Théorie de l'institution et de la fondation*, in *Cahiers de la Nouvelle Journée*, 4, 1925, p. 2 s., e S. Romano, *L'ordinamento giuridico*, Firenze, 1962. Per un'introduzione ragionata sull'argomento si tenga conto delle riflessioni di S. Cotta, *Prospettive di filosofia del diritto*, nuova edizione, Torino, 2014, p. 45 s.

[5] Nell'età moderna, l'autore che sancisce la nascita dello Stato moderno anticipando pure, per certi versi, la teorizzazione del positivismo giuridico è Thomas Hobbes: T. Hobbes, *Leviatano*, trad. it. a cura di G. Micheli, Firenze, 1976; Id., *De Cive. Elementi filosofici sul cittadino*, ed. it. a cura di T. Magri, Roma, 1979; Id., *Elementi di legge naturale e politica*, ed. it. a cura di A. Pacchi, Firenze, 1968. Per una ricostruzione critica del percorso teoretico hobbesiano cfr. G. Sorgi, *Quale Hobbes? Dalla paura alla rappresentanza*, cit.

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una struttura monistica, nel senso che lo Stato accentra in sé tutti i poteri, *in primis* quello di creare il diritto: esso non si accontenta di concorrere a questa creazione, ma vuole essere il solo che pone il diritto, o direttamente con la legge, o indirettamente grazie al riconoscimento e al controllo delle norme di formazione consuetudinaria. Si assiste, in altri termini, a quello che Norberto Bobbio definisce processo di «monopolizzazione della produzione giuridica da parte dello Stato»[6].

A questo trapasso nel modo di formazione corrisponde un cambiamento nella modalità stessa di concepire la categoria del diritto. Oggi siamo talmente abituati a considerare la legge e lo Stato come la stessa cosa che abbiamo una certa difficoltà a pensare il diritto come creato anche dalla società civile. Eppure, originariamente, e per lungo tempo, esso non viene posto dall'autorità statale: basti pensare alle norme consuetudinarie e alla loro trasformazione, dovuta ad una sorta di consenso manifestato dalla comunità con un certo comportamento costante e uniforme accompagnato dalla *opinio juris ac necessitatis*. La realtà statale pre–moderna, non si preoccupa di produrre norme giuridiche, ma ne lascia la formazione allo sviluppo della società, ed eventualmente a colui che è chiamato a dirimere le controversie, il giudice, il quale, in tal modo, ha il cómpito di fissare, di volta in volta, la regola da applicarsi. Il ruolo e l'attività svolta da tale figura sono esemplificativi dell'evoluzione della concezione del diritto, da quello *non statuale* si passa a un diritto *statuale*, da una concezione prevalentemente giusnaturalistica e consuetudinaria ad una positivistica e formalistica.

3. Potrebbe sembrare azzardato a questo punto del discorso introdurre il fattore sportivo. Ciò nonostante, se riflettiamo bene, l'idea non risulta poi, cosí, tanto avventata. Un'attività strutturata sulla relazionalità e sull'incontro/confronto fra uomini, come quella sportiva, rappresenta un terreno fertile da cui attingere per trovare eventuali conferme o smentite all'idea di fondo della nostra riflessione[7].

[6] Cfr. N. Bobbio, *Il positivismo giuridico*, cit., p. 15. Il concetto è ribadito anche in Id., *Teoria generale del diritto*, Torino, 1993, p. 10.

[7] Non a caso Martin A. Bertman afferma che «il fine dello sport, inteso come competizione fra individui o gruppi o squadre di individui, con un arbitro che giudichi il

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E proprio per favorire questa operazione è opportuno portare alla luce quei *fondamenti ludici*[8] posti alla base di uno sport modernamente inteso che lo distinguono da altre pratiche, in maniera tale da avere chiaro l'oggetto su cui le norme, la regolamentazione e le loro forme di evoluzione sono andate o vanno ancóra ad incidere[9].

Il punto da non tralasciare è la *competizione*. Non possiamo pensare un gioco senza l'*agon* in cui si esaltano le motivazioni interiori dell'atleta con l'obbiettivo di primeggiare grazie alle proprie capacità rispetto a quelle del proprio avversario. D'altra parte, non si può non evidenziare tra le caratteristiche principali di un gioco l'*alea*, ovvero il caso, la fortuna, la sorpresa. Essa rappresenta la casualità intrinseca alle dinamiche di gara dovute ora all'avversario o al giudice–arbitro, ora alle condizioni climatiche o ambientali. A questi fattori ne dobbiamo necessariamente, però, avvicinare un altro quello dell'*eccentricità* della pratica ludica. Vale a dire il suo essere insolita, fuori dalla normalità quotidiana. In altre parole, il suo riuscire a far evadere dagli schemi creati da una ripetitività cronica dello scorrere del tempo e degli eventi dell'esistenza di tutti i giorni[10].

gioco all'interno di un complesso di regole precedentemente fissate, è una faccenda politica e che in ogni caso richiede grande organizzazione, laddove il sistema sportivo è costituito dall'insieme delle condizioni convenzionalmente accettate». Cfr. M.A. Bertman, *Lo sport come cultura*, in *MondOperaio*, 4-5, luglio-ottobre 2003.

[8] Al proposito si possono richiamare le quattro categorie ermeneutiche utili per inquadrare il gioco proposte dallo studioso francese Roger Caillois: *agon* (competizione), *alea* (fortuna, caso), *mimicry* (travestimento), *ilinx* (ricerca della vertigine). Cfr. R. Caillois, *I giochi e gli uomini. La maschera e la vertigine*, Milano, 2007. Alcune interessanti riflessioni sulla tematica si trovano pure in B. Welte, *Filosofia del calcio*, a cura di O. Tolone, Brescia, 2010, pp. 51 e 54.

[9] Un vero e proprio dibattito sulla natura dello sport nasce nel secondo dopoguerra, a partire dagli anni sessanta, nei paesi di lingua inglese, ampliando il punto di vista della filosofia delle regole e occupandosi esplicitamente della natura dello sport. Tra le correnti filosofiche che possiamo menzionare ricordiamo quella "realista" rappresentata da Bernard Suits e quella "antiformalista" tra cui, ad esempio, spicca la figura di Fred D'Agostino. Cfr. G. Franchi, *Wittgenstein e le filosofie novecentesche del giuoco sportivo*, in Aa.Vv., *Ripensare lo sport. Per una filosofia del fenomeno sportivo,* a cura di G. Sorgi, cit., p. 33 s.

[10] Eugen Fink sostiene: «Giocando […] veniamo come trasportati su un altro pianeta, dove la vita sembra piú facile, come sospesa, piú felice». E. Fink, *Il significato del gioco come mondo*, in *Oasi del gioco*, tr. it. di A. Caligaris, Milano, 2008, p. 18. Nello stesso saggio risultano interessanti anche le considerazioni condotte alle p. 48 s.

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L'intrecciarsi di questi elementi, con altri[11], fa sì che si creino quei presupposti necessari affinché una attività fisica venga a connotarsi come attività ludica prima e sportiva poi. La *formalizzazione* agisce proprio su questo secondo passaggio[12]. Essa connota il momento strutturale che consente ad un *gioco*[13] di divenire uno *sport*. Il punto sta nella capacità di mantenere e conservare tali fondamenti ludici, formalizzandoli, per mezzo di regole tecniche e organizzative.

Ora, se facciamo riferimento alla categoria interpretativa ricavata dalla evoluzione del diritto possiamo aprire una duplice chiave di lettura. La prima, basata sulla convinzione che nella formazione di uno sport le regole mutano per apportare variazioni al gioco, con un processo *endogeno* che produce tali modifiche conducendo un'evoluzione che tiene conto dei fondamenti ludici sopra descritti. La seconda tiene ferma l'idea che le regole mutano per la volontà di chi ha il potere di mutarle, seguendo, dunque, un processo *esogeno*, secondo canoni che privilegiano l'aspetto formalistico e volontaristico a quello contenutistico delle norme.

4. Il gioco del calcio ha avuto nel tempo una graduale evoluzione[14] – ancóra in atto per alcuni versi – e ha attraversato momenti importanti e diversi fra loro. Esso è stato praticato fin dall'antichità[15], ma la sua popolarità, come sport, è arrivata alla fine dell'Ottocento, quando in Inghilterra[16] vengono codificate e uniformate quelle regole

[11] La *mimicry* (travestimento) e l'*ilinx* (ricerca della vertigine). Cfr. R. Caillois, *I giochi e gli uomini. La maschera e la vertigine*, cit.

[12] Sul punto si sono espressi in precedenza M.A. Bertman, *Filosofia dello sport: norme e azione competitiva*, cit., p. 40; G. Sorgi, *Hobbes e la metafora della corsa*, in Id., *Quale Hobbes? Dalla paura alla rappresentanza*, cit., p. 229 s; B. Welte, *Filosofia del calcio*, a cura di O. Tolone, cit., pp. 5, 25, 36 e 37.

[13] Sul punto Roger Caillois sostiene: «Ogni gioco è un sistema di regole. Esse definiscono ciò che è o non è gioco, vale a dire il lecito e il vietato. Queste convenzioni sono al tempo stesso arbitrarie, imperative e senza appello. Non possono essere violate con alcun pretesto, pena l'interruzione e la fine immediata del gioco». R. Caillois, *I giochi e gli uomini. La maschera e la vertigine*, cit., p. 8.

[14] Circa l'evoluzione storica del gioco del calcio si tenga conto, tra gli altri, di A. Scaino, *Trattato del giuoco della palla* (1555), Urbino, 2000; G. Franceschi, *Il giuoco del pallone e gli altri affini*, Milano, 1903; A. Ghirelli, *Storia del calcio in Italia*, Torino, 1967; A. Wahl, *Il calcio. Una storia mondiale*, Torino, 1994.

[15] Cfr. B. Welte, *Filosofia del calcio*, cit., p. 6 s.

[16] Se si richiama l'Inghilterra, il discorso si fa piú complesso. Dove ciò che per il di-

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che in precedenza sono alla base dei giochi popolari praticati fino ad allora (calcio fiorentino, *hurlin* inglese, *soule* francese).

Se si osserva come tali svaghi vengono regolamentati, l'aspetto principale che si evince è quello consuetudinario. La partita di pallone viene giocata con *regole* protratte nel tempo ad uso e costume della comunità che vi prende parte in quanto i criteri di regolarità che ne fanno un gioco esistono in una condivisione generale da parte di coloro che lo praticano.

Tale dato è confermato soprattutto dalla convinzione che per questo periodo non è possibile parlare già di *regola*. A questa sarebbe piú corretto sostituire il concetto di *regolarità condivisa*, dove il criterio per definire cosa è regolare e cosa non lo è, non viene fissato una volta per tutte, ma dipende da una condivisione di significati, usi, costumi, usanze, culture, che in quel momento e in quel luogo i praticanti possiedono[17].

Al proposito, possiamo cogliere un parallelismo tra diritto consuetudinario e *regolarità* nel gioco. La loro formazione ed evoluzione seguono una traiettoria lineare che consente di modificare nel tempo quegli aspetti che sono o non sono piú considerati giuridici o regolari dalla comunità, prendendo forma all'interno di essa. Per il diritto, nel proseguire quel comportamento generale consistente nella ripetizione uniforme e costante di atti simili da parte dei consociati agenti nella convinzione che quel comportamento rivesta carattere di obbligatorietà giuridica. Per il gioco del calcio, altrettanto, seguendo e modificando le *regolarità condivise* all'interno dello svolgimento della partita per valorizzare, da un lato, l'aspetto ludico, dall'altro per eliminare quelle che non sono piú sentite tali da chi lo pratica e da chi lo osserva. Per esempio, nel particolare, si tende a tralasciare e a intraprendere modi di giocare che riducono soprattutto l'aspetto relativo alla violenza razionalizzando il gioco[18].

ritto non si è concretizzato, avviene per le regole del calcio. Per due motivi: uno è di carattere storico–regolamentare, il secondo come trattazione del problema. Sul punto si rimanda a: J.A. Magnan, *Il mitico gentleman*, in *Lancillotto e Nausica*, 15, 1, 1998, p. 28 s., e R. Carew, *A Survey of Cornwall*, London, 1602, p. 73 s.

[17] Cfr. G. Franchi, *Wittgenstein e le filosofie novecentesche del giuoco sportivo*, in Aa.Vv, *Ripensare lo sport. Per una filosofia del fenomeno sportivo*, a cura di G. Sorgi, cit., p. 39.

[18] Sul tema della razionalizzazione della violenza nello sport, cfr. N. Elias, E. Dun-

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L'inizio della formalizzazione, infatti, avviene tenendo conto delle esperienze anteriori e da queste si è partiti per razionalizzare un gioco diffuso che alla base presenta, tuttavia, degli aspetti che devono essere mutati, come ad esempio, proprio un eccessivo tono violento. Il tentativo, tuttavia, conduce oltre. C'è, per certi versi, la volontà di ricercare quelle regole che non si limitino piú solo a regolamentare il gioco, bensì a fondarlo *a priori*[19]. La codificazione del regolamento prende corpo da basi consuetudinarie che, evolvendosi, tengono conto di una esigenza razionalizzante del gioco al fine di valorizzare sia le capacità tecniche dei praticanti sia gli aspetti interni. La prospettiva inizia a mutare radicalmente. Si tende ad un approccio formalistico della regolamentazione. Se fino ad un certo momento le pratiche che ordinano il gioco del pallone comportano una commistione di princípi che con il passare del tempo si vedranno alla base di altri sport (rugby *in primis*), ora si manifesta la necessità di estrapolare e, allo stesso tempo, di valorizzare quelle componenti essenziali che risulteranno *regole costitutive* del gioco del calcio. Vengono stabilite, in altri termini, quelle regole seguendo le quali si gioca a calcio o, altrimenti, si gioca ad un altro gioco[20]. Si badi bene. Tali cambiamenti avvengono grazie ad una scelta consapevole e volontaria. Risiede in questo passaggio il salto definitivo.

Come per il diritto, per il quale l'esigenza di certezza e uniformità risultano la spinta alla codificazione[21], cosí la disparità delle regole, all'interno dell'universo calcio, suscita troppi dissensi perché non si avvertisse l'esigenza di un univoco accordo. È dunque l'aspetto volontaristico a prevalere.

NING, *Sport e aggressività*, tr. it. a cura di V. Camporesi, Bologna, 1989. La tematica è analizzata anche in G. SORGI, *Sport e violenza*, in ID. (a cura di), *Ripensare lo sport. Per una filosofia del fenomeno sportivo,* cit., p. 229 s., e in L. GASBARRO, *Un'analisi critica della violenza ultrà. Un radicato fenomeno sociale indagato in chiave filosofico-politica*, in *Lancillotto e Nausica*, Anno XIX, n. 1-3, Roma, 2012, p. 120 s.

[19] L'altra prospettiva a cui facciamo riferimento è quella di Amedeo Giovanni Conte. Cfr. G. FRANCHI, *Wittgenstein e le filosofie novecentesche del giuoco sportivo*, in G. SORGI (a cura di), *Ripensare lo sport. Per una filosofia del fenomeno sportivo*, cit., p. 40 s.

[20] Circa la ricostruzione delle vicende che hanno condotto, poi, alla nascita del calcio moderno, si veda il contributo di S. JACOMUZZI, *La lunga marcia del calcio*, in *Football. I domini del calcio: memoria, cultura, comunicazione*, Firenze, 1990, p. 17 s.

[21] Che, però, come è noto, in tema di diritto, nel territorio anglo-sassone, non avvenne.

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Da occasione di svago e di divertimento con alla base regole convenzionali adattabili alle situazioni contingenti e, dunque, sempre mutevoli e mai stabili, il calcio è alla ricerca, poi effettivamente compiuta, di un proprio e unico regolamento codificato[22].

La formalizzazione del gioco piú affascinante[23] del mondo, tuttavia, non può dirsi terminata. La codificazione della regolamentazione non basta a rendere il calcio uno sport modernamente inteso. Per acquisire l'autorevolezza necessaria al fine di esser praticato con regolarità e uniformità ovunque, è necessario creare organismi capaci di rappresentare l'*autorità calcistica*. Il passo conclusivo è intuibile. Il calcio si organizza, fonda le sue *istituzioni*. Crea quello spazio autonomo di gestione a livello organizzativo, regolamentare e, innanzitutto, giurisdizionale che gli consente di completare concretamente la sua formalizzazione.

La nascita dell'*International Board*[24], accomunata a quella delle fu-

[22] Sull'evoluzione storica del regolamento del calcio, cfr. G. Franceschi, *Il giuoco del pallone*, cit., p. 141, oppure cfr. G. Cavazzana, *Il giuoco del calcio*, Milano, 1925.

[23] Per indagare il fascino e, quindi, il successo del calcio alcuni studiosi si sono soffermati sulla sua presunta valenza simbolica. Per una interpretazione in chiave simbolica del gioco e dello sport segnaliamo, tra gli altri, oltre il già citato E. Fink, *Spiel als Weltsymbol*, Stuttgard, 1960, tr. it. di N. Antuono, *Il gioco come simbolo del mondo*, Firenze, 1991 (pubblicato, poi, in E. Fink, *Oasi del gioco*, cit.); J. Ratzinger, *Gioco e vita*, in Id., *Cercate le cose di Lassù. Riflessioni per tutto l'anno*, (tr. it. a cura di G. Lupi), Roma, 2005; M.A. Bertman, *Lo sport come simbolo della vita e il carattere della scelta*, in Id., *Filosofia dello sport: norme e azione competitiva*, cit., p. 111 s.; G.M. Chiodi, *La spada di Alessandro, il filo di Arianna, il bagatto. Considerazioni di simbolica del gioco*, in Id., *Speculum symbolicum. Mondo immaginale e simbolica politica*, Napoli, 2010, p. 159 s.; B. Welte, *La partita come simbolo della vita. Riflessioni filosofico-teologiche sul gioco del calcio* e *L'esistenza nel simbolo del gioco*, in B. Welte, *Filosofia del calcio*, cit., p. 31 s.; O. Tolone, *Il calcio come simbolo escatologico*, *ivi*, p. 5 s.; R. Massarelli, T. Terret, *Images and Symbols in Ancient and Modern Sport*, in *Sport, Ethics and Philosophy*, Volume 6, Issue 3, 2012, p. 37 s.; C. Bonvecchio, *Lo sport: un mito della vita*, in G. Sorgi (a cura di), *Le scienze dello sport: il Laboratorio atriano.* Atti del Convegno – Atri 14-15 maggio 2012, Roma, 2012, p. 103-123; L. Gasbarro, *Per una lettura simbolica del fenomeno ultrà*, *ivi*, p. 171 s.; E. Matassi, *La pausa del calcio*, Rapallo, 2012; A. Di Chiara, παιδιά *Cenni per una filosofia dell'esistenza come gioco,* Rapallo, 2012; G. Sorgi, L. Gasbarro, *Un itinerario tra simbolica politica, gioco e sport*, in Aa.Vv., *Miti del potere. Potere senza miti*, a cura di G. Sorgi, Milano, 2013, p. 129 s.

[24] Nel 1886 le quattro federazioni britanniche, comprese Galles e Irlanda, costituirono in tal modo l'*International Board*, cui sono affidate ancóra oggi le "sacre tavole" e la giurisdizione su qualsiasi mutamento delle norme, sia pure, in séguito con l'ammis-

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ture Federazioni, può essere paragonata alla nascita dello Stato moderno per il diritto. Si segna un punto di non ritorno. Da adesso in poi le regole sono poste e la loro produzione segue una linea che va dall'alto verso il basso. Come per il positivismo giuridico per il quale al di fuori della legge positiva non si riconosce alcun principio giuridico valido e non si considera piú come diritto se non quello posto dal legislatore, cosí per il gioco del calcio le regole valide sono quelle stabilite e fatte rispettare dagli organi *legittimati* a compiere tale funzione. *In primis* dalla figura dell'arbitro.

Da un punto di vista filosofico-politico – come ricorda Giuseppe Sorgi – «nello sport è necessario» di conseguenza «un *Leviatano*, un'autorità che ordina la relazione tra gli sportivi altrimenti conflittuale («*homo homini lupus*») in quanto frutto di una idea problematica dell'uomo e quindi dell'atleta: un uomo, e pertanto un atleta, che senza l'autorità, senza l'arbitro, non è in grado di confrontarsi regolarmente». Il tema generale richiamato è quello del «rispetto delle regole» e del particolare «rispetto delle decisioni di chi le regole le fa applicare»[25].

5. La strutturazione di organismi efficienti[26], la naturale burocra-

sione di una minoranza di delegati stranieri. Cfr. S. Jacomuzzi, *La lunga marcia del calcio*, in *Football. I domini del calcio: memoria, cultura, comunicazione*, cit., p. 17 s.

[25] G. Sorgi, *La crisi della cultura sportiva*, in Aa.Vv., *Ripensare lo sport. Per una filosofia del fenomeno sportivo*, a cura di G. Sorgi, Rimini, 2010, p. 214. Su questo aspetto «è necessario riflettere» ricorda ancóra Sorgi «intorno alla *legittimità dell'autorità* impersonata nella figura dell'arbitro o del giudice. E tale apertura passa dal riconoscimento che ognuno degli sportivi praticanti e non (si pensi agli stessi tecnici, dirigenti, tifosi) offre alla figura dell'arbitro fornendogli la legittimità del suo operato [...]. È nella scelta consapevole e libera dei concorrenti di gareggiare, attraverso regole stabilite a priori, con un arbitro riconosciuto come "custode" del regolamento, che risiede l'autorevolezza dell'arbitro e soprattutto la legittimità del risultato finale della competizione sportiva. Solo se *a priori*, in uno schema prettamente contrattualistico, cediamo nella pratica sportiva all'autorità/arbitro il nostro "diritto a tutto", meglio conosciuto come "il farsi giustizia da sé", allora potremo avere un risultato legittimo. E in questa maniera avremo sicuramente un arbitro dotato di maggiore sicurezza nel suo operato perché legittimato dal consenso offertogli. E dunque non autoritario, ma autorevole nelle decisioni». *Ivi*, pp. 214-215. Sull'argomento, dello stesso autore si veda pure la *Prefazione* a M.A. Bertman, *Filosofia dello sport: norme e azione competitiva*, cit., p. 11 e B. Welte, *Filosofia del calcio*, cit., pp. 36 e 56.

[26] Non è da dimenticare l'anno 1904, data in cui viene fondata la F.I.F.A. (*Federation*

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tizzazione della gestione[27] e, soprattutto, il riconoscimento quali autorità legittime delle istituzioni sportive hanno fatto in modo che la formalizzazione dello sport–calcio si sia effettivamente compiuta.

La nascita dell'organismo *International Board* e la consolidazione di organismi come le Federazioni nazionali e internazionali, segnano un passo importante per la concezione e la modifica in chiave volontaristica delle norme sportive. Nel corso degli anni, sono intervenuti dei mutamenti minimi che, tuttavia, non hanno intaccato l'essenza del sport-calcio su cui rivestono un ruolo fondamentale alcuni elementi tra cui si possono citare la semplicità delle regole e il carattere imprevedibile, aleatorio e eccentrico che lo caratterizzano come *ludus*[28].

La strada intrapresa, però, segna un cambio di prospettiva proprio in relazione a quest'ultima considerazione[29].

Nell'ultimo periodo, il calcio, le sue norme e le sue regole sono investite da un desiderio di innovazione che ha aperto nuovi canali di discussione e di riflessione. La sua struttura, ormai consolidata, consente ad esso di muoversi all'interno dei meccanismi della società contemporanea con la prospettiva di divenire oggetto e/o soggetto delle nuove dinamiche economiche e sociali[30]. Per questo motivo, il

*International de Football Association*). L'organizzazione si propone di essere una federazione delle federazioni allo scopo di coordinare nel migliore dei modi lo svolgimento dei tornei tra i *clubs* e tra le rappresentative nazionali. Per far ciò, la F.I.F.A. decide di riconoscere per ciascun paese una sola Federazione. La Federazioni affiliate, in tal modo, detengono il monopolio della gestione e dell'organizzazione dell'attività sportiva nel proprio paese e allo stesso tempo garantiscono la regolarità degli incontri su scala internazionale. Lo sviluppo organizzativo si intreccia con quello regolamentare. Cfr. A. Papa, G. Panico, *Storia sociale del calcio in Italia*, cit.

[27] Si formano, cosí, all'interno delle stesse Federazioni comitati rispondenti alle esigenze della legislazione sulle associazioni e vengono redatti gli statuti al fine di regolare la vita interna delle società. Ovunque le Federazioni nominano commissioni con precisi ambiti di competenza: ruoli e designazioni arbitrali, tribunali sportivi, definizione del dilettantismo, selezione della rappresentativa nazionale. Fondamentale risulta la norma, codificata con sfumature diverse, ma accolta da tutti i paesi, secondo cui gli iscritti ad una Federazione non possono far dirimere alla giustizia ordinaria le controversie attinenti l'attività sportiva, riservandone la competenza ad organi giudiziari dipendenti dalle Federazioni nazionali.

[28] R. Caillois, *I giochi e gli uomini. La maschera e la vertigine*, cit.

[29] Cfr., tra gli altri, G.P. Ormezzano, *Verso il calcio del duemila*, in A. Wahl, *Il calcio. Una storia mondiale*, cit., p. 114 s.

[30] Sul punto, in particolare, G. Franchi, *Appunti di etica sociale dello sport*, Roma, 2007.

calcio, come organizzazione, essendo esposto in prima linea a influenze esterne[31] è chiamato a catalizzare ciò che dall'esterno tende a condizionare la sua intima essenza. In altre parole, le sue istituzioni fungono da catalizzatore tra l'esterno, vale a dire il mondo politico, economico e sociale, e l'interno rappresentato dal gioco in sé. Il punto chiave risiede sulla capacità e sulla volontà catalizzatrice di tali organi.

In che maniera vengono tradotte in regole organizzative e regole tecniche le influenze esterne? E domanda piú importante: il suo fondamento ludico viene intaccato?

Come possiamo intuire, il cambiamento prospettato ultimamente non è piú il risultato delle logiche interne alla sua essenza di gioco bensì è il prodotto scaturito da fattori estranei ad esso[32]. Sia chiaro un punto. Questo richiamato è un passaggio tutt'ora *in fieri* e relativo ad aspetti, alcuni organizzativi già in atto, altri relativi a norme tecniche ancóra in fase di studio. Ma l'inclinazione che si sta prospettando sembra segnata. Se si discute su innovazioni che schiodino il calcio dalle regole dettate alla fine dell'Ottocento e valide, come abbiamo visto, fino ad oggi, è chiara la tendenza per la quale le innovazioni sostanziali siano dettate non da esperti calcistici, ma da altri.

Per esempio, si è pensato di agire sul tempo effettivo per evitare le «manfrine» antispettacolo[33], sulle partite senza pareggi per offrire un vincitore comunque, sui punti in dipendenza dal numero dei gol segnati per esaltare il gioco d'attacco. Oltre alla già attuata introdu-

[31] Circa tale degenerazione si esprimono F. Ravaglioli, *Filosofia dello sport*, Roma, 1990, p. 14, e G. Sorgi, *La crisi della cultura sportiva*, cit., p. 221 s.

[32] Circa le problematiche di cui è investito lo sport moderno si rimanda al contributo di G. Sorgi, *o.u.c.*, p. 213 s. Sulla relazione sport–industrialismo invece, tra gli altri, cfr. A. Guttmann, *Dal rituale al record*, Napoli, 1994.

[33] L'*International Football Association Board* (I.F.A.B.) sembra avere come principale obiettivo di riforma regolamentare quello relativo alla riduzione se non all'eliminazione alle perdite di tempo. Statisticamente, secondo alcune rilevazioni, in un *match* di 90' ci sono all'incirca 60 minuti di gioco effettivo. L'idea, allora, è quella di eliminare le classiche due frazioni da 45' per passare a due tempi da 30' effettivi. Inoltre, si prospettano proposte per limitare a 6 secondi il tempo in cui il pallone può essere tenuto dal portiere, oltre ad una maggior rigorosità da parte degli arbitri nell'assegnazione dei minuti di recupero. Altre idee per evitare perdite di tempo: l'arbitro dovrebbe fermare il cronometro dopo il gol e fino alla ripresa del gioco, ma anche quando viene assegnato un calcio di rigore.

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zione della moviola in campo che supporti in tempo reale la decisione dell'arbitro in casi di difficile lettura[34]. E queste sono solo alcune ipotesi[35]. Senza pensare ai cambiamenti già avvenuti relativi al moltiplicarsi di tornei e partite per venire incontro alle esigenze televisive e, quindi, commerciali.

Questi mutamenti, solo prefigurati o alcuni già in vigore, come condizionano l'essenza del calcio? Ha ragione chi afferma che il calcio non è piú un gioco?

Rispondere a tali interrogativi significherebbe andare oltre quello che ci siamo prefissi nello svolgimento di tale contributo. Quello che, invece, possiamo rivelare è che i mutamenti, prospettati e in parte già attuati, hanno la responsabilità di iniziare a mettere *in fuorigioco* l'essenza del calcio stesso. Esso è, come ricordato in precedenza, per sua natura aleatorio e imprevedibile. L'abilità tecnica, la forza fisica, seppur importanti, non sono gli unici elementi che concorrono al risultato finale. Mettendo dei limiti o dei paletti alla sua *imprevedibilità* e alla sua *eccentricità* si rischia di snaturare[36] un fenomeno che tenderà, con il tempo, a perdere gran parte del suo fascino[37].

L'aspetto volontaristico e formalistico del cambiamento delle re-

[34] L'introduzione dell'elettronica è una delle ipotesi che si sta concretizzando con piú celerità. Oltre la "moviola in campo", tra le varie applicazioni c'è il dispositivo che consente di rilevare se la palla ha oltrepassato effettivamente la linea di porta eliminando i casi di *goal* fantasma. Quella dell'elettronica, però, non è una novità assoluta. Si pensi, infatti, alle bandierine dei guardialinee che sono dotate di un dispositivo elettronico in grado di richiamare l'attenzione dell'arbitro nel corso della partita, o agli auricolari utilizzati per favorire la comunicazione e la collaborazione tra i componenti della terna arbitrale.

[35] Altre ipotesi di riforma al vaglio dell'I.F.A.B.: chi batte la punizione può toccare la palla da solo, cioè può dribblare direttamente dal primo tocco; sul tabellone degli stadi andrà posizionato un orologio che sia collegato con quello dell'arbitro, che si ferma e riparta quando il direttore di gara lo aziona; concedere il fatto che il rinvio dal fondo sia battuta con la palla in movimento; definire in maniera piú chiara il concetto e la casistica dei falli di mano; chi segna un gol con la mano deve essere espulso; il portiere che raccoglie con le mani un retropassaggio o una rimessa laterale di un avversario deve essere punito con un calcio di rigore; l'arbitro può fischiare la fine di un tempo o della partita solo quando la palla esce dal terreno di gioco; non si può giocare sulla ribattuta di un calcio di rigore; se un rigore viene parato o calciato sul palo, poi il gioco viene fermato.

[36] Sul fenomeno della *quotidianizzazione* dello sport, si prendano in considerazione: F. Ravaglioli, *Filosofia dello sport*, cit., p. 149 s., e G. Sorgi, *La crisi della cultura sportiva*, cit., p. 220 s.

[37] Circa la contrarietà all'utilizzo della moviola in campo si esprime anche G. Sorgi, *o.u.c.*, p. 213 s.

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gole può incidere, dunque, sull'essenza del gioco, tendendo, se esasperato, ad una suo impoverimento. Una *degenerazione positivista* portata all'eccesso[38] conduce a perdere di vista l'oggetto che si va a regolamentare intaccandone i fondamenti ludici che, al contrario, dovrebbero essere protetti o, quantomeno, salvaguardati.

I risultati dell'ultimo periodo purtroppo segnano questa direzione. La relativa sovraesposizione del calcio in tv, dalla quale scaturisce la proliferazione delle partite, accompagnata dagli infortuni dei calciatori sempre piú frequenti, per non parlare dei fenomeni del *doping* o del calcio–scommesse, sono il sintomo che qualcosa non va nella direzione indicata. Molti dei cambiamenti allo studio, perciò, dovrebbero essere valutati e ponderati di conseguenza. La virtú[39] della *prudenza* dovrebbe illuminare le scelte nelle decisioni verso quelle modifiche tese semmai alla tutela dei fondamenti ludici per i quali possiamo ancóra oggi considerare il calcio come un gioco[40].

Questo richiamo riguarda in particolare la componente della comunità sportiva dedicata alla produzione del diritto sportivo e all'autogoverno dello sport. Risulta, pertanto, ancóra attuale la seguente riflessione: «Chi deve normare lo sport deve seguire criteri di giustizia mediante un atteggiamento prudenziale: il fine dello sport – cioè la realizzazione ottimale di un atto tendente a conseguire un risultato attraverso una pratica ludica o agonistica – deve guidare la regolamentazione e l'organizzazione giuridica dello sport [...]. La *governance* dello sport dovrà [...] evitare di essere il semplice luogo della formalizzazione giuridica di interessi di parte di gruppi o potentati del mondo

[38] Secondo Vittorio Possenti, in riferimento alla natura del diritto nella contemporaneità, è possibile addirittura parlare di *nichilismo giuridico*. V. Possenti, *Nichilismo giuridico. L'ultima parola?*, Soveria Mannelli, 2012.

[39] Un'indagine sulle possibili *virtú* nello sport è condotta in G. Franchi, *Appunti di etica sociale dello sport*, cit., p. 40 s.

[40] Chiaro è l'appello, in questo senso, all'autonomia che il calcio – quale organizzazione – deve dimostrare rispetto agli altri settori (economico, politico, tecnico, comunicativo, tecnologico) su cui si fonda la comunità generale e con cui esso e sempre piú in contatto. È fondamentale ribadire come all'interno della stessa pratica sportiva deve essere riconosciuta "l'*impossibilità* che gli atti (economici, organizzativi, medici, comunicativi ecc. ecc.), necessari ma non sufficienti alla definizione dello sport, e per le loro sottocomunità sportive, divengano essi stessi fini per lo sport e l'atto sportivo-primo divenga mezzo per il raggiungimento del loro fine specifico". G. Sorgi, *Postfazione* a G. Franchi, *Appunti di etica sociale dello sport*, cit., p. 80.

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sportivo, dovrà superare un modello ordinamentale meramente 'negoziale', per applicare criteri di una morale sostanziale centrata sul bene effettivo della persona e della sua attività fisica»[41].

Luca Gasbarro

*Abstract*

Negli ultimi secoli si è profilato un ampio dibattito sulla definizione di 'legge' e sul dilemma tra legge naturale e legge positiva. E il dibattito si è evoluto in favore di quest'ultima. Il saggio tende a trarre da questo contesto dottrinario una categoria interpretativa che possa evidenziare se la necessità, nata nel campo della filosofia del diritto e soddisfatta dalla codificazione della legge naturale, sia la stessa esigenza che ha dato inizio alla regolamentazione e formalizzazione dello sport, così come oggi viene intesa. Per sviluppare questo itinerario critico si ricorre ad una doppia chiave interpretativa. La prima, fondata sull'assunto che nella formazione di uno sport le regole sono fissate e modificate per mezzo di un processo endogeno mirante alla conservazione e valorizzazione di alcuni principi fondamentali. La seconda prende in considerazione l'idea che le regole sono poste e modificate dalla volontà di coloro che hanno il potere di fissarle e modificarle, quindi attraverso un processo esogeno.

Over the last centuries, philosophers have debated about the definition of «law» and the dilemma between natural law and positive law has evolved in favour of the second one.

It is interesting to abstract, from this historical and doctrinaire context, an interpretative category useful to highlight if the main necessity, arisen in the field of philosophy and law, and satisfied by starting the codification of natural law, is the same need that gave the very beginning to the regulation and formalization of sport as nowadays meant.

To develop this critical itinerary we will try to refer to a double interpretation key. The first one, based on the assumption that in the formation of a sport the rules are fixed – and if necessary changed – to make variations to the game, by means of an «endogenous» process aimed at the preservation and valorization of some fundamental playful principles. The second one takes into consideration the idea that the rules are set and change for the will of those who have the power to fix them and modify them, therefore, through an «exogenous» process, according to canons that privilege formalistic and voluntary features to the content of norms.

[41] G. Sorgi, *o.u.c.*, p. 66 s.

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# Ethics and Integrity in Sports:
# Are Measures Tackling Doping and Match fixing Going Too far?

Summary: 1. Sports Cases Before the European Court of Human Rights. – 2. The Strict Liability Rule in Doping Cases. – 3. The Civil Nature of Sport's Disciplinary Procedures. – 4. The Arbitration Contract as a Contract of Adhesion. – 5. The Jurisdiction and the Standard of Proof. – 6. The Athlete's Livelihood and the Standard of Proof. – 7. Wide Investigative Powers. – 8. Due process and Impartiality. – 9. Conclusion – Difference Between Law, Ethics and Integrity.

1. Over the years sports related cases have found their way before the European Court of human Rights (ECHR).

There are cases relating to hooliganism and the protection of the right to life and the right to liberty and security such as the cases of Harrison and Others v. the United Kingdom[1], Ostendorf v. Germany[2], Schwabach and Others v. Denmark[3].

There are also cases relating to the dissolution by State authorities of team's supporters clubs and the protection of the freedom of assembly and association such as the cases of Association Nouvelle Des Boulogne Boys v. France[4], «Les Authentiks» v. France and «Supras Auteuil 91» v. France[5].

There are also cases relating to sports and tax authorities and the right to a fair trial such as FC Mretebi v. Georgia[6], Liga Portuguesa de Futebol Profissional v. Portugal[7].

[1] *http://hudoc.echr.coe.int/eng#{«itemid»:[«002-9357»]}.*
[2] *http://hudoc.echr.coe.int/eng-press#{«itemid»:[«003-4282482-5111626»]}.*
[3] *http://hudoc.echr.coe.int/eng-press#{«itemid»:[«003-5791959-7367178»]}.*
[4] *http://hudoc.echr.coe.int/eng-press#{«itemid»:[«003-3461359-3895379»]}.*
[5] *http://hudoc.echr.coe.int/eng-press#{«itemid»:[«003-5532736-6964210»]}.*
[6] *http://hudoc.echr.coe.int/eng#{«itemid»:[«001-81996»]}.*
[7] *http://hudoc.echr.coe.int/eng-press#{«itemid»:[«003-3929953-4544958»]}.*

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The most interesting cases however are three pending cases relating to doping and the right to a fair trial. These cases are the Bakker v. Switzerland case[8], the Mutu v. Switzerland case[9] and the Pechstein v. Switzerland case[10]. There are also another two pending cases relating to doping challenging the whereabouts rule on the grounds of the right to respect for private and family life and home. These are the Fédération Nationale des Syndicats Sportifs (FNASS) and Others v. France[11] and the Longo and Ciprelli v. France[12].

What is very interesting is that these last cases are pending since 2012-2014[13] before the Court which may be interpreted as a difficulty or reluctance of the Court to rule on core issues of the sports world. Such difficulty is not observed when the Court is called to rule on matters laying on the periphery of the sports world such as tax cases and cases relating to public order (hooliganism, dissolution of supporters club). Sports legal theory as well legal practice awaits these pending decisions with great anticipation.

2. The principle of strict liability means that an anti-doping rule violation occurs whenever a prohibited substance is found in the athlete's specimen, regardless whether the athlete intentionally or unintentionally used a prohibited substance or was negligent or otherwise at fault[14].

Since the WADA code of 2015 the rule is handled with flexibility at least to what the sanctioning is concerned, since sanctioning depends on the specific circumstances. In cases of doping offences in-competition, the results of the athlete for that competition are automatically invalidated. To what subsequent sanctions (Art. 10 of the Code) are concerned, it is possible to avoid or reduce sanctions if the athlete can establish, to the satisfaction of the tribunal, how the

[8] *http://hudoc.echr.coe.int/eng#{«itemid»:[«001-113343»]}.*

[9] *http://hudoc.echr.coe.int/eng#{«itemid»:[«001-117165»]}.*

[10] *http://hudoc.echr.coe.int/eng#{«itemid»:[«001-117166»]}.*

[11] *http://hudoc.echr.coe.int/eng#{«itemid»:[«001-122864»]}.*

[12] *http://hudoc.echr.coe.int/eng#{«itemid»:[«001-145623»]}.*

[13] Cfr. *http://hudoc.echr.coe.int/eng#{«itemid»:[«001-145623»]}.*

[14] Cfr. Sooraj Sharma, ShujoyMazumdar, *A Critical Appraisal of the Concept Strict Liability in WADA Code*, in *Journal of Sports and Legislation*, I, 1, 2011, *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1909645*.

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substance entered his or her system, demonstrate that he or she was not at fault or significant fault or in certain circumstances did not intend to enhance his or her sport performance. The burden of proof is therefore placed on the athlete's shoulders[15].

Is it fair to place such a heavy burden of proof on the athlete's (offender) shoulders? The Courts say it is, since the strict liability principle has been consistently upheld in the decisions of the Court of Arbitration for Sport (CAS) and the Swiss Federal Court.

3. One question that is very difficult to answer is[16] whether sports disputes regarding issues, such as doping and match fixing, are of criminal or civil nature[17-18].

Before all non-national fora that are called to issue rulings on sports disputes, the tendency is clearly towards accepting that sports disputes either related to financial matters or related to disciplinary matters, should be considered of a civil nature. The Court of Arbitration for Sport (CAS), the Swiss Federal Tribunal (SFT), where decisions from the CAS are appealed, the Court of Justice of the European Union (CJEU), the European Court of Human Rights (ECHR) are reluctant not only to attribute a criminal nature but even to recognize some sort of *sui generis* nature to sports disputes as this would harm legal certainty and would make convictions much more difficult.

It is true that attributing a civil nature to disciplinary disputes makes all matters concerning due process, the standard of proof, safeguarding defendant's rights, protection of defendant's privacy, much easier. On the other hand, if sports integrity related cases are of criminal nature the safeguarding of the defendant's rights require a higher standard of proof. In short, the civil nature of these disputes makes a conviction of the athlete-defendant easier and the appeal against

[15] *https://www.wada-ama.org/en/questions-answers/strict-liability-in-anti-doping*.

[16] Cfr. Legal Opinion by J. P. Costa, issued at the request of the World Anti-doping Agency (WADA), *Legal Opinion Regarding the Draft 3.0 Revision of the World Anti-Doping Code*, Strasbourg, 25th June 2013.

[17] Cfr. Legal Opinion by Prof. G. Kaufmann-Koeller, A. Rigozzi, *Legal opinion on the Conformity of Art. 10.6 of the 2007 Draft World Anti-Doping Code with the Fundamental Rights of Athletes*, 13th November 2007.

[18] Cfr. Legal Opinion by C. Rouiller, 25th October 2005.

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such a decision more likely to be dismissed. On the contrary a criminal nature of these disputes makes extremely difficult to convict an athlete-defendant and the appeal against such a decision more likely to be upheld.

4. The arbitration contract signed by all professional athletes worldwide is undoubtedly a contract of adhesion. Given also the fact that sport federations enjoy the privilege of monopoly, meaning there is only one international federation for each sport, the athlete can either sign the contract or give up his dream of competing at a professional level[19].

But is this contract of adhesion also unconscionable? The right to practice a profession is a fundamental human right. Also a fair trial is a fundamental human right. However the athlete is presented with the signing of the contract of adhesion in order to start practicing his profession. The athlete has to choose between a present and certain damage of not being able to practice a (long-time ago) chosen profession and a future and uncertain damage of not being treated fairly in case a procedure is ever brought against him. When a person is presented with a dilemma on one hand to definitely and imminently being denied a fundamental right concerning his livelihood and on the other hand to waiving a future and uncertain fundamental right it is obvious that this person will choose the less of two evils and that is to waive the fundamental right of a fair trial if and when such trial occurs. When people are found with a gun on their head and asked to chose either to give up any future lottery winnings or to be shot on the spot, would there ever be anyone to think twice before deciding?

5. Since the sport federation is drafting the arbitration contract (of adhesion) it is also the federation who gets to pick a favourable jurisdiction. Federations tend to pick common law jurisdictions as these have very strict rules for annulment of a decision based on the unconscionable contract of adhesion argument.

Also these jurisdictions allow opting for a minimum standard of

[19] Cfr. M. Papaloukas, *CAS: The Court of Arbitration for Sport*, Papaloukas Editions, 2013, p. 218 s.

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proof such as the «preponderance of evidence» rule, thus making convictions very easy even in cases of «your word against mine». A high standard of proof such as the «beyond reasonable doubt» rule would safeguard the athlete's fundamental rights but would make convictions almost impossible. The application of the preponderance of evidence rule reverses the burden of proof and places it on the shoulders of the accused since it is the accused who will have to prove its innocence.

If one examines the latest CAS decisions[20] concerning alleged match-fixing charges brought against tennis players, it is easy to conclude that there are cases resulting in a conviction and therefore the destruction of an athlete's career and reputation whereby the only evidence presented is one testimony of the accusing party[21]. A higher standard of proof such as the «clear and convincing standard» or the «beyond reasonable doubt» standard would definitely lead to an acquittal in these cases.

6. The preponderance of the evidence is all that is required in most civil cases. But when *«particularly important individual interests are at stake»* a higher standard should apply[22]. When the individual interests at stake are both particularly important and more substantial than mere loss of money or involving individual rights whether criminal or civil, the standard of proof reflects the value society places on individual liberty[23].

The purpose of a high standard of proof is to place the burden of the risk of error on the accusing side and not the defendant. In

[20] Cfr. CAS award 2014/3467, Olaso Case, CAS award 2011/A/2490, Koellerer Case, CAS award 2011/A/2621, Savic Case.

[21] Cfr. also the Jakupovic Case brought before CAS in 2016 (ruling not published yet).

[22] *http://www.tlgattorneys.com/2010/09/standard-of-proof-in-most-personal-injury-and-other-civil-cases/.*

[23] Cfr. J.R. Silkenat, M.R. Shulman (eds.), *The Imperial presidency and the Consequences of 9/11*, Greenwood Publishing Group, 2007, p. 80-82: *https://books.google.gr/books?id= DzLOLY6SVQUC&pg=PA81&lpg= PA81&dq= supreme+court+particularly+important+individual+interests+are+at+stake&source=bl&ots=hdZV1QkKyY&sig=PRhfQ5QahG6O6Pcbj_UZuNKy9yA&hl=el&sa=X&ved=0CC8Q6AEwAmoVChMIoMyMs8qhxwIVxFkaCh3CtQFc#v=onepage&q=supreme%20court%20particularly%20important%20individual%20interests%20are%20at%20stake&f=false.*

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a sports-related case the amount of burden placed upon the accusing side reflects how much an athletic federation values the athlete. When a case involves issues of human rights or other fundamental rights of the individual of pivotal importance then this would be a clear case worthy of an elevated level of proof of at least «clear and convincing standard» if not «beyond any reasonable doubt».

In certain civil cases, the defendant may have an interest that is sufficiently compelling to require imposition of a higher standard of proof. A higher standard of proof shifts the risk of error away from the defendant, and toward the plaintiff. This standard is generally imposed when there is a particularly important individual interest that must be protected against the risk of error in the litigation. Courts do not apply this elevated standard to cases that simply require the payment of money. A finding that one has violated an anti-doping or integrity related provision does carry a professional as well as social stigma. In such cases, the defendant's interest is more than merely monetary, and due process concerns are implicated[24].

In cases where the decision is expected to have *ruinous effect on an individual's reputation for personal integrity* an elevated standard of proof is applicable[25]. Decisions based on a finding of a violation associated with personal discredit or conducting one's profession may tend to stigmatize a professional resulting *to a loss of position and other severe consequences related to their livelihood* and therefore in such cases an elevated standard of proof is applicable[26].

7. Sports authorities investigating match fixing cases possess wide investigative powers that allow them to collect evidence from all participants in the sports world. These powers allow them to collect a great amount of evidence. Their authority sometimes (e.g. tennis integrity officials) goes as far as demanding access to bank accounts,

[24] Cfr. Supreme Court of the State of Florida, South Florida Water management District v. RLI Live Oak LLC. SC 12-2336, L.T. 5DII – 2329.

[25] Cfr., e.g., In Re Pando, 903 So. 2d 902, 903 (Fla. 2005) also cfr. page 9, Supreme Court of the State of Florida, South Florida Water management District v. RLI Live Oak LLC. SC 12-2336, L.T. 5DII – 2329.

[26] Cfr., e.g., § 403.727(4), Fla. Stat. (2011) and also cfr. page 11-12, Supreme Court of the State of Florida, South Florida Water management District v. RLI Live Oak LLC. SC 12-2336, L.T. 5DII – 2329.

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phone records, download all data from witness's mobile phones, access their social networks etc. Apart from the obvious intrusion in the athlete's private sphere, the side of the accused athlete does not possess any of these powers in order to collect counter-evidence. The whole procedure before the hearing officials has to rely therefore in the evidence collected by the federation's investigating authorities, who are also a party in the procedure. Since all serious evidence are collected by them and without any supervision of their work by an impartial authority, they are being left alone to control the evidence that is presented in Court and the evidence that is not. This is why a party to a judicial procedure being at the same time also the investigating authority in the same procedure, is very dangerous for the integrity of the procedure and unfair for the accused party.

8. In most disciplinary cases brought before sports tribunals, sports authorities have to prove that the investigating sports authorities as well as the sports authorities issuing the ruling of first instance are separate from an organizational and financial point of view from the sports federation as a party to the proceedings. Any financial or organizational link between the federation as an accusing side, the Integrity Officers conducting the investigation and collecting the evidence and the Hearing Officer judging the case, call into question the independence of the whole procedure and eliminate any possibility of a fair trial as these links could possibly be influencing the outcome of the Hearing Officer's decision.

The CAS, before the formation of the ICAS, was financed entirely by the IOC, which could also modify the CAS statutes and possessed considerable power to appoint the president as well as its members. In February 1992 a case was brought before the CAS for a ruling[27]. The CAS award[28] was appealed on a public law basis before the Swiss Federal Tribunal contesting the validity of the award, which claimed was rendered by a court which did not meet the conditions of impartiality and independence needed to be considered as a proper arbitration court. The Swiss Federal Tribunal (henceforth

[27] Cfr. R. McLaren, *Twenty Five Years of the Court of Arbitration for Sport: A Look in the Rear-view Mirror*, in *Marquette Sports Law Review*, 20, 2, 2010, p. 304 s.
[28] Cfr. CAS 92/63 G. v/ FEI in *Digest of CAS Awards* 1986-1998.

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SFT) in its judgement of 15 March 1993[29], rejected the appeal and recognised the CAS as a true court of arbitration. However, the most important part of the judgment was the obiter statement of the SFT in which it drew attention to the numerous links which existed between the CAS and the IOC. It explained that in the event of the IOC's being a party to proceedings before CAS, the fact that the CAS was financed almost exclusively by the IOC, that the IOC was competent to modify the CAS Statute and the considerable power given to the IOC and its President to appoint the members of the CAS, could call into question the independence of the CAS. The SFT therefore sent a clear message to the CAS, that it should be made more independent of the IOC both organisationally and financially[30]. The IOC acted immediately by creating the ICAS[31].

9. Rules of law and ethics are not issued by the persons they are imposed upon but by an external authority. They are imposed on a person without being a problem whether he or she agrees with them. On the other hand, integrity is a quality that by definition comes from within. Integrity cannot be imposed on anyone. Therefore law and ethics are imposed on an individual by an external authority whereas integrity is more internal since it is a set of principles adopted guiding the behaviour and therefore also the actions of an individual.

Rules of law as well as rules of ethics form a code of conduct everyone has to comply with otherwise there are sanctions. But these rules work a lot like the tax code. One should not breach these rules but this does not mean that one cannot bypass them or get advantage of any loopholes in their wording and thus breaching the spirit of the rule while complying with the wording of the rule[32]. In fact this is exactly what lawyers and accountants are hired for.

Law and ethics is about following rules whereas integrity is about

[29] Cfr. published in the *Recueil Officiel des Arrêts du Tribunal Fédéral* (Official Digest of Federal Tribunal Judgements), 119, II, p. 271.

[30] Cfr. The Court of Arbitration for Sport Site: *http://www.tas-cas.org/history.*

[31] Cfr. M. Papaloukas, *CAS: The Court of Arbitration for Sport*, Papaloukas Edition, 2016.

[32] *http://www.zoomstart.com/ethics-and-integrity/.*

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doing the right thing. It is therefore possible to have a situation whereby one follows the rules and so one behaves ethically but not with integrity.

There are many cases brought before the CAS, the Swiss Federal Tribunal as well as the European Court of Human Rights with claims of breaches of fundamental rights. Often these cases involve a weak side (an athlete) against a strong side (an International Sport Federation). The athlete often loses the legal battle after having to debate elaborate rules and procedures that the athlete was forced to accept otherwise he could not become a professional player. The Courts find against the athlete on the basis of the rule of law or the sports regulations. So the Sport Federation is definitely ethical but while drafting and applying the rules are they also considering integrity?

MARIOS PAPALOUKAS

*Abstract*

It is universally accepted that doping and match fixing plague sports in a way that the core values of sport are jeopardized. Sports authorities have adopted regulations and codes of ethics providing strict penalties for offenders. In this manner sports authorities wash their hands of the offensive behaviors threatening the values of the Olympic Idea.

The whereabouts rule, the introduction of expensive procedures before sports courts, procedural rules securing easy convictions for offenders, low standards of proof before sport courts, the strict liability rule, are some or many issued that raise some integrity questions.

So although ethics are protected in the sport world by the introduction of elaborate regulations, the question remains whether all the measures and the procedures imposing them are also guaranteeing the integrity of sport authorities.

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# Role of Rules and Regulations on Ethics and Sport Integrity

SUMMARY: 1. Ethics in sport. – 2. Threats posed to the integrity of sport. – 3. Rules and regulations in regard to Ethics and Integrity in sport. – 4. Some solutions of Unethical Sport behavior. - 4.1. Personality education. - 4.2. Encourage the athlete's right behaviors and condemn the wrong behaviors. - 4.3. Conducting correct sports programs. - 4.4. Responsibility Training and Personality Basics. - 4.5. Introducing the pattern for ethical behaviors. - 4.6. Introducing the pattern for ethical behaviors. - 4.7. Setting up common habits. – 5. Conclusion and Suggestions.

1. Ethics is a system which supports the morality and integrity of its individuals. Integrity is a complex word that takes meaning in different environment and contexts. Integrity is related to a range of sport-related virtues. Sport can reflect the values of the wider society. Winning and being competitive are often perhaps problematically, seen as virtues in sport. Respect for the game is an important feature of sport integrity[1]. One of the signs of respect to game, is respect rules and regulations of playing. Regulations in sports generally, includes special regulations every field of sport and no codified laws in terms of failure to comply with honesty and morals in sports.

Ethics in sport requires four key virtues: Fairness, Integrity, Responsibility, and Respect. Generally, cheating and poor integrity make some unethical behavior in sport. Unfair play and inappropriate behavior in sport can be derived from an idea "Winning is Everything". This idea can make a distinction between Gamesmanship and Sportsmanship. Gamesmanship is built on the principle that winning is

[1] M. TREAGUS and others, *Integrity in Sport, Literature Review*, The University of Adelaide, 2011, p. 12 s.

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everything. Athletes and coaches are encouraged to bend the rules wherever possible in order to gain a competitive advantage over an opponent, and to pay less attention to the safety and welfare of the competition. In the other hand, in sportsmanship model, healthy competition is seen as a means of cultivating personal honor, virtue, and character. It contributes to a community of respect and trust between competitors and in society. The goal in sportsmanship is not simply to win, but to pursue victory with honor by giving one's best effort[2].

More recently, issues concerning poor integrity, corruption, and incidents of unethical behavior, appear to be more prevalent in sport. These include illegal and unethical activities such as match-fixing, the use of insider information for illegal betting purposes, the use of performance and image enhancing drugs, and discrimination or abuse directed at sporting officials, athletes or other persons in a sporting context. Participation in sport should be based upon the concepts of fairness, fun, sportsmanship and respect[3]. When an athlete do such activities; faking a foul or injury, attempting to get a head start in a race, tampering with equipment, such as corking a baseball bat in order to hit the ball farther, covert personal fouls, such as grabbing a player underwater during a water polo match, inflicting pain on an opponent with the intention of knocking him or her out of the game, the use of performance-enhancing drugs, taunting or intimidating an opponent[4], and when a coach lying about an athlete's grades in order to keep him or her eligible to play; how can we except that; sport make fun and fairness competition?

Despite sport activities and environment are always for the various events prepared conditions have, but more coaches and athletes are not awareness about the legal problems of this environment and this is deemed that their violations ultimately some legal ramifications led to the disciplinary and destroyed easily solved. While the development and expansion of activity exercise and increase knowl-

[2] *https://www.scu.edu/ethics/focus-areas/more/resources/what-role-does-ethics-play-in-sports*.

[3] *https://www.clearinghouseforsport.gov.au/knowledge_base/organised_sport/sport_integrity/Integrity_in_Sport*.

[4] *https://www.scu.edu/ethics/focus-areas/more/resources/what-role-does-ethics-play-in-sports*.

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edge and awareness of the athletes and families, the necessity of knowing the legal regulations and legal conditions for officials in the field of sports, is important more than ago[5].

Sport is a science, a science without ethics is not valuable. The aim of sport is attend a man and a society with the values of human dignity, enthusiastically. Rainer Martens believes "when you as a coach face with an athlete who have some ethical problem, you can ignore him or her or you can spend more time for him or her and hope to change his or her character and help the athlete to be a good human"[6].

The concern in this research is that; regulations associated with sports morality must be written and codified. The rules and regulations should be ratified, determined guarantee for unethical behavior.

2. Sport violations are four categories: Technical Violations, General Misdemeanors, Intervention in Arbitrators, and Ethical Misconduct. Fortunately, Ethics in sport does not have an equivocal meaning, every behavior is accepted as a good behavior, is good in all over the world and same circumstance for bad behavior.

Pierre de Coubertin says: «Internationalism and peace are obvious ideas that we want to write ethical power cases in regard to them, to can amplify sport moral».

Ethical principles are optional and they are base of justifying rules and social agreements. These international principles are justice, equality of rights of individuals and respect for human beings. In addition these principles, there are some special norms in each field like Music, Painting, Science, Sport and other fields[7].

Some threats that posed to the integrity of sport are:

– Cheating in sport that is opposite side of Fair play[8]. Sport cause to know that victory is valuable just when we gain it by attempting not by cheating.

[5] M.M. Kashef, M. Sheidayi, *Sport law and Ethics*, Tehran, 2015, p. 13.

[6] R. Martens, *Successful Coaching*, translated to Farsi by R. Soheili, Behnashr publication, 2004, p. 90.

[7] A. Farahani and others, *Sports law*, Hatmi publication, translated to Farsi, 2005, p. 133 s.

[8] Definition of fair play – respect for the rules or equal treatment of all concerned.

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– Violence in sport that is a kind of harmful behavior that is far from the aim of sport.

– Sexual discrimination in sport; Justice requires sport must be allowed to do by everyone who like to do.

In regard to “Arizona Officials Agreements 1999”; The main elements of sport ethics are Reliability, Respect, Responsibility, Fairness, Kindness and Social Assistance. When each of these elements be at risk, can be a threat for sport integrity and ethics.[9] If ethical issues prevail in sport, there will be great benefits in the small sports community as well as in the social life of other people, because athletes are considered a community model. Millions of people do sport and there are many audiences and advocates of various sport events broadcasted by T.V and radio channels. Since athletes are as patterns especially for youth, it is so important for a society to be clever about its athlete`s behavior[10].

3. Since Sport is like a mirror for society, when we decide to solve a problem in sport it can be so helpful in other aspects.

In this way, we should know Sport Ethics and Integrity how reflected in rules and regulations;

– The Ten Commandments of the United States Sport Coaches:

In this regulation, emphasize the impressive role of coaches on athlete`s character.

– Canadian Sports Enforcement:

Canadian society of coaches determined a letter that all coaches and athletes are required to read and sign when they receive cards and licenses. One of important part of that is about doing their duties with integrity and fairness.

– Principles of the Olympic Charter

One of important aim of Olympic Games is: “Encourage and Support of Sport Ethic Development”.

– Code of Ethics for Coaches (NFHS)

In this code, that prepared for United State high schools emphasize coaches role again.

[9] R. Martens, *Successful Coaching*, cit., p. 74 s.

[10] M. Yousefi Sadeghloo, M. Mokarrami, *Codification of proved sport pattern; a study of necessity*, in *e-lex Sportiva Journal*, 52, 2, 2014.

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– Ethical Charter of the Iranian Football Association

This charter contains 21 articles that determined functional and behavioral framework of all sports activists to gain the aim of improve social and individual behavior and developing Islamic and Iranian culture.

– Act 2, Constitutional law of Iran

In part 6: «Dignity and the high value of man and freedom with his responsibility to God».

– In Islam

In Islam always emphasize moral and ethical behavior in every aspects of life. We can say Islam is relying on honesty and integrity and we can see this aim in other religions also.

– In Iranian culture

In Iranian culture, ethic has a strong support. In Iran we have a new category of sport named 'Humorous sports'. This kind of sport emphasize Ethics, Integrity, Fair play, respect and being a real human instead of just being a winner. We have special places in Iran named 'Zurkhane' means: A house for power. In this place men practice with some special devices to have powerful muscles and in addition, Zurkhane is a place that old men often are there and have some speech about Moral and Ethics in all aspects of the life[11].

4. As you read in the last part, we have some Rules and Regulations in all over the world about moral, ethics and integrity. But the important question is; how can we enforce these rules? In the other words, we want to know, is it enough just to have these written rules and regulations? What should we do to be successful in enforcement? Are there any ways to encourage athletes to follow these written rules in the exciting situation in Sport?

We think some following Instructions can be helpful in this way:

4.1. This item is directly related to the impressive role of coaches. One of the important duty of coaches in addition to teach technical rules to athletes, is teaching ethics to them. A coach can help the

[11] We suggest to everyone who read this article to come to Iran and at least visit one "Zurkhane". Welcome!

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athletes to improve their personality, characters with the help of this three steps;

– Recognizing Principles of Morality: These principles tell us what conducts are true and what are wrong. Sometimes we prefer to do something but ethical values tell us that is not true, in this situation we must select what is good to do.

– Teaching the Principles of Morality: A coach must determine the principles and teach them in details.

– Providing opportunities for practice: Practices are good opportunities to make a challenge for athletes to make decision in force majeure situations.

4.2. As a coach, should be a patient person, when an athlete conduct in a bad behavior you can appreciate their progress in good behaviors. You can reward them for their clean act in practices or competitions. Give some privileges to good acts.

4.3. Sport programs should develop physical skills, mental skills, social skills and ethical skills.

4.4. If athletes are informed of Liability for themselves, even at emotional moments, they can be equipped with this kind awareness which prevents them from committing violence and offenses and unethical behaviors. Also, as justice maintains that a loss should be compensated, this type of liability contributes to this entitlement and helps performing justice which is the mostly sublimed objective of sports law that cause ethical behavior and integrity in sport[12]. In the other hand, we can modify some criteria as good behaviors, for instance 6 advices for athletes can be:

Be polite in every situation, Be a responsible person, Be kind, Be honest, Be fair-minded and Be a good citizen.

4.5. This item has Two aspects:

One of them is: As a coach how can be a good pattern for athlete?

[12] M. Mokarrami, "M.A" Thesis on *Athletes' civil liability due to violation of norms in sport law*, Islamic Azad university, Tehran, 2015, p. 58.

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The second is: Athletes are pattern for people.

Rainer Martens believes that: "Behavior is more effective than speech. What we say will have a greater impact on moral behavior than we do. Since an instructor is important to his players, he listens to his moves and mimics them. So try to be a good model for your players; not a complete but a good pattern![13].

In the other hand, Sport can be recognized in the physical education. Physical education is training body and establishing moral traits in personality of people through physical activities, For example when athletes respect each other in the sport fields, we can hope that this instructions and feeling will transmit from this domain to other domains. Footballer who stops moving in front of opponents' empty gate when referees whistle, boxer who control himself or herself while opponent hits mistakenly and doesn't follow rules, skater who leaves the skate tack in play off rink. These athletes will respect more red light in an empty junction and in fact, these influences of sport will correct morality, law-abiding. It's absolutely clear that all costs, attention of society, family and organization considering sport, follow one target: modifying behavior and propagating morality. Winning game and achieving championship isn't only the purpose of sport, but it is a mean for reaching social moral ideals that has a complete relationship with legal system and codified principles[14].

4.6. We should know that: Legislation alone is not enough. As a coach you must explain about every behavior and a logical reason for it. A coach should categorized behaviors and help athletes to understand it.

4.7. In all periods of history, people's habits of various societies have been accepted by the people of society through repetition, becoming law and regulations. This process, especially in the case of rules with moral origin, is much stronger. If a coach accustomed his players to always treat each other with respect and invite them to help charity, or to honor and support the pioneers and do things like

[13] R. Martens, *Successful Coaching*, cit, p. 84 s.

[14] M. Yousefi Sadeghloo, M. Mokarrami, *Codification of proved sport pattern*, cit., p. 75.

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that; they are accustomed to these behaviors, and they themselves pass on these behaviors to their own generation.

5. When we decided to write an article on this subject, we thought that by collecting the laws and regulations that were approved in this area, we would reach comprehensive rules and propose them to the international institutions.

The more we studied in this field, we found: Although the development of such a comprehensive set of rules and regulations is required by the sports community, two other issues should not be overlooked.

First, let's not forget that ethics education is not possible except by a human being. A person who is himself the moral model of others and is a sports coach. The role of the sports coach in ethics was discussed in detail in the article.

The second issue is that: although there are currently several different laws and regulations in this area, it seems to us, better than just that these laws and regulations were exhaustive and integrated with the performance guarantees of its own, and it was also better to have this category. The rules and regulations were drafted and approved, which was a way to prevent any kind of unethical behavior and lack of integrity in sport.

Mahsa Mokarrami,
Ali Zare

*Abstract*

Sport is a vital part in the life in all over the world. No one can deny the important role of sport in various aspects. In this article we debated about an important aspect; sport ethics and integrity. Integrity requires respect for the game, the people, moral responsibility and moral accountability. Sport can influence the values of the society and affect it. Ethical behavior concerns different kinds of actions that athletes, officials and spectators do during a sport event or in normal life in regard to sport. If we have codified sports regulations in regard to Ethical behavior and sport integrity then define and determine some behaviors as criteria, we will be able to help sport organizations in detecting and deterrent ways in this regard. This article discusses the importance of the role of these regulations in facilitating issues of sport ethics.

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# ROUND TABLE – MISCELLANEOUS

# Giustizia sportiva nazionale e internazionale e principio di specificità dello sport. Problemi e prospettive

Sommario: 1. Introduzione. – 2. Il caso Pechstein. – 3. Il caso SV Wilhelmshafen. – 4. La Corte costituzionale italiana e il caso Greta Cicolari. – 5. Il principio di specificità dello sport nell'ordinamento europeo. – 6. Considerazioni di chiusura.

1. In primo luogo, mi preme porgere un sentito ringraziamento agli organizzatori di questo prestigioso convegno internazionale, in particolare al Professor Giovanni Puoti, per avermi invitato a presentare una relazione al 23° Congresso annuale della *International Association of Sports Law* e avermi affidato la copresidenza di questa sessione.

Unitamente ai ringraziamenti, mi complimento vivamente per la piena riuscita dell'evento, di elevatissimo livello.

Infine, un ringraziamento alla Professoressa Francesca Serra per la pazienza mostrata nei miei confronti e le puntuali indicazioni fornitemi di volta in volta.

Il tema della mia relazione verte su uno degli argomenti classici del diritto dello sport. Negli ultimi tempi esso è anche oggetto di una riaccesa attenzione da parte degli studiosi ed operatori del settore per alcune sentenze che stanno segnando una rilevante evoluzione in materia sia a livello nazionale, sia a livello internazionale ed europeo. Di qui la scelta della mia relazione imperniata sull'analisi di alcuni casi.

Il riferimento è in primo luogo alla complessa ed articolata vicenda di Caludia Pechstein, la pattinatrice sul ghiaccio tedesca, che sta suscitando grande scalpore ed è già stata oggetto di numerose decisioni che vanno dal lodo del CAS/TAS, impugnato per ben due volte dinanzi alla Corte federale svizzera, a quelle dei giudici tede-

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schi di merito e di Cassazione. E il percorso giudiziario non è ancóra chiuso, essendo nel contempo pendenti un ricorso alla Corte di Strasburgo e un *Verfassungsbeschwerde* alla Corte costituzionale tedesca.

Altra vicenda altrettanto interessante è quella che ha riguardato la squadra di calcio tedesca SV Wilhelmshafen, decisa dai giudici di Brema nonché dal *Bundesgerichtshof*.

Infine, sulla base della sentenza n. 49/2011 in materia di giustizia sportiva della Corte costituzionale italiana, verrà analizzato il caso Cicolari Greta, deciso dal TAR con una condanna della FIPAV poi revocata dal Consiglio di Stato (n. 3065/2017).

Queste sentenze pongono degli interrogativi e dei problemi ai quali è necessario dare una risposta adeguata per garantire, da una parte, l'efficienza del sistema di giustizia sportiva, ma anche, dall'altra, i diritti fondamentali dei soggetti – atleti ed enti – che ad esso devono rivolgersi per risolvere le liti insorte tra loro nell'esercizio dell'attività sportiva. Pertanto, dopo aver esposto i casi e le relative decisioni, verrà svolta una valutazione delle questioni poste alla luce del principio di specificità dello sport. Questo porterà a formulare delle considerazioni di chiusura e delle proposte sul tema.

2. La complessa vicenda giudiziaria della Pechstein, pattinatrice sul ghiaccio tedesca di alto livello che si mantiene con l'attività sportiva e con i proventi di sponsorizzazioni e altre fonti, verte principalmente sulla clausola arbitrale e sugli effetti della posizione monopolistica delle federazioni, specie di quelle internazionali.

A causa di una presunta violazione del codice antidoping, nel luglio 2009 la Pechstein veniva squalificata per due anni dalla Commissione disciplinare della Federazione internazionale di pattinaggio (*International Skating Union, ISU*), essendo preclusa la sua partecipazione alle future competizioni per il periodo marchiato dalla squalifica. Informata dell'accaduto, la Federazione nazionale tedesca *Eisschnelllauf-Gemeinschaft e.V.* provvedeva a sua volta ad escludere l'atleta anche dalla partecipazione agli allenamenti federali e della *Verein* per la quale era tesserata, nonché dalla selezione che doveva gareggiare ai Giochi olimpici invernali di Vancouver del 2010.

In virtú della sottoscrizione di diversi accordi con la *ISU* contenenti, tutti, clausole arbitrali, la Pechstein dovette impugnare la deci-

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sione dinanzi al C.A.S./T.A.S. di Losanna[1]. Per avviare la procedura dovette sottoscrivere anche l'accettazione delle regole procedurali che, tra l'altro, affermavano la competenza del C.A.S./T.A.S. Il *Panel* decise che il provvedimento impugnato era da considerarsi corretto, respingendo pertanto la domanda attorea. La Pechstein si rivolse allora alla Corte federale svizzera, chiedendo la revisione del lodo. Il *Beschwerde* venne respinto con la conferma del lodo sia la prima volta[2], sia la seconda, quando la ricorrente propose un altro ricorso alla luce di un ulteriore parere medico a lei favorevole.

Terminata la squalifica, la Pechstein tornò con successo a gareggiare. Poiché, a suo avviso, era stata ingiustamente condannata e aveva subìto una perdita di 4,4 milioni di Euro, la pattinatrice decise di citare dinanzi al *Landesgericht* München I la Federazione internazionale e quella nazionale, chiedendo che fossero dichiarate responsabili e condannate in solido al risarcimento dei danni patiti. L'attrice assumeva che alla sua richiesta non si poteva opporre l'esperita procedura arbitrale, in quanto la clausola compromissoria non era stata da lei sottoscritta volontariamente.

Il *Landesgericht* ha respinto la domanda, argomentando che con l'accettazione dell'arbitrato dinanzi al T.A.S. era stata validamente rifiutata la giurisdizione ordinaria, non potendosi quindi piú lamentare della violazione del diritto di accesso alla giustizia statale. Tuttavia, il *Landesgericht* ha anche ritenuto ricorrere la mancanza di volontà delle sottoscrizioni di siffatte clausole arbitrali e ha palesato dubbi rilevanti sulla effettività terzietà del T.A.S.[3]. È pertanto interessante analizzare nel prosieguo i passaggi piú rilevanti della sentenza.

[1] Sul C.A.S./T.A.S. sia consentito rinviare a L. Di Nella, *L'arbitrato sportivo*, in Aa.Vv., *L'autonomia negoziale nella giustizia arbitrale*, Atti del 10° Convegno internazionale della SISDIC, Napoli, 2016, p. 551 ss., ove si rinviene altra bibliografia in argomento.

[2] *Tribunal fédéral*, 10 febbraio 2010, 4A_612/2009, e *Tribunal fédéral*, 28 settembre 2010, 4A_144/2010, in *http://www.juricaf.org*.

[3] *LG* München I, in *SchiedsVZ*, 2014, p, 100 ss.; sulla sentenza, v., tra gli altri commenti, quelli di D. Monheim, *Das Ende des Schiedszwangs im Sport. Der Fall Pechstein*, in *SpuRt*, 2014, p. 90 ss.; L. Handschin, T. Schütz, *Bemerkungen zum Fall Pechstein*, *ivi*, 2014, p. 179 ss.; T. Pfeiffer, *Rechtsgeschäftliche Entscheidungsfreiheit beim Abschluss von Schiedsvereinbarungen - Bemerkungen zum Pechstein-Urteil des Landesgerichts München I vom 26. Februar 2014*, in *SchiedsVZ*, 2014, p. 161 ss.; C. Duve, K.Ö. Rösch, *Der Fall Pechstein: Kein Startschuss für eine Neugestaltung der Sportschiedsgerichtsbarkeit*, *ivi*,

In via logica, il primo nodo da sciogliere è quello relativo alla verifica della competenza che il *Landesgericht* ha affermato senza mostrare alcun dubbio. Rispetto alla federazione tedesca la decisione si poggia sul fatto che la sua sede è a Monaco, ciò che radica appunto la competenza territoriale nel relativo tribunale ai sensi del § 17 § 1 *ZPO* (*Zivilprozessordnung*, codice di procedura civile), che regola il foro generale delle persone giuridiche[4].

Piú complessa è la posizione della federazione internazionale. Rispetto a questa il Tribunale tedesco ha richiamato l'art. 6, n. 1, della Convenzione di Lugano concernente la competenza giurisdizionale, il riconoscimento e l'esecuzione delle decisioni in materia civile e commerciale, ai sensi del quale, in caso di pluralità di convenuti appartenenti a Stati "vincolati", la persona domiciliata in un altro Stato può essere convenuta davanti al giudice del luogo in cui uno qualsiasi di essi è domiciliato, sempre che tra le domande esista un nesso cosí stretto da rendere opportuna una trattazione ed una decisione uniche, per evitare il rischio di giungere a pronunciamenti incompatibili in caso di giudizi separati. Anche se questa disposizione è ritenuta di stretta interpretazione, non sembra potersi dubitare che nel caso *de quo* vi sia la richiesta connessione, vertendo la questione in entrambi i casi sulla validità e sull'efficacia della squalifica per *doping*. Doveva dunque essere evitato il rischio di giudicati contraddittori sul medesimo fatto. Pertanto, il *Landesgericht* ha correttamente rigettato l'eccezione di incompetenza sollevata dalla federazione internazionale, la quale sosteneva di essere stata citata esclusivamente per radicare la competenza del giudice tedesco.

2014, p. 216 ss.; U. Scherrer, R. Muresan, K. Ludwig, *"Pechstein" ist kein "Bosman der Sportschiedsgerichtsbarkeit"*, *ivi*, 2015, p. 161 ss.; T. Niedermaier, *Schiedsvereinbarungen im Bereich des organisierten Sports*, *ivi*, 2014, p. 280 ss.; U. Haas, *Der Court of Arbitration forSport im Spiegel der deutschen Rechtsprechung*, in *ZVglRWiss*, 2015, p. 516 s.

[4] Secondo il § 1 il foro delle persone giuridiche (comunità, corporazioni, società, fondazioni, cooperative, associazioni ecc.) viene determinato in base alla loro sede: tale è considerata quella in cui viene svolta l'attività amministrativa, se non risulta diversamente. Questo il testo del § 1: «Der allgemeine Gerichtsstand der Gemeinden, der Korporationen sowie derjenigen Gesellschaften, Genossenschaften oder anderen Vereine und derjenigen Stiftungen, Anstalten und Vermögensmassen, die als solche verklagt werden können, wird durch ihren Sitz bestimmt. Als Sitz gilt, wenn sich nichts anderes ergibt, der Ort, wo die Verwaltung geführt wird».

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Il punto che però ha attirato l'attenzione degli esperti su questa controversia è la statuizione del *Landesgericht* sulla non opponibilità all'attrice della giurisdizione arbitrale ai sensi dei §§ 1032, comma 1, e 1025, comma 2, *ZPO*, poiché le diverse clausole compromissorie sono state considerate inefficaci[5]. Si è certamente dinanzi ad una forte presa di posizione, che trova un precedente nel caso Körbuch del 2000. In questa sentenza il BGH ha deciso l'identica questione relativa ad una controversia avente ad oggetto una clausola arbitrale imposta ai membri di un'associazione, ritenendo che un "accordo estorto" (*abgenötigte Vereinbarung*) è nullo per contrasto con il diritto fondamentale all'accesso alla giustizia statale, il quale è considerato violato quando la clausola arbitrale è imposta e non liberamente scelta[6].

Il *Landesgericht* motiva la sua statuizione osservando che l'atleta non ha sottoscritto volontariamente l'accordo arbitrale, poiché le due federazioni sono in posizione di monopolio nel rispettivo àmbito di competenza e senza l'adesione della pattinatrice alla predetta clausola non le sarebbe stato possibile esercitare l'attività professionistica. Da questo dato risulta che le parti dell'accordo si trovano in una posizione di squilibrio strutturale da cui deriva la mancanza di volontarietà dell'accettazione da parte dell'atleta che si trova in una posizione contrattuale debole, la quale non deve essere manifestata esplicita-

[5] Va precisato che la decisione, sul punto, è stata adottata facendo riferimento al diritto tedesco per le clausole arbitrali pattuite con la federazione nazionale, e al diritto svizzero per quelle intercorse con la federazione internazionale.

[6] *BGH*, in *NJW*, 2000, p. 1713: «Das Recht auf Zugang zu den staatlichen Gerichten, das sich aus dem Rechtsstaatsprinzip ergibt, und das Recht auf den gesetzlichen Richter (Art. 101 Abs. 1 Satz 2 GG) haben Verfassungsrang. Zwar ist es dem Gesetzgeber nicht verwehrt, die Schiedsgerichtsbarkeit für Sachgebiete zuzulassen, bei denen die streitenden Parteien berechtigt sind, über den Gegenstand der Rechtsstreitigkeit einen Vergleich zu schließen. Sie ist insoweit Ausfluß des in Art. 2 Abs. 1 GG verankerten Grundrechts der Handlungsfreiheit und Privatautonomie (Achterberg, Bonner Kommentar zum GG, Art. 92 Rdn. 173 ff. m.w.N.; Heyde, HdB des Verfassungsrechts, 2. Aufl. 1994, S. 1579, 1596; vgl. auch BGHZ 65, 59, 61). Dieses Grundrecht verlangt jedoch, daß die Unterwerfung unter die Schiedsgerichtsklausel und der damit verbundene Verzicht auf die Entscheidung eines staatlichen Rechtsprechungsorgans grundsätzlich auf dem freien Willen des Betroffenen beruhen. Die Formvorschrift des § 1027 a.F. ZPO soll, indem sie dem Betroffenen die Tragweite seiner Erklärung möglichst nachhaltig und eindringlich vor Augen führt, dementsprechend sicherstellen, daß der Verzicht auf die Entscheidung staatlicher Gerichte und auf den gesetzlichen Richter zugunsten eines privaten Schiedsgerichts bewußt und freiwillig erfolgt».

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mente, potendo anche risultare dalla concreta situazione. All'argomento che giustifica la clausola compromissoria con la necessità di garantire un'applicazione internazionalmente uniforme delle regole sportive su cui contano tutti gli atleti grazie ad un sistema arbitrale internazionale, il giudice obietta che alla volontaria accettazione degli sportivi ai medesimi regolamenti non corrisponde però anche la volontaria accettazione di un meccanismo arbitrale per risolvere le liti come quello del T.A.S., nell'àmbito del quale gli sportivi stessi non hanno alcuna influenza sulla composizione del collegio. Poiché il giudice ordinario costituisce per l'atleta il "giudice di legge" (*gesetzlicher Richter*) ai sensi dell'art. 101, § 2, del *Grundgesetz*, la rinuncia ad esso può essere fatta validamente soltanto in modo "consapevole e volontario" (*bewusst und freiwillig*) per le suesposte ragioni di diritto costituzionale. Da ciò consegue ulteriormente che la prova della volontarietà dell'accettazione grava sulle federazioni, le quali non sono riuscite a fornirla. Il *Landesgericht* aggiunge in proposito che ai fini della predetta prova sarebbe sufficiente che allo sportivo fosse riconosciuto un effettivo diritto di scelta, come accade esemplarmente nei regolamenti della Federazione tedesca di atletica leggera che consentono di ricorrere ad arbitri indipendenti ed esterni all'organizzazione federale[7].

La valutazione delle conseguenze della mancanza di volontarietà viene effettuata in base al diritto tedesco e a quello svizzero, corrispondentemente alla nazionalità delle controparti. In forza del primo, la clausola compromissoria imposta è nulla per contrarietà al buon costume ai sensi del § 138 BGB e pertanto inefficace. A sopperire la mancanza di volontà non è ritenuta sufficiente la possibilità riconosciuta dal § 1034, comma 2, *ZPO* di far fronte allo svantaggio di una parte derivante da una certa composizione del collegio arbitrale, ricorrendo alla sostituzione degli arbitri in forza dell'intervento del giudice ordinario. Per un verso, il giudice sostituito non sarebbe co-

[7] In proposito va ricordato che, a partire dal 1° gennaio 2008, il *Deutscher Leichtathletik-Verband* (*DLV*) sottopone le liti relative ai casi di *doping* che vedono coinvolti atleti selezionati (*Kaderathleten*) minacciati da una squalifica alla *Deutsche Institution für Schiedsgerichtsbarkeit e.V.* (*DIS*), un ente privato e indipendente che offre arbitrati amministrati nazionali e internazionali e ADR a chi ne fa richiesta. Con tale scelta, adottata in Germania per la prima volta dalla *DLV*, si vuole assicurare che le sanzioni non siano piú inflitte da arbitrati gestiti dalle Federazioni, bensí da arbitri esperti e neutrali.

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munque il giudice legale; per l'altro, nel caso concreto una siffatta correzione della composizione non sarebbe effettiva, poiché comunque il giudice subentrante proverrebbe dalla lista chiusa di arbitri del T.A.S., sulla cui composizione l'atleta non ha alcuna influenza. Alla medesima conclusione si giunge se si segue quella letteratura che propone di sottoporre la clausola compromissoria alla *Inhaltskontrolle ex* §§ 242 e 138 *BGB*, giacché il sistema arbitrale del T.A.S. costituisce una deroga alla garanzia di accesso alla giustizia statale potenzialmente svantaggiosa per la parte che la deve accettare.

Anche applicando il diritto svizzero il *Landesgericht* giunge alla medesima conclusione ai sensi dell'art. 27, comma 2, del codice di procedura civile elvetico. In proposito, vengono richiamati gli artt. 6 e 13 della Convenzione europea sui diritti dell'uomo (CEDU) che, garantendo anch'essi l'accesso alla giustizia statale, non consentono di giudicare come valido un accordo arbitrale non formatosi volontariamente[8]. Il giudice tedesco cita a supporto della decisione la sentenza emessa nel 2010 dalla Corte europea dei diritti dell'uomo nel caso Suda c. Repubblica Ceca, per la quale la scelta dell'arbitrato deve essere "volontaria, lecita e inequivoca"[9]. Il *Landesgericht* valuta anche la procedura arbitrale sportiva ai sensi della CEDU, ritenendo con risoluta chiarezza che il sistema T.A.S. non offre le garanzie dovute. Questo risulterebbe, tra l'altro, dai seguenti elementi. Gli arbitri vengono scelti da una lista chiusa sulla cui formazione l'atleta non esercita alcuna influenza. Inoltre, il presidente del collegio viene scelto dal Segretario generale con una procedura intrasparente che lascia molto a desiderare. Stessa valutazione negativa è fatta, infine, per l'ob-

[8] Va evidenziato che, sul punto, il *Landesgericht* contraddice l'orientamento del Tribunale federale svizzero. In dottrina U. HAAS, *Internationale Sportgerichtsbarkeit und EMRK*, in *SchiedsVZ*, 2009, p. 80, ritiene che la volontarietà dell'accettazione della clausola arbitrale sia necessaria anche ai sensi della CEDU, ma disapplica la sanzione della nullità in ipotesi di ricorso nel caso concreto di ragioni legate ad una "good administration of justice".

[9] Corte eur., 28 gennaio 2011, n. 1643/06, Suda c. Repubblica Ceca, §§ 48 e 49, ammette che è valida la scelta di rinunciare al diritto di accesso ad una autorità giurisdizionale statale a favore di un arbitrato nelle materie disponibili dalle parti, ma «à condition qu'une telle renunciation soit libre, licite et sans équivoque», nonché precisa che il deferimento della cognizione ad una giurisdizione arbitrale implica l'applicazione dell'art. 6 CEDU anche a questa (cfr. V. PETRALIA, *Equo processo, giudicato nazionale e Convenzione europea dei diritti dell'uomo*, Torino, 2012, p. 128 ss., spec. 130).

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bligo di presentazione della bozza del lodo al predetto Segretario, ciò che contrasta con la necessità di garantire l'indipendenza del collegio.

Come già detto, il *Landesgericht* ha però rigettato la domanda dell'attrice per le seguenti ragioni. Il giudice osserva che, secondo il § 1061 *ZPO* e le disposizioni della Convenzione di New York del 1958 per il riconoscimento e l'esecuzione delle sentenze arbitrali straniere, il lodo del CAS/T.A.S. sarebbe inficiato dal fatto di non essere fondato su un valido accordo arbitrale. Tuttavia, in concreto tale lodo è riconoscibile, poiché formalmente presenta tutti i requisiti richiesti dalla legge e l'efficacia dell'accordo arbitrale non potrebbe essere rilevata d'ufficio, essendo un vizio del contenuto valutabile dal giudice soltanto se contestato dalla parte. La pattinatrice in effetti non ha mai negato la competenza del CAS/T.A.S. durante il relativo procedimento. Per questo motivo il lodo può essere riconosciuto, non essendo stata sollevata la questione della competenza e avendo cosí l'attrice implicitamente rinunciato all'accesso alla giustizia statale. L'argomento utilizzato per rigettare la domanda di risarcimento del danno ai sensi del GWB (*Gesetz gegen Wettbewerbsbeschränkungen*), non sembra in realtà convincente, poiché la mancanza di una valida clausola compromissoria inficia inevitabilmente il relativo lodo[10].

La Pechstein ha impugnato la sentenza di primo grado dinanzi al competente *Oberlandesgericht*, che è giunto a conclusione parzialmente diverse[11]. I giudici di appello hanno confermato la loro com-

[10] In proposito, v. D. MONHEIM, *Das Ende des Schiedszwangs im Sport. Der Fall Pechstein*, cit., p. 93, il quale osserva che lo svolgimento regolare della procedura comunque non è in grado di superare il vizio della mancanza di un valido accordo arbitrale.

[11] *OLG München*, 15 gennaio 2015, in *SchiedsVZ*, 2015, p. 40 ss., e in *NZKart*, 2015, p. 197 ss.; sulla sentenza v. F.C. HAUS, I. HETZER, *Kartellrecht gegen (Sport-)Schiedsgerichtsbarkeit - 1:0. Zum Urteil des OLG München in der Sache Claudia Pechstein*, *ivi*, 2015, p. 181 ss.; W. HEERMANN, *Zukunft der Sportsgerichtsbarkeit sowie entsprechender Schiedsvereinbarungen im Lichte des Pechtstein-Verfahrens sowie des § 11 RegE-Anti-DopG*, in *SchiedsVZ*, 2015, p. 78 ss.; ID., *Anmerkung zum Teil-Urteil des OLG München vom 15.1.2015 - U 1110/14 Kart*, in *JZ*, 2015, p. 355 ss.; ID., *Missbrauch einer marktbeherrschenden Stellung im Sport (Teil 1)*, in *WRP*, 2015, p. 1047 ss.; R. BLEISTEIN, C. DEGENHART, *Sportschiedsgerichtsbarkeit und Verfassungsrecht. Schiedsvereinbarungen und Anti-Doping-Gesetzgebung auf dem Prüfstand*, in *NJW*, 2015, p. 1353 ss.; G. BRANDNER e R. KLÄGER, *Ein Sieg über (oder für) das System der Sportschiedsgerichtsbarkeit?*, in *SchiedsVZ*, 2015, p. 112 ss.; U. SCHERRER, R. MURESAN und K. LUDWIG, *"Pechstein" ist*

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petenza nei confronti di entrambe le parti, non avendo l'attrice abusato della normativa *de qua* per motivi riprovevoli. Non si rinvengono neanche ragioni che ostacolano l'impugnazione del lodo arbitrale dinanzi alla giustizia statale.

Anche i giudici dell'*OLG* ritengono che l'accordo arbitrale sia inefficace, giacché viola norme imperative del diritto sui cartelli. Viene infatti riconosciuta la posizione di monopolista della Federazione internazionale di pattinaggio nel mercato delle competizioni internazionali, rispetto alle quali vi è un rilevante interesse degli atleti a parteciparvi per evidenti ragioni, non essendo a questo paragonabile l'interesse alla partecipazione alle gare di livello soltanto nazionale.

A causa della posizione dominante sul mercato sarebbe, infatti, possibile alle imprese di imporre condizioni negoziali di qualsiasi tipo che deroghino a quelle che sarebbero invece usuali in una situazione di piena concorrenza. Pertanto, la Federazione non potrebbe esigere l'accettazione della clausola compromissoria. L'*OLG* precisa però – in contrasto con il giudice di primo grado – che gli accordi di arbitrato intercorsi tra una federazione internazionale organizzatrice di competizioni e gli atleti che vi prendono parte non sono da ritenere *tout court* invalidi per mancanza di volontà dell'accettazione da parte di questi ultimi[12]. In effetti, vi sono fondati motivi oggettivi che depongono per la sottoposizione delle liti ad un unico giudice, invece che ai giudici statali di diversi paesi, ciò che potrebbe condurre a decisioni divergenti.

Tuttavia, ricorre nel caso concreto un abuso di potere di mercato

*kein "Bosman der Sportschiedsgerichtsbarkeit"*, *ivi*, 2015, p. 161 ss.; A. Rombach, *The "Pechstein-judgment" of the OLG München: What does it mean for international sports and commercial arbitration*?, *ivi*, 2015, p. 105 ss.; F. Graf von Westphalen, *Die Sportschiedsgerichtsbarkeit vor den Schranken der Klausel-Richtlinie 93/13/EWG – Der Fall Pechstein*, in *SpuRt*, 2015 p. 186 ss.; M. Nordmann, S. Förster, *Der Fall Pechstein und die Grenzen des kartellrechtlichen Missbrauchsverbots, in WRP*, 2016, p. 312 ss.

[12] Secondo *OLG München*, cit., «auch Art. 6 Abs. 1 EMRK steht zwar der Anwendung einer Schiedsvereinbarung auf eine Streitigkeit entgegen, der eine der Streitparteien nicht zugestimmt hat (vgl. EGMR, Urt. v. 28. Oktober 2010 - 1643/06, Suda/Tschechische Republik Tz. 52 ff.). Liegt aber tatsächlich eine Zustimmung vor, so führt allein der Umstand, dass diese wirtschaftlich notwendig war, um eine bestimmte berufliche Tätigkeit auszuüben, nicht zu einer Verletzung der Garantien des Art. 6 Abs. 1 EMRK (vgl. EKoMR, Entsch. v. 13. Juli 1990 - 11960/86 - Axelsson u. a../. Schweden; EKoMR, Entsch. v. 5. März 1961 - 1197/61 - X../. Bundesrepublik Deutschland)».

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da parte della federazione per il fatto che la competenza arbitrale viene riconosciuta a favore del T.A.S., sul cui funzionamento e sulla cui composizione influiscono il C.I.O., le federazioni internazionali e i Comitati olimpici nazionali, ma non gli atleti che l'accettano, poiché altrimenti non possono partecipare alle competizioni internazionali. La composizione del C.I.A.S. e le modalità di scelta degli arbitrati, di fatto determinati principalmente dagli enti sportivi di vertice, pone questi ultimi in una situazione strutturale di forza che pregiudica alla base la neutralità del T.A.S. Inoltre, il presidente del collegio nei procedimenti di appello viene nominato dal Presidente del relativo settore all'interno del C.I.A.S. (Consiglio Internazionale di Arbitrato Sportivo). Per questo non è garantita la terzietà dei collegi arbitrali, essendo questi composti da persone piú vicine agli enti di vertice che agli atleti. Una giustificazione oggettiva per questa preponderanza non viene considerata esistente dall'*OLG*. Agli atleti dovrebbe pertanto essere riconosciuto almeno il diritto di scegliere arbitri al di fuori della lista del T.A.S., magari indicando astratte caratteristiche professionali quali requisiti per la nomina.

Quindi, il fatto che gli atleti accettino la competenza del T.A.S. dipende soltanto dalla posizione di forza delle federazioni. Se a loro fosse offerta la possibilità di rivolgersi anche a strutture arbitrali effettivamente neutrali per risolvere le loro controversie, allora probabilmente a queste sarebbe data la preferenza. Questo aspetto consente dunque di applicare la disciplina sul divieto di abuso di posizione dominante, integrandone la soglia della rilevanza.

Pertanto l'accordo arbitrale è nullo per violazione del divieto di abuso di posizione dominante ai sensi del § 134 *BGB*, che sancisce la nullità dei negozio per violazione di un divieto di legge (*gesetzliches Verbot*).

All'attrice non viene imputato un comportamento contraddittorio che le impedisce di accedere alla giustizia statale. Peraltro, questo non è pregiudicato da altri eventuali accordi arbitrali, perché di relativi alla richiesta del risarcimento del danno non si rinvengono.

L'*OLG* ritiene che la domanda dell'attrice non possa essere ritenuta infondata in ragione del riconoscimento del lodo arbitrale. Questo è infatti in contrasto con l'ordine pubblico e pertanto non può essere riconosciuto ai sensi del § 1061, comma 1, *ZPO* e dell'art. 5, comma 2, lett. *b*, della Convenzione di New York sui lodi stranieri.

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A questo consegue che i tribunali tedeschi non sono vincolati al lodo per valutare la richiesta di risarcimento del danno. Tuttavia, la decisione non è ritenuta matura per la sentenza nella parte relativa al risarcimento, riservandosi l'*OLG* di decidere con altro procedimento tale questione.

Questa decisione è stata a sua volta impugnata dinanzi al *BGH*, il quale l'ha cassata affermando quanto segue[13]. I giudici di ultima istanza hanno ritenuto che la clausola compromissoria sia valida e pertanto ostativa alla richiesta di risarcimento del danno. Il C.A.S./T.A.S. viene considerato un vero e proprio tribunale arbitrale ai sensi dei §§ 1025, comma 2, e 1032, comma 1, *ZPO*, all'interno del quale non viene riscontrata una posizione di diretto predominio da parte delle federazioni. Si riconosce che un'associazione sportiva internazionale come l'I.S.U. ha una posizione dominante nel mercato delle competizioni relative alla propria disciplina. Tuttavia, quando una federazione sportiva condiziona la partecipazione alle sue gare alla sottoscrizione di una convenzione di arbitrato in favore del C.A.S./T.A.S., conformemente al codice mondiale *antidoping*, questa non abusa della suddetta posizione. In considerazione dell'elenco degli arbitri, composto da piú di 200 persone, si ritiene siano garantite l'indipendenza e l'imparzialità del C.A.S./T.A.S. (non ostante la lista chiusa degli arbitri e il fatto che questi siano scelti dal C.I.A.S.). La necessarietà di una siffatta istituzione arbitrale risulta peraltro dall'interesse alla lotta al *doping* che è comune ad atleti e federazioni: cosí argomentando, non viene rilevato un conflitto di interessi tra i predetti soggetti e si ritiene che l'accettazione da parte dello sportivo della clausole arbitrale sia effettivamente volontaria.

[13] *BGH*, in *NJW*, 2016, p. 2266 ss.; sulla decisione, v., tra gli altri, A Dalinger, *Der Vertragsbruch des Berufsfußballspielers und die Rechtsfolgen nach art. 17 FIFA-RSTS*, Baden-Baden, 2017, p. 77 ss.; K. Thorn. C. Lasthaus, *Das Pechstein-Urteil des BGH- ein Freibrief für die Sportschiedsgerichtsbarkeit?*, in *IPRax*, 2016 p. 426 ss.; P.W. Heermann, *Die Sportschiedsgerichtsbarkeit nach dem Urteil des BGH*, in *NJW*, 2016, p. 2224 ss.; F. Stancke, *Die sportkartellrechtliche Bedeutung des "Pechtstein"-Entscheidung des BGH*, in *SpuRt*, 2016, p. 230 ss.; S.J.M. Longréé, S. Wedel, *Die Entscheidung über die Einrede der Schiedsvereinbarung nach § 1032 Abs. 1 ZPO als finaler verfassungs- und europarechtlicher Kontrollgegenstand - (K)ein Ende des Prozessmarathons im Fall Pechstein in Sicht?*, in *SchiedsVZ*, 2016, p. 237 ss.; H. Prütting, *Das Pechstein-Urteil des BGH und die Krise der Sport-Schiedsgerichtsbarkeit*, in *SpuRt* 2016, p. 143 ss.

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Con siffatta decisione il *BGH* ha rilasciato una sorta di "attestazione di nulla osta" al C.A.S./T.A.S. I Giudici di legittimità hanno anche effettuato un bilanciamento di interessi (*Interessenabwägung*) alla luce del diritto *antitrust* tedesco ai sensi della versione allora vigente del § 19 I GWB e, pur se indirettamente, del § 102 TFUE. Cosí, in considerazione del principio dell'*Ein-Platz-Prinzip* la I.S.U. è considerata una monopolista, giacché le attività sportive sono anche attività economiche e, come tali, sottoposte al diritto sulla concorrenza: viene dunque confermata la controllabilità delle decisioni e degli atti delle federazioni[14]. In concreto viene valutato, da una parte, l'interesse dell'atleta ad una decisione emessa da un tribunale arbitrale indipendente, il suo diritto alla tutela giudiziaria e la sua libertà di esercizio di attività professionale, tutelati dall'art. 12 *GG*. Dall'altra, è stato considerato il diritto alla libertà di associazione *ex* art. 9 *GG* della federazione e l'interesse di quest'ultima ad una unitaria regolamentazione delle competizioni e della lotta al *doping* nonché al mantenimento di un sistema arbitrale funzionante di portata mondiale. In tal modo viene evidenziata una comunanza dell'interesse degli atleti e delle federazioni alla lotta al *doping*. Peraltro, il *BGH* ha anche ritenuto che l'atleta non sia comunque privo di tutela, giacché può scegliere gli arbitri e comunque impugnare il lodo dinanzi al Tribunale federale svizzero.

In dottrina si osserva sia come siffatta impostazione del bilanciamento sia frettolosa e non convincente[15], sia come sia stato altresí *tout court* oscurato e aggirato il problema del conflitto strutturale tra le predette parti. Anche se nel caso *Pechstein* l'inferiorità strutturale dell'atleta non sembra essere cosí incisiva come a volte viene descritta, è indubbio che permane una forte criticità relativa all'influenza strutturale che esercitano le federazioni sulla formazione del collegio, in particolare sulla nomina del presidente di quest'ultimo da parte del presidente del reparto impugnazioni del C.A.S./T.A.S.[16].

[14] In tal senso, v. F. Stancke, *Die sportkartellrechtliche Bedeutung des "Pechtstein"-Entscheidung des BGH*, cit., p. 231; S. Horn, *Die Anwendung des europäischen Kartellrechts auf den Sport*, Berlin, 2016, p. 88 ss.

[15] A. Dalinger, *Der Vertragsbruch des Berufsfußballspielers und die Rechtsfolgen nach art. 17 FIFA-RSTS*, 2017, cit., p. 80, ove si sottolinea che non basta indicare l'interesse comune alla lotta al *doping*, dovendosi anche analizzare il "come".

[16] B. Hess, *Aktuelle Kontroversen um die Sportschiedsgerichtsbarkeit: Die Urteile Pechstein und SV Wilhelmshaven*, cit., p. 130.

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Altro punto considerato debole della decisione è che la stessa non fonda con chiarezza anche le ragioni per le quali è stata valutata positivamente la neutralità e l'imparzialità del C.A.S./T.A.S., ciò che tiene in realtà aperta una problematica che non va sottovalutata, nonostante la posizione del *BGH*[17].

Oltre a questo, la dottrina critica il *BGH* per non aver chiesto l'intervento in via pregiudiziale della Corte di giustizia europea ai sensi dell'art. 267, comma 3, TFUE, al fine di valutare la compatibilità della clausola arbitrale sportiva con il diritto *antitrust* dell'Unione. Questo, nonostante il richiamo contestuale che il *BGH* fa al § 19 I GWB e all'art. 102 TFUE e la portata europea della vicenda che è invece stata totalmente trascurata[18].

La "guerra" giudiziaria è tutt'altro che conclusa. La Pechstein ha non soltanto fatto ricorso alla Corte di Strasburgo, ma ha anche presentato un *Verfassungsbeschwerde* al *BVerfG*[19]. Si è dunque in attesa della decisione del Giudice tedesco delle leggi.

3. Il caso SV Wilhelmshaven, deciso dalle Corti anseatiche di Bremen e dal *BGH*, verte sui limiti dell'esecuzione autonoma dei lodi da parte delle federazioni nello sport professionistico (*Selbstvollzug*). In sostanza, le sanzioni irrogate dalle federazioni e dai collegi arbitrali vengono eseguite internamente all'organizzazione piramidale federale dall'alto verso il basso, quindi in un contesto che è totalmente all'esterno della giustizia statale.

Questi i fatti oggetto della vicenda. L'associazione SV Wilhelmshaven si era rifiutata di pagare la c.d. *training compensation* fissata dalla F.I.F.A. La somma doveva essere versata ad un *club* calcistico

[17] P.W. Heermann, *Die Sportschiedsgerichtsbarkeit nach dem Urteil des BGH*, cit., p. 2225, il quale discorre in proposito di «blaues Auge» (occhio nero) del C.A.S./T.A.S.; A. Dalinger, *o.l.u.c.*

[18] F.C. Haus, *Das Urteil des BGH in Pechstein/International Skating Union - Ein Schritt vor, zwei Schritt zurück für das Kartellrecht in der Sportschiedsgerichtsbarkeit?*, in *NZKart,* 2016, p. 368 s.

[19] Cfr. S. Wilske, L. Markert und L. Bräuninger, *Entwicklungen in der internationalen Schiedsgerichtsbarkeit im Jaht 2016 und Ausblick auf 2017*, in *SchiedsVZ*, 2017, p. 61; Longreé e Wedel, in *SchiedsVZ*, 2015, p. 237; v. anche E. Zucconi Galli Fonseca, *Arbitrato dello sport: l'attesa decisione della Corte suprema tedesca nel caso Pechstain*, in *Riv. arb.*, 2017, p. 148 ss.

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argentino, il quale aveva sotto contratto due giocatori che successivamente hanno stipulato nuovi contratti con l'associazione tedesca. Il competente organo della F.I.F.A. aveva pertanto imposto al Wilhelmshaven di versare 157.000 euro al *club* argentino.

La decisione della F.I.F.A. è stata impugnata dal *club* tedesco dinanzi al C.A.S./T.A.S., ma senza successo. Non ostante la condanna subíta, il SV Wilhelmshaven rifiutava ancóra di pagare quanto dovuto. Cosí, l'organo disciplinare della F.I.F.A. si vedeva costretto a ordinare la retrocessione della squadra in un campionato inferiore. Anche questa decisione veniva impugnata dinanzi al C.A.S./T.A.S. con esito nuovamente negativo. La competente federazione regionale tedesca (*Norddeutschen Fußballverbands e.V.*), in attuazione dei suoi obblighi statutari, procedeva ad eseguire la decisione della F.I.F.A. Va segnalato che il *club* è membro non del *DFB*, la Federcalcio tedesca, bensí della predetta federazione regionale, la quale però non contempla in modo specifico nei suoi regolamenti una sanzione per la fattispecie *de qua*.

La retrocessione veniva impugnata dinanzi all'*OLG* di Bremen, chiedendogli di dichiarare l'inefficacia del provvedimento, giacché il *training compensation* sarebbe in contrasto con l'art. 45 TFUE sulla scorta di quanto statuito dalla sentenza Bosman della Corte di giustizia. In effetti, i giocatori erano (anche) cittadini italiani, quindi europei. L'*OLG* Bremen ha accolto la domanda, dichiarando che la retrocessione imposta era effettivamente in contrasto con il diritto europeo e pertanto era invalida[20]. Nella sostanza, con siffatta decisione non è stato riconosciuto il lodo del C.A.S./T.A.S. L'*OLG* Bremen ha fondato la decisione primariamente su ciò, che le federazioni regionali tedesche devono rispettare direttamente il diritto imperativo dell'UE anche in sede di esecuzione delle sanzioni sportive.

La sentenza è stata impugnata davanti al *BGH*, il quale invece non ha affrontato la questione della compatibilità del pagamento del *training compensation* con il diritto della UE, limitandosi ad osservare *obiter* che l'esecuzione del lodo del C.A.S./T.A.S. presuppone il riconoscimento dello stesso ai sensi del § 1016 *ZPO* e dell'art. V della

[20] *OLG* Bremen, in *SpuRt*, 2015, p. 70 ss., e in *SchiedsVZ*, 2015, p. 149 ss.; per un commento v. J.F. ORTH, M. STOPPER, *Entscheidungsvollzug in der Verbandspyramide und Ausbildungsentschädigung*, in *SpuRt*, 2015, p. 51 ss.

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Convenzione di *New York* del 1958 per il riconoscimento e l'esecuzione delle sentenze arbitrali straniere[21]. Secondo il *BGH*, invece, la questione verte sul fatto che negli statuti della federazione regionale citata in giudizio non prevedono espressamente una conseguenza per la fattispecie in esame e per questo deve considerarsi nulla la sanzione della retrocessione irrogata al SV Wilhelmshaven. I giudici osservano che le regole delle federazioni sovraordinate, specialmente di quelle internazionali, non vigono per propria forza in virtú della sola struttura organizzativa piramidale, ma hanno bisogno di un espresso fondamento nello statuto della federazione subordinata o di un'altra forma di sottoposizione[22], quindi di una espressa sanzione disciplinare per i fatti ritenuti punibili[23]. Con siffatta argomentazione dunque è stata bloccata l'esecuzione della sanzione, ma questo non ha aiutato direttamente il SV Wilhelmshaven, il quale nel frattempo era già retrocesso nei campionati inferiori[24].

4. Il caso Cicolari va preliminarmente inquadrato alla luce della sentenza della Corte costituzionale n. 49 del 2011, la quale ha ritenuto non fondata la questione di legittimità dell'art. 2, commi 1, lett. *b*, e 2, d.l. n. 220 del 2003 in riferimento agli artt. 24, 103 e 113 cost.[25]. Questi i passaggi essenziali.

– L'art. 2, comma 1, d.l. n. 220 del 2003 riserva all'"ordinamento sportivo" le questioni concernenti l'osservanza e l'applicazione delle «regole tecniche», nonché «i comportamenti rilevanti sul piano disciplinare e l'irrogazione ed applicazione delle relative sanzioni»;

– per le questioni oggetto di riserva, stante la irrilevanza per l'ordinamento generale delle situazioni in ipotesi violate, la tutela è ap-

[21] *BGH*, in *SpuRt* 2017, p. 25 ss., e in *NZG*, 2016, p. 1315 ss.; sulla sentenza, v. J.F. Orth, *Die Fußballwelt nach Wilhelmshaven*, in *SpuRt*, 2017, p. 9 ss.

[22] *BGH*, cit.: «Regeln eines übergeordneten Verbands – wie hier der FIFA – gelten grundsätzlich nur für dessen Mitglieder. Sie erstrecken sich nicht allein aufgrund der Mitgliedschaft eines nachgeordneten Vereins – hier des Beklagten – in dem übergeordneten Verband auf die Mitglieder des nachgeordneten Vereins – hier den Kläger».

[23] *BGH*, cit.: «Eine vereinsrechtliche Disziplinarstrafe darf verhängt werden, wenn sie in der Satzung des Vereins vorgesehen ist».

[24] Cfr. Walker, in *LMK* 2016, 384727-*beck-online*, il quale non ha escluso per la società la possibilità di esigere il risarcimento del danno subìto a causa della retrocessione.

[25] Pubblicata in *Rass. dir. econ. sport*, 2012, p. 270 ss.

prestata da organismi sportivi secondo lo schema della giustizia associativa.

– Per «le norme meramente tecniche dunque è escluso un intervento della giurisdizione statale […], poiché non può essere loro attribuita natura di norme di relazione dalle quali derivino» diritti soggettivi o interessi legittimi. Siffatte conclusioni richiamano quelle a cui le Sezioni unite sono pervenute in due sentenze caratterizzate da analoga struttura argomentativa, la prima antecedente alla legge in esame[26] e la seconda successiva alla sua entrata in vigore[27]. Ad analoghe conclusioni è giunto il medesimo giudice, affrontando la questione sotto l'aspetto processuale del diritto di agire in giudizio per la loro eventuale tutela. Nella ordinanza n. 18052 dell'agosto 2010 le Sezioni unite ritengono inammissibile il regolamento preventivo di giurisdizione concernente la possibilità di sottoporre al giudice statale una controversia relativa al ridimensionamento degli iscritti nei ruoli dei direttori di gara, altrimenti riservata all'autonomia dell'ordinamento sportivo, in quanto «costituisce […] accertamento rimesso al giudice del merito la configurabilità o meno di una situazione giuridicamente rilevante per l'ordinamento statale e, come tale, tutelabile». In altre parole, la valutazione tra l'irrilevante giuridico, che non dà accesso alla giurisdizione statale, e ciò che invece è per quest'ultima rilevante deve essere rimessa al giudice di merito, che assumerà le sue decisioni secondo quanto prevede il diritto positivo[28].

– Al contrario, la possibilità di essere affiliati o tesserati ad una federazione nonché la possibilità di essere ammessi a svolgere attività agonistica disputando le gare ed i campionati federali, «non è situazione che possa dirsi irrilevante per l'ordinamento giuridico generale e, come tale, non meritevole di tutela da parte di questo». Ciò in

[26] Cass., Sez. un., 26 ottobre 1989, n. 4399, in *Riv. dir. sport*, 1990, p. 57 ss.

[27] Cass., Sez. un., 23 marzo 2004, n. 5775, in *Foro amm. C.d.S.*, 2004, p. 680 ss., la quale afferma che tali questioni «non hanno rilevanza nell'ordinamento giuridico generale e le decisioni adottate in base [alle regole promananti dall'associazionismo sportivo] sono collocate in un'area di non rilevanza per l'ordinamento statale, senza che possano essere considerate come espressione di potestà pubbliche ed essere considerate alla stregua di decisioni amministrative. La generale irrilevanza per l'ordinamento statuale di tali norme e della loro violazione conduce all'assenza della tutela giurisdizionale statale».

[28] Cosí anche Cass., Sez. un., 24 luglio 2013, n. 17929, in *Foro amm. C.d.S.*, 2013, 10, p. 2672.

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quanto è attraverso siffatta possibilità che trovano attuazione sia fondamentali diritti di libertà, fra tutti quello allo svolgimento della propria personalità e quello di associazione[29], sia non meno significativi diritti connessi ai rapporti patrimoniali, ove si tenga conto della rilevanza economica che ha assunto il fenomeno sportivo spesso praticato a livello professionistico ed organizzato su base imprenditoriale[30], tutti oggetto di tutela costituzionale.

– Pertanto una chiave di lettura che fuga i dubbi di costituzionalità, salvaguardando l'autonomia delle organizzazioni sportive, è quella per la quale la domanda volta a ottenere il risarcimento del danno per la lesione di posizioni giuridiche rilevanti debba essere proposta innanzi al giudice amministrativo in sede di giurisdizione esclusiva. Non è invece possibile domandare la caducazione dei provvedimenti sportivi.

Sul piano meramente pratico la Corte ha adottato una soluzione di compromesso che, da un lato riduce la tutela giurisdizionale, limitandola alle sole pretese risarcitorie e, dall'altro, attenua la riserva di competenza riconosciuta al c.d. ordinamento sportivo.

La sentenza presenta alcuni aspetti positivi e diversi passaggi non condivisibili. È significativo aver inquadrato il fenomeno sportivo nel sistema costituzionale dell'autonomia associativa e della tutela della persona nelle formazioni sociali. L'autonomia negoziale è quindi una delle fonti delle regole sportive, inquadrate a loro volta nella gerarchia delle fonti dell'ordinamento italo-europeo. Non sembrano invece del tutto convincenti altri passaggi della motivazione[31]. In estrema sintesi, questi sono i punti piú critici.

La sentenza non è sicuramente condivisibile per l'incongruente qualificazione in termini di «irrilevanza» per l'ordinamento giuridico

[29] In tal senso, ma differenziando per tipologie di pratica, già L. Di Nella, *Il fenomeno sportivo nell'ordinamento giuridico*, Napoli, 1999, pp. 162 ss. per i dilettanti e 171 ss. per i parasportivi.

[30] V., ancóra, L. Di Nella, *o.u.c.*, p. 153 ss. per le società e gli sportivi professionisti; in tal senso, v. Cons. St., 14 novembre 2011, n. 6010, in *Giur. amm.*, 2011, I, p. 1792 ss.: «la possibilità, o meno, di essere ammessi a svolgere attività agonistica – disputando le gare ed i campionati organizzati dalle federazioni sportive facenti capo al CONI – non è una situazione certo irrilevante per l'ordinamento giuridico generale e, come tale, non meritevole di tutela da parte di questo».

[31] Diffusamente, in proposito, v. L. Di Nella, *Costituzionalità della "giustizia sportiva" e principio di specificità dello sport*, in *Rass. dir. ec. sport*, 2012, p. 56 ss.

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dei rapporti dipendenti dalle regole tecniche, con buona pace dei «casi di rilevanza per l'ordinamento giuridico della Repubblica delle situazioni giuridiche soggettive connesse con l'ordinamento sportivo», come recita l'art. 1, comma 2, d.l. n. 220[32]. Questa salvezza sembra infatti essere intesa erroneamente come eccezione: l'art. 2 d.l. n. 220 fisserebbe i casi in cui tale rilevanza senz'altro non ricorre[33].

Sicuramente contraddittorio è discorrere di «autonomia» e nel contempo ritagliare una zona di «irrilevanza» all'interno della stessa, in spregio anche al dettato dell'art. 1322 c.c. per il quale l'autonomia negoziale è tenuta a perseguire interessi meritevoli di tutela secondo l'ordinamento giuridico: *ergo*, le manifestazioni dell'autonomia sono per ciò stesso giuridicamente rilevanti.

Non del tutto convincente è poi ritenere che le liti patrimoniali tra atleti e sodalizi siano rilevanti per l'ordinamento giuridico, mentre quelle tra federazioni affiliati e tesserati, pur se attinenti a rapporti patrimoniali e a quelli fondamentali della persona, siano riservate soltanto all'"ordinamento sportivo". Questa affermazione è frutto in primo luogo di una lettura non corretta degli artt. 1 e 2 del d.l. n. 220 del 2003. Il comma 1 dell'art. 2 riserva alcune controversie al giudice sportivo nel rispetto dei "princípi" fissati dall'art. 1, ossia dell'autonomia dell'organizzazione sportiva e della rilevanza, tutt'altro che eccezionale, delle situazioni per l'ordinamento della Repubblica. Diversamente, ci si deve chiedere se quanto statuito comporti, ad

[32] In proposito, pur se dalla prospettiva della pluralità degli ordinamenti, L. Stanghellini, *Gli interessi delle associazioni dei tifosi di calcio tutelati nel diritto sportivo*, Napoli, 2009, p. 12, osserva correttamente in nota 18: «Su questa tematica, preliminarmente, è opportuno rilevare la singolarità della codificazione, all'interno dell'ordinamento statale, del vincolo di giustizia sportiva. Quest'ultimo, con la legge n. 280/2003, è stato introdotto nel nostro ordinamento giuridico nelle materie indicate dall'art. 2, comma 1 [...]. La predetta volontà del legislatore di introdurre in una legge nazionale il vincolo di giustizia, cosí come formulato, in favore di altro ordinamento giuridico, pare contraddittoria. Se le materie indicate dalla norma o, comunque, alcune di esse, sono irrilevanti, sotto il profilo giuridico, per lo Stato, la codificazione del vincolo non ha alcun senso e sarebbe stato preferibile che esso continuasse ad essere previsto soltanto all'interno degli statuti o dei regolamenti degli organi sportivi. Se, invece, taluna delle questioni, indicate dalla stessa norma, assume rilevanza giuridica per l'ordinamento statale, la codificazione del vincolo sportivo, in favore di altro ordinamento, costituisce una palese manifestazione di volontà contraddittoria rispetto all'interesse statale per quelle questioni».

[33] Cosí anche Cons. giust. amm. Regione Sicilia, 8 novembre 2007, n. 1048, in *Rass. dir. econ. sport*, 2008, p. 373 s.

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esempio, la «irrilevanza» dei casi Pistorius e Casey Martin, considerato che le questioni vertevano sull'applicazione di norme tecniche da cui dipendeva la loro esclusione dalle competizioni, essendo stato contestato ad entrambi il ricorso a strumenti non contemplati dai regolamenti tecnici di gara[34].

Infine, il riconoscimento a favore del soggetto leso dal provvedimento federale del solo rimedio del risarcimento del danno a carico della federazione è altresí criticabile per altri aspetti.

Premesso che le federazioni sportive sono associazioni riconosciute e che in forza dell'art. 15, comma 2, d.lg. n. 242 del 1999 è applicabile ad esse la disciplina codicistica per quanto non espressamente previsto dal predetto decreto, almeno in linea generale si dovrebbe poter ricorrere all'art. 23 c.c. per l'annullamento delle delibere, salvo dimostrare che vi è la predetta incompatibilità. Su questo aspetto però la sentenza tace.

La motivazione addotta per giustificare l'irrogazione della sola san-

[34] Rispettivamente, si tratta di protesi e di una *golf cart* per lo spostamento da una buca all'altra sul campo di golf; sul caso Pistorius v. L. Di Nella, *Lo sport per disabili tra integrazione e segregazione*, in *Rass. dir. econ. sport*, 2008, p. 260 ss., spec. 277 ss., sul caso Casey Martin v. Id., *La tutela della personalità dell'atleta nell'organizzazione sportiva*, in Aa.Vv., *Fenomeno sportivo e ordinamento giuridico*, Atti del 3° Convegno nazionale della SISDIC, Napoli, 2009, p. 121 s. E lo stesso quesito vale anche per la posizione di giovani atleti bloccati dal "vincolo sportivo" e per questo impossibilitati a praticare lo sport presso altri sodalizi in mancanza dello svincolo dell'ente per il quale sono tesserati, trattandosi di vicende legate a regole organizzative (v., ad esempio, il caso di un minore che voleva esercitare la pratica sportiva presso un altro sodalizio per il quale non era tesserato: Trib. Venezia, ord., 14 luglio 2003, in *Fam. dir.*, 2004, p. 51 ss., con nota di E. Vullo, *Provvedimento d'urgenza, potestà parentale e legittimità del vincolo di esclusiva tra un giocatore e l'associazione sportiva per cui è tesserato*, disconoscendo la natura contrattuale del vincolo sportivo ed affermando che «la presenza» dello stesso «non rappresenta una insostenibile limitazione alla libera esplicazione dell'attività sportiva», ha rigettato il ricorso presentato dalla madre per ottenere un provvedimento di urgenza che annulli oppure dichiari nullo o inefficace il modulo di tesseramento ad un'associazione sportiva sottoscritto dal minore e dal padre o, in via subordinata, le clausole che vietano il tesseramento per un altro sodalizio sportivo in mancanza del nullaosta dell'associazione di appartenenza). Anche in dottrina è stata propugnata l'opinione secondo la quale «le regole dettate dalle comunità sportive per disciplinare le loro attività – siano esse regole di organizzazione, di comportamento, o tecniche – hanno, nell'ordinamento dello Stato, potenzialmente la stessa rilevanza che hanno le regole di ogni altra comunità che rientri nel catalogo delle formazioni sociali riconosciute e garantite dallo Stato» (cosí R. Caprioli, *Il significato dell'autonomia nel sistema delle fonti nel diritto sportivo nazionale*, in *Nuova giur. civ. comm.*, 2007, II, p. 285).

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zione risarcitoria non è condivisibile. Il giudizio di annullamento, scrive la Corte, «difficilmente potrebbe produrre effetti ripristinatori», considerati i tempi necessari per arrivare alla sentenza statale. Annullamento che rappresenterebbe comunque «una forma non armonica di intrusione rispetto all'affermato intendimento di tutelare l'ordinamento sportivo». Cosí si opera una scelta aprioristica e cristallizzata a favore della "autonomia" dell'ordinamento sportivo, i cui atti non sono in alcun caso caducabili, negando qualsiasi bilanciamento di interessi con posizioni altrettanto meritevoli di tutela. Anche il discorso relativo alla scarsa utilità del rimedio caducatorio per ragioni di intempestività della tutela non convince, non potendosi generalizzare la validità dell'assunto[35].

Il profilo dei rimedi si rivela dunque particolarmente problematico. Per un verso, la "monetarizzazione" del pregiudizio subìto dagli sportivi può essere persino irrisoria per le indubbie difficoltà di quantificazione. Quando invece non sia tale, questo può anche risolversi in un serio pregiudizio per le federazioni, non sempre dotate di adeguate risorse finanziarie. La soluzione piú equilibrata sembra dunque essere quella di ammettere sia il rimedio risarcitorio quando non avrebbe senso dichiarare l'annullamento del provvedimento, sia il rimedio caducatorio, quando ciò è funzionale alla tutela effettiva del soggetto sportivo. Diversamente, peraltro, si viene a creare una ulteriore disparità di trattamento tra gli enti sportivi e le altre associazioni soggette al Libro Primo del codice civile, rispetto alle quali è applicabile l'art. 23 c.c., il quale prevede l'annullamento e la sospensione delle deliberazioni a cui si affiancano anche le patologie della nullità, della illiceità e della inesistenza, secondo quanto ritiene

[35] La scelta adottata crea poi una evidente disparità di trattamento, che emerge per esempio alla luce del caso del giocatore del Togo S.I.B.K. Il Tribunale di Lodi con ordinanza del 2010 ha annullato le NOIF impugnate per la discriminazione che esse provocavano in applicazione degli artt. 4 d.lg. 9 luglio 2003, n. 215 (sui comportamenti discriminatori) e 44 d.lg. 25 luglio 1998, n. 286 (Trib. Lodi, ord., 13 maggio 2010, in *Rass. dir. econ. sport*, 2011, p. 422 ss., con nota di L. Tullio, *Sport: tra cultura e integrazione … o tra «etnocentrismo» e «discriminazione»? Minori extracomunitari, accesso all'attività agonistica e pieno sviluppo della persona umana*). Questo caso, non solitario (per altri casi, v. L. Di Nella, *La tutela della personalità dell'atleta*, cit., p. 105 ss.), mostra come sia possibile per gli stranieri annullare atti federali, ma non per gli italiani, ai quali la Corte riserva ora soltanto il rimedio risarcitorio. Vi è quindi una disparità di trattamento, non giustificabile in base alla nazionalità.

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autorevole dottrina[36]. Non è infatti detto che l'autonomia delle altre realtà associative sia costituzionalmente meno rilevante di quella del c.d. ordinamento sportivo.

Con una sentenza sicuramente destinata a costituire un noto precedente, il TAR del Lazio ha condannato la Federazione Italiana Pallavolo al pagamento, a titolo risarcitorio, della somma di euro 208.000,00 in favore della giocatrice di *beach volley* Greta Cicolari[37]. Il TAR ha accolto il ricorso con cui la suddetta atleta aveva chiesto: 1) l'annullamento della decisione n. 16/2014 dell'Alta Corte di Giustizia Sportiva del CONI, con la quale era stata dichiarata l'inammissibilità del ricorso che la Cicolari aveva proposto avverso la decisione della Corte Federale F.I.P.A.V.[38], che a sua volta aveva confermato la sanzione della sospensione per sei mesi da ogni attività federale, inferta alla ricorrente dalla Commissione Giudicante Nazionale F.I.P.A.V. in data 10 ottobre 2013 (decisione prima confermata anche dalla Commissione di Appello Federale F.I.P.A.V.[39]); 2) la condanna della F.I.P.A.V. al risarcimento del danno.

La vicenda che ha portato alla decisione in commento ha avuto origine nel novembre 2013, quando la Commissione Giudicante Nazionale F.I.P.A.V. ha inflitto all'atleta Greta Cicolari la sanzione disciplinare della sospensione dall'esercizio di ogni attività federale. In particolare l'irrogazione di tale sanzione era derivata dall'addebito alla Cicolari di due comportamenti: il primo consistente nell'aver aggredito verbalmente in luogo pubblico, in data 10 agosto 2013, il proprio tecnico federale, apostrofandolo in modo arrogante e provocatorio, nonché rivolgendogli fantasiose accuse, millantando informazioni ricevute in ambito federale; il secondo consistente nell'aver veicolato tramite *Twitter* frasi allusivamente offensive e denigratorie, nei confronti del direttore tecnico delle squadre nazionali femminili di beach volley, attribuendogli epiteti quali "caprone nero" o "uomo nero".

Per entrambi i fatti la Commissione Giudicante aveva ravvisato la violazione, da parte della Cicolari, dei princípi di lealtà e correttezza

[36] In argomento v., per tutti, M. Basile, *Le persone giuridiche*, Milano, 2003, p. 230 ss.

[37] TAR Lazio Roma, Sez. III *quater*, 9 marzo 2016, n. 3055, in *Foro it.*, 2016, 5, III, c. 289 ss., con nota di R. Pardolesi.

[38] C.U. 20 febbraio 2014, n. 2.

[39] C.U. 7 gennaio 2014, n. 9.

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sanciti dall'art. 16 dello Statuto F.I.P.A.V. e richiamati dall'art. 19 del Regolamento Affiliazione e Tesseramento, nonché dell'art. 2 del Codice di Comportamento Sportivo del CONI. La Cicolari si è rivolta al TAR del Lazio dopo aver impugnato, senza ottenere alcun successo, la decisione della Commissione Giudicante nazionale F.I.P.A.V. dinanzi agli organi di giustizia endofederali (ovvero Commissione di Appello Federale F.I.P.A.V. e Corte Federale F.I.P.A.V.) e dopo aver proposto ricorso anche all'Alta Corte di Giustizia Sportiva del CONI, la quale aveva dichiarato il ricorso inammissibile.

La sentenza del TAR del Lazio appare meritevole di attenzione da due profili. In primo luogo, per aver condannato la F.I.P.A.V. al pagamento, a titolo risarcitorio, di un ingente somma di denaro (euro 208.500,00) per la risoluzione dei contratti (euro 61.500,00), per la perdita di *chance* causata dalla interruzione di trattative (euro 55.000,00), per la perdita di *chance* per i premi persi (euro 42.007,00) e per il danno all'immagine subíto dall'atleta (euro 50.000,00). In secondo luogo, la decisione è degna di nota soprattutto per i concetti in essa affermati in tema di rapporto tra giurisdizione sportiva e giurisdizione amministrativa, nonché in materia di acquisizione delle prove da parte delle procure federali e dei giudici federali. In particolare, per quanto riguarda il tema dell'acquisizione delle prove, il TAR ha ribadito che il principio di autonomia dell'azione disciplinare sportiva non subisce un «*vulnus dalla ammissione della prova testimoniale, atteso che, secondo l'art. 20, comma 3 del Regolamento Giurisdizionale del CONI, gli interessati possono chiedere l'ammissione di specifici mezzi di prova*» e che «*l'art. 71, comma 1 del medesimo atto generale stabilisce che il Procuratore Federale procede alla audizione di testimoni, all'acquisizione di documenti e di ogni altro elemento di prova ritenuto utile per il compimento dell'istruttoria*». Pertanto, i giudici sportivi, diversamente da quanto hanno fatto, ben avrebbero potuto chiamare a testimoniare anche un teste non direttamente citato dalla Cicolari, al fine di chiarire i fatti di causa.

La sentenza è stata impugnata dinanzi al Consiglio di Stato, il quale ha accolto due dei cinque punti dell'appello presentato dalla Federazione in séguito alla sentenza del TAR che aveva condannato la F.I.P.A.V. a risarcire i danni a Greta Cicolari[40].

[40] Cons. St., 22 giugno 2017, n. 3055, in *Corriere giur.*, 2018, 2, p. 200 ss., con nota

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I primi tre punti dell'appello relativi alla procedura sono stati rigettati poiché è ammesso che il giudice amministrativo intervenga successivamente alle istanze della giustizia sportiva.

La sentenza del TAR sostiene che gli organi della giustizia sportiva avrebbero violato in danno di Cicolari i princípi processuali sull'acquisizione e valutazione delle prove, mentre la sentenza del Consiglio di Stato stravolge questa interpretazione nel quarto punto, per il quale l'appello della F.I.P.A.V. è stato ritenuto ammissibile. «Sotto il primo profilo, risulta dagli atti che effettivamente la Cicolari, nel predisporre la propria strategia difensiva avanti al giudice sportivo, aveva liberamente scelto di non chiamare a deporre, in proprio favore, la collega S.C., benché la stessa fosse stata presente all'incontro con l'allenatore L. D.C. Ciò, stando alle dichiarazioni della medesima Cicolari, poiché la suddetta S.C. non avrebbe in realtà sentito nulla del colloquio intercorso tra la essa e l'allenatore».

Il Consiglio di Stato prosegue, asserendo che «la possibilità (*recte*, il diritto) di scegliere liberamente una strategia difensiva risponde al principio generale di autoresponsabilità ed è uno dei cardini insopprimibili del diritto di difesa e del c.d. giusto processo: altrettanto ne è l'automatica conseguenza che la detta libertà di scelta assume il colore di un onere per chi ne fruisce; egli, nel curare il proprio interesse, ha la libertà, e semmai l'obbligo verso se stesso, di responsabilmente farsi carico di tutte le sue esplicazioni e resta destinatario di tutte le inerenti conseguenze: anche quando quella prescelta risulti poi mostrarsi, all'atto pratico, la soluzione meno conveniente. Ma, a parte questo, in concreto alla luce delle produzioni processuali nulla permette di escludere che la decisione di tenere lontana S.C. dal giudizio sportivo sia stata invece del tutto appropriata: in ipotesi perché costei avrebbe potuto fornire una versione dei fatti sfavorevole alla ricorrente. Comunque sia, il principio dispositivo della prova è inerente al giusto processo, di cui la ricorrente lamentava la violazione. [...] Non è dunque condivisibile l'argomento – fatto proprio dal Tribunale amministrativo – per cui la suddetta mancata assunzione officiosa del mezzo di prova, a suo tempo insistentemente escluso dalla ricorrente (in un contesto caratterizzato dal principio dispositivo, es-

di G. Facci, *La responsabilità civile delle Federazioni sportive e la* vexata quaestio *dei rapporti tra ordinamento statale e ordinamento sportivo*.

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sendo il giudice un terzo imparziale e non anche un tutore delle parti in causa), si tramuterebbe oggi in una violazione delle regole del giusto processo».

L'altro argomento di cui si occupa il quarto punto sono i *tweet* nei quali, secondo la giustizia sportiva, Cicolari avrebbe usato espressioni allusivamente offensive e denigratorie quali "caprone nero" e "uomo nero" nei confronti del tecnico. Recita la sentenza del Consiglio di Stato che è altresí «fondato il secondo rilievo dell'appellante FIPAV, atteso che, diversamente da quanto afferma la sentenza gravata, bene il giudice sportivo aveva chiarito le ragioni per cui, nel caso di specie, le espressioni usate su un *social network* erano da intendersi riferite all'allenatore L. D.C. e non piuttosto frutto di scherzi, anche privati, tra la ricorrente ed il compagno». In sostanza, il Consiglio di Stato si riallinea al Giudice Sportivo e ritiene lesive e riconoscibili nei confronti del tecnico le espressioni pubblicate via *Twitter* da Cicolari.

Anche nel quinto punto il Consiglio di Stato accoglie l'appello della F.I.P.A.V. relativo all'inammissibilità della richiesta di risarcimento avanzata dalla Cicolari, facendo leva anche sullo *status* di atleta non professionista della *ex* azzurra. «Le voci risarcitorie considerate dall'appellata sentenza non hanno a che vedere con un'ipotetica lesione interna allo sviluppo della "attività sportiva" in ipotesi cagionata dagli atti contestati (nel caso di specie, la sospensione semestrale e le successive pronunce degli organi di giustizia sportiva): esse attengono invece ai figurati minori introiti patrimoniali che la ricorrente ipotizzava di ottenere utilizzando – con contratti personali a motivo commerciale – la propria notorietà raggiunta nell'ordine sportivo».

Secondo il Consiglio di Stato, oggetto della tutela accordabile dalla giustizia sportiva ed, eventualmente, dal giudice amministrativo investito a rimediare ai pronunciamenti della prima, non concernerebbe la pretesa tutela patrimoniale di asseriti ed esulanti interessi economici privati che si vorrebbero lesi per effetto delle decisioni sportive. «La tutela risarcitoria del giudice amministrativo è strumento sussidiario di protezione di beni giuridici indisponibili che non abbiano ricevuto reale protezione ad opera di quest'ultima; deve corrispondere, nei limiti della tutela per equivalente, alla ragione oggettiva dell'originario processo sportivo e dev'essere finalizzata a un ristoro del

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diritto o dell'interesse fondamentale che sin *ab initio* si era domandato – evidentemente invano – al giudice sportivo di salvaguardare. Non solo: ove occorra, nella specie è comunque dirimente considerare, in coerenza a quanto osserva l'appellante Federazione, che comunque l'interessata non risulta essere un'atleta professionista che ricava da siffatti proventi il suo sostentamento lavorativo – ammesso ciò sia consentito in quel contesto, viste le caratteristiche al riguardo di quella Federazione – di fronte alla FIPAV. Quando dunque l'atleta Cicolari si rivolgeva al giudice amministrativo, non poteva immutare la ragione del contendere, e venendo a chiedere non un ristoro dell'ipotetico *vulnus* sportivo subìto (*id est*, l'eventuale lesione allo sviluppo della propria carriera sportiva, discendente dagli atti contestati), bensì di suoi figurati, personali, ulteriori e occasionali interessi commerciali, estranei alla praticata "attività sportiva" in quanto tale. Relativamente a tali voci di danno, ancorché provate, il giudice amministrativo adito avrebbe dovuto pronunciare l'inammissibilità del ricorso, trattandosi di questioni per lui prive di ingresso in giustizia».

L'ammissibilità degli ultimi due punti del ricorso della F.I.P.A.V. conduce a rovesciare l'esito della sentenza del TAR che aveva decretato un risarcimento danni a favore della Cicolari da parte della F.I.P.A.V.

La sentenza del Consiglio di Stato è criticabile da diversi punti di vista. Nell'economia del presente lavoro, vengono analizzati due aspetti problematici.

In primo luogo, il Consiglio di Stato omette di considerare che la Corte di Giustizia ha da molti anni riconosciuto la figura dell'atleta semiprofessionista. Tale *status* può essere sicuramente riconosciuto anche alla Cicolari. La distinzione tra professionisti e semiprofessionisti[41] è stata elaborata dalla Corte, la quale ha ribadito piú di una volta che l'applicazione delle norme del Trattato in tema di non discriminazione non può essere limitata dalle qualificazioni formali operate,

[41] Sul "semiprofessionista" v. già Corte giust., 14 luglio 1976, c. 13/76, Donà c. Mantero, in *Giur. it.,* 1976, I, p. 1649 ss.; di recente, v. anche Corte giust., 11 aprile 2000, c. riunite 51/96 e 191/97, Deliège c. Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union européenne de judo e Deliège c. Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union européenne de judo François Pacquée, in *Racc.*, 2000-1, p. 2595 ss.

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piú o meno arbitrariamente, dalle federazioni sportive nazionali[42]. Nel caso Donà-Mantero[43], secondo la Corte «si è affermata con maggior forza la rilevanza economica dell'attività sportiva, professionistica o semiprofessionistica, anche al di là di un regolare contratto di lavoro subordinato e senza pregiudizio riguardo al contenuto specifico dell'attività remunerativa […] Essa sussiste altresí per qualsiasi tipo di remunerazione, anche inferiore al salario minimo stabilito»[44]. Sul presupposto che «il libero accesso al lavoro costituisce un diritto fondamentale attribuito dal trattato», la Corte ha anche puntualizzato che «l'esistenza di un rimedio giurisdizionale contro un provvedimento con cui un'autorità nazionale neghi il godimento di questo diritto è essenziale per garantire al singolo la tutela effettiva del suo di-

[42] Per una prima ricostruzione della giurisprudenza della Corte, cfr. G. Vidiri, *La libera circolazione degli allenatori nella Unione Europea*, in *Riv. dir. sport.*, 1995, p. 6 ss.; successivamente, S. Bastianon, *Il diritto comunitario e la libera circolazione degli atleti alla luce di alcuni recenti sviluppi della giurisprudenza*, in *Dir. un. eur.*, 1998, spec. p. 905 ss.; E. Crocetti Bernardi, *La libera circolazione in Europa degli sportivi comunitari ed extracomunitari*, in Aa.Vv., *Lo sport e il diritto*, a cura di M. Colucci, Napoli, 2004, p. 93 ss. Da ultimi M. Colucci, *L'autonomia e la specificità dello sport nell'Unione europea. Alla ricerca di norme sportive necessarie, proporzionali e di «buon senso»*, in *Riv. dir. econ. sport*, 2006, p. 19 ss.; L. Musumarra, *Il rapporto di lavoro dello sportivo nel diritto comunitario*, in Aa.Vv., *Il rapporto di lavoro dello sportivo*, cit., p. 113 ss.; R.C.A. White, *Free movement of persons and sport*, in Aa.Vv., *The regulation of the sport in the European Union*, Bodmin, 2007, p. 33 ss.; E. Szyszczak, *Is sport special?*, *ivi*, p. 6 ss. Per una recente ed approfondita analisi nella dottrina tedesca, attenta anche alle diverse posizioni sostenute in precedenza, cfr. P.W. Heermann, *Verbandsautonomie versus Kartellrecht. Zu Voraussetzung und Reichweite der Anwendbarkeit der Art. 81, 82 EG auf Statuten von Sportverbänden*, in *Causa Sport*, 2006, p. 345 ss., e già Id., *Sport und europäisches Kertellrecht*, in *SpuRt*, 2003, p. 89 ss.

[43] Corte Giust., 14 luglio 1976, c. 13/76, Donà c. Mantero, in *Foro it.*, 1976, c. 361 e in *Giur. it.*, 1976, I, c. 1649, con nota di A. Trabucchi, *Le limitazioni all'ingaggio dei giuocatori stranieri e la libera circolazione dei lavoratori nella Comunità Europea*. In argomento cfr. C. Alvisi, *Le clausole di cittadinanza e le regole sportive prima e dopo la riforma del sistema della giustizia sportiva*, cit., p. 20 ss.; E. Grayson, *Sport and the law*, cit., p. 272 ss.; sulla portata della sentenza nell'àmbito della libera circolazione degli sportivi, cfr. F. Bianchi D'Urso, *Attività sportiva e libera circolazione nella CEE*, in *Dir. lav.*, 1992, p. 482 ss.; G. Vidiri, *La libera circolazione dei calciatori nei paesi della C.E.E. ed il blocco "calcistico" delle frontiere*, in *Giur. it.*, 1989, IV, c. 66 ss. L. Di Nella, *Il fenomeno sportivo*, cit., p. 157.

[44] P. Lombardi, *Il vincolo degli atleti nel diritto dello sport internazionale*, in Aa.Vv., *Vincolo sportivo e diritti fondamentali*, a cura di P. Moro, Pordenone, 2002, p. 102.

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ritto»[45]. Nella sentenza Deliége la Corte ha drasticamente escluso che la mera legittimazione di una federazione a classificare i propri membri come dilettanti comporti che l'attività di costoro non possa ricadere nella previsione di cui all'art. 2 del Trattato di Roma[46]. Nella decisione si legge che le prestazioni della judoka Deliége si inseriscono in un'attività economica: a fronte della prestazione atletica offerta, ella percepisce, ancorché dilettante, una serie di gratificazioni economiche (tra cui premi e *bonus*), oltre al rimborso delle spese sostenute.

In secondo luogo, assodata la sua qualificazione di atleta semiprofessionista, non si può negare il risarcimento del danno richiesto dalla Cicolari per il pregiudizio economico discendente dal provvedimento federale. La pratica sportiva dalla stessa svolta si inserisce nel quadro di un'attività economica di cui la prima rappresenta il nucleo. Sostenere, pertanto, come fa il Consiglio di Stato, che l'attività economica sia al di fuori dello sport significa nei fatti negare tutela a questa tipologia di atleti, che si mantengono e possono praticare sport proprio grazie alle correlate entrate economiche. Piú in generale, sembra evidente che la decisione del Consiglio di Stato "chiuda" la porta alla sola tutela, quella risarcitoria, che la Corte costituzionale ha riconosciuto agli sportivi. Questo esito non può essere condiviso.

[45] Corte giust., 15 ottobre 1987, c. 222/86, Union nationale des entraineurs et cadres techniques professionnels du football c. Heylens, in *Racc.*, 1987, p. 4097 ss.

[46] Corte giust., 11 aprile 2000, Cause riunite C-51/96 e C-191/97, Deliége c. Ligue francophone judo (A.S.B.L.), in *Rep. Foro it.*, 2000, voce *Unione europea*, n. 911. Per un commento sul caso Deliége, precedente alla pronuncia della Corte ma molto lucido nell'analisi delle problematiche connesse ai rapporti tra fenomeno sportivo e diritto comunitario, cfr. S. Bastianon, *Il diritto comunitario e la libera circolazione degli atleti alla luce di alcuni recenti sviluppi della giurisprudenza*, in *Dir. un. eur.*, 1998, p. 913 ss.; si veda altresí il puntuale contributo di M. Castellaneta, *Le discipline sportive*, in *Dir. com.*, 2001, p. 224 ss., la quale evidenzia che «la Corte ha incluso anche le attività dei dilettanti in quelle economiche, preferendo una valutazione specifica dell'attività svolta piuttosto che aderire a una classificazione preordinata dalle federazioni». In argomento anche F. Agnino, *Statuti sportivi discriminatori ed attività sportiva*, in *Foro it.*, 2002, I, c. 897 ss., commento a Trib. Pescara, ord., 14 dicembre 2001, Trib. Pescara, ord. 18 ottobre 2001, Trib. Teramo, ord. 30 marzo 2001, Trib. Reggio Emilia, ord. 2 novembre 2000; L. Musumarra, *La qualificazione degli sportivi professionisti e dilettanti nella giurisprudenza comunitaria*, in *Riv. dir. econ. sport*, 2005, p. 39 ss.; S. Bastianon, B. Nascimbene, *Lo sport e il diritto comunitario*, in E. Greppi, M. Vellano, *Diritto internazionale dello sport*, Torino, 2005, p. 268 ss.

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5. In tutte le sentenze appena illustrate si rileva un dato comune: i giudici hanno deciso i casi prescindendo totalmente dal principio di specificità dello sport, espressamente previsto nell'art. 165, § 1, comma 2, TFUE[47] (e, in Italia, nell'art. 1, comma 2, lett. *b*, d.lg. n. 106 del 2007). Detto articolo di diritto primario non può non informare il diritto interno dei Paesi UE, che va pertanto applicato conformemente ad esso, anche secondo il consolidato orientamento della Corte di Giustizia e della Corte costituzionale italiana[48].

Ai fini che qui rilevano, va sottolineato che l'art. 165, § 1, comma 2, TFUE costituisce uno strumento per guidare l'interpretazione degli atti normativi europei e interni da applicare in materia sportiva. Questo assunto si fonda sullo stadio oggi raggiunto dall'integrazione delle fonti europee nel sistema normativo nazionale. Detta influenza si articola in due modi. Per un verso, la previsione del principio di specificità dello sport, di cui al § 1, comma 2[49], fornisce ai giudici il

[47] Sull'art. 165 TFUE v. L. Di Nella, *Lo sport nel diritto primario dell'Unione Europea: il nuovo quadro normativo del fenomeno sportivo*, in A. Benazzi, N. Saccardo (a cura di), *La tassazione dei calciatori in Italia e all'estero*, Milano, 2011, p. 3 ss.

[48] Cfr., per tutti, P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti*, 3ª ed., Napoli, 2006, p. 265 ss.

[49] Su tale principio sia consentito rinviare a L. Di Nella, *Le federazioni sportive nazionali dopo la riforma*, in *Riv. dir. sport.*, 2000, p. 53 ss., e in Aa.Vv., *Profili evolutivi del diritto dello sport*, Napoli, 2001, p. 103 ss.; Id., *Lo sport. Profili teorici e metodologici*, in Id. (a cura), *Manuale di diritto dello sport*, Napoli, 2010, p. 54 ss.; v. anche M. Colucci, *L'autonomia e la specificità dello sport nell'Unione europea. Alla ricerca di norme sportive necessarie, proporzionali e di «buon senso»*, in *Riv. dir. econ. sport*, 2006, p. 19 ss. Cfr. AGCM, A378, Provvedimento n. 17070 del 19 luglio 2007, in *Rass. dir. econ. sport*, 2008, p. 231 ss., la quale ha deciso che «le regole sportive relative all'esercizio di una data disciplina possono produrre effetti sull'attività economica dei soggetti coinvolti nella pratica di detta disciplina e, quindi, sono suscettibili di assumere rilevanza sul piano *antitrust*. In tal caso devono essere valutate attraverso il c.d. *test* di proporzionalità, al fine di verificare se l'eventuale restrizione della concorrenza che le stesse cagionano è necessaria al buon funzionamento di una data attività sportiva e se costituiscono il mezzo meno restrittivo della concorrenza per perseguire tale scopo» (p. 236). Il principio di proporzionalità, che detta il modo d'essere delle relazioni tra i princípi fondamentali in termini di bilanciamento reciproco e di tutela del loro *Wesengehalt*, si articola in tre distinte regole: il controllo di meritevolezza dell'interesse perséguito, il dovere di adeguatezza allo scopo e il dovere di necessarietà che impone l'adozione del mezzo meno aggressivo delle prerogative fondamentali riguardate tra quelli a disposizione. Cfr. R. Alexy, *Theorie der Grundrechte*, Baden-Baden, 1985, p. 100, il quale discorre di «Grundsatz der Verhältnismäßigkeit mit seinen Teilgrundsätzen der Geeignetheit, der Erforder-

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criterio legale per guidare l'applicazione delle norme giuridiche dell'ordinamento europeo e nazionale ai regolamenti sportivi. Le regole che esprimono valori e scopi specificamente tipici dello sport possono essere riconosciute dall'ordinamento come meritevoli di tutela se conformi a quest'ultimo e pertanto sono sottratte all'applicazione delle norme giuridiche con esse contrastanti, purché dette regole siano conformi nel loro contenuto al principio di proporzionalità, quindi limitino a quanto necessario le prerogative fondamentali dei destinatari delle stesse[50]. Questa prima efficacia dell'articolo *de quo* è già

lichkeit (Gebot des mildesten Mittels) und der Verhältnismäßigkeit im engeren Sinne (eigentliches Abwägungsgebot)» e in nota 84 precisa correttamente che tali singole partizioni vanno qualificate come regole che devono essere rispettate, pena l'invalidità (cosí, G. Haverkate, *Rechtsfragen des Leistungsstaats*, Tübingen, 1983, p. 11, che parla di *subsumtionsfähiger Rechtssatz*): di conseguenza, la proporzionalità non è un principio nel senso da lui adottato in quanto non è soggetta a bilanciamento e perciò è definibile con il termine *Grundsatz*; su questa tripartizione del principio in esame, v. anche L. Hirschberg, *Der Grundsatz der Verhältnismäßigkeit*, Göttingen, 1981, pp. 25 ss. e 75 ss., ove ulteriori riferimenti bibliografici; M. Gentz, *Zur Verhältnismäßigkeit von Grundrechtseingriffen*, in *NJW*, 1968, p. 1601 ss.; D. Medicus, *Das Verhältnismäßigkeitsprinzip im Privatrecht*, in *AcP*, 192, 1992, p. 51 s. Nell'ordinamento italiano, v., per tutti, P. Perlingieri, *Il diritto civile nella legalità costituzionale*, cit., p. 379 ss., il quale rileva che «è entrato a far parte dell'ordinamento, specie in materia contrattuale, il principio di proporzionalità. Esso, assecondando e attuando anche princípi e valori normativi di rilevanza costituzionale – impegnativi non soltanto per i contratti di impresa dove vige anche il principio del non abuso della posizione dominante, ma per il pieno svolgimento dell'intera autonomia negoziale (quali l'eguaglianza, la solidarietà, la ragionevolezza, ecc.) – è destinato ad incidere profondamente sulla moderna concezione del contratto che, in tal modo, si allontana definitivamente dalla tradizionale interpretazione volontaristica del principio *pacta sunt servanda*». L'argomento della specificità in materia sportiva sembra evocato anche dalla Corte europea dei diritti dell'uomo nella decisione del 15 gennaio 1998, adottata nel ricorso n. 35722/97 promosso da M. Azzopardi c. Malta (pubblicata in *HUDOC*, *www.echr.coe.int./ECHR/EN/hudoc*, banca dati *on line* della Corte): «The Commission notes that the competition is a public event which is organised according to the rules determined by the competent sports authorities. It is the rules of such an event which determine the participants and not the participants who determine the rules. They are not unchangeable and inevitably affect the individual's interests in one way or another».

[50] Il principio di proporzionalità (detto anche principio del giusto mezzo; in argomento sia consentito ancóra rinviare a L. Di Nella, *Mercato e autonomia contrattuale nell'ordinamento comunitario*, Napoli, 2003, p. 233 ss.) è uno strumento di controllo dei regolamenti federali che pongono limiti ai destinatari e opera su tre livelli: in primo luogo, occorre verificare la meritevolezza di tutela degli scopi (ad esempio, l'equilibrio delle competizioni e l'incertezza dei risultati) e/o dei valori precipui (ad esempio, solidarietà, etica sportiva, composizione delle squadre nazionali quale valore culturale) perseguiti dalle re-

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stata spiegata sulla giurisprudenza della Corte di giustizia, la quale nel caso Bernard del 2010 lo ha applicato per la prima volta nel senso indicato ad una controversia sportiva[51]. Per l'altro, l'art. 165 TFUE pone dei princípi e crea dei diritti soggettivi perfetti a favore degli sportivi i quali rappresentano rispettivamente dei parametri di validità dei regolamenti sportivi e delle posizioni giuridiche protette, quindi direttamente azionabili di fronte alla giurisdizione europea e a quella nazionale a favore dei destinatari delle stesse nei confronti delle istituzioni pubbliche italiane ed europee (rapporti verticali), nonché delle organizzazioni sportive stesse (rapporti orizzontali), in virtú della efficacia nei confronti dei terzi ascritta ai diritti fondamentali previsti nei Trattati dalla giurisprudenza europea (c.d. *Drittwirkung*)[52].

Alla luce di quanto esposto, si può tentare di applicare il principio di specificità ai casi *supra* esposti per verificarne i possibili esiti.

In applicazione del principio alla questione della validità della clausola arbitrale imposta agli atleti per la partecipazione alle competizioni, si può certamente sostenere, insieme all'*OLG* München, che gli accordi di arbitrato intercorsi tra una federazione internazionale che organizza competizioni e gli sportivi che vi prendono parte non sono da ritenere *tout court* invalidi per mancanza di volontà dell'accettazione di questi ultimi[53]. In effetti, vi sono motivi oggettivi e meritevoli di tutela che depongono a favore della sottoposizione delle liti ad un unico giudice sia per esigenze di rapidità di adozione delle decisioni, sia per evitare di radicare la competenza di giudici statali di diversi paesi, ciò che potrebbe condurre a decisioni divergenti. Siffatti arbitrati possono quindi essere considerati esprimere una specificità dello sport meritevole di tutela.

gole sportive; se l'esito è positivo, si controlla se l'attuazione degli stessi poteva essere conseguita con strumenti meno invasivi delle situazioni giuridiche degli sportivi (ad esempio, *moral suasion* o altre tipologie di regole); infine, superato il precedente controllo, si valuta se le disposizioni federali siano proporzionali alla protezione degli interessi in gioco.

[51] Causa C-325/08, Olympique Lyonnais SASP *c.* Bernard e Newcastle, in *Rass. dir. econ. sport*, 2011, p. 411 ss.

[52] Di questa efficacia sono chiara prova le decisioni emesse in materia sportiva, le quali hanno fatto valere i diritti e le libertà riconosciute nel Trattato di Roma nei confronti delle organizzazioni sportive: sul punto sia permesso rinviare a L. Di Nella, *La tutela della personalità dell'atleta nell'organizzazione sportiva*, cit., p. 68 ss., ove si rinviene ulteriore bibliografia.

[53] V., *retro*, nota 12.

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Quanto invece al tema della scelta dell'arbitrato e dell'indipendenza e imparzialità del giudice, in base alla specificità e soprattutto della proporzionalità delle regole limitative dei diritti degli atleti, l'esito potrebbe essere duplice: o si evita di affidare la competenza arbitrale a favore del T.A.S., sul cui funzionamento e sulla cui composizione influiscono il C.I.O., le federazioni internazionali e i Comitati Olimpici Nazionali ma non in modo altrettanto significativo gli atleti, individuando una istituzione arbitrale terza; oppure si danno maggiori garanzie in merito alla effettiva indipendenza degli arbitri del C.A.S./T.A.S. In effetti, la composizione del C.I.A.S. e le modalità di scelta degli arbitrati, di fatto determinati principalmente dagli enti sportivi di vertice, pone questi ultimi in una situazione strutturale di forza che pregiudica alla base la neutralità del C.A.S./T.A.S. Inoltre, il presidente del collegio nei procedimenti di appello viene nominato dal Presidente del relativo settore all'interno del C.I.A.S. Per questo non sembra essere pienamente garantita la terzietà dei collegi arbitrali, essendo questi composti da persone piú vicine agli enti di vertice che agli atleti. Una giustificazione oggettiva per questa preponderanza non sembra sussistere. Dal punto di vista della proporzionalità si può quindi ritenere che le regole di funzionamento della procedura *de qua* ledono i diritti fondamentali degli sportivi e dovrebbero essere riviste.

Anche l'aspetto del controllo dei lodi arbitrali può avere una risposta positiva in base al principio di specificità dello sport: i diritti fondamentali degli atleti e l'ordine pubblico non possono essere violati in alcun modo. Correttamente allora l'*OLG* ritiene che la domanda della Pechstein non possa essere ritenuta infondata in ragione del riconoscimento del lodo arbitrale: questo è, infatti, in contrasto con l'ordine pubblico e pertanto non può essere riconosciuto in virtú del § 1061, comma 1, *ZPO* e dell'art. 5, comma 2, lett. *b*, della Convenzione di New York sui lodi stranieri.

In tal senso, va risolto anche il caso SV Wilhelmshaven: correttamente l'*OLG* Bremen ha accolto la domanda, dichiarando che la retrocessione imposta era effettivamente in contrasto con il diritto europeo e pertanto invalida[54]. Nella sostanza, con siffatta decisione non

[54] OLG Bremen, cit., p. 70 ss.

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è stato riconosciuto il lodo del C.A.S./T.A.S. L'*OLG* Bremen ha appoggiato la decisione primariamente su ciò, che le federazioni regionali tedesche devono rispettare il diritto imperativo dell'UE anche in sede di esecuzione delle sanzioni sportive. Pur se con motivazioni differenti, sempre nel caso SV Wilhelmshaven, il *BGH* ha correttamente deciso la questione osservando che negli statuti della federazione regionale e di quella nazionale il potere disciplinare è previsto in modo insufficiente: per questo deve considerarsi nulla la sanzione della retrocessione irrogata al SV Wilhelmshaven. I giudici rilevano che le regole delle federazioni sovraordinate, specialmente di quelle internazionali, non vigono per propria forza in virtú della sola struttura organizzativa piramidale, ma hanno bisogno di un espresso fondamento nello statuto della federazione sottordinata o di altra forma di sottoposizione.

Infine, in relazione al problema dei rimedi della giustizia statale contro i provvedimenti federali, l'applicazione della proporzionalità conduce ad esiti diversi da quelli cui è pervenuta la Corte costituzionale e il Consiglio di Stato. Per un verso, la "monetarizzazione" del pregiudizio subìto dagli sportivi può essere persino irrisoria per le indubbie difficoltà di quantificazione. Quando invece non sia tale, questo può anche risolversi in un serio pregiudizio per le federazioni, non sempre dotate di adeguate risorse finanziarie. La soluzione piú equilibrata sembra dunque essere quella di ammettere sia il rimedio risarcitorio, quando non avrebbe senso dichiarare l'annullamento del provvedimento, sia il rimedio caducatorio, quando ciò è funzionale alla tutela effettiva dello sportivo.

6. Da quanto scritto non può non essere rilevato come nella giurisprudenza tedesca ed italiana esaminata vi sia un problema di disallineamento nell'approccio di base seguíto dai giudici per risolvere le controversie sportive, ciò che conduce ad esiti inevitabilmente differenti. Siffatta diversità nel contempo sembra riverberarsi anche in violazione del diritto primario europeo e della giurisprudenza della Corte di Giustizia. Considerazione, questa, che sembra altresí valere per la giurisprudenza arbitrale sportiva. Si deve pertanto sostenere con forza la necessità di uniformazione dei predetti orientamenti giurisprudenziali al comune quadro normativo europeo in materia.

Pertanto, innanzi tutto, occorre affermare in sintonia con la Corte

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di Giustizia UE[55] che tutte le fattispecie relative allo sport sono potenzialmente rilevanti per l'ordinamento giuridico, il quale le lascia in parte disciplinare dai regolamenti federali e dai relativi sistemi di giustizia interna, ma sempre nel rispetto quanto meno delle norme imperative e dei princípi dell'ordinamento nazionale-europeo. Fattispecie dunque sempre giustiziabili dalla giurisdizione statale, salvo il preventivo ricorso alla giustizia sportiva se del caso, ogni volta si configuri la lesione di una posizione giuridica che non sia giustificata dal principio di specificità dello sport e/o che discenda dalla scorretta applicazione delle regole sportive.

Da questo deriva che, almeno a livello UE, la giurisprudenza statale e quella arbitrale sono tenute al rispetto del principio di specificità dello sport, che è chiamato a fungere da guida nel dirimere le questioni sportive e a bilanciare l'applicazione del diritto nazionale e dei regolamenti federali, secondo l'insegnamento della Corte di Giustizia e le prescrizioni dell'art. 165, § 1, comma 2, TFUE.

Ma ben vedere, il principio di specificità dello sport può anche trovare applicazione a livello internazionale in tutti quegli ordinamenti che non lo contemplano. Come *supra* scritto, tale principio nasce dalla giurisprudenza europea che, nel corso di decenni e in assenza di norme *ad hoc*, lo ha elaborato partendo dalla necessità di contemperare le esigenze di autoregolamentazione dello sport, fondate sulla libertà di associazione e sulla autonomia negoziale, con le tutele indisponibili degli sportivi e con le norme imperative contenute nell'ordinamento giuridico. Un principio siffatto, che nasce da concrete esigenze comuni a tutti i sistemi e non da elaborazioni teoriche piú o meno condivisibili, consente, per un verso, di riconoscere le specificità dei regolamenti sportivi nazionali e internazionali e, per l'altro, di bilanciare tali esigenze con le prescrizioni inderogabili dei vari ordinamenti, permettendo altresí di tener in considerazione le caratteristiche giuridiche e, prima ancóra, culturali di ogni realtà normativa. La specificità dello sport è in effetti un principio che presenta i connotati della ragionevolezza dal punto di vista tecnico e della flessibilità in sede applicativa: la sua adozione a livello internazionale

[55] Corte giust., 18 luglio 2006, c. 519/04, David Meca-Medina e Igor Maicen c. Commissione, in *Rass. dir. econ. sport*, 2007, p. 85 ss., spec. 92 ss., con nota di D. Lo Verde, *Principio di proporzionalità e regolamenti antidoping*.

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consentirebbe la creazione di una giurisprudenza statale e arbitrale quanto meno ispirata da un principio condiviso.

Per concludere, tornando in particolare alla giustizia sportiva, in base alla specificità questa va sicuramente riconosciuta e tutelata, ma nella misura in cui sia imparziale ed effettivamente indipendente e risponda ai princípi a tutela dei diritti fondamentali della persona nel processo[56]. In tal senso, autorevole dottrina auspica una riforma della giustizia arbitrale internazionale[57].

LUCA DI NELLA

*Abstract*

Lo scritto affronta il tema della giustizia sportiva alla luce della recente giurisprudenza in materia, analizzando alcune sentenze che stanno segnando una rilevante evoluzione a livello sia nazionale, sia internazionale ed europeo. Il riferimento è in primo luogo al complesso ed articolato caso Ursula Pechstein, la pattinatrice sul ghiaccio tedesca, che sta suscitando grande scalpore ed è già stato oggetto di numerose decisioni che vanno dal lodo del CAS/TAS, impugnato dinanzi alla Corte federale svizzera, a quelle dei giudici di merito bavaresi e dal *Bundesgerichtshof*. E il percorso giudiziario non è ancóra chiuso, essendo pendenti un ricorso alla Corte di Strasburgo e un *Verfassungsbeschwerde* alla Corte costituzionale tedesca. Altra vicenda altrettanto significativa, anche in un'ottica comparatistica, è quella che ha riguardato la squadra di calcio tedesca SV Wilhelmshafen, decisa dal Tribunale anseatico di Bremen nonché dal *Bundesgerichtshof*. Infine, viene analizzato il caso Cicolari Greta, sul quale si sono pronunciati il Tribunale amministrativo regionale del Lazio e il Consiglio di Stato n. 3065/2017 sulla scorta della decisione in materia di giustizia sportiva emanata a suo tempo dalla Corte costituzionale italiana. Alla luce del principio di specificità dello

[56] P. SCHLOSSER, *sub* art. 1025 ZPO, in F. STEIN e M. JONAS (a cura di), *Kommentar zur Zivilprozessordnung*, 10, *§§ 1025-1066*, 23 ed., München, 2014, p. 8, afferma che tale garanzia deve valere anche per i giudici statali che si occupano di casi relativi allo sport.

[57] Nell'esperienza tedesca auspicano tale riforma, tra gli altri, B. HESS, *Aktuelle Kontroversen um die Sportschiedsgerichtsbarkeit: Die Urteile Pechstein und SV Wilhelmshaven*, cit., p. 130; C. DUVE, *Muss die deutsche Justiz die Rechtsprechung des Schweizerischen Bundesgerichts korrigieren?*, in AA.VV., *Bitburger Gespräche: Jarbuch 2016. Schiedsgerichtsbarkeit und private Justiz: Rechtspolitische Herausforderungen*, München, 2017, p. 71 ss.; P.W. HEERMANN, *Die Sportschiedsgerichtsbarkeit nach dem Urteil des BGH*, cit., p. 2227; K. THORN e C. LASTHAUS, *Das Pechstein-Urteil des BGH- ein Freibrief für die Sportschiedsgerichtsbarkeit?*, cit., p. 426.

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sport, previsto dall'art. 165 TFUE e applicato dalla Corte di giustizia, vengono valutate le predette decisioni ed elaborate alcune proposte rivolte a cercare di garantire un corretto equilibrio tra l'efficienza del sistema di giustizia sportiva e i diritti fondamentali di atleti, nell'àmbito di un dialogo costruttivo tra le corti nazionali e internazionali e i giudici sportivi endofederali e arbitrali.

The paper deals with sports law in the light of the recent jurisprudence, analyzing judgments significant at national, international and European level. The first case examined is the controversial and complex case of the German ice skater Claudia Pechstein, which has been subject to various rulings ranging from CAS arbitration, challenged in the Swiss Federal Court, to rulings by the Bavaria Courts and by *Bundesgerichtshof* (Federal High Court). The case is still currently pending appeal at the European Court of Human Rights in Strasbourg and a*Verfassungsbeschwerde,* for the violation of the fundamental rights, at the German Constitutional Court. Another significant case involves SV Wilhelmshafen, the German soccer team, brought before the Hanseatic Court in Bremen and before the *Bundesgerichtshof*. Lastly, the case of Greta Cicolari is analyzed. The Lazio Regional Administrative Tribunal and the Council of State n. 3065/2017 issued judgements in line with the sports justice decision taken by the Italian Constitutional Court. These judgements are evaluated the light of the principle of sport specificity, provided for in Art. 165 TFUE and applied by the Court of Justice. Proposals are put forward which aim to strike a balance between the efficiency of the sports justice system and the basic rights of athletes, in the context of constructive dialogue between national and international Courts and sports federation judges.

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# Disciplinary Procedures in Football
## An international and comparative analysis[1]

SUMMARY: 1. FIFA Rules. – 2. Autonomy and Specificity of Sport. - 2.1. Self-Regulation. - 2.2. Disciplinary Standards. – 3. Forms. – 4. Disciplinary Bodies. - 4.1. Freedom to set up and organise. - 4.2. Appointment. - 4.3. Separation of Investigating and Adjudicating Functions. - 4.4. Prosecutor (Brazil, Italy, The Netherlands, UEFA). - 4.5 Independence and Impartiality. – 5. Disciplinary Proceedings. - 5.1. Freedom to Establish the procedure. - 5.2. Start of the Proceedings. – 6. Disciplinary Offences. – 7. Rules of Conducts. – 8. Disciplinary versus Criminal. – 9. Harmonisation? – 10. Conclusion.

1.
6 Regional confederations:
– AFC – CAF – CONCACAF – CONMENBOL – OFC- UEFA
19 National sports associations:
- Argentina, Brazil, China, France, Germany, Italy, Japan, Qatar, South Africa

2. – 2.1. Rules and regulations for members
Rules of game

2.2. Governing the organization and functioning of disciplinary proceedings
Establishing the disciplinary procedure
Defining the infringements
Determining the sanctions

[1] From Powerpoint. Research: M. CAVALIERO, M. COLUCCI (eds), *Disciplinary Procedures in Football*, SLPC (www.slpc.eu) – October 2018.

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3. Disciplinary Code/rules (FIFA, OFC, CAF)
No Code at all (CONCACAF)
Code of Ethics (FIFA)

4. – 4.1 Freedom to set up and organize
Broad: Switzerland
Strict: France because need to comply with ordinary law
All the others: in the middle but more close to Switzerland

4.2. Council and ratified by the Congress (UEFA - CONCACAF)
Executive Committee (OFC)

4.3. – 4.4. – 4.5.

5. – 5.1. Freedom to establish the Procedure
BUT national legal order constraints (France)
One or more judges
One instance or two-tier procedure

5.2. (ex officio China, Mexico, Italy,Brazil, and in any other federations where there are prosecuting bodies).
No in Croatia!
Hearings are not public but…
Exceptions (France and Brazil)
Right to be heard: in writing (CAF – OFC – UEFA), oral hearings, mixed system
Evidence: full range
Deadlines: very tight
Publication of decisions or sanctions:
No (OFC), By means of media releases: (CAF- CONCACAF)

6. Discretional Principle
Evaluation of behaviour
Legal classification according to the sports rules
Sanctions

7. – Players

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– Clubs
– Officials
– Spectators

8.

| PRINCIPLES | *In Dubio pro reo* | *Obligation to Co-operate* | *Nulla poena sine lege* | *Evidence* |
|---|---|---|---|---|
| CRIMINAL | YES | NO | YES | BEYOND ANY REASONABLE DOUBT |
| DISCIPLINARY | NO | YES | NO but... | CONFORTABLE SATISFACTION |

9. What:
Internal organisation rules? No
Standard of behaviour
Sanctions
How:
International binding rules: FIFA on discrimination, IOC – WAADon doping
International instruments: international conventions

10. Towards a 'fair' and credible sports Process
Due process: rights and safeguards
Arbitration for Inclusive Sports System Less Intrusion from Ordinary Courts.

Michele Colucci
Marc Cavaliero

*Abstract*

Authors aim to show the possibility of a fair and credible sports process. By powerpoint they present FIFA Rules and discuss sport autonomy and its specificity, Disciplinary Standards and Disciplinary Bodies, Disciplinary Proceedings and Disciplinary Offences are presented by a comparaison between varius experiences.

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# Study on the penalty specification of rule-breaking and discipline-breaking behaviors of sports competition

Summary: 1. Source of penalty power of sports. – 2. Definition of the rule-breaking and discipline-breaking behavior of sports. – 3. Acceptance of rule-breaking and discipline-breaking behaviors. – 4. Authenticity of penalty evidence. – 5. Procedure of penalty. – 6. Principle of punishment. – 7. Relief of penalty. - 7.1. Internal Relief. - 7.1.1. Statement of fact. - 7.1.2. Hearing. - 7.1.3. Arbitration. - 7.2. External relief: lawsuit relief mechanism. - 7.3. Supervision of penalty power. – 8. Feasibility of judicial review of penalty power of sports association. – 9. Conclusion.

1. Article 49 of Law of the PRC on Physical Culture and Sports stipulates that «whoever commits fraud or other acts violating the discipline or sports rules in competitive sports shall be punished by the relevant public sports organization in accordance with the provisions of its articles of association [...]»[1]. Article 50 of Law of the PRC on Physical Culture and Sports stipulates that «whoever resorts to banned drugs or methods in sports activities shall be punished by the relevant public sports organization in accordance with the provisions of its articles of association; State functionaries who are held directly responsible shall be subject to administrative sanctions in accordance with law [...]»[2]. Accordingly, sports associations have the right to exercise disciplinary punishment on the behavior of violating discipline and rules of sports in competitive sports in line with laws. When it comes to the source of the power, we should first confirm the authorization of law, which is from the express provisions of laws and can be regard as the legislation of administrative au-

[1] Article 49 of the Law of the PRC on Physical Culture and Sports.
[2] Article 50 of the Law of the PRC on Physical Culture and Sports.

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thority. Although the sports social organizations are not national administrative institutions and not adjusted by the Organic Law of the State Council of the PRC, it can be regarded as the important affiliation of sports management of the government according to its present function, which is the important reflection of the primary stage of socialism and the whole-nation system and adaptive to the theory on constructing Chinese characteristics socialism.

The second power is from the articles of association of sports associations. The mandatory of national laws and regulations is fully reflected in the articles of association, and promotes to form a powerful internal behavior norm, so as to make the members of the association absolutely abide by it which is a kind of internal governance.

The third is the inherence of the power of sports association. The Chinese Football Association, Chinese Basketball Association, and Chinese Volleyball Association are sports organizations representing the state and government and have strong public authority and influence. When the organizations apply for register and approval of the organizations, they are endowed with corresponding rights by the government, which can be called extensible right or delegated power.

The comprehensive quality of each subject of the competitive sports needs to be improved, and the ability of self-discipline and self-regulation is poor, so there is always rule-breaking and discipline-breaking behavior, and some of the behaviors even have bad impact on the society. As a result, certain penalty is inevitable and necessary. The purpose of the paper is to study how the sports associations exercise the penalty power and how to represent its normalization.

2. Rule-breaking behavior refers to the behavior of relevant subject violating competition rules, interpretation of competition rules, competition regulations and other relevant competition rules. Sports is a recreational activity and an exalted game. Participants must seriously abide by the corresponding game rules and the game principle of fairness and justice, otherwise, they should be punished. Rule-breaking behavior should also include the behavior of violating the provisions of sports laws and regulations, for example, if one in-

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fringes the provisions of the Law of the PRC on Physical Culture and Sports and Anti-Doping Code, he or she will assume corresponding legal responsibility.

Discipline-breaking behavior refers to the behavior of relevant subjects violating the provisions of the articles of association of sports association, discipline and norms, and measures on punishment as well as the normative document of relevant disciplinary provisions of sports association. Discipline is a kind of code of conduct with normalization, definiteness, exemplary and mandatory, and is from the direct provision or authorization of laws and regulations to regulate social members. Sports discipline regulates the sports industry and its practitioners.

As a result, what the rule-breaking and discipline-breaking behaviors in competitive sports violate is the code of conduct in the industry, and the measures of punishment set by the industry are applicable to punishing the subject.

3. The accepting institution of rule-breaking and discipline-breaking behaviors in competitive sports is disciplinary committee of sports association (or the competent department of competitive sports). First, accepting member association, division committee, the team, audience, news media, the department and committee of China individual competitive sports, the legal person and natural person within the jurisdiction of sports association submit evidence or relevant report of the rule-breaking and discipline-breaking behaviors in race or non-race. The disciplinary committee is responsible for defining the scope of jurisdiction. The problem due to improper enforcement of referee should be directly accepted by the board of reference, and the rule-breaking operations of sports organizations should be treated by the sports administrative department in line with the regulations. Second, if the rule-breaking and discipline-breaking behavior of organization, officials and athletes is serious and reaches the standard of additional penalty, on the basis of findings of act by the board of reference, the disciplinary committee can accept it after the legitimacy of relevant evidence of rule-breaking and discipline-breaking behaviors is checked.

4. Bentham, an English philosopher, ever said, «evidence is the ba-

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sis of justice»[3]. It is said that evidence is the foundation for judicial authority to define facts and law-breaking behaviors, as well as the assurance of a system. It has probativeness of believing truth and shows the public that truth judges "credibility". When it comes to the internal penalty of sports industry, whether the fact is true is the first place to be considered based on the composition of relevant evidence, that is, the implementers of the penalty should carry out the punishment with relevant evidence. Article 42 of the Criminal Procedure Law of the People's Republic of China regulates that «all facts that can prove the true circumstances of a case shall be evidence»[4]. In line with the provision, it is believed that the real circumstances of rule-breaking and discipline-breaking behaviors in competitive sports are facts, namely, the evidence for punishment. The penalty evidence includes: 1) report on competition supervision (regarded as duty evidence). Competition supervision is the duty of the important officials designated by sports association to monitor the whole process of the competition on behalf of industry association. The officials give evidence for the process and results of their personal duty behavior according to law, and state their duty behaviors, which can be regarded as a means of proof for penalty or lawsuit. After competition, they submit the evidence in written to the sports association. 2) Report of referee. Referee is the organizer and inquisitor of competitive sports, should be maintain fair and just, restrict the behavior of the officials and athletes of both sides on(in) the field, guarantee the fairness of the competition's results, and write report that reflects real circumstances and suggestions after a competition. 3) Report of referee supervisor. Referee supervisor is designated by the board of reference of sports association to monitor the enforcement of referee in the whole process of a competition, especially, propose comment to the significant penalty made by a referee and write real report and submit it to the board of reference. 4) Presentation, statement and testimony of the parties concerned. It mainly refers to the statement of the facts of alleged rule-breaking and discipline-breaking behaviors of both teams, including the comments of news me-

[3] W. Liming (ed.), *Introduction of Law of Evidence*, China People's Publishing House, p. 44.

[4] Article 42 of the Criminal Procedure Law of the People's Republic of China.

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dia. 5) Evidence of experts' claims refers to that experts interpret some scientific and technological knowledge of the rule-breaking and discipline-breaking facts in sports industry in the form of suggestions with their own professional knowledge. Experts' opinions can be regarded as important reference evidence. 6) Video and audio recording. Video recording is an important evidence for penalty and has real credibility. The video source should be selected, dominant by the video recording taken by sports association and news media. Audio recording can be regarded as one kind of evidence. In 2006, the relevant clubs of Serie A had been strictly punished because of "Calciopoli" which was alleged match-fixing and was proved by phone call recording. However, audio recording must be inspected technically, or else it will not be applicable. 7) Photo. As special proof, the source of photos should be acquainted, so as to judge its primitiveness. Photos can be regarded as penalty evidence only when they are transformed to visible object through certain scientific and technological equipment.

In accordance with the above-mentioned evidences, what is the most important is the authenticity of evidence, otherwise, it is unfair for the punished person and also affects the credibility of the implementer. Therefore, human testimony and material evidence for punishment should be complete, including report of referee, report of competition supervisor, video recording, testimony of a witness of relevant subject as well as material evidence, which are dependable factual proof of rule-breaking and discipline-breaking behavior of competitive sports. If the report of officials is inconsistent and difficult to discern, the event occurs in the field is subject to the referee's report and that occurs outside the field is subject to the report of competition supervisor. In addition, when there is no video recording as evidence, it is necessary to invite the serving referee, competition supervisor and representatives of both teams to enhance the credibility of evidence.

5. Sports association establishes disciplinary committee whose members are composed of lawyers and authoritative person in sports field who maintain neutral and implement penalty according to procedures independently and strictly. The implementers of penalty should adhere to the following procedures (taking football as an example):

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– To check evidences and the reliability, including confirmation of evidences' source; to formally accept the penalty.

– To fist review the case and propose planed penalty suggestion and inform the counterpart that whether they request factual presentation (regarded as hearing of witness).

– Factual presentation of relevant parties, mainly including athlete representative of both teams, serving referee, competition supervisor and division responsible person.

– Make penalty decision

(1) Identity the authenticity and competency of evidences.

Relevant materials of evidence should be checked and testified in detail, including repeatedly watching video recording and relevant image data, listening to experts to interpret technical actions, analyzing and demonstrating.

(2) Identify the nature of the behavior of the planned subject of punishment.

According to facts, evidence and the rule-breaking and discipline-breaking circumstances, whether the behavior is unintentional, intentional or spiteful can be judged. The nature of behavior can be classified into: general foul; serious foul, act of violence, unfair action, and other behaviors of seriously violating sportsmanship.

(3) Basis of punishment.

According to the identification of the behavior nature of the punished subject, on the basis of relevant punishment measures and disciplinary regulations, the penalty should be implemented reasonably, fair and legally.

Reasonableness: the intensity of punishment is determined according to behavior nature, and the upper limit and lower limit of punishment can be selected in accordance with circumstance.

Fairness: the punishment does not to protect any party and maintains fair and judicial.

Legitimacy: the punishment is applicable to the scientificalness of the regulations and provisions of laws, has solid basis, and withstands scrutiny.

(4) The punishment decision should be informed to the counterpart with formal document and announced to the public.

– Timeliness of punishment

In terms of the timeliness of punishment, the regulations of dif-

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ferent sports associations are different. Taking football association as an example: Article 5 and 49 of the Disciplinary Standard and Penalty Measures of Chinese Football Association stipulate the timeliness of punishment, which abides by «the principle of applying the old law with the exception of a less punishment in the new law» and «the principle of a prescribed punishment for a specified crime». Meanwhile, as for the general rule-breaking and discipline-breaking behaviors, the timeliness will be two years. However, the behaviors of seriously violating the competition principle, such as falsification, menace, corruption, doping, improper trading and related transactions, are not limited by timeliness. The penalty power of disciplinary committee is designated by sports association and has certain authority. Its penalty decision can't be changed except arbitration agency and the court. If the person concerned has alleged illegal behavior, he or she will be handed over to the judicial authority.

6. (1) Fact is the premise of applying a law, and law is the standard for correctly dealing with a case. When it comes to dealing with the rule-breaking and discipline-breaking behaviors in competitive sports, there will be no objective basis without facts and no objective standard without laws. Only taking facts as basis and taking law as criterion can make punishment fair, equitable and accurate.

(2) Principle of statutory punishment.

Article 3 of the Law of the People's Republic of China on Administrative Penalty stipulates that «where administrative penalty needs to be imposed on citizens, legal persons or other organizations for their violations of the order of administration, it shall be prescribed by laws, rules or regulations pursuant to this Law and imposed by administrative organs in compliance with the procedure prescribed by this Law. Administrative penalty that is not imposed in accordance with law or in compliance with legal procedures shall be invalid»[5]. According to the provisions of Law of the People's Republic of China on Administrative Penalty, the principle of statutory punishment means that creation of penalty, subject imposing a penalty, penalty basis and procedure should be legal at the same time.

[5] Article 3 of the Law of the People's Republic of China on Administrative Penalty.

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(3) Principle of fairness, justice and openness.

Article 4 of the Law of the People's Republic of China on Administrative Penalty regulates that «administrative penalty shall be imposed in adherence to the principles of fairness and openness [...]»[6]. Accordingly, the basis, procedure and result of penalty must be open to accept social supervision. Fairness and justice mean that the circumstance of penalty should match the influence on society.

(4) Principle of combining penalty and education.

Article 5 of the Law of the People's Republic of China on Administrative Penalty stipulates that «in imposing administrative penalty and setting to rights illegal acts, penalty shall be combined with education, so that citizens, legal persons and other organizations shall become aware of the importance of observing law»[7]. According to the provisions of the article, we can conclude that penalty is not the final purpose, and should focus on education. Punishing relevant practitioners in sports can educate them to draw lessons and abide by regulations and disciplines, actively eliminate bad social effect, and restore the normal order of game.

(5) Principle of guaranteeing legitimate rights.

In line with the principle, during imposing penalty on the rule-breaking and discipline-breaking behavior of relevant person, right to learn the truth, the right of statement, right of hearing, right to defend oneself, right to know, arbitration right and just claim of counterpart should be guaranteed, so as to enhance the acceptability of penalty decision.

7. According to the provisions of the principle of legal relief, it can be interpreted that when the subject imposes penalty on counterpart, the relief channel of the counterpart must be guaranteed, except he or she give up the relief, or else the penalty can't be imposed. Therefore, relevant sports organizations and practitioners have rights of statement, to defend oneself and hearing over the penalty imposed by sports association. If the counterpart is not satisfied with the penalty, he or she has the right to apply for arbitration or institute legal proceedings in a people's court. Moreover, if the counter-

[6] Article 4 of the Law of the People's Republic of China on Administrative Penalty.
[7] Article 5 of the Law of the People's Republic of China on Administrative Penalty.

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part gets losses due to the penalty imposed by sports association, he or she has the right to claim for compensation in accordance with laws. At present, the relief way in sports field include internal relief and external relief.

7.1. Internal relief means that when the counterpart is in an unfavorable position, the industry should provide relief to guarantee the rights. The mode of internal relief includes:

7.1.1. Statement of fact refers to the rights possessed by counterpart to state facts of rule-breaking and discipline-breaking behaviors. The content of statement mainly includes approval or denial the fact alleged by the subject imposing penalty, including undiscovered facts or subversive supplementary facts. The statement of fact can be written, video recording or oral or meeting which can be chosen by the counterpart freely.

7.1.2. Article 42 of the Law of the People's Republic of China on Administrative Penalty stipulates that «an administrative organ, before making a decision on administrative penalty that involves ordering for suspension of production or business, rescission of business permit or license or imposition of a comparatively large amount of fine, shall notify the party that he has the right to request a hearing; if the party requests a hearing, the administrative organ shall arrange for the hearing»[8]. Hearing is a right. Before imposing penalty on counterpart by a subject, the counterpart has the right to apply for hearing. According to the application of the counterpart, the subject imposing a penalty should arrange for the hearing to listen to the suggestions of the parties concerned. It can be said that hearing is a relief of the counterpart's right and disadvantage position and has legitimacy. At present, before make the decision of penalty, individual sports association implements the procedure of factual statement at the request of counterpart, which is regarded as hearing by the public or media. In fact, it is wrong in concept. As far as the author knows, there is no association implementing the procedure of

[8] Article 42 of the Law of the People's Republic of China on Administrative Penalty.

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hearing before penalty until now for three reasons: first, there is no legal regulations of hearing procedure of rule-breaking and discipline-breaking behavior; second, the competition is instantaneous. The competitive sport is held one by one and one round by one round. If the penalty of rule-breaking and discipline-breaking behavior is not made, it will affect the subsequent competition and even the whole one. Therefore, the application of hearing procedure in sports field is limited by instantaneity; third, the subject imposing penalty and the counterpart have poor consciousness of obtaining relief legally. I think that in order to guarantee the sports association impose penalty in accordance with law and protect the legal right of counterpart, the hearing procedure should be implemented before significant penalty, but scientific competition system should be considered.

7.1.3. Arbitration is possessed of neutrality in civilian and has prominent advantage of specialty, convenience and availability. Through studying practice of sports arbitration in foreign countries, sports arbitration has become the most primary and effective relief method in countries worldwide. However, the establishment of sports arbitration system in China is very lagging. It has been 21 years since the sports arbitration was listed in the legislation plan by the State Council in 1996, but sports arbitration has not been actually legislated. At present, there are thousands of livelihood events waiting for legislation, and sports arbitration has to wait for longer time. Viewed from its nature, sports arbitration is an external relief mechanism. At present, there is no sports arbitration institution, and only the Chinese Football Association set up sports arbitration department, which is the reason why I define arbitration as internal relief. It is a great process of relief mechanism that Chinese Football Association established internal arbitration institution. However, independence, justice and neutrality of internal arbitration institution is debatable, and there are flaws in the arbitration procedure, range, efficiency and arbitral case.

7.2. As we all known that lawsuit is the last threshold for counterpart with national coercive force and legal validity as well as high cost. At present, many scholars pay close attention to whether the counterpart can institute legal proceedings if the counterpart refuses

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to accept the punishment. To my knowledge, first, citizens, legal persons or other organizations think their own rights and interests are infringed, they have the right to institute court proceedings which is a statutory right of appeal. Second, taking football as an example, FIFA Statutes and prospectus of the countries regulate that the party concerned must use up the internal relief measures in sports association before instituting court proceedings, which does not completely exclude the possibility of judicial relief. Third, in terms of solving disputes, the provisions of articles of association of Chinese Football Association, Chinese Basketball Association, Chinese Volleyball Association, Chinese Table Tennis Association, Chinese Badminton Association exclude that judicial relief is illegal. As a juridical association, sports association should also accept judicial review and supervision.

Above all, the penalty relief in Chinese sports associations is not standard, specifically, the relief mechanism is imperfect; external relief channel is not smooth; and overall relief is not effect.

7.3. The penalty power of sports association should be obtained legally, and scholars have various understanding about the legal nature of penalty power, including the attribute of private right and public right or mixed power. I think penalty power is public right and exercises the public administration of sports industry, so it obtains the public rights of express provisions authorized by laws. However, it is worth exploring that who is responsible for supervising public rights, social supervision (media supervision) or the superior unit in sports industry.

8. With the intensifying of commercialization and professionalism of sports, the public right of sports association will be expanded; meanwhile, the progress of national legalization and enhancing of citizens' legal consciousness will constraint its corresponding right. At the end of 2009, the football industry began the storm of anti «fake, gamble and black», which proved the possibility of judicature intervening sports industry. It should be emphasized that judicial intervention is good for standardizing the establishment of the system of sports association. The penalty power of sports association is possessed of specialty. How to carry out judicial review on it? First, it

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is necessary to confirm that whether judicature can review the penalty power of sports association, including court's power and sufficiency of legal basis. If the disciplinary penalty power of sports is included into the scope of administrative lawsuit, and it is necessary to review whether it accords with the legal norm. Second, the force of judicial review can be interpreted as the degree of freedom of the opinion of court review replacing the view of sports association as well as the moderation of the range of intervention of reviewing the penalty power of sports association, such as the review on penalty procedure and basis. Due to the professionalism, technicality and instantaneity of sports industry, judicial review should be prudent, maintain limited intervention to prevent the non-legitimacy of judicial behavior.

9. It is a long-term and arduous task to maintain good and harmonious contest environment and order. The improvement of relevant laws and regulations as well as mechanism play important role in developing competitive sports especially «three big-ball».

2. Adhering to procedural justice is the foundation of governing sports in accordance with laws.

3. Improving relevant penalty basis can make penalty more convincing.

4. According to the provisions of relevant laws, where there is no relief, there is no penalty. Therefore, it is urgent to improve relief system.

5. It is advised to develop the Law of Competitive Sports which can comprehensively normalize the rights, obligations, and legal responsibilities of athlete, coach, referee, sports officials and sports organizations.

Xiaoping Wang

*Abstract*

In competitive sports, in accordance with its provisions of articles of association and relevant regulations, sports organizations have the right to punish the behavior of violating the principle of equitable liability, damaging sports morality and spirit as well as sports rules, and the penalty has legitimacy. It can be said that disciplinary punishment plays certain role in maintaining good sportsmanship and discipline as well as contest order.

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However, the nonstandard punishment of relevant sports organizations always leads to many disputes and makes the fairness and justice of penalty be questioned. Relevant legal issues of penalty is discussed in this paper, so as to provide reference for the specification of disciplinary penalty of China sports.

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# Risk management in sports activities of Iranian schools

SUMMARY: 1. Introduction. – 2. Methodology. - 2.1. Research Methods. - 2.2. Population, sample and sampling method. – 3. Findings. – 4. Discussion and conclusion.

1. Real understanding of events, needs a clear impression of the concept of risk. Information systems throughout the day is full of news about different events that people grapple with them and seeks solution to avoid the consequences of such events[1]. Today, areas of risk, is enhanced and transforming it into a small accidents and injuries and even tragic and catastrophic events, has attracted a lot of attention in terms of scientific[2]. In general, risk management is defined as identification process or diagnosis of damage that an organization or person is exposed and is defined as the best way to deal with these damages[3].

Sport, as a social phenomenon can be affected by risk factors because of various reasons and have problems for society and the country. So sport community is not away from the problems and dangers that threaten it and may eventually cause crisis to this active and dynamic community. Although creating chaos in sporting activities also like other activities, is the outcome of the operation of elements and factors in the social, economic, political and cultural areas of society, Proper and desirable functioning of these areas is key to stability and safety in sports and dysfunction and disorder in the work

[1] S. SETARG DARE *et alii*, *Risk Management*, Isfahan, 2005.

[2] S. MACINTYRE, A. ELLAWAY, *Social and local variations in the use of urban neighbourhoods: a case study in Glasgow*, in *Health & Place*, 4, 1998, p. 91 s.

[3] S. SETARG DARE *et alii*, *Risk Management*, cit.

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of any of them will cause adverse condition[4]. In the meantime responsibility of coaches, physical education teachers, school principals and principals in charge of sports Apparatuses for their athletes, has been doubled due to unforeseen situations and threats in sports fields. Setarg Dare research results showed that many of sports administrators are not aware of legal consequences of accidents generated in sport facilities, while existence of any factor that endanger the health of sports users can have prosecution.

In this regard, efforts to reduce predictable injuries in sports has been in lot of attention that resulting from the increasing litigation from negligence of sports managers and recreational programs. Since even natural disasters in sports events also has gone into litigation, business owners in the sport need to think more than ever in preparing efficient and secure environment in order to prevent legal litigation (Setarg Dare, 2006). In Iran today, about 12 million students spend irregularly part of their daily time by addressing exercise. On the importance of addressing this current issue suffice to say that in recent years many researchers have allocated their scope of investigation to the issue of sports rights. For example, in a study titled «*Prevalence of sports injuries in secondary schools (boys) of Mashhad*» announced causes of sports injuries respectively to sports operations error with 32%, role of the equipment and facilities 31%, lack of safety at a rate of 28 percent and lack of physical stamina 9 percent. Also in this study, results showed that a little percentage (17%) of coaches are familiar with the topic of sports rights[5]. While assessing the safety status of athletic training facilities (schools and universities of the country) have shown that generally sports grounds and also the status of sports equipment used in the sport places are low in terms of safety[6]. Investigation of Knowledge of coaches and sports administrators from sport rules also indicate that most of the legal issues and problems in the sports field are associated with lack of

[4] S. Macintyre, A. Ellaway, *Social and local variations in the use of urban neighbourhoods*, cit.

[5] N. Soltani, M. Ezzatollah, *Prevalence of sports injuries in high school for boys (city of Mashhad)*, Master's thesis, University of Tehran, 1998.

[6] A. Farsi, *Check the status of Sport space security of country's schools*, in *Research Project, Physical Education Institute and sport science*, 2006.

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knowledge of sports coaches and managers[7]. From the viewpoint of Maloy[8] sport directors or educational organizations often attempt to escape liability arising of fault of the staff, coaches and teachers or those who work for them, and their argument is that they are not supervised sport activities effectively, while each manager is responsible for the correct or incorrect decisions of their employees[9]. In order to explain the importance of the issue should be stated that every year a lot of students participate in sport programs of Iranian schools, such as sport team's membership, participation in tournaments and sports competitions and exercises[10].

One of main responsibilities of educational authorities and any other institutions that are engaged in sports is employing qualified, competent and expertise sports coaches and physical education teachers to manage classes and sports events. A qualified coach is a person who coaching certified from the relevant sports federations and also has enough experience. It should be added that teachers of physical education of schools should be graduated of sports sciences major, at least at the bachelor degree level. Optimal performance of a sports coach or physical education teacher in schools sports activities, is raised continuous and accurate presence, high level predictive power in sport activities and also sufficient knowledge and experience in matters of sport. Numerous cases from sports lawsuits in courts indicate that, even slight negligence has been caused irreparable damages in sport events[11].

In relation to the responsibilities of a sport coach or physical education teacher several items are presentable. One of the most important items is the awareness of athletes' health. So that a sport

[7] A. Taj, M. Naghavi, F. Jafari, and Z. Abdolvahabi, *The determination of sport coaches and managers' knowledge with sport laws*, in *European Journal of Experimental Biology*, 2, 5, 2012, p. 1738 s.

[8] B. P. Maloy, *Safe environment*, in D.J. Cotton, J.T. Wolohan and T.J. Wilde (eds), *Law for Recreation and Sports Managers,* Dubuque, 2001.

[9] *Ibidem*.

[10] M. Kashef, *Investigate and identify the effects of plan creating age groups and absence of participatory of two-year students in interscholastic competitions on academic quality*, Department of Physical Education, Ministry of Education, 1997.

[11] C. Pascual, E. Regidor, P. Astasio, P. Ortega, P. Navarro and V. Dom´nguez, *The association of current and sustained area-based adverse environment with physical inactivity*, in *Social Science and Medicine*, 65, 2007, p. 454 s.

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coach or physical education teacher must before starting any operation was ensured athletes' health. In this regard, he or she should ask or investigate the athlete medical records, and should prevent from participating in practice and competition when the athlete is illness or undergo medical treatment. It is better a sport coach or physical education teacher receive medical reporting sheet that endorse health of athletes who have been injured and now intend after their recovery return to competition and exercise[12]. Among other duties of a sport coach or physical education teacher will be to continuously visit sport equipment particularly before starting the activity and also change to worn out, quadratic or defective devices. Athletes need to use sport equipment that has been set in accordance with the relevant provisions. So being incomplete, poor or illegal of these devices may cause damage to Athletes and in this cases sport coach or physical education teacher will be responsible. In regard to important of the safety places and sport facilities, a sport coach or physical education teacher must use of proper sport equipment, sufficient maintenance of sport facilities and spaces, having schedule for repair of facilities that can prevent a lot of injuries[13]. Poor design of sport facilities and places may restrict maintenance and monitoring facilities and result in increases exposuring of participants with the risk situations. These factors can lead to greater likelihood of damage and increase the lawsuits resulting from the negligence[14]. So far many studies has been done in the around of world about the issue of risk management and responsibilities in sports, but it was not investigated in Iranian school, the present study was conducted in order to complete international findings and provide new solutions Iran and other countries. Among the studies relevant to issue of present study can point out research findings of Pantera *et al* (2004) that considered vital the need for effective communication with the audience and participants in sports programs and careful evaluation of programs be-

[12] H. Foroughi Pour, *Check the knowledge of educators, teachers and sporting director of Tehran with sports rights and provision of educational strategies*, MA thesis, Research Center of the Physical Education, 2004, Abstract.

[13] A. Cassady, R. Weintraub, *Playing it safe. The Consumer Federation of America: U.S. Public Interest Research Group Education*, 2002.

[14] J.O. Spengler, D.P. Connaughton and A.T. Pittman, *Risk Management in Sport and Recreation*, Gainesville, Florida, 2006, p. 101 s.

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fore the start of the race and the necessary training to special forces for emergency response in case of emergency accident and familiarization of human resources active in sports programs including players, spectators, coaches and referees and forces[15].

Research findings of Jambur and Palms (1990) and Sachs *et al* (1998) also showed that the causes of sport injuries from accidents in playgrounds, include such as climbing of equipment, inadequate coverage of sport equipment, lack of safety zone, exposed sharp edges, improper of land, improper installation of equipment, improper floorboard, loose fence or wall, ropes, wires and cables abandoned in the playground and so on (according to the Sayyah, Dehkhoda, Arab Ameri and Bigdeli, 2005)[16].

In a report was been noted that in the United States each year, more than 5.25 million students take part in various sports activities that according to the Association of sports American, more than one fifth of the athletes (about 3.1 million) suffer by participating in various sports. Interestingly, the majority of these injuries (62%) occur during training, when medical personnel such as physical doctors and medical assistant are not present in training location[17]. According to one estimate, the cost of treatment for damage and injuries caused by sports facilities and playgrounds in the America has been estimated about 2.1 million dollars. Other estimates show that only in the State of Massachusetts of America, a state with a population of 6 million, the cost of treatment for sports injuries in sports facilities and playgrounds is about one million dollar in a year[18].

In another study, the most important factors affecting the health and safety of sport facilities has been declared such as insufficient place, old schools and unsanitary toilet, restrooms, drinking foun-

[15] D. B. Doerries, V.A. Foster, *Essential skills for novice structural family therapists: a Delphi study of experienced practitioners perspectives*, in *The family journal: counseling and therapy for couples and families*, 13, 3, 2005, p. 259 s.

[16] M. Sayyah, M. R. Dehkhoda, B. Arab-Ameri, and M. Elaheh, *The safety conditions of sports facilities*, in *Kashan in 1384*, first articles of national Conference of Sports, Tehran, 2006.

[17] M. Riva, L. Gauvin, and L. Richard, *Use of local area facilities for involvement in physical activity in Canada. Insight for developing environmental and policy intervention*, in *Health Promotion International*, 22, 3, 2007, p. 227 s.

[18] A. Cassady, R. Weintraub, *Playing it safe*, cit.

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tains and unsafe spaces inside the school sports land (asphalt with larger sand, having holes and collecting surface waters, lack of separation of land from each other, not fixed arrows is the floor of exercise) and also platforms and shrubs in margin close to the sports ground, inappropriate entrance and exit, too close to the parking lot, and sometimes the use of sport space as a parking, the possibility of electric shock and fire and inadequate first aid [19]. Research findings of Farsi et al (2005) showed that generally spaces within the play grounds and also condition of sport equipment used in the sport places of schools are at a low level in terms of safety[20]. Izadi[21] findings showed, there is not significant difference between identify and control of risks involved with the type of pool management (public or private) and between experience of management in sports activities and risk management practices[22]. But his research results showed a significant difference between the risk assessment and the type of pool management and also between gender and risk management operations. There is a significant relationship between risk management operations and rate of accidents and litigation[23]. Petrido[24] in his research concluded that the lack of safety in the infrastruction of sport facilities and also use of old and non-standard equipment, are the most important factors of injuries to athletes. In support of these findings, the results of Marshall *et alii*[25] also showed that the use of suitable equipment can prevent the onset of many sports injuries.

Thus, according to multiple severe sports injuries and litigation related to the neglect and procrastination of sports authorities and irreparable physical and psychological damage of some sports injuries

[19] E. HosseinPour, *Paper of Safety and Health of Sports Spaces and Schools*, in *Journal of Educational Psychology*, XI, 3, 2011.

[20] A. Farsi, *Check the status of Sport space security of country's schools*, cit.

[21] B. Izadi, *The risk management practices in public and private swimming pools of Tehran*, MA thesis Degree in physical education and sport management, Tarbiat Modares University, 2008.

[22] *Ibidem*.

[23] *Ibidem*.

[24] E. Petrido, J. Sibert, X. Dedoukou, I. Skalkidis and D. Trichopoulos, *Injuries in public and private playgrounds: The relative contribution of structural, equipment and human factors*, in *Acta Paediatr*. 95, 4, 2002, p. 495 s.

[25] W. Marshall, S. Loomis and S.E. Waller, *Evaluation of protective equipment for prevention of injuries in rugby union*, in *International Journal of Epidemiology*, 2005.

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and on the other hand, because of the direct involvement of school administrators and physical education teachers, in this study we have tried to investigate the effectiveness rate of various factors on the incidence of sports injuries and also condition of risk management in Iranian schools from the viewpoint of experts physical education teachers and school administrators due to their close relationship with the students and seeing their objective in order to take positive step in elimination of causes of dangers and appearance of damages according to the findings of the research, to identify and alert and also the authorities attention and those involved in school sports.

2. – 2.1. The present study was applied in terms of purpose and descriptive-survey in terms of method of data collection

2.2. The population consisted of Elite Teachers of Physical Education Participating in the scientific – Sports Olympiad (2016), (100 men and 100 women), which were due to the census sampling method, 200 people, physical education teachers participated in the study. The data collection tools was risk management Gray (1995)[26] questionnaires included 68 questions and run levels behaviors of risk management in the ten areas of This questionnaire consisted of 68 questions and assessed the implementation level of risk management practices in the ten areas included insurance (6 items), medical and health issues (14 items), safety equipment and facilities (10 items), regulations (2 items), the standard of care (4 items), transportation (5 items), supervision and training (7 items), and the legal aspects (7 items), archive records and information (5 items) and documentation of parental consent (3 items). The single-sample t-test and independent t-test was used for data analysis. The questionnaire was formed with Likert scores (from strongly agree, agree no comment, disagree and strongly disagree). In order to final implement, first original questionnaire was translated into Farsi, and then was translated into English by language specialist. In addition, translated version from Persian into English was matched with the original version and was ap-

[26] G.R. Gray, *Risk management planning: conducting a sport risk assessment to enhance program safety*, in *Journal of Physical Education, Recreation and Dance*, 62, 6, 1991, p. 29.

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proved. Before final implementation, content validity of the questionnaire was reviewed and approved by experts in sports science and reliability of questionnaire was obtained 0.74 in a pilot study involving 30 physical education teachers by Cronbach's alpha.

Statistical methods: in order to analyze research data, descriptive statistics including frequency, means, standard deviation and percentages were used in the form of tables and graphs. In inferential statistics also independent t-test was used to compare the mean. All statistical processes were conducted using SPSS software version 22 and the significance level of P 0.05.

3. Research findings showed that of the 96 patients who responded to the questionnaire (100 physical education teachers and 39 school principals), 100 participants (50%) were males and 100 participants (50 %) were female. 61 participants (80.5 percent) had a bachelor's degree and 29 participants (14.5 percent) had a master degree and 10 participants (5 percent) had a PhD degree. among the 200 participants that has coaching degree, 132 participants (66 percent) of them are between 10 – 15 years of coaching experience, 57 participants (28.5 percent) of them are between under 10 years of coaching experience and 11 participants (5.5 percent) of them are upper 15 years of coaching experience. To check the risk status management of the schools 10 components were evaluated that components included insurance, laws and regulations, standards of care, transportation, supervision and training, facilitation, legal aspects, medical issues, the consent records and is investigated in the tables below from the perspective of sport teachers and administrators and also males and females.

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Table 1 - *State of risk management in sports of schools (average assumptions*: 3)

| components | N | Average | Standard deviation | t | p |
|---|---|---|---|---|---|
| insurance | 96 | 2.79 | 0.691 | 2.12 | 0.032 |
| laws and regulations | 96 | 3.92 | 0.729 | 0.251 | 0.358 |
| standards of care | 96 | 2.88 | 0.687 | 2.39 | 0.048 |
| transportation | 96 | 2.55 | 0.721 | 2.81 | 0.039 |
| supervision and training | 96 | 3.11 | 0.593 | 1.68 | 0.65 |
| safety of equipment | 96 | 2.29 | 1.12 | 2.76 | 0.021 |
| legal aspects | 96 | 2.58 | 1.91 | 2.36 | 0.038 |
| medical issues | 96 | 2.71 | 0.681 | 2.71 | 0.042 |
| parental consent | 96 | 3.85 | 0.721 | 1.68 | 0.723 |
| Record keeping | 96 | 2.86 | 0.529 | 1.99 | 0.048 |

As Table 1 shows there was showed significant difference between majority of components with average assumptions of 3 ($p<0.05$).

Table 2 - *Comparison of mean in physical education teachers and school administrators in relation to the status of risk management in school sports*

| components | participants | N | Average | Standard deviation | t | p |
|---|---|---|---|---|---|---|
| insurance | administrators | 39 | 3.12 | 0.721 | 2.12 | 0.041 |
| | teachers | 57 | 2.76 | 0.956 | | |
| laws and regulations | administrators | 39 | 3.87 | 0.851 | 0.384 | 0.592 |
| | teachers | 57 | 3.94 | 0.849 | | |
| standards of care | administrators | 39 | 3.05 | 0.659 | 2.25 | 0.039 |
| | teachers | 57 | 2.65 | 0.721 | | |
| transportation | administrators | 39 | 3.57 | 0. 827 | 1.68 | 0.032 |
| | teachers | 57 | 2.44 | 0.759 | | |
| supervision and training | administrators | 39 | 3.12 | 0.562 | 0.157 | 0.621 |
| | teachers | 57 | 3.38 | 0.521 | | |

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*Segue:* Table 2 - *Comparison of mean in physical education teachers and school administrators in relation to the status of risk management in school sports*

| | | | | | | |
|---|---|---|---|---|---|---|
| safety of equipment | administrators | 39 | 3.18 | 1.12 | 2.02 | 0.047 |
| | teachers | 57 | 2.89 | 0.689 | | |
| legal aspects | administrators | 39 | 3.39 | 1.32 | 0.553 | 0.359 |
| | teachers | 57 | 3.88 | 0.821 | | |
| medical issues | administrators | 39 | 3.71 | 0.374 | 2.25 | 0.029 |
| | teachers | 57 | 2.92 | 1.54 | | |
| parental consent | administrators | 39 | 3.81 | 0.658 | 1.59 | 0.729 |
| | teachers | 57 | 3.99 | 0.712 | | |
| record keeping | administrators | 39 | 3.02 | 0.417 | 2.02 | 0.045 |
| | teachers | 57 | 2.81 | 0.559 | | |

As Table 2 shows there was no significant difference between the components of the laws and regulations, supervision and training, legal aspects and Parent consent from viewpoint of school administrators and physical education teachers ($p<0.05$).

Table 3 - C*ompare mean scores of females and males in relation to the status of risk management in school sports*

| **components** | **participants** | **N** | **Average** | **Standard deviation** | **t** | **p** |
|---|---|---|---|---|---|---|
| insurance | males | 42 | 2.93 | 0.58 | 2.05 | 0.042 |
| | females | 54 | 2.54 | 0.52 | | |
| laws and regulations | males | 42 | 3.67 | 0.78 | 1.78 | 0.058 |
| | females | 54 | 3.10 | 0.69 | | |
| standards of care | males | 42 | 2.24 | 0.65 | 2.01 | 0.048 |
| | females | 54 | 2.73 | 0.79 | | |
| transportation | males | 42 | 2.98 | 0.76 | 2.12 | 0.039 |
| | females | 54 | 2.55 | 0.81 | | |
| supervision and training | males | 42 | 3.60 | 0.70 | 1.69 | 0.49 |
| | females | 54 | 3.75 | 1.25 | | |
| safety of equipment | males | 42 | 2.86 | 1.15 | 1.72 | 0.65 |
| | females | 54 | 2.69 | 0.72 | | |

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*Segue:* Table 3 - C*ompare mean scores of females and males in relation to the status of risk management in school sports*

| | | | | | | |
|---|---|---|---|---|---|---|
| legal aspects | males | 42 | 2.79 | 0.76 | 2.09 | 0.043 |
| | females | 54 | 2.10 | 1.10 | | |
| medical issues | males | 42 | 2.72 | 0.62 | 2.23 | 0.030 |
| | females | 54 | 2.01 | 0.97 | | |
| parental consent | males | 42 | 3.80 | 0.66 | 1.85 | 0.52 |
| | females | 54 | 2.86 | 0.67 | | |
| record keeping | males | 42 | 2.94 | 0.71 | 1.24 | 0.24 |
| | females | 54 | 2.86 | 0.89 | | |

As Table 3 shows there was no significant difference between the components of supervision and training, safety of equipment and facilities, Parent consent and Record keeping in views of statistical sample of males and females ($p<0.05$).

4. Findings of present research showed that generally state of risk management in Iranian school sports, the components of insurance, medical issues and health safety of equipment and facilities, the standard of care, transportation, legal aspects, archive records and information have distance from the expected average and statistically there was observed significant difference between the assumed average (number 3) and acquired averages ($p<0.05$). It is worth mentioning that three components of safety of equipment and facilities with an average of 2.29, transportation with an average of 2.55 and respect for the legal aspects with an average of 2.58 have been allocated weakest scores in risk management of schools sport. Also three components of laws and regulations with an average of 3.92, Parent consent with an average of 3.85 and supervision and training with an average of 3.11 has been allocated best scores in risk management of schools sport. In regard to assessing of risk management component in schools findings of the research showed that in general, insurance status in the Iranian schools with an average of 2.89 is not desirable and is statistically different from expected average (mean 3). Also, there is statistically significant difference between viewpoint of administrators and sport teachers in insurance status of schools sports

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activities ($p<0.05$). So that the gained mean score in this component in terms of administrators, was 3.12, and in terms of physical education teacher, was 2.76. In the completed assessment of this issue and by referring of researcher to some schools and talking on the subject of insurance and reading documents with the participation of school administrators and physical education teachers separately, it seems that school administrators regarding the responsibility that have towards consequences of lack of insurance in their schools have tried to make the insurance situation seem better in school under his management, But physical education teachers due to their direct involvement with damages and costs caused by sports injuries to their athletes and inadequacy of insurance coverage of them, have had more realistic comment in this field. This finding is in line with the research results of Mozafari and Hasanpour[27], Elahizadeh (1392), Seyfali and Goudarzi[28], Najmi[29], Bing Feng[30], Yongly[31] and Wei[32]. These researchers concluded that athletes have few satisfaction from insurance costs, diversity of services, access to medical care and administrative processes of reception and medical examination in Iran and the athletic and accident insurance has not adequacy of possible medical expenses, is consistent and also the findings of Yongly[33] and Wei[34] showed that the laws and regulations of sports insurance in China is incomplete and legal strict system should be created about sport in-

[27] S. Mozafari, E. Hasanpoor, *Assess the satisfaction of athletes injured in the Hormozgan province of sports insurance*, in *Journal of Exploratory Studies in Law and Management*, 3, 1, 2015, p. 72 s.

[28] M. Seyfali, M. Goudarzi, *Evaluate sport managers' satisfaction of country's universities from service delivery of Federation of Sports Medicine to injured student athletes*, in *Journal of Sport Management*, 2, 2008, p. 246 s.

[29] R. Najmi, *Review insurance coverage of Iranian professional league players and compare it with the Japanese professional league*, Master's thesis, Payam Noor University Tehran, 2007, p. 53 s.

[30] Y. Bing-Feng, *Comparison of international sports insurance systems and enlightenment*, in *Journal of Wuhan Institute of Physical Education*, 43, 9, 2009, p. 34 s.

[31] S. Yongli, *Current situation and countermeasures of sports insurance development*, in *Journal of Insurance Studies*, 3, 2007, p. 13 s.

[32] M. Wei-min, *Foreign sports insurance system modes and their inspiration to China*, in *Journal of Physical Education*, 15, 7, 2008, p. 33 s.

[33] S. Yongli, *Current situation*, cit.

[34] M. Wei-min, *Foreign sports insurance system modes and their inspiration to China*, cit.

surance. Sport, especially championship sports are constantly pregnant to intrinsic or unexpected accidents, due to this issue procrastination or neglect because of insurance costs can not only bring irreparable financial and moral losses to school administrators and physical education teachers but also look to bring creation of onerous litigation. So it seems, according to the obtained results it is necessary to school administrators, physical education teachers and parents of children be sensitive about the issue of insuring their children and with appropriate knowledge have readiness to deal with possible injuries in sports. It should be noted that views of males and females of statistical sample of this research in relation to the insurance status was statistically different from each other and females had gained less average (2.54) than males (2.93) in this field, that it can be linked to more sensitive and microscopic of female administrators and physical education teachers that reported insurance status weaker.

Of other findings of present research can be said that generally situation of transportation of student athletes to the venue of sports events of schools with an average of 2.55 is not desirable in schools of the province and is statistically different from expected average (mean 3). While differences of school administrators and sport teachers' opinion in relation to this issue was statistically significant. So that the acquired scores in this component was 3.57 for managers, and 3.44 for physical education teachers, between male and female managers (2.55) and physical educators (2.98) was statistically significant difference. This finding is in line with the research results of Murray et al (2008) which showed that transportation of students to sports events is in very low levels, but is antithetic with the research findings of Keshkamat *et alii*[35] and Waitt[36]. Transportation of students to the venue of competitions out of school can be context of litigation arising from procrastination of administrators and physical education teachers. Therefore it seems that according to the obtained results about this component, authorities, especially school adminis-

[35] S. Keshkamat, J.M. Looijen and M.H. P. Zuidgest, *The formulation and evaluation of transport route planning alternatives: a spatial decision system for the Via Baltica project, Poland*, in *Journal of Transport Geography*, 17, 2009, p. 54 s.

[36] G. Waitt, *Social impacts of the Sydney Olympics*, in *Annals of Tourism Research*, 30, 1, 2003, p. 194 s.

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trators and physical education teachers on the subject of transportation of students to sports events with the appropriate decisions, including contracting with approved vehicles, attention to vehicle and driver health, ask for help from parents and other school staff at the time of presence of students teams in competitions, create preventative forecasts in probable accidents.

One of other findings of the present research was the issue of supervision and training as an effective component in risk management at school. Results showed that generally status of monitoring and training of student athletes in schools with an average of 3.11 is desirable. While there was observed no statistically significant differences between views of school administrators and sport teachers and also between views of female and male administrators and physical education teachers. This finding is correspond with research results of Ramezani *et alii*[37] and Bonyan *et alii*[38] and is incompatible with the research results of Foroughi pour *et alii*[39] that had declared that 62 percent of coaches are not familiar with regular visits and maintenance of sports equipment and monitoring the performance of athletes. One of the most important components affecting risk management that has preventive role in accidents and subsequent sports lawsuits, is accuracy, sensitivity and continuity in supervision and comprehensive training to the athlete students that seems statistical sample of research has acted appropriate in this field. Assessment of safety of school sports facilities is another component that was studied in assessment of risk management. Generally, the immune status of school sports facilities with an average of 2.29 is not desirable and with expected average (mean 3) is statistically different. While differences of opinion of school administrators and sport teachers in relation to this issue was statistically significant. So that the acquired

[37] A. Ramezani, A. Nazarian Madvani, *The relationship between safety and efficiency of sports facilities from the perspective of students with the prevalence of sports injuries*, in *Sports management Studies Quarterly*, 21, 2013, p. 194.

[38] A. Bonyan, M. Kashef, *The difference of low awareness and civic responsibilities of male and female coaches at sporting events*, in *Applied Research in Sport Management*, 4, 8, 2014, p. 90 s.

[39] H. Foroughi Pour, *Check the knowledge of educators, teachers and sporting director of Tehran with sports rights and provision of educational strategies*, MA thesis, Research Center of the Physical Education, 2004, *Abstract*.

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scores in this component was 3.18 for managers, and 2.89 for physical education teacher. But there was no statistically significant difference between the views of male and female managers (2.86) and physical educators (2.69). This finding was in line with research results of Farsi *et alii* (2002)[40], Hampel *et alii*[41], Mac Cormak *et alii*[42] and Jones *et alii*[43], Riva *et alii*[44], Crombie *et alii*[45], Macintyre and Ellaway[46] and Pascual[47]. These researchers said that not being safe the sports equipment and facilities is of the main problems of sports spaces. Farsi[48] in assessment of safety of equipment and sports spaces of schools of the country showed that interior spaces of sports grounds and condition of sports equipment used in the sport places and spaces are at a low level in terms of safety. School sports equipment and facilities have a significant role in determining the safety of sports activities, and any inattention to quality, longevity and safety of them can cause risk. Therefore, it is essential to school administrators and physical education teachers to be absolutely alerted in the supply, maintenance and use of them and pay sensitivity carefully and especially to standards of any instrument or athletic location.

Of other evaluated factors in present study can point out legal knowledge of school administrators and physical education teachers

[40] A. Farsi, *Check the status of Sport space security of country's schools*, cit.

[41] S. Hampel, N. Owen and E. Leslie, *Environmental factors associated with adults' participation in physical activity: a review*, in *American journal of preventive medicine*, 22, 2002, p. 188 s.

[42] G. McCormack, B. Giles-Corti, A. Lange, A. Smith, K. Matric and T. Pikora, *An update of recent evidence of the relationship between objective and self-report measures of the physical environment and physical activity behaviours*, in *Journal of Science and Medicine in sport*, 7, 2004, p. 81 s.

[43] A. Jones, C. Benthan, C. Foster, M. Hillsdon and G. Panter, *Obesogenic environment: Evidence review. Foresight Tackling Obesities*, in *Future choices project long science review*, London, 2007.

[44] M. Riva, L. Gauvin, and L. Richard, *Use of local area facilities,* cit.

[45] I.K. Crombie, L. Irvine, B. Williams, A.R. McGinnis, P.W. Slane, E.M. Alder and M.E.T. McMurdo, *Why older people do not participate in leisure time physical activity: A survey of activity levels. Beliefs and Deterrents*, 33, 2004, p. 287 s. Retrieved from the world wide web (2006): *ageing.oxfordjournals.org*.

[46] S. Macintyre, A. Ellaway, *Social and local variations in the use of urban neighbourhoods: a case study in Glasgow*, in *Health & Place*, 4, 1998, p. 91 s.

[47] Pascual *et alii*, *The association*, cit.

[48] A. Farsi, *Check the status of Sport space security of country's schools*, cit.

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in risk management. In general, condition of this component with an average of 2.58 is not desirable and with expected average (mean 3) is statistically different. While differences of opinion of school administrators and sport teachers in relation to this issue was not statistically significant. But there was no statistically significant difference between the views of male and female managers (2.10) and physical educators (2.79). This finding is consistent with research results of Aghayi Nia[49], Bonyan *et alii*[50], Nafziger[51] and Seyyedlar (2006) and is inconsistent with research results of Foroughi Pour *et alii*[52] and Adarm[53]. Seyyedlar study results (2006) showed that many of athletic directors are not aware of legal ramifications of accidents generated in sport facilities, while existence of any factor that endanger health of sports users can have prosecution. In study of Soltani and Ezzatollahi[54] results indicate that a small percentage (17%) of coaches are familiar with the topics of sports rights. Bonyan and *et alii*[55] in their findings concluded that knowledge of coaches and athletic directors of sport rules also indicate that most of legal issues and problems in the sports field is associated with lack of awareness of sports coaches and managers. Legal knowledge and familiarity with the general and sport rules and regulations has an invaluable role in special attention of school administrators and physical education teachers to conduct sporting events. According to the obtained results forming Legal working groups and developing preventive and warning guidelines and procedures for the sport authorities is essential.

Medical issues and athletes' health is one of the most important elements affecting risk management in physical activities, especially sporting events. Researchers in the evaluation of this component

[49] H. AghayiNia, *Sports Law*, Mizan publication, Seventh Edition, 2007.

[50] A. Bonyan, M. Kashef, *The difference of low awareness and civic responsibilities of male and female coaches at sporting events*, cit.

[51] J. Nafziger, *International sports law: A replay of characteristics and trend, in American Journal of international sport law,* 86, 2010, p. 489.

[52] H. Foroughi Pour, *Check the knowledge of educators,*

[53] M. Adarm, *Investigate and compare the level of knowledge of coaches of four selected sports fields of Ahvaz with legal aspects of the sport*, cit.

[54] N. Soltani, M. Ezzatollah, *Prevalence of sports injuries*, cit

[55] A. Bonyan, M. Kashef, *The difference of low awareness and civic responsibilities of male and female coaches at sporting events*, cit.

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reached to the conclusion that condition of medical issues and the health of athletes with an average of 2.71 are not desirable and with expected average (mean 3) has statistically significant difference. While difference among school administrators' opinion with an average of 3.71 and against physical education teachers with an average of 2.92, difference between females opinion with an average of 2.01 against male with an average of 2.71 was statistically significant. This finding is consistent with research results of Youssefi *et alii*[56], Carter e Muller[57], Emerich and Nadolska[58], and is incompatible with research results of Finch and Hennessy[59], Hsiao[60], Zazyrin[61], Doosti *et alii*[62], Izadi *et alii*[63] and Kharkan *et alii*[64]. Since having a medical health certificate and archive a copy of it in the school helps sport authorities in critical situations, is essential school administrators and physical education teachers for the prevention of unintentional injuries caused by ignorance from their student athletes physical condition, besides requirement for students to refer to reliable physician of the Department of Education or school and receive a certificate of health, especially cardiovascular health, to sensitively pay special attention to all medical documentation of student athletes and any signs of re-

[56] S. Youssefi, P. Zaki and I. Sharifian, *Evaluation of knowledge of athletic trainers about first aid to the injured athlete in the fields of sport*, *Applied Research in Sport Management*, 2 (PA-5), 2013, p. 162 s.

[57] A.F. Carter, R. Muller, *A survey of injury knowledge and technical needs of junior Rugby Union coaches in Townsville (North Queensland)*, in *Journal of Science and Medicine in Sport*, 11, 2008, p. 167 s.

[58] K. Emerich, E. Nadolska-Gazda, *Dental trauma, prevention and knowledge concerning dental first-aid among Polish amateur boxers*, in *Journal of Science and Medicine in Sport*, 2012, *http://dx.doi.org/10.1016/j.jsams.2012.10.002*.

[59] F.C. Finch, M. Hennessy, *The safety practices of sporting clubs/centers in the city of Hume*, in *Journal of Science and Medicine in Sport*, 3, 1, 2005, p. 9 s.

[60] R. Hsiao, *Analysis of risk management practices and legal issues in college natatoriums in Taiwan*, in *Journal of aquatic research and education*, 2007, p. 302 s.

[61] T. Zazyryn, C. Finch, and A. Garnham, *Is safety a priority for football clubs?*, in *Journal of Sport Health*, 21, 2001, p. 19 s.

[62] M. Doosti, *Assessment of risk management in Iran football stadiums*, MA thesis, Tehran University, 2008.

[63] B. Izadi, *The risk management*, cit.

[64] K. Kharkan, M. H. Razavi and S. E. Hosseini, (2009), *A Survey of Risk Management (risk) in pools of Mazandaran*, MA thesis, University of Mazandaran, 2009.

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peated physical weakness in the sports activities besides informing the parents, be referred to a specialist.

Sports record keeping of student athletes helps effectively in managing the risks of lack of awareness of physical education teachers in the use of students in sports teams and on the other hand cause reduction in costs caused by negligence of school. Assessment of this component in schools showed that condition of sport Record keeping of student athletes with an average of 2.86 is not desirable and with expected average (mean 3) has statistically significant difference. While difference among opinions of school administrators with an average of 3.02 and against physical education teachers with an average of 2.81 was statistically significant, but between the views of male and female was not statistically significant. This finding is consistent with research results of Kharkan *et al* (2009)[65], Doosti *et alii*[66], Izadi *et alii*[67], Zazyrin *et alii*[68] and Styles[69]. Physical education teachers and school administrators should attempt to this important issue by providing unified forms and folders for sporting Record keeping and become aware of the health and fitness documentation of their students during the formation of sports teams and even physical education classes at the beginning of the school year.

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Hosain Hasan Baigi

*Abstract*

Sport, as a social phenomenon can be affected by risk factors because

[65] K. Kharkan *et alii*, cit.

[66] M. Doosti, *Assessment of risk management*, cit.

[67] B. Izadi, *The risk management practices in public and private swimming pools of Tehran*, cit.

[68] T. Zazyryn *et alii*, *Is safety a priority*, cit.

[69] A.E. Styles, *The development of risk management recommendations and guidelines for a university recreational facility*, Doctoral dissertation, Kent State University of Ohio, copyright by proQuest information and learning company, 2002.

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of various reasons and have problems for society and the country. So sport community is not away from the problems and dangers that threaten it and may eventually cause crisis to this active and dynamic community.

The aim of this study was to assess Risk management in sports activities of Iranian schools. The Method was descriptive that was carried out to survey form. The statistical population consisted of Elite Teachers of Physical Education Participating in the scientific – Sports Olympiad (2016), (100 men and 100 women), which were due to the census sampling method, 200 people, physical education teachers participated in the study. The data collection tools was risk management Gray[70]. This questionnaire consisted of 68 questions and assessed the implementation level of risk management practices in the ten areas, included insurance (6 items), medical and health issues (14 items), safety equipment and facilities (10 items), regulations (2 items), the standard of care (4 items), transportation (5 items), supervision and training (7 items), and the legal aspects (7 items), archive records and information (5 items) and documentation of parental consent (3 items). The one-sample t-test and independent t-test was used for data analysis. The results show that the three components of risk management, included sports safety equipment and facilities, transportation and compliance with legal aspects were worse and the three components of compliance with laws and regulations, parental consent and supervision and training best to allocate (p )0/05). It Recommended that a risk management plan be developed at the level of education office.

[70] G.R. Gray, *Risk management planning*, cit., p. 29.

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# Prioritizing factors affecting on professional ethics in selected Iranian sports organizations

SUMMARY: 1. Introduction. – 2. Research Methodology. - 2.1. Statistical population, sample and sampling method. - 2.2. Statistical methods and methods of data analysis. – 3. Research findings. – 4. Discussion and conclusion.

1. Ethics is one of the important topics that have attracted the attention of researchers, organizations and governments. By addressing the issue of ethics, they intend to explain it and improve the performance indicators of employees and government agencies. In other words, the importance of examining ethics is that, if the ethical values are not internalized in a society and its organizations, not the law, nor the efforts and government measures, and other devices and mechanisms will not function and be effective.

Ethics is the necessity of a healthy society and due to its individual, organizational and social positive consequences have always been the source of attention of scientists, educators and managers of organizations and communities in order to work to maintain and promote it[1]. Many of the behaviors and decisions of employees and managers in today organizations are influenced by their ethical values (Schulert *et al*, 2008).

According to Conaock and Johns[2] morality is related to fairness, truth, and integrity, deciding what is good and what's wrong, and the activities and rules that shape responsive behavior among indi-

[1] B. REZAEI MANESH, *Investigating the Ethical Infrastructure in the Public Services Section of Iran*, Ph.D., Allameh Tabataba'i University, Iran, Tehran, 2004, p. 56 s.

[2] M. CONAOCK, L. JOHNS, *Total Quality Management and its humanistic Orientation towards Organizational Analysis*, in *The TQM Magazine*, 10, 1998, 40293- 301, p. 493 s.

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viduals and groups. Morality is defined as a system of values, beliefs, principles, basics, dues, and norms, on the basis of which the good and the organizations' definitions are identified and the bad action is distinguished from good[3]. Ethics is the inseparable part of human life. Regardless of race, culture, politics and social class, ethical issues play an important role in human behavior. According to Arnold[4], ethics means that we also accentuate about others as well as distinguish between good and bad, and right and wrong.

Morality is an important as a regulator of human relationships. Because morality is an internal system, without the need for external levers, it is able to guarantee the moral functions of the employees and create an ethical system. The role of ethics in actions and behaviors, in decisions and choices, in encounters and communications is crucial. Hence, ethical issues in management and organizations have become one of the major topics of management. Moralizing of organizations lead to increased efficiency and effectiveness, which are both fundamental to productivity. Observance of ethical principles in the workplace has greatly functional and ethical benefits from leaders and managers[5].

If an organization is committed to ethical values, the human resources of that organization will be loyal to organizational values and seek to maintain membership in that organization and will tend to work beyond the tasks specified in the job description framework with all its endeavors.

In addition, the increasing complexity of organizations and the increase of unethical, illegal and irresponsible work in organizational environments have focused managers' attention on professional ethics and ethical management. The professionalism of an organization, community, or group depends on the collective effort of individuals to adhere to common professional principles and the pursuit of ever more professional development, rather than to depend on full-time activity of peoples to various benefits, including economic benefits.

[3] S.M. Alvani, *Ethics and Management*, in *Management Studies Quarterly*, 42-41, 2004, p. 200.

[4] P.J. Arnold, *Sports and moral Education*, in *Journal of Moral Education*, 23, 1994, p. 75 s.

[5] S.M. Alvani, *Ethics and Management*, cit.

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According to Airaksinen[6], professional ethics are a set of standards and rules that apply to the behavior of all members of a profession. Nowadays, professional ethics is a competitive advantage in organizations. Professional ethics is one of the new branches of ethics that seeks to answer the ethical issues of various profession[7]. The purpose of professional ethics is the moral responsibility that a person has in his occupation. Professional ethics in the organization is able to help the organization at large in reducing tensions and success in achieving its goals effectively. In other words, professional ethics is a set of accepted ethical actions and responses that are mandated by professional organizations or assemblies to provide the most desirable social relationships for their members in the accomplishment of their professional duties[8]. Professional ethics refers to the moral responsibility of a person in a job.

Since each organization is a unique society, the need to observe and promote the factors affecting professional ethics is felt more.

Different ethical behaviors of individuals as employees of the organization can be analyzed in a linear spectrum, one in the head of which is the administrative health and the other head is administrative corruption. The level of administrative health plays an important role in the success of the organization in carrying out missions, implementing of strategies and plans, and ultimately achieving organizational goals.

Today, with the expansion of human societies, the need for civic organizations is felt more. One of these organizations is sports organizations.

Sports have the ability to play role in most political, social, economic, cultural and scientific subjects. In fact, in the present world, there are fewer phenomenons that have such character and ability[9]. Although the concept of morality is often common concept, one of the special fields of ethics application is sports. Traditionally, sports

[6] T. Airaksinen, *Professional ethics*, in *Encylopedia of Applied Ethics*, 3, 1998, p. 671 s.

[7] M. Hartog, D. Winstanley, *Ethics and Human Resource Management*, in *Professional Development and Practice*, 6, 1998.

[8] F. Ghara Maleki, *Organizational ethics, productivity and HR studies institute*, Tehran, Saramad, 2009.

[9] T. Nedaei, S.M. Allavi, *Ethics in Exercise with a Fair Play Approach*, in *Quarterly Journal of Qom University*, 10, 38, 2008.

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are a sign of growth and evolution, and thus it is naturally blended with morality.

Today, the place of sports among the countries of the world has a special feature and it is presented as a cultural and social phenomenon and its range has come from individual domains to social domains. For this reason, it is necessary to study the sports and its cultural and social dimensions. One of the important social and cultural dimensions in sports organizations is ethics and attention to ethical issues.

Sports organizations are one of the most basic infrastructures and one of the most important institutions for promoting sports goals, especially professional sports.

Compliance with professional ethics in these organizations is also one of the most important ways to achieve success and to advance goals[10]. Therefore, the first step in achieving these objectives is to understand the concept of professional ethics and to identify the factors affecting the professional ethics of employees in sports organizations.

The most important research on the necessity of professional ethics in sports organizations are:

1) Shagie *et alii* in a paper titled «*The impact of individual, political, legal, and economical Iranian football environments on professional ethics decision making*»[11], showed that there is no significant relationship between perceived perception of players and their ethical decision making. However, except the perception of political environment, three perceptions of economic, individual and legal environments had an effective role in explaining the variance of environmental perception of Iranian professional soccer players.

2) Rudnika emphasizes on the individual (family) environment, ethical and professional atmosphere of sports, and ultimately the degree of legalization on moral decision-making[12].

[10] J.O.I. Desensi, T. Rosenberg, *Morality in Sports Management*, Translation by Seyyed Mohammad Hosein Razavi and Mohsen Bollywood, Tehran 2005.

[11] R. Shajie, H. Kozechian, M. Ehsani and M. Amiri, *The Impact of Individual, Political, Legal, and Economical Iranian Football Environments on Professional Ethics Decision Making of the Professional Players,* in *Applied Researches of Management and Life Sciences in Sport*, 3, 2012, p. 19 s.

[12] E.A. Rudnicka, *Development and Evaluation of a Model to assess Engineering*

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3) Sharifzadeh's research results (2012) showed that organizational factors, the objective environment of organization and the manpower characteristics of organization effectively affect on ethics and working relationships of the employees.

Regarding the nature of sports and its stressful environment, it is necessary for managers of sports organizations, like managers of other organizations, to be aware of the degree of ethics in these organizations. Also, it is necessary, the managers of sports organizations, to identify the barriers of regard ethics in sports organizations, if possible. Therefore, the main issue of the present study is which factors influences the professional ethics in Iranian sports organizations.

2. Methods: this research was descriptive study and applied in terms of purpose.

2.1. The statistical population of this study was all managers and deputies of the Ministry of Sports and Youth and Sports Federations of the Islamic Republic of Iran (N=110).

Regarding the size of the population, 90 people were selected randomly that completed the research questionnaire. Finally, 80 questionnaires were returned to the researcher.

A professional ethics researcher-made questionnaire was used to collect data. For this purpose, the most important factors affecting professional ethics in sports organizations were found by referring to books and researches, as well as interviewing with experts of professional ethics in sports.

Based on theoretical foundations, effective factors on professional ethics were categorized into three groups of individual, organizational and environmental factors.

Meanwhile, in order to confirm the formal and content validity, the questionnaire was distributed to 12 specialists of sports management. After ensuring the content validity, to verify the reliability, the questionnaire was distributed among 30 managers of the Ministry of Sports and Youth and Sports federations. The Cronbach's alpha co-

*Ethical Reasoning and Decision Making*, A Thesis in Doctor of Philosophy, University of Pittsburgh, 2009.

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efficient was 0.78. This is an indication of the reliability of the research questionnaire.

2.2. The data were analyzed by using descriptive statistics and inferential statistics.

In descriptive statistics, relative frequency, mean and standard deviation were used and in inferential statistics, one-sample t-test and Friedman rank test was used.

3. One-sample T test was used to determine the status of professional ethics of managers and deputies of the Ministry of Sports and Youth and Sports Federations of the Islamic Republic of Iran.

Based on the results of this test, which is presented in «Table 1», the status of professional ethics of managers and deputies of the Ministry of Sports and Youth and Sports Federations of the Islamic Republic of Iran was favorable situation.

In other words, professional ethics had a desirable situation, with a certain degree of satisfaction (compared to the average score of 2.50 from the perspective of experts).

Table 1 - *T-test results for determining the status of professional ethics*

| Test Value = 2.5 | | | | | |
|---|---|---|---|---|---|
| **Variable** | **Mean & standard deviation** | **t** | **DF** | **Sig.** | **mean differences** |
| Professional Ethics | 0/33676 ± 3/4916 | 26/825 | 82 | 0/000 | 0/99157 |

Friedman Rank Test was used to prioritize the factors affecting professional ethics of managers and deputies of the Ministry of Sports and Youth and Sports Federations of the Islamic Republic of Iran.

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Table 2 - *Friedman Ranke Test Results to Prioritize Factors Affecting Professional Ethics*

| Row | Variable | Average rating | rate | $X^2$ | DF | Sig. |
|---|---|---|---|---|---|---|
| 1 | Individual factors | 2/05 | 2 | | | |
| 2 | Organizational factors | 2/60 | 1 | 68/417 | 2 | 0/000 |
| 3 | Environmental factors | 1/34 | 3 | | | |

Based on the results presented in Table 2 and based on the results of the Friedman rank test, ranking of the factors affecting professional ethics showed that organizational factors have the first rank, individual factors have the second rank and environmental factors have the third rank ($P<0.05$).

4. In the current context, failure to comply of certain ethical standards has created many concerns in governmental and nongovernmental sectors.

The collapse of behavioral standards in the public sector has forced researchers to look for theoretical foundations in this regard. Therefore, one of the main concerns of efficient managers at different levels is how to create suitable fields for human resources working in all professions so that they work with a sense of responsibility and commitment to issues in their society and profession, and they had considered ethical principles governing their occupation and profession.

Therefore, the purpose of this study was prioritizing factors affecting on professional ethics in selected Iranian sports organizations

The results of this study showed that in the field of professional ethics in sports organizations of Iran, organizational, individual and environmental factors are effective.

Regarding the effect of the organizational factor, this factor is affected by many factors, such as cultural condition and environment that governing the Iranian sports organizations, the rules and lungs governing, how individuals interact and behave in the organization, how to manage and monitor and plan and so on.

Therefore, considering the effect of organizational factors on the

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professional ethics of sports managers, it can be said that ethical functioning of Iranian sports managers is an institutionalized culture in organizations and is dependent on organizational conditions governing sports organizations in Iran.

This finding is consistent with Dehghani's results (2008) that linked inter-organizational factors such as organizational culture in promoting ethics in the organization[13].

The other result of this study is the effect of individual factors on professional ethics in managers of Iranian sports organizations. In explanation of this result, it should be said that the individual factors that are generated by feelings, thoughts, attitudes and beliefs of individuals have also been influenced on professional ethics in sports managers' organizations in Iran. In fact, since the Iranian society is a religious community and there is an emphasis on observance of the ethical principles of Iranian religion, therefore, observance of religious beliefs in ethical functioning of individuals is very natural. Thus, one of the reasons for the ethical behaviors of the managers in Iranian sports organizations are due to the cultural-social and ethical conditions that dominated the Iranian society.

The last factor affecting professional ethics in managers of Iranian sports organizations is the environmental factor. This factor, deals with political and economic issues. In fact, after organizational and individual factors, the political and economic individuals' conditions, as well as the political and economic conditions of Iranian society also affect the process of ethical decision making by managers in sports organizations.

In addition to technology, the importance and priority of security and justice, educational programs and education are among the factors that affect the ethical behavior of employees in Tavallaee's research[14].

Maryam Mokhtari Dinani

[13] E. Dehghani, *Factors related to promoting professional ethics*, in *SSO*, MSc thesis, Allameh Tabatabei University, 2008.

[14] R. Tavallaee, *Factors affecting employees ethical behavior*, in *Organization, police HRD scientific and promotional seasonal magazine*, 25, 2010.

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*Abstract*

Ethics is one of the important topics that have attracted the attention of researchers, organizations and governments. Since each organization is a unique society, the need to observe and promote the factors affecting professional ethics is felt more. Therefore, the main issue of the present study is which factors influences the professional ethics in Iranian sports organizations. The statistical population of this study was all managers and deputies of the Ministry of Sports and Youth and Sports Federations of the Islamic Republic of Iran (N=110). Regarding the size of the population, 90 people were selected randomly that completed the research questionnaire. Based on theoretical foundations, effective factors on professional ethics were categorized into three groups of individual, organizational and environmental factors. The data were analyzed by using descriptive statistics and inferential statistics. In descriptive statistics, relative frequency, mean and standard deviation were used and in inferential statistics, one-sample t-test and Friedman rank test was used. Based on the results of one-sample t-test, the status of professional ethics of managers and deputies of the Ministry of Sports and Youth and Sports Federations of the Islamic Republic of Iran was favorable situation. Also, ranking of the factors affecting professional ethics showed that organizational factors have the first rank, individual factors have the second rank and environmental factors have the third rank.

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# Some Legal Aspects of Fighting Doping in Sport

SUMMARY: 1. Doping and its definition. – 2. The case of Russian Athletes before the 2016 Rio de Janeiro Olympic Games. – 3. Views on sanctions against Russian athletes. – 4. The way forward – potential anti-doping policies of the IOC. – 5. Conclusion.

1. If there is anything that upsets the general and also the professional public in the field of sport, it is certainly the doping scandals, as they take the credibility away from sports competitions and sports results. Doping is an issue that most people believe they are very knowledgeable about, but in fact, due to its complexities, many people know very little about it. Even the list of banned substances, created and continuously altered by the World Anti-Doping Agency (WADA) is so long that very few people know it in its entirety, but it is even more difficult to establish which foods, drinks, drugs and food supplements contain elements of performance enhancing drugs. I served the President of the Anti-Doping Tribunal for the International Ski Federation (FIS), which heard the case of the well-known Austrian skier Hans Knaus, the recipient of a medal from the Olympic Games[1] and World Championships, who used food supplements of an American manufacturer, whose information leaflet (declaration) gives no information about the fact that the supplements contained doping substances. Even though the skier was not aware of this, he was sanctioned, and forced to end his sporting career.

The controversial nature of doping is reflected in its definition in the 2015 World «Anti-Doping Code» adopted by the World Anti-Doping Agency (WADA) on 15 November 2013 in Johannesburg in

[1] Silver medal in giant slalom in Nagano in 1998.

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South Africa[2]. It is an amended and adapted version of the World «Anti-Doping Code» that was initially passed in 2003 and came into effect in 2004. The matter is also regulated by the International Convention against Doping in Sport[3], which was passed by the UNESCO General Conference on 18 October 2005 in Paris.

In principle, it is necessary to agree with the definition of the aims of the World "Anti-Doping Code" and the World Anti-Doping Program, as well as with the basic reasons for the World "Anti-Doping Code"[4]. Essential statement of the Code is that doping is fundamentally contrary to the spirit of sport. The definition of doping in the Code is insufficient because it is mainly legal and bureaucratic.

The following definition of doping can be found in Article 1 of the World "Anti-Doping Code": «Doping is defined as the occurrence of one or more of the anti-doping rule violations set forth in Article 2.1 through Article 2.10 of the Code. The aim of Article 2 of the Code is to specify the circumstances and conduct which constitute anti-doping rule violations. Hearings in doping cases will proceed based on the assertion that one or more of these specific rules have been violated. Athletes or other Persons shall be responsible for knowing what constitutes an anti-doping rule violation and the substances and methods which have been included on the Prohibited list». Violations of anti-doping rules are listed in Articles 2.1 through Article 2.10. The provision in Article 2.1, which defines the responsibility of the athletes, is especially important. Thus, Article 2.1.1 states that «it is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, Fault, negligence or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping rule violation under Article 2.1».

[2] World «Anti-Doping Code», available at *www.wada-ama.org*.

[3] Mednarodna konvencija proti uporabi nedovoljenih snovi v _portu – MKUNSP (The Official Gazette of the Republic of Slovenia, No. 113/2997, 11th December 2007).

[4] Both aims «to protect the athletes' fundamental right to participate in doping-free sport and thus promote health, fairness and equality for athletes worldwide» and «to ensure harmonized, coordinated and effective anti-doping programs at the international and national level with regard to detection, deterrence and prevention of doping».

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A comment to the Article in question furthermore explains that a violation of an anti-doping rule violation is committed under this Article «without regard to an Athlete's Fault». In various decisions, the International Court of Arbitration for Sport (CAS) has referred to this rule as «Strict Liability». «An Athlete's Fault is taken into consideration in determining the Consequences of this anti-doping rule violation under Article 10. This principle has consistently been upheld by CAS».

In this context, it is necessary to draw attention to the attitude towards the standard of proof. Since it is the personal duty of every athlete to prevent prohibited drugs from entering his or her body, it is not necessary to prove the athlete's intent or knowing use of the prohibited substance to establish a violation of anti-doping rules. The proof of intent is necessary only in the test of prohibited substance use. From this point of view, this is a case the so-called objective responsibility of the athlete, which is contrary to the civilizational norms in criminal and «quasi criminal» procedures, which anti-doping cases clearly are. Thus, in anti-doping cases the athlete is almost always – and *a priori* – guilty. However, it is very difficult to prove –simultaneously or at a later time – the involvement of all those that were part of the «doping subculture», *i.e.*, those providing the athletes with doping substances and enabling their use, often without the athlete's knowledge or consent. WADA and the International Olympic Committee (IOC) invented a term for other individuals involved in the use of doping substances, entourage[5], which is used in almost all languages, and means in practice those who are very responsible, both morally and legally, for anti-doping violations, but are almost never sanctioned. Athletes cannot and should not be the only ones responsible for doping offences[6]. As it happens athletes are always responsible. The others, who represent a very essential part of the so called doping subculture- producers, pushers, doctors, physiotherapists, team leaders, coaches and all the others are seldom being investigated. From my point of view this situation should be studied

[5] French for company, companions.

[6] «Where an athlete cannot prove source it leaves the narrowest of corridors through which such athlete must pass to discharge the burden which lies upon him». Cfr. also CAS 2016/A/4534.

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much more carefully and everyone who is found guilty in a correctly led legal procedure should be punished. So, not only athletes but also the whole entourage should be regarded and treated in the same way as athletes. This is a basic request for justice and a precondition for more efficient fight against doping. Consequently, I agree with the legal position of the President of the International Olympic Committee, Dr Thomas Bach, that the philosophy of the International Olympic Movement should be changed for the credibility of sports competitions and athletes. «The Olympic Movement is all about the clean athletes. They are our best ambassadors, they are our role-models, they are our treasure. Therefore we have first and foremost to protect the clean athletes. We have to protect them from doping, match-fixing, manipulation and corruption»[7]. At the same time, Dr. Bach also highlighted that while it is extremely important to catch cheats, it is even more important to protect clean athletes.

Doping involves boosting and enhancing the abilities of athletes artificially chemically, pharmacologically, genetically or by using banned methods. Doping is cheating, because athletes that use doping gain prominent advantages by being able to achieve greatly superior results than they would without using doping substances. In addition, doping has been scientifically proven to have harmful health effects. Even though there is no doubt that doping is banned, harmful and should be opposed, ideas on and approaches towards it differ. There are still very strong initiatives for international sport to be completely dedicated to fighting doping, and therefore no longer be based on the principle of clean athlete protection.

2. The above-mentioned initiative was first formed in 2015 in the report of a special WADA commission led by Canadian lawyer, Richard Pound, the first President of WADA and former President of the International Olympic Committee. In his report published on 9 November 2015, which had been requested by WADA, Pound accused the Russian Federation of systematically violating the anti-doping rules and carrying out state-sponsored doping, and demanded strict sanctions against it. A key feature of the procedure was the

[7] Dr Thomas Bach's speech at the 127th Meeting of the International Olympic Committee in Monaco on 7 December 2014.

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testimony of Grigory Rodchenkov, former Director of the Moscow Anti-doping Laboratory (RUSADA), who had fled Russia for the United States. The interview was first published in «The New York Times»[8], but it also received great attention throughout Europe, above all in German press. Following Pound's report, an investigation into the matter at the instigation of WADA was carried out by Canadian professor, Richard McLaren[9]. His findings, published in two reports, were also based Rodchenkov's testimony and some forensic investigations, but with little or no co-operation from the Russian side. The findings were extremely troubling for Russian sport, although the basic charges kept changing, and no irrefutable evidence for them was provided. Here, I am focusing above all on the charge of state-sponsored doping that was later changed to the charge of institutional conspiracy. However, recently, there has been a gradual shift back to the former allegation. The results and the measures that followed isolated the Russian Federation and limited the performances of its athletes at the most-top world competitions. The Russian doping agency and entire parts of Russian sport were proclaimed non-compliant with the World "Anti-Doping Code" by WADA. As a consequence, Russian athletes were banned from competing in the 2016 Olympic Games in Rio de Janeiro, Brazil[10], and Russian Paralympic Team was banned from competing in the Paralympic Games in the same city.

However, the story is far from over, since the IOC established two commissions with the task to examine the current state of affairs and suggest measures to be taken. The first commission is led by the IOC member Denis Oswald from Switzerland. The task of the commission is to check the charges relating to the manipulation of samples and to re-examine the samples of Russian athletes at the London Olympic Games. The second commission is led by a member of the IOC ethic commission and former President of the Swiss Confederation, Samuel Schmid. The task of the second commission

[8] Cfr. *Even With Confession of Cheating, World's Doping Watchdog Did Nothing*, article published in «The New York Times» on 16 June 2016, at *www.nytimes.com/2016/06/16/sports/olympics/world-anti-doping-agency-russia-cheating.html* (Accessed on 14 September 2017).

[9] Both reports from 2016 are available on Wada webpage (*www.wada-ama.org*).

[10] Cfr. CAS 2016/A/4703; *Lyukman Adams et al v. IAAF* dated 24th October 2016.

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is to determine whether there was institutional conspiracy, and whether Russian athletes co-operated with representatives of the Russian authorities, above all the Ministry of Sport and the Russian secret service (FSB). The findings of both commissions will be prepared in December of 2017, therefore, the measures of the IOC that will follow are not yet known.

On the other hand, the content of the two interim reports submitted by Samuel Schmid and Denis Oswald at the 130th Meeting of the International Olympic Committee in Lima, Peru, 12-16 September 2014 is known. While Schmid wrote in his report that the work is not over yet, and that he can provide no details, including details on the names of the persons who had been questioned, because this would jeopardize the integrity of the investigation, Oswald was more concrete, and provided the number of anti-doping rule violators from Bejing, London and Sochi. It is interesting to note that in addition to individual cases, over 10 violations with positive samples have been discovered from the states of Kazakhstan, Belarus and Ukraine, as well as the Russian Federation. The procedures are very complicated, because when a violation is established, the athlete is questioned, and temporarily suspended, and often the case is brought before the International Court of Arbitration for Sport in Lausanne. The true sanctions within the jurisdiction of individual international Olympic sports federations follow later. In most cases this order of events has not yet been completed, so it is not to talk about final statistical data and the extent of the problem.

Oswald expects final decisions on Russian doping cases within a month or two before the Winter Olympic Games in PyeongChang in South Korea, which will be held in February 2018. However, speakers at the International Olympic Committee session in Lima have condemned the pressure from the seventeen national anti-doping agencies that had issued a public appeal for immediate sanctions against the Russian Federation. The general opinion, expressed most directly by the IOC member and WADA President, Sir Craig Reedie, was that this was a case of exerting unfounded pressure on decision-making at a time when the investigation is not yet completed, and that any sanction would be premature and unlawful.

In the meantime, samples of many athletes, above all Russian participants in the Olympic Games, have been re-examined. Some of the

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athletes have already been sanctioned, and some medallists have been stripped of their Olympic medals. While none of the Russian athletes had tested positive in the 2012 London Olympic Games, later tests showed positive results for at least 11 athletes[11]. So far so good, since the principle of zero tolerance towards doping requires that all cases of anti-doping rule violations should be discovered and systematically sanctioned.

Yet the above-mentioned policy of Russian Federation athlete isolation and collective sanctions against these athletes, regardless of whether their individual responsibility or fault had been established, adopted by the IOC, diverges greatly from the principle of clean athlete protection.

Although the President of the International Olympic Committee, Dr Thomas Bach, has on several occasions spoken convincingly on individual justice, the IOC later adopted the position that the decision on the eligibility of Russian athletes for the Rio de Janeiro Olympic Games and for their participation in other major international sporting competitions should be transferred to international Olympic sports federations. While the majority of associations introduced no obstacles for Russian athlete participation in the 2016 Rio de Janeiro Summer Olympic Games, the «International Association of Athletics Federations» (IAAF), led by Lord Sebastian Coe from the United Kingdom, decided that Russian athletes cannot compete in the Olympic Games under the Russian flag. A few exceptions were made following a complicated procedure (based on international doping control results), that made it possible for some Russian athletes to compete as neutral athletes. The anti-doping rule violations proved so far are, in fact, quite grave and numerous. All those responsible for them must face the consequences. The athletes and all those involved must receive suitable regulatory sanctions following fair procedures with all the necessary evidence and a guaran-

[11] In August 2017 the Russian athlete Anna Pyatykh received a four-year ban because of banned substance abuse. She will also be stripped of the bronze medal from the World Championship in Osaka in 2007, which means that the Slovenian athelte, Marija _estak, will receive the bronze medal. _estak finished fifth in the triple jump competition. Pyatykh (36) tested positive for anabolic steroids; she was sanctioned by being stripped of her past titles and awards.

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teed right to a defence. Having studied the case, I can say that the problem, is, in fact, substantial, but I have not found enough arguments that this was a case of «state-sponsored doping» or «institutional conspiracy». I believe that it was a case of a doping subculture of a sort, the kind that we have identified in the sport systems of other countries, occasionally also Slovenia, where vast earnings of the manufacturers of doping substances, the suppliers, and others involved, and above all the ambitions (often financially conditioned) of individual top athletes, led to banned substance abuse. It is quite possible that individual Russian state officials were also involved in these violations. Moreover, I agree with those who believe that doping as a form of crime will continue to exist, like other criminal offences, in a limited scope in the future as well, because it is socially conditioned. The possibility to achieve a top results, especially for those athletes that are at the end of their sporting career, and whose powers are declining, the ability to acquire or maintain a competitive and financial status, or simply the opportunity to reach momentary fame are unfortunately too enticing and not everyone will denounce them.

3. In this context the question of what to do in the Russian case arises. The fundamental dilemma is whether Russians should be «given a slap on the wrist» or «taught a lesson», or whether we should rely on those parts of Russian sport that are sincerely anti-doping, which, to my knowledge, constitute the majority or are at least prevalent. This would mean enforcing the principle of clean athlete protection, which is, in the long-run, in the interest of Russian sport. The IOC must seek and define its allies in Russia, and must not spend too much of its time on dealing with its enemies. The allies are those that are willing to introduce an effective system of control, and fight against doping within the framework of Russian sport and state. It is therefore my belief that the problem of doping in the Russian Federation can only be handled by the Russian state and the Russian organized sport led by the Russian Olympic Committee.

In both processes, the organised Russian sport is showing a great deal of readiness for co-operation and tolerance. Many other nations would, if attacked and isolated as systematically as this, abandon the scene, whatever it were, in protest. We must be aware of the fact that historically sport has been of great importance for Russia. So-

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viet and later Russian sportsmen achieved more than thousand and seven hundred medals at different editions of summer and winter Olympic Games. Because of this and because of the seriousness of the problem itself and the number of anti-doping rule violations, the main factors in the Russian Federation, from the state to the Russian Olympic Committee, have opted to co-operate.

Russia has thus changed its criminal code to criminalize anti-doping rule violations[12], a national plan of fighting against doping has been adopted, the national anti-doping agency (RUSADA), which now only has two founding members, the Russian Olympic Committee and the Russian Paralympic Committee, has been reorganized and restored, its financing has been introduced (it is funded directly by the Ministry of Finance), and action plan on regaining a recognition of compliance (RUSADA compliance) has been developed. The anti-doping laboratory will now be the responsibility of the leading Russian university, Lomonosov Moscow State University. Both the IOC and WADA have maintained that a great amount of work has so far been done in the Russian Federation as well.

The IOC is conducting a meaningful policy in its fight against doping in uneasy circumstances. In this context, it has declared that the protection of clean athletes is an absolute priority. According to the IOC, WADA, which was established at the investigation of the IOC in 1999, is responsible for both the concept and the principles of the world fight against doping. New findings dictate that the testing of athletes and the sanctioning of doping offenders be completely independent of sports organizations and national influence. At the same time, the same type of treatment of athletes from different countries and different sports must be guaranteed.

While WADA is responsible for the system itself, in other words for putting together the list of banned substances, the procedural rights and a general definition of sanctions, and thus has a sort of a legislative function, the position of the IOC is that testing and sanctioning should be done separately within independent organizations.

[12] This is similar to Slovenia, cfr. Article 186 of the Criminal Code (Kazenski zakonik) – KZ-1: «Unlawful Manufacture and Trade of Narcotic Drugs, Illicit Substances in Sport and Precursors to Manufacture Narcotic Drugs» (The Official Gazette of the Republic of Slovenia, No. 55/08 and subsequent.).

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My reservation is that in this division into – so to speak – the legislative, executive and judiciary branch, the concepts of independence and integrity are intermixed. In my opinion, integrity can also be ensured in agencies that are not completely independent, if there is indeed such a thing as complete independence. Moreover, it is possible that highly independent agencies fail to deliver integrity in practice due to content errors and other reasons.

At the international level, the International Court of Arbitration for Sport (CAS) in Lausanne has taken the role of the top-level independent decision-maker on sanctions in cases involving anti-doping rule violations. The Court of Arbitration had jurisdiction over anti-doping rule violation procedures in the 2016 Olympic Games in Rio de Janeiro, and will have the same jurisdiction in the 2018 Winter Olympic Games (WOG) in PyeongChang.

Ideas that the Russian Federation needs to be sanctioned, humiliated (and even offended) to set an example are inappropriate since they fail to solve the problem, but apply unreasonable sanctions against clean athletes, causing aversion. Those at fault need to be sanctioned, but the sanctioning of innocent athletes serves no purpose. In view of the fact that Russian athletes (and Soviet athletes before them) achieved top results in sports in the past, the exclusion of the Russian Federation from international sport would not only be unfair, but would also lead to a lower level of competitiveness and quality in the top sporting events, such as Winter and Summer Olympic Games, World and European Championships and similar competitions. It is quite obvious that limiting the competition directly decreases the quality of these events and the results achieved there.

In sport too, regardless of its specificity and autonomy, the rule of law must be accepted and recognized. This means that following legal norms in their entirety, including the norms of the specific sport law, is a "conditio sine qua non" of any sport ethic. From this perspective, the systematic breaking of the rules of sport, often codified at the state or international level, is especially unacceptable. It needs to be pointed out that the media coverage may suggest that doping is an extremely wide-spread phenomenon, but the numbers show that there are relatively few doping cases discovered compared to the vast dimensions of international sport.

Meaningful politics must strive to achieve a balance. If it fails to

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do so, it will quickly become extreme. And in criminal and quasi criminal procedures, it will turn into a witch hunt. There is plenty of historical experience and proper evidence of that. If we only remember the horrible events in world history and in Slovenian history, when the knowledge of the fact that there are no witches was gained at least a hundred years too late for the unfortunate women and girls accused of witchcraft.

4. In this case of a mass violation of anti-doping rules, the views of the international sport public were deeply divided. WADA, the IAAF and the International Paralympic Committee, and, to some extent and in a limited period of time, the International Weightlifting Federation, used the most rigorous sanctions for athletes from the Russian Federation, such as a ban on participating in international competitions, including the Olympic Games and World Championships, or a ban on wearing the national symbols of the Russian Federation (the team colours, the flag, the emblem). However, the vast majority of other international Olympic sports federations decided to only punish those athletes for whom an anti-doping rule violation had been proven, while the rest of the athletes were allowed to perform in all competitions, including the top-level ones, and were able to do so wearing Russian symbols. The radical group allowed the occasional performances of Russian athletes if they underwent a special international doping control, and participated as neutral athletes.

The legal approach used by the radical group (WADA, IAAF, IPC) entails proclaiming the Russian Federation and its athletes as noncompliant with international anti-doping rules. At the same time they present the Russian Federation and its sporting bodies (Russian Government, Ministry of Sport of the Russian Federation, Russian Olympic Committee) with very strict (and continuously evolving) conditions for acquiring compliance with international anti-doping rules[13]. Some of these conditions are quite humiliating, for instance the first of the twelve WADA conditions demand an absolute and *a*

[13] On 2nd August 2017, WADA thus issued special instructions («Roadmap to compliance») for the Russian anti-doping agency (Rusada). Cfr. *www.wada-ama.org.*

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*priori* recognition of both McLaren reports even though Russian Federation agencies and Russian sport leaders never participated in the creation of those reports, and thus never implemented their basic right to defence.

The task of the IOC is to guarantee the integrity of international sport that must be based on universal principles, such as honesty, democracy and tolerance. Even though temporary measures to exclude entire countries and their Olympic Committees from international sport are legally possible, a longer exclusion of any nation, state or even a national Olympic Committee is questionable since it jeopardizes one of the basic principles of the Olympic Movement, the principle of universality. Thus it is doubtful whether top-level competitions are truly world or Olympic competitions, if important countries or nations do not participate in them for any reason.

The sporting career of a world-class champion is short-lived, only very few have several opportunities for participating in top-level competitions. Failing to participate in Olympic Games or a World Championship can never be replaced, since any new participation involves new qualifications and new conditions. This means that limiting the performance of clean athletes, *i.e.*, those who have clearly not committed doping offences or abuses, is a great injustice that can never be repaired. That is why I believe that this measure is in its essence immoral, and thus contrary to Olympic ethics.

The definition of zero tolerance towards doping makes it perfectly clear that all those using or enabling the use of doping should be sanctioned. It is necessary to apply the principle of personal responsibility. It is unacceptable to introduce a punitive policy far and wide and impose collective sanction, thus sanctioning equally those at fault and those innocent.

On the other hand, a permissive policy of the IOC tolerating doping would make the world of sport and many athletes disabled. It is therefore also inappropriate for moral and practical reasons.

5. Let me conclude:

1. The IOC must continue its firm policy of fighting doping based on the principle of zero tolerance.

2. The principle aim of the IOC must be the protection of clean athletes.

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3. The policy of IOC in relation to doping cases must be balanced. By this I mean above all the presumption of innocence, the right to a defence and the burden of proof, which is on the plaintiff.

4. The so-called principle of personal responsibility should be implemented for both athletes and their companions.

5. Any form of collective sanctions is unethical and intolerable.

6. All anti-doping procedures must take into account the contemporary level of human rights protection and the standards of pre-trial and trial procedures. In this sense it is appropriate to separate the powers and responsibilities of WADA (the legislative procedures), the agencies that carry out the testing, the agencies that identify doping offences and the agencies that impose sanctions. Those that identify offences and accuse must be as far as possible from imposing sanctions.

7. The existing relationships and controversies must be resolved in a short period of time and result in final legal consequences. It is unacceptable that open questions would burden international sport, its integrity and its universal nature.

8. If the anti-doping policy mechanisms for some reason collapse, they should be restored. That applies to national anti-doping agencies (NADO'S), to accredited laboratories etc. The approach to it is also clear. The credibility of an organ or an organization is restored when the system is organized in and brought to the required level. The competent international organs have to check it in the procedure of compliancy. The necessary time to find out if an organization or a structure is compliant to the international rules and standards, should be within reasonable time limits e.g. few months or half a year at the most. If it takes longer, it is no more a compliance procedure but a punishment. Such a punishment is illegal and immoral.

Janez Kocijančič

*Abstract*

The general and professional public is upset because of doping scandals as they take away the real value of competition, sport result and their credibility. The legal form of the fight against doping is governed by the World

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Anti-Doping Code, adopted by the World Anti-Doping Agency (WADA). President of the International Olympic Committee Dr. Thomas Bach is convinced that it is necessary to change the philosophy of the International Olympic Movement if we want to obtain the credibility of sports competitions and protect «clean» athletes. Athletes are ambassadors of sport, their role models and its treasure. We have to protect athletes from doping, cheating with sport results and corruption.

In the affair, which was followed by confessions of former Director of Russian Anti-doping laboratory (RUSADA) RodËenkov, who emigrated from Russia to America, various measures have been taken. Russian athletes in track and field and members of Russian Paralympics Team were not allowed to compete in the Olympic Games and Paralympics Games in 2016 in Rio de Janeiro.

Regardless of the different views regarding the sanctions towards Russian athletes, it is clear that the problem of doping in Russia can only be resolved by the Russian State and the organized sport in Russia led by the Russian Olympic Committee. In this regard the IOC must resolutely continue the fight against doping with the policy based on the principle of zero tolerance, there must be a fundamental objective of protecting the clean athletes, the IOC policy in relation to the phenomena of doping should be balanced, doping must establish the principle of personal responsibility – both of athletes and officials –, any form of collective sanctions is unethical and unacceptable to all anti-doping procedures and it is necessary to take into account the contemporary level of protection of human rights and to apply standards, which are used in the criminal procedures.

In this context, it is appropriate to divide the power and responsibility among WADA (legislative procedures), authorities which have to carry out doping tests and subjects which are responsible for the sanctions. The one, who finds the violation should be as far as possible away from the decision-making of sanctions. Existing relationships and contradictions should be cleared in the short term and leading to the final legal effects. On a long term it is unforgivable that open questions of sport stay unresolved as it could make a lot of damage to international sport, its integrity and universality.

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# Liability under Anti-doping Law in Public Law Domain

SUMMARY: 1. Dualist division of law. – 2. Importance of dichotomous division of law. – 3. Discriminating theories. - 3.1. The interest theory. - 3.2. The subjection/subordination theory (*Subordinationstheorie*). - 3.3. The subject theory. – 4. International legal regulation of doping. – 5. Combating doping in Polish law.

1. It is commonly believed that the dualist division of law originates in Roman law. The classical statement on this dichotomy was included in the «Digest» and was attributed to Ulpian: «Huius studii duae sunt positiones, publicum et privatum. Publicum ius est quod ad statum rei Romanae spectat, privatum quod ad singulorum utilitatem: sunt enim quaedam publice utilia, quaedam privatim. Publicum ius in sacris, in sacerdotibus, in magistratibus consistit, privatum ius tripertitum est: collectum etenim est ex naturalibus praeceptis aut gentium aut civilibus»[1].

The contemporary discussion of this distinction began in the 16th century[2]. It was argued then that private law covered all the rules

[1] D. 1, 1, 1, 2. There is a dispute in Roman law studies over the authenticity of the statement quoted, cfr. H. MÜLLEJANS, Publicus *und* Privatus *im Römischen Recht und im älteren Kanonischen Recht unter besonderer Berücksichtigung der Unterscheidung* Ius publicum *und* Ius privatum, München, 1961; E. MOLITOR, *Über öffentliches Recht und Privatrecht. Eine rechtssystematische Studie*, Karlsruhe, 1949, p. 8 s.

[2] Public law has been taught at universities since the beginning of the 17th century. Attempts have been made ever since to delimit the subject of public law in academic lectures in relation to the adjacent field of study, i.e. private law. One of the earliest known lectures devoted to the relationship between public law and private law was the inauguration lecture of Urlich Obrecht in 1682 on his appointment as Dean of Institution and Public Law at the Faculty of Law at the University of Strasbourg. M. BULLINGER, *Öf-*

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governing relationships between citizens and between a citizen and the state, while public law encompassed the provisions beyond the borderline of private law. The relationship of a principle and of an exception was thus created between private law and public law, where private law was «common law» in the sense of generally and subsidiarily applicable law, and public law was *ius singulare*. This formulation of the problem has weighed on the theses of the most notorious theories that delineate public law from private law, seeking primarily to justify why a special part should be distinguished from the whole of law as public law[3].

The debate revived in Germany in the 19th century. With the promulgation of Allgemeines Landrecht (General State Law of the Prussian States) in 1794, the German system of law headed towards the prevalence of statutes. Since then, statute giving has been part of the superior power of government, unlike the power of a territorial ruler in the Middle Ages or the expression of power of an absolutist sovereign. On the other hand, the school of the law of nature, which was developing at that time, claimed that the purpose, and at the same time the bounding line, of all state activities, including statute giving, were delimited by «natural liberty»[4].

As a matter of course, nineteenth-century literature considered as a fundamental problem the distinction between public law and private law as associated with the new understanding of the state government. New theories were proposed to this end. As early as 1904, Holliger was able to distinguish 17 theories on this subject, which he systematized in two groups:

a) The distinctive criterion is beyond a legal norm, e.g. in the legislative technique or in the organisation of legal protection institutions;

b) The distinctive criterion lies within a legal norm itself, e.g. in the history of the establishment of a legal norm, in the extent to

*fentliches Recht und Privatrecht. Studien über Sinn und Funktionen der Unterscheidung*, Stuttgart, 1968, p. 8.

[3] D. Schmidt, *Die Unterscheidung von privatem und öffentlichem Recht*, Baden-Baden, 1985, p. 20.

[4] B. Kempen, *o.c.*, p. 15 s.

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which a legal norm is mandatory or in the objective or subjective relations construed by a legal norm[5].

In 1985, I. v. Münch argued that the number of known theories of this issue varied between 20 and 30[6].

2. Literature tended to underrate the importance of the distinction between public law and private law. For authors such as Martin Bullinger[7], Gerd Rinck[8] or Joachim N. Stolterfoht[9] this distinction was not valid for the whole law but only for singular issues, and in particular for determining the admissibility of a legal action, as a historically justified separation of legal material[10]. A similar position is taken by those authors who, though they do not deny the importance of the dichotomous division of law, see its influence primarily in putting legal actions in order[11].

Reducing the division of law into public law and private law to a simple phenomenon of organisation of the judiciary stems from a narrow understanding of the presented problem.

It is primarily about the diversity of forms of action in both legal areas.

The distinction between private and public law is also relevant when defining supplementary assumptions and legal effects of a form of action chosen or to be chosen, and for the statutory damages relationship.

[5] J. Holliger, *Das Kriterium des Gegensatzes zwischen dem öffentlichen Recht und dem Privatrecht dargestellt im Prinzipe und in einigen Anwendungen mit besondere Berücksichtigung des schweizerischen Rechtes*, Zürich, 1904, p. 11 s.

[6] I. v. Münch, *Verwaltung und Verwaltungsrecht im demokratischen und sozialen Rechtsstaat,* in *Allgemeines Verwaltungsrecht*, Berlin-New York, 8, 1988, hrg. H.-U. Erichsen, W. Martens, p. 16.

[7] M. Bullinger, *Öffentliches Recht und Privatrecht*, cit., p. 106 s.; *ivi*, p. 69 s.

[8] G. Rinck, Das *Wirtschaftsrecht im abklingenden Spannungsfeld zwischen öffentlichem und privatem Recht*, in *WiR*, 5, 1972 (7f., 16); Id., *Wirtschaftsrecht*, Köln, 5, 1977, p. 5 s.

[9] J. N. Stolterfoht, *Zur Rechtswegzuständigkeit bei der Geltendmachung legal zedierter Steueransprüche*, JZ 1975, p. 658 s.

[10] D. Schmidt, *Die Unterscheidung von privatem und öffentlichem Recht,* cit., p. 45.

[11] F. Baur, *Neue Verbindungslinien zwischen Privatrecht und öffentlichen Recht*, JZ 1963, 41 ss.; W. Jellinek, *Verwaltungsrecht,* p. 45 s.; W. Rüfner, *Formen öffentlicher Verwaltung im Bereich der Wirtschaft*, p. 177 s.; H.P. Rill, *Zur Abgrenzung des öffentlichen und privaten Recht*, ÖZöR, 11, 1961, p. 464.

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The very content of a legal provision can often only be understood when it is attributed to a larger set of norms that can be termed «regulation». Any regulation (e.g. tenancy law) defines the principles necessary for a proper understanding of each single legal provision of this regulation. With the principle that private law and general administrative law apply only to material relationships and legal provisions within their jurisdiction, the limitation of regulation becomes at the same time an auxiliary argument in favour of distinguishing between private law and public law.

3. There are many theories that define public law and private law. There is no need to discuss all of them in this paper. It is worth, however, pointing out those that are most often applied and which still find many followers. These include the following theories:

a) interest theory;
b) advocate theory;
c) subjection/subordination theory;
d) tradition theory;
e) competence theory;
f) subject theory;
g) combined theories;
h) other theories.

Usually, however, law textbooks focus on three of these theories: the interest theory, the subjection theory, and the subject theory.

3.1. The historical point of departure for the interest theory is Ulpian's famous statement in the Digest: «publicum ius est quod ad statum rei Romanae spectat, privatum quod ad singulorum utilitatem»[12]. According to this theory, public law covers all the norms that serve the public interest (the interest of the state), while the norms of private law serve the interest of individuals (the private interest)[13].

[12] D. 1, 1, 1, 2.

[13] It was noted, however, that Ulpian distinguished public law on the grounds of the subject, the state, and private law on the grounds of the interest, the benefit (*utilitas*); cf. H. Müllejans, Publicus *und* Privatus *im Römischen Recht*, cit., p. 18 s. Therefore, the authors who refer to Ulpian give different criteria for the distinction, and different interpretations of his division; J. Nowacki, *o.c.*, p. 9 s.

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Comprehensibility is a great advantage of this theory. It seems that there is no more obvious criterion than that public law is established in the public interest, and private law in the private interest. Moreover, the interest, and especially the public interest, belongs to the most current legal concepts[14].

It has long been pointed out in literature that the problem of the dichotomous division of law was replaced in the interest theory with the problem of a division of interest into public and private, which poses an equally, if not more, difficult question. It is often impossible to separate private interests from public interests, and to attribute specific legal provisions to only one interest[15]. It is not that a provision protects either a private interest or a public interest, since often these interests are not contradictory and may even be identical. Given the multitude of purposes and interests, the same legal provision can serve both the private interest and the public interest[16]. Moreover, in many public law provisions it is not possible to indicate even a prevailing public interest. The most notorious example is a subjective public right, which, according to its assumptions, is to rely precisely on the fact that a legal norm also serves private interests. Therefore, public law will always play an important role for private interests[17]. It was further noted that the whole body of law, by giving legal certainty and legal security, serves the public[18], and so both private law and the fulfilment of all obligations under private law are also in the public interest[19].

3.2. Until the 1950s, the subordination theory (*Subordinations-*

[14] Cf. P. Häberle, *Öffentliches Interesse als juristisches Problem*, Bad Homburg, 1970; H. Schulte, *Eigentum und öffentliches Interesse*, Berlin, 1970.

[15] J. Mielke, *Die Abgrenzung der juristischen Person des öffentlichen Rechts von der juristischen Person des Privatrechts*, Hamburg, 1965, p. 58; H. Kelsen, *Allgemeine Staatslehre*, p. 81.

[16] E. Molitor, *Über öffentliches Recht und Privatrecht*, cit., p. 30.

[17] H.J. Wolff, O. Bachof und R. Stober, *Verwaltungsrecht*, I, p. 322; *Allgemeines Verwaltungsrecht*, hg. H.-U. Erichsen, W. Martens, p. 121; H. Maurer, *Allgemeines Verwaltungsrecht*, München, 1994 (9), pp. 144-147; D. Schmidt, *Die Unterscheidung von privatem und öffentlichem Recht*, cit., p. 91.

[18] J. Holliger, *Das Kriterium des Gegensatzes*, cit., p. 61.

[19] J. Mielke, *o.c.*, p. 57; E. Molitor, *Über öffentliches Recht und Privatrecht*, cit., p. 30; *Allgemeines Verwaltungsrecht*, hg. H. U. Erichsen, W. Martens, p. 16.

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*theorie*), also known as the subjection theory (*Subjektiontheorie*) or the higher value theory (*Mehrwerttheorie*), was dominant in German law studies. The most significant proponents of this theory were E. Forsthoff[20] and G. Jellinek[21]. For the advocates of this theory, the decisive criterion is the equality or subordination of the participants of a legal relationship. Private law relationships are characterized by the equality of subjects acting as parties, while in public law relationships one party occupies a superior position over the other. In the former case, a legal relationship emerges and continues as a result of congruent declarations of the parties, while in the other the party in a superior position may unilaterally both cause a legal relationship to emerge and interfere in the sphere of rights and obligations of the subordinate party by its own unilateral decisions[22].

This theory is valid insofar as it related to classical public law (such as police law or tax law), characterized by the relationship of subordination of a citizen to the state power. Within its domain, the state was given, by virtue of a statute, the competence to unilaterally pass, by an administrative act or by ordinances or charters, any norms binding on the citizen, and was not obliged, as is the case with private law, to reach an agreement with the citizen as an equitable subject[23].

However, what is of interest in disputed cases is not this kind of power vesting in the state; the dichotomous division of law is only relevant when it indicates the legal instruments that one may use, *i.e.* either a public law form of action (including an administrative act) or a private law contract. The admission, in principle, of a unilateral ordinance in the place of an agreement between equitable parties is a legal consequence of the distinction between public and private law. When the subjection theory simultaneously assumes this superiority

[20] E. Forsthoff, *Lehrbuch des Verwaltungsrechts*, p. 113 s.

[21] G. Jellinek, *Allgemeine Staatslehre*, cit., p. 384 s.

[22] «Der Gegensatz von Privat- und öffentlichem Recht kann auf den Grundgedanken zurückgeführt werden, daß im Privatrecht die einzelnen als grundsätzlich Nebengeordnete einander gegenüberstehen, es daher die Beziehungen der einzelnen als solcher ordnet, während das öffentliche Recht Verhältnisse zwischen verschiedenen Herrschaftssubjekten oder die Organisation der Herrschaftssubjekte und deren Beziehungen zu den der Herrschaft Unterworfenen regelt», G. Jellinek, *Allgemeine Staatslehre*, cit., p. 384.

[23] H.J. Wolff, *o.c.*, p. 211 s.; Ch.F. Menger, *o.c.*, p. 154 s.

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as a decisive criterion of distinction, it imposes a legal norm, the hypothesis of which (*Tatbestandsvoraussetzungen*) makes a reference to the disposition, which is a known logical error, *petitio principii*[24].

Apart from this methodological and logical fallacy, the constitutional and administrative obsolescence of this theory is emphasised.

The subordination theory conflicts with the constitutional principle of democracy, which prevents, in essence, a formation of relationships between the state and the citizen such that the citizen is subordinated to the state power. This "democratic inadmissibility" of the subjection theory is particularly evident in the subjective rights of individual citizens, arising from the democratic order itself (e.g. the democratic function of many constitutional rights, such as freedom of expression, freedom of the media, freedom of assembly and association). Subjective civil rights are characterized precisely by the lack of citizen's subordination to the state[25]. The rejection of the subordination theory as an undemocratic one was postulated already by H. Kelsen, who pointed out that the distinction between superiority (or subordination) and equality was at the same time a distinction between forms of the state, namely between autocracy and monarchy as a form of the state of superiority and subordination on the one hand, and democracy and the republic as a form of the state of equality, on the other. It is precisely for this reason that H. Kelsen attributed political grounds or an ideological character to the subordination theory, and concluded that it aimed to strengthen the state power[26].

The subordination theory is utterly at variance with the theory of subjective public rights universally accepted today. Legal relationships under public law, that is, most commonly legal relationships between the state and the citizen, have the same structure as legal relationships under private law, where a subjective public right correlates with an obligation of the state[27].

[24] H.J. Wolff, O. Bachof und R. Stober, *o.c.*, p. 98; H.P. Rill, *o.c.*, p. 465; D. Schmidt, *o.c.*, p. 95 s.

[25] D. Schmidt, *o.c.*, p. 96 f.

[26] H. Kelsen, *Allgemeine Staatslehre*, cit., p. 86 s.; Id., *Reine Rechtslehre*, cit., p. 286; a similar contemporary view in M. Zuleeg, *Die Anwendungs bereiche des öffentlichen Rechts und des Privatrechts*, cit., p. 391, and H.J. Wolff, O. Bachof und R. Stober, *Verwaltungsrecht*, I, p. 98.

[27] N. Achterberg, *o.c.*, p. 315; D. Schmidt, *o.c.*, p. 97 s. This problem was also

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One may add further that this theory ignores the public service administration (*Leistungsverwaltung*) or administrative contracts or administrative agreements, where subordination is out of the question altogether, although these are undoubtedly institutions governed by public law. On the other hand, there are many instances of subordination relationships in private law, such as legal relationships under labour law or relationships between parents and children[28].

3.3. In view of the weaknesses of the interest theory and the subordination theory, the idea emerged very early that public law and private law should be separated by the criterion of subjects participating in a legal relationship. It was first termed the subject theory (*Subjektstheorie*) by Otto Mayer in its *Lehrbuch des Deutschen Verwaltungsrechts*. He wrote that public law was nothing more than the order of relationships, which involve a public authority subject as such, and therefore public administration itself[29].

The contemporary version of the subject theory was announced by Hans J. Wolff in 1950[30]. This version was named the special rights theory (*Sonderrechtstheorie*).

Hans J. Wolff observed that there were legal norms that concerned, granted powers to or imposed obligations on only public authority subjects or bodies. It is these that compose public law. This is thus a special law of public management, or administration. It is

recognised by G. Jellinek. In his work on subjective public rights he departed from the subordination theory which he had still accepted in the "*Allgemeine Staatslehre*" and saw the difference between a subjective public right and a subjective private right by the material criterion according to the interest theory, namely in the prevalence of the public interest; cf. G. Jellinek, *System der subjektiven öffentlichen Rechte*, p. 53 s.; G. Jellinek, *Allgemeine Staatslehre*, cit., p. 416 s.

[28] W. Martens, *Öffentlich als Rechtsbegriff*, Bad Homburg-Berlin-Zürich, 1969, p. 91 s.; H. Maurer, *o.c.*, p. 28; Schmidt-Rimpler, *o.c.*, p. 686.

[29] O. Mayer, *Lehrbuch des Deutschen Verwaltungsrechts*, Bd. 1, Berlin, 1914 (2), p. 16. The criterion of the subject is already mentioned in F.C. v. Savigny, who wrote: «bleibt zwischen beiden Gebieten ein fest bestimmter Gegensatz darin, daß in dem öffentlichen Recht das Ganze als Zweck, der Einzelne als untergeordnet erscheint, anstatt das in dem Privatrecht der einzelne Mensch für sich Zweck ist, und jedes Rechtsverhältniss sich nur als Mittel auf sein Daseyn oder seine besonderen Zustände bezieht». F.C. Savigny v., *System des heutigen Römischen Rechts*, Bd. 1, p. 22f.; cf. J. Nowacki, *o.c.*, p. 23 s.

[30] H.J. Wolff, *Der Unterschied zwischen öffentlichem und privatem Recht*, cit., p. 205 s.

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not about whether an action is taken by contract or by privilege, but about the legal norm on which a claim is based. Those obligations, rights, claims and legal relationships fall under public law, which refer to a public special legal norm, and only insofar they do so. In cases of doubt, it is therefore about the legal norm on which a claim or an obligation has been or may be based. When any private person can rely on a legal norm in their claim against any other private person, the claim falls under private law. And when a subject of public management or administration is involved in the facts concerned, or when powers or obligations vest in a public authority subject or a public administration body, then the claim or obligation falls under public law.

H. J. Wolff ultimately defined public law as that encompassing those legal norms that grant powers to or impose obligations on only such subjects, which are specified in legal norms or in state acts, or those that grant powers or impose obligations in a given factual situation in which only one such subject participates[31].

German law studies, however, concluded that the state could participate in private law relationships on equal terms as natural persons, also together with natural persons[32]. This thesis required a modification of the special rights theory. It was not enough to declare that a specific legal norm was addressed to a public authority subject. The decisive factor should be whether the public authority subject was, in that capacity, empowered or obliged. The modification proposed by O. Bachof was termed as the assignment theory (*Zuordnungstheorie*)[33] or the material special rights theory (*materielle Sonderrechtstheorie*), whereas the original definition was termed the formal special rights theory (*formale Sonderrechtstheorie*)[34]. The assign-

[31] «Öffentliches Recht ist der Inbegriff derjenigen Rechtssätze, welche nur solche Subjekte berechtigen oder verpflichten, die ausschließlich durch Rechtsätze und Staatsakte bestimmt sind, oder die auf Grund eines Tatbestandes berechtigen oder verpflichten, der nur einem solchem Subjekt zurechenbar ist», H.J. WOLFF, *Der Unterschied zwischen öffentlichem und privatem Recht*, cit., p. 210.

[32] D. SCHMIDT, *o.c.*, p. 107.

[33] H.J. WOLFF, O. BACHOF und R. STOBER, *Verwaltungsrecht* I, p. 200 s.; D. SCHMIDT, *o.c.*, p. 111.

[34] D. EHLERS, *Verwaltung und Verwaltungsrecht im demokratischen und sozialen Rechtsstaat*, in *Allgemeines Verwaltungsrecht*, hg. H.-U. Erichsen, p. 28 s.

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ment theory allows for certain demarcation in many doubtful cases. It suffices if one of those in whom powers vest under a legal norm, or on whom obligations are imposed, is a subject of the state power. In this case, according to the assignment theory or the special rights theory, such legal norm belongs to public law, since the legal norms establishing such subjects, by giving them a specific legal position, (e.g. public law corporations), simultaneously assign relevant obligations and powers to them. These subjects are defined without the use of the terms «authority» or «the public», so the assignment theory escapes the *definitio per idem error*, or the circular reasoning error[35]. It is not burdened with the *petitio principii error*[36], as the subject's qualification is not reasoned from the legal norm to be applied. One cannot accuse it of legitimising any legal or actual monopoly either, especially any duress in contract, since any such monopoly may also arise for private persons and relationships under private law[37].

The subject theory is further complemented by the conflict of law rules proposed by Christian Pestalozza[38]. The first rules defines public law as a mandatory special law for the state. Private law norms are binding on the state where public law is missing, or where the application of a private law norm is expressly or implicitly permitted. The concept of special law is therefore of dual meaning, *i.e.*:

1) as the assignment of a relevant norm to the state;
2) as the mandatory application of the norm to the state[39].

The second conflict of law rule provides that private law is a possible special law of the individual. Just as public law is in principle a mandatory special law for the state, private law may also appear to bear features of a special law. Private law also includes conflict of law rules, *i.e.* the rules on who may act in the capacity of a private

[35] This accusation in N. Achterberg, *o.c.*, p. 10.
[36] This accusation in Wagner, *Amts- oder Fiskalhaftung*, JZ, 1968, 246.
[37] H.J. Wolff, O. Bachof und R. Stober, *Verwaltungsrecht*, I, p. 201 s.
[38] Ch. Pestalozza, *Kollisionsrechtliche Aspekte der Unterscheidung von öffentlichem Recht und Privatrecht. Öfentliches Recht als zwingendes Sonderrecht für den Staat*, DÖV 1974, p. 188 s. More on this issue in Ch. Pestalozza, *"Formenmißbrauch" des Staates. Zu Figur und Folgen des "Rechtsmißbrauchs" und ihrer Anwendung auf staatliches Verhalten*, München, 1973.
[39] Ch. Pestalozza, *Kollisionsrechtliche*, cit., p. 190.

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law subject. Any civil law norm can be questioned whether it is applicable to the state at all (or to everyone, according to the special rights theory) or whether it is addressed only to private persons given its meaning and association. Any private law action of the state faces a double barrier of the conflict of law rules, which provide for options for the state to move beyond the borderline of its special law (first barrier), which does not mean, however, the state may apply any private law norm (second barrier). It can thus be concluded that private law applies only to the state in a subsidiary way[40].

4. The legal regulation of doping has undergone a process similar to criminal law, *i.e.* from private law to public law. Originally, it was enough for athletes to make a statement that they have not used illicit methods to boost their fitness. Such statements were first introduced in 1928 by the International Amateur Athletic Federation, then the International Cycling Federation, the International Football Federation, and finally the International Olympic Committee. The International Cycling Union was the first to develop a list of prohibited substances, including, but not limited to, strychnine, amphetamine, narcotic analgesics. It also defined the rules for anti-doping control. This was accomplished in 1967. In the same year, however, there was also a fatal case associated with the use of doping at one of the stages of the Tour de France. Tommy Simpson from England died after taking amphetamine while climbing Mont Ventoux[41]. Therefore, doping issues were regulated by the internal laws of sports associations.

1967, however, became a turning point also because the International Olympic Committee established the Medical Commission. The Chairman of the Commission, Prince Alexandre de Merode of Belgium, defined its objectives as protection of athletes' health, sports ethics, and equal opportunities for all competing athletes, in the spirit of fair play. The IOC Medical Commission began its doping controls from the Olympic Games in Mexico in 1968. In Munich in 1972, systematic examinations of athletes were conducted, with more than two thousand tests completed, which detected seven cases of doping with amphetamine, ephedrine and coramine. Doping with anabolics and hormones

[40] *Ibidem*, p. 191.
[41] S. Fundowicz, *Prawo sportowe* [Sport Law], Warszawa, 2013, p. 217 s.

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was on a rising tide at that time. Tests for these were first used at the Montreal Olympic Games in 1976, where 8 cases of doping with substances of this type were detected[42]. However, this was still the internal law of sports organisations, even if one with a universal coverage.

A breakthrough in combating doping was the establishment of the World Anti-Doping Agency (WADA) in 1999, which took over the powers for anti-doping control and listing of prohibited substances and methods. Since 1 January 2004, the WADA has become the main organisation in charge of the fight against doping on the Olympic Games and championship levels, at the events organised by individual national and supranational sports federations, to replace the IOC Medical Committee. The first Olympic Games, where the controls were run by the WADA and based on the World Anti-Doping Code, were the Athens Olympic Games in 2004. Almost 3,500 blood and urine samples were analysed, resulting in the disqualification of 17 athletes. The WADA gained a fundamental recognition in international law through the International Convention against Doping in Sport of 19 October 2005 (OJ of 2007, no. 142, item 999), which was adopted during the 33rd session of the General Conference of the UN Educational, Scientific and Cultural Organisation (UNESCO) in Paris. The Convention has two annexes and three appendices. Annex 1 covers The Prohibited List – International Standard. Annex 2 sets out the Standards for Granting Therapeutic Use Exemptions. Appendices comprise: World Anti-Doping Code, International Standard for Laboratories, International Standard for Testing and Investigations. However, the appendices do not form an integral part of the Convention but are attached to it for informational purposes only. The documents created by the WADA are today widely recognised as standard in the fight against doping. Although the WADA is a foundation established under Swiss law, its significance goes far beyond the private law dimension suggested by its legal personality. T. Dauerman notes that the Agency is an entity created under Swiss private law, which may not entail difficulties in relation to sports organisations and associations but is sometimes troublesome in the relationship between the Agency and state governments. The Copenhagen Declaration envisaged that the Agency would become

[42] *Ivi*, p. 218.

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a subject of international law, treated on the basis of partnership between states and international organisations. At the 2006 Munich International Symposium on Biomedical Side Effects of Doping, Paul Mariott-Lloyd stated: «State governments, given the status of a private foundation enjoyed by the WADA, have not been obliged to adopt its anti-doping solutions, they could only express their moral support for the Code's principles by signing the Copenhagen Declaration». In any case, the WADA is an independent international organisation whose primary objectives are to monitor, harmonise and update all legally available methods of combating doping. On 5 March 2003 the WADA Foundation Board adopted the World Anti-Doping Code. The set of WADA anti-doping rules together with the international standards and best practice models constitute the World Anti-Doping Program. International standards concerning the various technical and operational areas in the anti-doping program are developed in consultation with signatories and governments, and then endorsed by the WADA. The international standards aim to harmonise the activities undertaken by the anti-doping organisations responsible for the specific technical and operational parts of anti-doping programs. Under the Code, compliance with the international standards is mandatory. The international standards may be revised from time to time by the WADA Executive Committee following well-founded consultation with the signatories and governments. Unless the Code provides otherwise, the international standards and any revisions thereto become effective on the date stated in the specific international standard or revision. The WADA Executive Committee is empowered to revise the international standards without having to amend the Code or the rules and regulations of individual parties concerned. Best practice models and guidelines based on the Code are intended as solutions practicable in different areas of combating doping. The models are recommended by the WADA and made available to the signatories upon request, though their application is not mandatory. In addition to the models of anti-doping documentation, the WADA also offers the signatories some training assistance. The Anti-Doping Code itself is a fundamental and universal document underlying the World Anti-Doping Program[43].

[43] S. FUNDOWICZ, *Prawo sportowe* [Sport Law], cit., p. 223 s.

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International law thus provides for a special role for the World Anti-Doping Agency, which oversees the uniformity of anti-doping regulations and their correct application. In spite of the private law character of its personality, it operates by means characteristic of public law and is universally recognised in this capacity by states, the International Olympic Committee and the Sports Federations.

5. The Polish doctrine of law has recognised that different types of liability may arise as a result of the use of doping. M. Bojarski notes that in the cases of doping athletes are subject to international rules. According to the World Anti-Doping Code, the use of doping by an athlete during a competition may result in the cancellation of the achieved result. The cancellation may apply to the results not only of the competition, during which the athlete was confirmed for having used a prohibited substance but also of other competitions. Those who use doping are liable to up to two years of disqualification. For repeated use of doping, an athlete is liable to lifetime disqualification. This also applies to an attempt to use a prohibited substance or a mere possession thereof[44]. Following the accepted distinction of the rules of the game between the technical and disciplinary rules, in the sports sphere A. Wach distinguishes the professional sport liability and disciplinary liability. The former provides for a response to a violation of the technical rules of a particular sport discipline. This includes a warning, a reprimand or a temporary disqualification of an athlete, a cancellation of a result or a record. The latter concerns a violation of the anti-doping rules[45]. A violation of anti-doping rules entails not only the consequences under sports law, such as disqualification, but also, to a certain limited extent, criminal liability[46].

The Polish Act on Sport of 25 June 2010[47] originally defined the competent authority for combating doping in sport. It was the Commission against Doping in Sport. However, the 2010 Act did nod entrust the Commission with the possibility of establishing anti-dop-

[44] M. Bojarski, *Doping w sporcie – prawnokarna ocena zjawisk*, in *Ustawa o sporcie* [Act on Sport], ed. A. J. Szwarc, Poznan, 2011, p. 108.

[45] A. Wach, *Odpowiedzialnosc prawna za stosowanie dopingu w sporcie*, in *Studia Iuridica*, 48, 2008, p. 374 s.

[46] S. Fundowicz, *Prawo sportowe* [Sport Law], cit., p. 228.

[47] Consolidated text: Journal of Laws of 2017, item 1463.

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ing rules. These were to be developed by individual Polish sports associations. It was not until 2015, after many Polish sports associations were accused of inactivity and received various reminders from representatives of the International Olympic Committee, that the Act on Sport was supplemented with a provision enabling the Commission against Doping in Sport to establish anti-doping rules applicable to all Polish sports associations. The next step was the adoption of the Act on Combating Doping in Sport of 21 April 2017[48]. The new Act pursues the following objectives:

1) defining the concept of doping in sport;

2) establishing the Polish Anti-Doping Agency, giving it a legal personality, defining the scope of its activity and identifying its bodies and their responsibilities;

3) defining requirements for doping inspectors, their training programs and their powers and responsibilities;

4) defining the principles of financial management of the Agency;

5) introducing the obligation on athletes to submit to doping controls during and outside the competition;

6) setting up an independent Disciplinary Board at the Agency;

7) defining the rules of the Agency's cooperation with the Police, Customs Service, Border Guard, Military Police and prosecutor offices to the extent necessary to establish disciplinary liability for doping in sport, and with the minister competent for healthcare insofar as doping in sport remains a matter of public health;

8) defining the rules for awarding a special-purpose grant to the Institute of Sport – the National Research Institute for the tasks related to maintaining the World Anti-Doping Agency's accreditation and purchasing doping testing equipment;

9) amending penal provisions on doping in sport;

10) introducing the concept of public interest in the context of the Agency's activities;

11) granting the Agency's doping inspectors the protection provided for in the Act of 6 June 1997 – the Penal Code (Journal of Laws of 2016, item 1137 and 2138) for public officials[49].

[48] Journal of Laws item 1051.

[49] Print No. 1184. Government draft law on combating doping in sport; *orka.sejm.gov.pl/Druki8ka.nsf/0/9E8501FEA895DC14C125809D004C3C98/%24File/1184.pdf*.

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The Act thus provided the legal basis for the existence of the Polish Anti-Doping Agency (POLADA), as a state legal entity, whose tasks are, among others: 1) to determine the principles and procedure of doping control; 2) to lay down disciplinary rules regarding doping in sport; 3) to plan and conduct in-competition and out-of-competition doping control; 4) to train and develop the competence of Agency's doping inspectors; 5) to authorise the use of a prohibited substance or prohibited method by an athlete; 6) to prepare and implement education, training and information programs concerning the combating of doping in sport; 7) to notify athletes or other persons collaborating with the person assisting in the preparation for sports competition of the status of that person and of the consequences of collaborating with them; 8) to issue opinions on draft laws and draft regulations on combating doping in sport; 9) to cooperate with foreign entities involved in combating doping in sport; 10) to cooperate with public administration bodies, research institutes and other entities competent in the field of research supporting the combating of doping in sport[50].

POLADA is therefore a body governed by public law, which establishes anti-doping rules, controls and oversees compliance[51], authorises the use of prohibited substances or methods, and conducts disciplinary action for violation of anti-doping rules[52].

The Act on combating Doping in Sport also took over the penal provisions, which had been previously included in the Act on Sport[53].

[50] Articles 4-5 of the Act on Combating Doping in Sport.

[51] It is noteworthy that the Agency, when conducting doping controls during a competition or out of the competition, performs a public benefit task as referred to in Article 23 (1) (4) of the Act on the Protection of Personal Data of 29 August 1997 (Journal of Laws of 2016, item 922), the purpose of which is to ensure the fairness of sporting competition, the disclosure of offences referred to in the Act and the protection of the health of athletes [Article 29 (1) of the Act] and that the inspectors, when performing their duties or in connection therewith, enjoy protection provided for public officials and are subject to criminal liability laid down for public officials under the rules set out in the Act of 6 June 1997 – Penal Code (Journal of Laws of 2016, item 1137, as amended) [Article 28 (5) of the Act].

[52] The Disciplinary Board [Article 35 (1)] acts independently and impartially at the Agency.

[53] «Article 48. 1. Any person, who gives a minor athlete a prohibited substance as listed in group S1, S2 or S4 of Annex 1 to the Convention referred to in Article 2 (1), shall be liable to a fine, restriction of liberty or imprisonment of up to 3 years. 2. Any person, who gives an athlete, without their knowledge, a prohibited substance as listed

Therefore, there should be no doubt that the Polish regulation on combating doping in sport falls within the scope of public law; a specialised state entity is set up, which unilaterally formulates anti-doping law and enforces it in the disciplinary terms, applying the rules of professional sport liability, unilaterally grants exemptions and enjoys protection of its activity under public law. The criminal liability also has a public law character.

Sławomir Fundowicz

*Abstract*

Theories defining public law and private law are analysed: principally interest theory, subjection theory and subject theory. Hence paper examines the international legal regulation of doping, considering that it has undergone a process from private law to public law. Paper presents Polish Law and particularly the Act on Combating Doping in Sport of 21 April 2011 which provides the legal basis for the existence of the Polish Anti-Doping Agency (POLADA) as a state legal entity. POLADA is a body governed by public law, which establishes anti-doping rules, controls, and oversees compliance, authorizes the use of prohibited substances or methods, and conducts disciplinary action for violation of anti-doping rules.

in group S1, S2 or S4 of Annex 1 to the Convention referred to in Article 2 (1), shall be liable to the same sanction. Article 49. 1. Any person, who makes available to third persons, for consideration or free of charge, a prohibited substance as listed in group S1, S2 or S4 of Annex 1 to the Convention referred to in Article 2 (1), or stores it to make it available to third persons, for a consideration or free of charge, without holding a marketing authorisation issued pursuant to Article 3 (1) or (2) of the Act of 6 September 2001 – Pharmaceutical Law (Journal of Laws of 2016, item 2142 and 2003), shall be liable to a fine, restriction of liberty or imprisonment of up to 3 years. 2. Any person, who, without the authorisation referred to in Article 70 (4), Article 74 (1) or Article 99 (1) of the Act of 6 September 2001 – Pharmaceutical Law, markets a prohibited substance as listed in group S1, S2 or S4 of Annex 1 to the Convention referred to in Article 2 (1), shall be liable to the same sanction. 3. Any person, who in violation of Article 68 of the Act of 6 September 2001 – Pharmaceutical Law imports or brings into the Territory of the Republic of Poland a prohibited substance as listed in group S1, S2 or S4 of Annex 1 to the Convention referred to in Article 2 (1), shall be liable to the same sanction». The provisions refer to, as a matter of course, the International Convention against Doping in Sport of 19 October 2005.

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# Civil liability of manufacturer and sellers of sport goods in terms of Iranian law and Islamic law

SUMMARY: 1. Introduction. – 2. The basics of different types of injuries that may result from neglect of these people to the athlete. - 2.1. Damage. - 2.2. Causality relationship. - 2.3. Direct and indirect loss. - 2.4. Legitimacy of the act. - 2.5. Definite damage. – 3. Different types of loss. - 3.1. Financial loss. - 3.2. Spiritual loss. - 3.3. Physical loss (injuries). - 3.3.1. Paralysis (disability). - 3.3.2 Reputation detraction. – 4. Conditions for achieving the civil liability of the manufacturer and the seller of sports products. - 4.1. Product imperfection from manufacturer. - 4.2. Imperfection in design. - 4.3. Imperfection in production. - 4.4. Imperfection in information and cautions. - 4.5. Imperfection of a product for lack of maintaining in suitable condition by seller. - 4.6. Product imperfection through misusing of competition organizer. – 5. Conclusion.

1. Law must be expressed as a widespread science which has the ability to interfere in all affairs. Today, we can see the law position in human events obviously. Sport is a prominent example of this social confrontation which needed law and civil liability. Civil liability has a special place in sport laws because there are different types of direct and indirect communications and also, the accidents are inevitable in sports. In definition, civil liability is that a person has to compensate other's damage[1]. In specific, civil liability is that «a person will take responsibility because of damaging to other person while there's no contract between her/him and the injured person»[2]. This liability is critical in case of manufacturer and sellers' responsibilities. Sports equipment caused the most injures to the athlete in different

[1] N. KATOOZIAN, *Out-of-Contract requirements*, 7th edition, 1386, Tehran University publication, p. 46.
[2] M. GHASEMZADEH, *Civil liability*, 9th edition, Mizan publication, p. 19.

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sports which leads to liability. Sports equipment may cause injuries to athlete's body according to the usage form in specific conditions (pressure resistance, speed, and special time and place) and direct and/or indirect relationship with athlete's body; therefore, it needs specific attention and precision about the possible damages and injuries. Causing responsibility by sport equipment damages and injuries divided into two categories: first, during the production phase such as using inferior quality raw materials, failure to follow the acceptable national and international standards, and failure to note necessary cautions to use properly. And second, during the products' selling; selling unsuitable products to athletes and failure to match the product to physical conditions, age, gender, health condition, and lack of informing purchaser about the usage and necessary cautions.

In this paper, we will investigate the liability of these types of jobs about consumers which could be either professional/amateur athlete. This paper has been written in two sections. The titles are «The basics of different types of injuries that may result from neglect of these people to the athlete» and «Conditions for achieving the civil liability of the manufacturer and the seller of sports products».

2. Social importance of sport increase continuously. Being active and sport life style are the important part of people's life nowadays. Athlete, professional or amateur, exercise in gym. Therefore, the importance of sport equipment is most considered because athlete satisfaction of sport equipment encourages other people to exercise[3]. Hence, the important role of manufacturer and seller emphasized more than ever. As it pointed before, sport products is a special type of product and the difference is the usage form compared to similar products whether the athlete is professional or amateur. Sport products such as shirts, shoes, and pants may not differ from non-sport products in case of appearance but the difference is about usage conditions which leads to choose sport products. For example, «the color of shirts and equipment, material, and weight are the important factors which must be considered in their production phases. Nylon fabrics may cause allergy or skin diseases. Also, wearing bright color

[3] D. KHAJAVI, *Sport facility recognition (educational book),* 1384, Educational Book publication, p. 59 s.

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shirts in warm areas is more reasonable»[4]. Therefore, it must consider about sport equipment and game equipment[5] such as ball, salon covering, grass of the field, vault, and still rings while inaccuracy in producing or selling the equipment causes to irrecoverable injuries. This will cause that athlete cannot exercise and stay at home and this may cause different types of injuries. Before investigating different reasons of the responsibility, it must note that we investigate the principle of liability generally.

We need different factors in order to achieve the liability and compensation:

1. Damage;
2. Causality relationship;
3. Direct and indirect loss;
4. Legitimacy of the act;
5. Definite damage.

2.1. In word, damage defines as harm and detriment, pain, injury, suffering, difficulties, loss, and hurt[6]. In concept, damage defines as «when there is a loss in property/interest or there is an insult to someone's personal dignity or feelings, we say that there can be a damage»[7]. In accordance with act 728 in previous Civil Trial Law about damages resulting from lack of liability, damage defined as «damage may cause by losing finance or interest which result from a liability». To attain civil liability and identify someone as guilty person, it's necessary that harm agent damage other person (affected person) without legal license; and if acting or abandonment do not consider as offence, then there is no criminal liability or civil liability[8]. Therefore, civil liability has direct relationship with damage existence and recognizing a person as guilty is based on damage to other person. Hence, if the salon covering is inferior and some of its

[4] M. Jalali Farahani, *Safety of sport facilities and sport events*, Tehran University publication, 1392, p. 16

[5] D. Khajavi, *Sport facility recognition (educational book),* 1384, Educational Book publication, p. 60.

[6] H. Amid, *Persian dictionary*.

[7] N. Katoozian, *Out-of-Contract requirements*, cit., p. 244.

[8] S. Madaddi, *Civil liability of manufacturers and sellers,* 1388, Mizan publication, p. 14.

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part brake during the game which may leads to injury to athlete's foot, manufacturer or seller may consider responsible.

2.2. Since the manufacturer and seller of sport products are responsible for damages resulting from sport products, we can investigate the liability of these entities[9]. Causality derived from past participle of cause root which means cause, causing, and motivation[10]. Causality means «causing damage to other's property that the source is not the agent but the damage caused by fault or neglect of the agent»[11]. In jurisprudence, causing means «something that if barrier do not impact it, cause something else»[12].

In Iran civil law, there's a statement about causality in third debate (act 331-335) of second chapter as «the necessities achieved without contract» but the legislator did not provide any specific definition of causality. In Islamic Criminal Law (ICL) in act 506 which approved in 92, it stated that «causality in crime means someone cause damage or injury to other person and the agent did not committing the crime directly that his inaccuracy caused crime. For example, someone digs a well and other falls into the well and injured». In aforementioned definitions, there's no principle definition about causality, but causality and cause define directly. In definition, it means that two or more entities cause damages and there's no intermediary between the act and damage; agent and other intermediary consider as cause[13]. Therefore, it's understood from aforementioned definitions that damage agent as a direct agent do not cause damage to other's property or life without intermediary in causality definition but the agent is an indirect damage agent which is more powerful than direct damage agent[14]. In accordance with the principles, the main aim is compensating, not punishing the damage agent, in civil liability. Therefore, if the damage agent guiltiness approved but there's no damage to other person, it means that causality relationship break off

[9] *Ivi*, p. 67.

[10] H. Amid, *Persian dictionary*.

[11] M.J. Jafari Langeroudi, *Law terminology*, 16th edition, Ganje Danesh publication, 1385, p. 151.

[12] *Ivi*, p. 352.

[13] *Ivi*, p. 353.

[14] D. Madaddi, *Civil liability of manufacturers and sellers*, cit, p. 68 s.

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and the agent is not responsible for the damages (there's no damages to compensate), although his/her act will be blamed morally. In civil liability, damage agent will be punished, even though there's no damage to other. In civil liability field, the existence of causality is necessary factor between damage acts, guiltiness, or hurt to other person in addition to proving damage act and guiltiness (it's understood from act 335, 328, 666 in civil law, act 1 in law of civil liability, and act 520 approved in 79 and act 728 in law of civil procedure)[15]. Except damage existence, there must be a relationship between damage agent and damage itself which can be direct or indirect. Hence, the manufacturer who produces damaged or inferior quality products without standards or caution labels or seller who provides it for sport consumers and this product cause damage because of inferior quality or imperfections, then the manufacturer or seller considers as guilty and must compensate the damages based on causality theory.

2.3. As it noted previously, damage existence from damage agent and a relationship which relates agent to damage, are the critical factor for guiltiness of damage agent. Damage divides into two categories: direct and indirect. Whilom, the damage agent is the person himself/herself who perform something leading to damage to other directly; In accordance with previous version of act 728 in law of civil procedure, «if the loss claimant proved that this loss is direct resulting from lack of liability, liability delay, or failure to submit the specified verdict». Direct means that there's no accident between damage agent and the loss[16]. It means that no event breaks off the relationship between damage agent and loss existence in order to relate loss to damage agent. For example, if athlete suffered from skin allergy because of using sport cables and inferior quality of cover fibers, then his/her skin burn in the presence of boiling water or fire, hence we can't consider manufacturer of the product as guilty because another factor (such as boiling water, fire, etc.) break off the causality relationship.

[15] M. Ghasemzadeh, *Necessities of civil liability without contract*, 1390, Mizan publication, p. 89 s.
[16] N. Katoozian, *Out-of-Contract requirements*, cit., p. 286.

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2.4. In accordance with act 1 in civil liability law approved in 1339, it stated that the basis of liability is guilt «if a person causes financial loss or harm to other without legal license, whether it is intentionally or unintentionally, s/he is liable for compensating resulting from his/her act». Therefore, civil liability is not considered as perform an action and causing a loss, but the act must be illegal. In opposite, it means that losses resulting from applying a law, is not guaranteed[17]. In France civil law, the act is illegitimate with presence of guiltiness, but it is possible in other legal systems that the guilty person is not the specific liability source. In this case, the illegitimate act is considered as terms of liability[18]. About liability in some legal systems, it's worth noting that the liable of manufacturer and seller accepted and can generalize to sport products. In such legal systems, it must note that there no need to specify the legitimate or illegitimate of act because the manufacturer is responsible for every product which cause harm to the consumer. By supplying the products and advertising, the product will be guaranteed and the manufacturer reassure the customer that using the product will have no damage. Since, this product can be insured, it's less harmful for the defenseless consumer. Hence, it is more rational that the poor class do not take responsibility[19].

2.5. In civil liability, the damage must be compensated, but this question arises: what types of damages must be compensated? Certainly, we can't consider possible damages as a criteria for compensation. The damage must be compensated which is definite (not possible damages) and the damage agent had to compensate. In civil liability law, there's no act about this phenomena, but there's a statement in law of civil procedure «if the court order that claimant must prove the damages and these damages caused by lack of liability, liability delay, or failure to submit the specified verdict»[20]. Direct loss

[17] M. Mokarrami, *Civil liability of athletes resulting violation of norms in sport law*, cit., p. 22.

[18] N. Katoozian, *Out-of-Contract requirements*, cit., p. 311.

[19] N. Katoozian, *Liability resulting of production imperfection*, 3th edition, 1390, Tehran University publication.

[20] S. Madaddi, *Civil liability of manufacturers and sellers*, cit., p. 18.

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means that there's no accident between damage agent and the damage itself, therefore we can consider the damage agent relationship as definite[21]. For example, the salon covering has inferior quality or there is an inaccuracy in the installation of materials. As a result, a part it is broken and the athlete's foot will damage; then he falls from the stretcher during the transfer out of field and this causes another damage. In this case and second damage, the causal relationship between the damage and the damage agent of the manufacturer's neglect or the cover installer broke off, and we can't consider the next damage as a consequence of the first damage; also, we can't refer all the damage to the damage agent, because another incident broke off the relationship and the occurrence of a loss from the manufacturer or installer has been uncertain and unenforceable. Therefore, the manufacturer or the seller must compensate the damages which are direct.

3. «Loss divided into three categories based on the damage agent. Loss means that a person/something are suffered by a damage. If the loss is property or financial, it is referred as financial loss. If the loss (injury) is physical, it's referred as physical injury. If this is about reputation, it is referred as spiritual loss»[22].

In following, we investigate the different types of loss. Juristic divided loss intro three categories based on the type of loss to the person: financial, spiritual, and physical[23].

3.1. In explanation, financial loss can be referred as this statement: «reducing an entity's asset and preventing its increasing considered as financial loss». If the loss be measurable to money, it is in financial loss category. Factors such as damaging to property, devaluing the asset, intellectual property, and losing legitimate rights of others placed in this category. Generally, violating any legitimate rights which is measurable to money, placed in financial loss category. «Financial loss may be divided into accurate finance, interest, and right. In accordance with act 29 in civil law, this division formed that the fi-

[21] N. Katoozian, *Out-of-Contract requirements*, cit., p. 286.
[22] A. Barikloo, *Civil liability*, cit., p. 63.
[23] N. Katoozian, *Out-of-Contract requirements*, cit., p. 224.

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nance includes specific, interests, and liability»[24]. Financial loss has a wide range and it includes all losses which result from devaluing movable and immovable properties and the related rights. Even, physical injuries to human body is financial harm. In accordance with this approach, some lawyers divided financial loss into two categories: financial loss and physical injury[25]. Based on previous version of the act 728 in law of civil procedure, financial loss to a person is because of property loss or losing interest: «the loss may cause by financial losing or losing interest which caused liability». Lost interest must be definite, otherwise, the possible interest which is gained in future, is not consider as definite and it's only a possibility[26]. Another type of financial loss is work force deprivation: «in law, if the damaged person employed by other, this type of damage is claimable and there's no ethical principle in this case»[27]. Hence, loss which resulting from work force deprivation, is a type of financial loss and claimable. Based on this law, if an athlete who is employed by a team and cannot accompany his/her team because of injuring, this loss (injury) is claimable.

3.2. In constitution law, act 171 expresses spiritual loss explicitly which presents the validity of spiritual loss compared to financial loss but the distinction of this loss is not facile. In definition, spiritual loss which is hard to distinguish, is not physical damage or financial loss, but it's a loss about feelings and emotions. In act 1 in civil liability, it's stated that the spiritual loss must be compensated based on criteria: «if an entity damage freedom, dignity, commercial reputation, or such legitimate rights which result financial loss or spiritual loss, s/he must compensate the loss». Also, act 9 and 10 state criteria about compensating spiritual loss: «spiritual loss is a loss which hurts human's spirit such as feelings, reputation, and esteem»[28]. In a definition, «spiritual loss means the hurting non-financial properties

[24] M.J. Jafari Langeroudi, cited as Mehman Navazan, Rooh-al-Allah, *Claimable damages in Iran law*, p. 58.

[25] I. Nazari, *No-contract requirements*, 1392, Tehran, Majd publication, p. 57.

[26] N. Katoozian, *Out-of-Contract requirements*, cit., p. 244 s.

[27] A. Barikloo, *Civil liability*, cit., p. 63.

[28] H. Bahrami Ahmadi, *Civil liability*, 1388, Tehran, Mizan publication, p. 77.

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of a person such as emotions, reputation, and physical injuries. The agent of spiritual loss must compensate the losses such as dignity, credibility, reputation, physical injuries, spiritual losses, freedom, and such losses based on act 1 in civil law»[29]. Distinction between these is not facile, because some spiritual loss leads to financial loss such as maim. Maim is in physical injury category which is also in financial loss and spiritual loss category. Sometimes, spiritual loss is about human's feeling such as losing family members caused by a third-party, but this loss will hurt reputation and dignity of an entity[30]. In Islamic law, legal punishment of pederasty equals to a crime which caused losing dignity and reputation. After four times repeating pederasty, death penalty is the verdict of Islamic law for a person who thread other's dignity and reputation[31]. It compared to racist insults in sports which is a type of spiritual losses.

3.3. Physical loss includes all losses on a person's body. Physical loss limited to natural person[32]. Some lawyers believe that physical loss may include financial loss and spiritual loss. «Some lawyers interpret physical loss as a complicated loss[33], but the interpretation which derived from compensating physical loss, is not possible and the legislator bounds the damage agent to pay specific money in order to support injured person which is referred as atonement»[34]. The losses (e.g. hand fracture and foot fracture) cause not only physical and spiritual suffering but also impose hospital expenses to injured person[35]. Paralysis is a consequence of physical injuries which is in financial loss and spiritual loss categories. The losses which consequences of physical loss, divided into four categories: 1. Therapy expenses; 2. Paralysis and disability; 3. Losses that family members of the injured person deprived of them; and 4. Spiritual losses of the

[29] M. Shahidi, cited: Mehman Navazan, Rooh-al-Allah, *Claimable damages in Iran law*, Tehran, 1389, Majd publication, p. 62.

[30] N. Katoozian, *Out-of-Contract requirements*, cit., p. 246.

[31] M. Darabpoor, *Out-of-Contract liabilities*, 1387, Majd publication, p. 121.

[32] A. Barikloo, *Civil liability*, cit., p. 71.

[33] H. HosseiniNejad, Hosseingholi, *Civil liability*, 1st edition, Tehran, Jahade Daneshgahi publication, 1370, p. 95.

[34] A. Barikloo, *Civil liability*, cit., p. 71.

[35] N. Katoozian, Naser, *Out-of-Contract requirements*, cit., p. 246.

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injured person and his/her family members[36]. If an athlete maims and paralysis caused by inferior quality of a sport product which has deficiency in production, the damage agent must compensate not only financial loss but also the spiritual loss. In addition to spiritual and physical suffering, the spiritual loss may cause loss of reputation.

3.3.1. Total paralysis means «physical power reduction of insured person who can't achieve more than one-third of his earnings by previous job or other job»[37]. Partial paralysis means «physical power reduction of insured person who can achieve only a part of his earnings by previous job or other job»[38]. In accordance with the definition and except supporting/lack of supporting of insurance, paralysis is a condition which occurs because of work force reduction of a person. As a result, the person lost a part of his/her earnings alternately. Based on the physical power reduction, this condition may occur due to aging and activity reduction or an accident and this leads to word force reduction. In fact, it must be considered in this paper that physical power reduction caused by an accident which leads to paralysis (disability). Based on the act 5 in civil liability law, «if a person suffers from a physical loss or work force reduction (or also caused living expenses increase) which damage body or health condition, then the damage agent must compensate all the aforementioned losses. According to the condition of the case, the court will determine the compensation through annuity or atonement».

Act 6 stated that «if a person dies in an accident, damage agent must compensate all the expenses especially the burial expenses. If it wasn't sudden death, treatment expenses and work force reduction losses include the losses during unhealthy condition».

The regulation of this law recognizes the distinction of compensating financial and non-financial officially. In determining the expenses and based on this distinction, the court will verdict according to condition of a person's injury[39].

[36] N. Katoozian, *Out-of-Contract requirements*, cit., p. 247.
[37] Article 13th, act 2, Social Security Insurance law, 1354, modified.
[38] Article 14th, act 2, Social Security Insurance law, 1354.
[39] I. Babaei, *Compensating losses resulting of physical injuring in Iran civil liability*, Paper, p. 5.

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Atonement system which is different from acting law of civil liability of Iran about physical loss, is stated that the law act for all equally notwithstanding with the paralysis, time of disability, and spiritual loss based on the loss. In law of civil liability, this approach will not compensate all losses to support the injured person.

Spiritual loss (non-financial loss resulting from physical loss) is one of the concerns that new system of civil liability encounter with. The loss includes all spiritual aspects such as unpleasantness, lack of social and sport activities, or beauty loss. These factors cannot be assessed by no measurement tools[40].

In accordance with the special exercise activities and spending all expenses and forces to an athlete's body, the disability can be more sufferable compared to other people in society. If an athlete who spend all his/her time to attain the sport prominent purposes, be deprived of sport fields for a long time or life time by inaccuracy of manufacturer or seller of sport products, then there's no forgiveness for such negligence.

3.3.2. In the definition, it's better to express the second meaning. «Reputation» (commercial reputation or brand) is the superiority of a company or institution and its products to others. Customers will buy the products or services more expensive, according to the brand and reputation of the product[41]. If there's any indemnify to the reputation during the trade process, the reputation of this brand will be destroyed. According to the situation, if a person caused this reputation detraction, s/he must take responsibility. In fact, reputation detraction is another aspect of spiritual loss and the act 1 of law of civil liability considered the reputation detraction as a spiritual loss, in addition to implication. Therefore, one of the claimable spiritual loss is reputation detraction of a merchants. Now, this question is stated that if an athlete is merchant (institution or commercial product), why reputation detraction proposed about him/her? Since there's no approved law as being commercial of an athlete's activity, but it can be observed that reputation is an inseparable part of this career. When we discuss about commerce, it seems that it's about product(s)

[40] I. Babaei, *o.u.c.*, p. 10.
[41] *Biotech Journal*, title, No. 11, 1389.

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which are investigated. As it stated in commercial reputation, how can we placed an athlete's activity as a brand or commercial reputation? It's believed that sport industry (such as other industries) has products and sport events consider as sport products including players' transfers, coaches, selling put opinion of television broadcast of sport event, selling tickets, advertisements, establishing sport facilities, gambling, and tourist and sponsors attraction (some of these factors are not institutionalize in Iran)[42]. Today, it's the intellectual system which emphasize on thoughts. In fact, the reputation of natural person is not important such as coach, athlete, etc. Athlete's skill and reputation is the one factor that intellectual system emphasize on[43]. Athlete's skill[44] defined as a technique or specific approach to achieve a specific purpose[45]. Except physical force to achieve victory title and scoring, an athlete needs to use his/her mental force not only to choose the best approach, but also to reach balance between his/her mind and body. Hence, the athlete can present his/her sport skills in the best way. Exercises referred to the moves of all or parts of athlete's body which presented individually or as a team. In 1996, Robert Kunstadt et al supported exercises through intellectual property law and they published an essay in America Law magazine. In this essay, there are different factors expressed such as high motivation of the athletes, legal monopoly, scoring, winning over the opponent, earning money, and also the tendency of juridical proceedings to support exercises[46]. In accordance with the importance of exercises and sport skills for athletes in sport industry, it's inequitable to disregard it as a brand or commercial reputation which is monopolized to a person or a team. Therefore, if this reputation detracts in different manners such as using without considering intellectual property and rights or detracting the reputation (or even damaging athlete which caused partial disability), the damage agent must take responsibility and compensate the losses. Similarly, sport product manufacturer dis-

[42] F. Asgarian, cited from M. Hekmat Nia, A. Khoshnevis, *Sport Intellectual Property*, Paper, p. 128.

[43] M. Hekmat Nia, A. Khoshnevis, *Sport Intellectual Property*, cit., p. 129.

[44] Sport techniques.

[45] M. Hekmat Nia, A. Khoshnevis, *Sport Intellectual Property*, cit., p. 129.

[46] *Ibidem.*

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tributes an inferior product which cause loss to a professional athlete and his/her partial disability and detract his/her reputation. The manufacturer is not only responsible for spiritual loss but also must compensate the injuries.

Sport product is more considered because it will be used in a special situation. Because of the aforementioned reason, it will be distinguished from non-sport products in case of similarities even this product has some similarities. It's appropriate that we investigate the difficulties of sport products in different conditions. In the next section, we will discuss about achieving «civil liability of manufacturers and sellers of sport products», investigating the difficulties of sport products resulting from production or lack of maintenance in good quality by selling, and also using improperly by authorities.

4. In order to achieve civil liability, there are several factors which defined by civil law and common law. Difficulties of distributed products is one of the factors of achieving civil liability of manufacturer and seller of sport products. The difficulties which caused injuries to consumers, may have different sources. One of those is the imperfection from manufacturer.

4.1. In word, imperfection[47] means badness, defect, and deficiency[48]. The civil law of Iran does not define imperfection and concedes it to the common law (act 426 in civil law)[49]. Therefore, lawyers define the term as following. «If there's flaw or exuberance in property such that there are no factors about flaw or exuberance, whether it exists in nature or it's artificial»[50]. Therefore, the important term in each transaction which is about a product, is the product in good order. There's no difference whether the product distributes directly or indirectly by manufacturer or intermediary, respectively. However, both manufacturer and seller have specific responsibilities from production to consumption processes.

[47] Kunstadt.

[48] Defect.

[49] S. Madaddi, *Civil liability of manufacturers and sellers*, 1388, cit., p. 94.

[50] M.J. Jafari, M. Langeroudi, *Law terminology*, 16th edition, Ganje Danesh publication, 1385, p. 482.

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In general, the manufacturer must follow law regulations, safety regulations, and protection regulations in designing, producing, and using the products. If the seller neglects about the common maintenance conditions, s/he will be responsible. In addition to aforementioned expression, this regulation is presumed in act 1 of civil liability law. «If a person hurts others' health, freedom, commercial reputation, property, or dignity (or any legitimate rights) without legal license deliberately or inadvertently which causes financial loss or spiritual loss, the person will be responsible for compensating»[51]. The manufacturer adheres to critical factors in producing sport productions and the manufacturer must ensure the customer that the final product is safe and appropriate[52]. Sometimes, there's lack of accuracy in good's production and the production distributed imperfectly. In this case, the customer can use the option of defect, but it must be investigated that how the imperfection is assessed. In non-gratuitous transactions, the product selling traded based on tax. Therefore, if there's any difficulties in a product and it devalues the product and also the common law approves the devaluation, it referred as imperfection[53]. Imperfection divided into three categories based on technical phase, design phase, and selling phase:

A. Imperfection in general design and technical design of production phase.

B. Imperfection in production phase or execution the technical design.

C. Imperfection in teaching necessary cautions in order to prevent possible dangers of using[54].

4.2. The source of the imperfection results from the technical design of the product which exists in all factors of a product. For example, «the ball No. 6 designed in basketball for women and its volume and the weight are 79.39 cm and 553.496 g, respectively»[55]. If the manufacturer doesn't follow the standard and produce a heavier

[51] Act 1, Civil liability law.
[52] W. Jampion. Jr., *Civil liability in sport*, Tran. Aghaei Nia, 1388, p. 133.
[53] N. Katoozian, *Liability resulting of production imperfection*, cit., p. 136.
[54] *Ivi*, p. 145.
[55] *Imanschool.blogsky*, paralysis sport website.

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ball which occurred during design and before production, this imperfection referred as general imperfection or imperfection in design and this will include all factors in production unit[56]. Another example is a claim in one of the US states that «court recognized the manufacturer of a helmet as guilty, because the ball crossed over three parts and caused injury to the head of athlete»[57]. In a multi-part product, if manufacturer prevent to distribute the complete product and the manufacturer imagine that the customer can provide necessary parts and install them in order to provide safety, this will be the design imperfection and s/he is liable[58]. For example, a product has not enough sport equipment to install safety and the consumer install the non-standard equipment without being aware of it, the manufacturer is guilty and must compensate, if athletes or others injured by the equipment which separated from the wall or ground.

4.3. If the product is in desired condition in primary design phase, then production unit workers neglect during the production or an inferior quality part installed into equipment, as a result the distributed product to customer will be imperfection. This imperfection is involuntary, but the imperfection design performed by contemplating. In addition to that, the manufacturer performs an imperfection in design phase in order to produce cheap, undesirable, and non-durable products for jobbery. In case of imperfection of a product during production phase, one or more products will have an imperfection during production phase; and as a result, distinguish of the mentioned product having producing imperfection, is easy because the product is distinguishable based on the factors[59].

4.4. Sometimes, it's necessary to inform the customer several information and cautions. In this case and in common law, the product will be imperfect because lack of information from customer about the product and usage method causes disorder the usage (or the product cannot be used generally). Even if it can be useful and

[56] N. Katoozian, *Liability resulting of production imperfection*, cit., p. 146.
[57] W. Jampion. Jr., *Civil liability in sport*, cit., p. 134.
[58] N. Katoozian, *Liability resulting of production imperfection*, cit., p. 147.
[59] *Ivi*, p. 148.

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desired product, it can cause dangers[60]. Therefore, it's necessary that the manufacturer informs the customer about the possible dangers and cautions of the product[61]. There are three hypotheses about the manufacturer's liability in order to inform information and cautions: 1) the manufacturer did not anticipate unexpected dangers; 2) the manufacturer was not aware of unexpected dangers; and 3) the manufacturer recognized the unexpected dangers, but s/he had no instrument to inform it, such as driving a car in highway. In order to distinguish the manufacturer's liabilities, the cautions must be distinguished into unnecessary cautions and necessary cautions[62]. The cautions are necessary and relate to the safety of product that if the manufacturer do not inform the customer about those cautions, using the product will be dangerous and the manufacturer's liability is certain about the inform cautions. For example, if the manufacturer doesn't inform the necessary cautions that the helmet will not protect the athlete against the impact to head, then the consumer purchases the product imagining that the helmet will protect his/her head against the impacts and uses it in sport which is full of danger for the head[63], as a result, there might be problems for using the product. In this case, if there's not a loss for customer, it will be an inferior purchase which will be compensate if the customer proved it. If the consumer has enough information about the common cautions, then there will no need to labeling the cautions and its responsibility such as using a product in other conditions e.g. wearing swimming cap instead of hockey helmet. Sometimes, the manufacturer or seller inform customer about cautions but it's not enough. For example, an athlete hurt his/her spine during back flips on mini trampoline[64], a court in USA verdict for guiltiness of the manufacturer for lack of cautions and not informing about the possible cautions and using the product without coach. Hence, the manufacturer which could foresee the lack of direct observation of coach, is guilty and responsible[65].

[60] *Ibidem*.
[61] W. Jampion Jr., *Civil liability in sport*, cit., p. 135.
[62] N. Katoozian, *Liability resulting of production imperfection,* cit., p. 149.
[63] W. Jampion Jr., *Civil liability in sport*, cit., p. 135.
[64] *Trampoline*, Wikipedia.
[65] W. Jampion Jr., *Civil liability in sport*, cit., p. 135.

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4.5. In several cases, the relationship between manufacturer and the consumer is different because the relationship is conventional. In conventional relationship, safety product is the implied term of contract.

When purchaser or consumer will have a loss because of product imperfection, the damage agent will be liable, according to the law. Therefore, seller will be liable because s/he is not performed according to the contract; it seems that the seller was aware of product imperfection and not inform that to the purchaser, then the seller is guilty and s/he must compensate. The agreement violation will force the party to compensate which caused by lack of information of consumer about the hidden imperfection of product[66]. If we assume that the seller didn't perform the duties about maintaining the product in a good condition, the seller is liable for compensating the losses to purchaser or consumer. In case of sport products, it's important that they can't be maintained and warehoused in a same method. Sport products' content are leather, rubber, fabric and wool and they need different methods to warehouse. For example, the leather ball must be flat and then it must be warehoused in a dry place without pressure and warm air flow. The most common problems are temperature and high humidity for leather instruments. Green mold is harmful which causes decay. In order to prevent decay resulting from green mold, the leathers must be warehoused in dry and cool condition. The rubber balls are sensitive to direct sunlight, heat, grease, and oil which should be protected from mentioned factors[67].

4.6. Negligence about the sport equipment maintaining is not occurred from the seller, but it's occurred from the competition organizer after signing agreement between seller and purchaser. Thus, the product will be bought in a good condition, but the competition organizer will cause injury to athletes because s/he did not maintain them in a safety condition. Two criteria are important in order to maintain sport equipment: 1) manager, authority, and even athlete must aware of the specific warehousing condition of each sport equipment. 2) The correct method must be thought to them in a specific

[66] S. Madaddi, *Civil liability of manufacturers and sellers*, cit., p. 41.
[67] *http://www.yjc.ir/4130320*.

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manner. The maintenance method of sport facilities and equipment divided into two categories. First method is thought by the manufacturer who explained about the right method of maintaining and protecting the product. Second method is codifying a guideline which expressed about the subject comprehensively. This guideline can be provided by different institutes such as ministry of education or ministry of sport in order to increase the knowledge of users, managers, and finally the quality of sport in schools and society. Fortunately, this process is approved by the education ministry which is titled as «safety guideline for space and sport facilities of schools». It's a valuable process in health conditions of students and personnel and this process can decrease the treatment expenses which causes society's development[68]. The guideline can help to country's sport. Since, its factors can help schools more than sport complexes, it can be a source to other institutes in order to establish a guideline suitable for professional sport complexes which are different compared to schools. If the law considers the direct relationship of sport as the enough information about the maintenance of space and equipment, we must approve that any negligence is traceable in sport equipment maintenance whether they have necessary cautions or not and the authorities will be responsible for the athlete's injuries. It seems that such manner is not fair and based on justice which is the final purpose of the law. In accordance with the technology development and variety of sport products, manufacturing of sport product is an important industry and we can't expect that a person, even professional athletes, be aware of different correct maintenance method. Therefore, it is notable that a correct approach has to be choose. Thus, if the production which has instructions about the protection and maintenance or the seller inform the purchaser about the mentioned instructions, causes injury to the athlete because of lack of maintenance, then the authority is guilty. There are equipments which have no instructions. If it's not a new equipment and the authorities operate them before, but the mentioned hypothesis will be applied and the authority will be responsible. As a result, if the authority was not aware of the maintenance conditions, then the manufacturer and seller

[68] *http://mahmoodvarzesh.blogfa.com*.

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are responsible for lack of informing the necessary information, in order to execute loss reduction principles.

5. In sport law, civil liability is one of the most applied law terms. Sport law considered as the events which had penal aspects and sport law experts were also penal law experts. Thus, private law entered the sport law more than before by passing of time, sport development, and variety events which have not penal roots. In this case, civil liability which is the most important private law terms, becomes more common. The civil liability of manufacturers and sellers of sport products is critical which must not be ignored. The criticality of the subject expressed generally and the notable point is that the civil liability of manufacturers and sellers is not payed attention to as it must be. In the most countries, the civil liability considered fairer and consumer's right will not be violated. For example, KASCO store which is one of the biggest goods distributers in USA, provides the customer that if the customer is not satisfied with the product, s/he can relapse it. In our county, we can see on all boards that «the sold good will be not relapse»[69]. This manner with customer which spend money but s/he didn't use the product and leonine, is not accordant to our law principles. Hence, both product's sensitivity and recognizing damage agent caused that the consumer of sport product not only be safe from loss but also incur no loss. Therefore, the athlete can exercise more energetic than before in the sport. It seems that the roles accordance with executive guarantee which support the athlete, will encourage not only the interested people to use the domestic products with standard but also the professional athlete to achieve different titles. On the other side, professional athletes don't use domestic products and this subject is particular for amateur athletes which have weakness in seeking their rights.

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[69] M. Arizi, *Liability of manufacturers and sellers for consumers*, Gorgan Nowrouzi publication, 1391.

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*Abstract*

Civil liability is an important phenomenon in private law and it used widespread in sports because of different types of accidents. Civil liability is one of the basic principles of law which is rooted in «No Harm» principle and also «The man who attain advantage is responsible for damage and loss» jurisprudential basis. Therefore, there is no damage without compensation and the benefactor must endure the possible damages. Hence, civil liability of the manufacturer and seller is compatible not only with law principles but also with sport products sensitivity because of usage procedure and their differences with non-sport products in conditions such as pressure resistance and impact speed to water and soil, etc. In accordance with the spiritual and physical vulnerability and achieving medals and glory to his/her country, the consumer (athlete) is valuable because s/he has not enough support based on the conditions in country's principles. Lack of consumer support, especially sport products consumer in Iran, is one of the critical issues which is not considered properly; although consumer protection law passed but there is few claim in courts. This is not because of complete satisfaction of consumers and the good quality of products. It's because that the consumer isn't aware of his/her rights and also, there's not suitable laws in this case. In other words, the consumers have not enough support.

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# Analysis of the Necessity to Build the Third-Party Professional Game Match Referee Organization for International Competitive Sports

SUMMARY: 1. Introduction. – 2. The procedure is not fair. – 3. The Direct Implementation Source for Sports Corruption. – 4. Analysis of the Necessity to Build the Third-Party Professional Game Match Referee. Organization for International Competitive Sports. - 4.1.1. Justice of Procedures. - 4.2. Specialization Requirements. - 4.3. Professional requirements. - 4.4. Scientific management requirements. – 5. The Construction Principles of the Third-party Professional Referee Institutions in International Competitive Sports. - 5.1. The principle of justice. - 5.2. Principle of non-profit. - 5.3. Principle of scientific management. - 5.4. Principle of preference and avoidance. – 6. The Management Conception of the Third-party Professional Referee Institutions in International Competitive Sports with the System of «Concentrated and Decentralized Sports Management». - 6.1. The concept of the third-party professional referee institutions in international competitive sports. - 6.2. The Management over the Third-party Professional Referee Organ in the International Competitive Sports.

1. The modern Olympic Games has been for over a hundred years history, but the development of the referee is still in its initial time. As an important part of the competitive sports, referee plays a crucial role in the match, with supreme authority while matching, seeing it is named the judge in black. On-the-spot judging situation, referees make judgment according to the game rules of the corresponding sport, however for the referee, justice presents to be the most needed but the hardest thing to pursue, which seems to be an eternal topic of the arena[1]. The appointment of referees for international competitive sports is exposed to the problem that some sport player

[1] C. Lu, *Trial Discussions on the Unfair Factors in Modern Competitive Sports*, in *Shandong Sports Science*, 3, 1999, p. 72.

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is at meantime a referee. The Third-Party Professional Game Match Referee Organization is created by holding the attitude that the injustice problem must be settled form its bottom choosing and appointing referees. Thus, under the centralized and decentralized sports management system, the author puts up with the idea of building the Third-Party Professional Game Match Referee Organization. Legal proverb has it that nobody could be the judge to his own case. There have been the cases of disputes for the referees' judges in the major events as the Olympic Games. Take the modern Olympic Games in London in 1908 as the example, as the US delegates blamed that the UK's referee showing preference for the team of his own country[2], who was known as the «country-loving referee», the International Olympic Committee reformed the refereeing work, into that the referees should not be arranged by the hosting country any longer. Instead, the International Sports Organization makes the choice among the referees of all the countries around the world under the general planning of the International Olympic Committee[3]. In the light middleweight boxing match in Seoul Olympic Games of 1988, it was a battle between the US legendary contestant Roy Jones and Piao Xihong, a contestant from South Korea, the hosting country. Jones had a complete success in the battle though, the referee raised the hand of Piao Xihong at last. The research after the contest showed that Jones had beaten the counterpart for 86 times, well over the 32 times that the counterpart beat her. This became one of the scandals of that Olympic Games[4]. In the Figure Skating Double Slide Race in the Salt Lake City of 2002, problems showed in the refereeing again. Even though the Canadian player had a perfect performance, the championship was won by the Russian contestant. After the contest, the Canadian delegate made the protest, blaming the injustice of the referee. At last, a gold medal is granted to the Canadian contestant, meanwhile the Russian contestant kept its gold medal. The

[2] BBC (2004), *The London Olympic Games in 1908-Olympics in the Fog City*[EB/OL]. *news.bbc.co.uk/chinese/simp/hi/newsid_3910000/newsid_3917000/3917087.stm*.

[3] *The Country-loving Referee in the UK*[EB/OL]. *www.bowenwang.com.cn/most-contentious-referee-decision-in-history2.htm*.

[4] Xinhua (2016), Com. *All the Faulty Judgment are all Target on China?*[EB/OL]. *news.xinhuanet.com/comments/2016-08/11/c_1119372379.htm*.

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referee's qualification of Le Guerney was cancelled for the long term. The Russian delegates declared that being discriminated by the referees led by the referees in North America, Russia decided to quit from this Olympic Games. Then, with the mediation of the International Olympic Committee, the Russian delegate declared to recover the decision of appeal. Not just the Russian team, On Feb. 18, after the Ice Dance Competition ends, the Lithuania delegation proposed the appeal, claiming that because the ice dance referees are implementing different judgment criteria, the Lithuania contestants failed to obtain a medal. In the Men's Gymnastics All-around Game of the Athens Olympic Games of 2004, because of the faults made by 3 technical officers, the parallel bars which should be ranked from 10 scores were ranked from 9.9 scores for the South Korean contestant Liang Tairong, who ended in ranking the third place with a score difference of 0.049. Even though the International Federation of Gymnastics (FIG) had admitted the faults and suspended the positions of the three referees who made the mistake afterwards, it still refused to grant the gold medal to Liang Tairong[5]. «The Referee Gate» crisis disturbed the London Olympic Games[6]. The International Boxing Federation declared (Oct. 6, 2016) in Lausanne of Switzerland that 36 of the referees and enforcement officers participating Rio Olympic Games were forbidden to participate into the Olympic Games. The International Boxing Federation will organize for Special Investigation Committee to carry out investigations for their behaviors[7].

The referees are supposed to make the timely judgment or punishment for the teams of the two parties as an intermediary party, therefore, the justice of the referees for international sports competition and whether they are equipped with high level professionalism will pose direct impacts on the contest's effects, contest's results and

[5] Sina Sports (2002), *The Salt Lake City filled with Scandals and Disputes—One of the Flashbacks for the Winter Olympic Games in 2002* [EB/OL]. *sports.sina.com.cn/o/2002-02-26/26240471.shtml*.

[6] Renmin. Com (2012), *The 'Referee Gate' Crisis Disturbing the London Olympic Games. The Frequent Occurrence of Security Oolong Event*[EB/OL].

[7] CNTV (2016), *Thorough Investigation| No Free Lunch in the World! The Referees for Boxing of Rio Olympic Games are Forbidden to be Referees Collectively* [EB/OL]. *news.cctv.com/2016/10/08/ARTId38oVgNDiIRll4WaTVkB161008.shtml*.

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sports appreciators' evaluations for the contests. Because internationalization of the contest, it will even influence the order and custom of the society, and lead to series of social problems. The International Olympic Committee for Fair Play is in the wind and rain. The appointment of referees for international competitive sports is exposed to the problem that some sport player is at meantime a referee. The Third-Party Professional Game Match Referee Organization is created by holding the attitude that the injustice problem must be settled form its bottom choosing and appointing referees. Thus, under the centralized and decentralized sports management system, the author puts up with the idea of building the Third-Party Professional Game Match Referee Organization.

2. The proverb says, «there is no justice without procedures». Modern international referee selected of the Olympic Games is the London Olympic Games in 1908 the level is relatively mature and independent, hosting the Olympics Britain by a British member of the IOC and the Olympic council representatives of each individual sport association. The games all the technical work, formulate rules and layout, to select the referee, organize the game all by Britain's responsible for individual sport association, greatly improve the standardization degree, this for the later is managed by the national association of an individual sport games technical work laid the foundation. the IOC(1926) finally agreed to establish a technical committee composed of representatives of individual international sports federations[8].

Cooperation of the international Olympic committee international individual sports federations (IFS) according to the degree of intimacy can be divided into three types: the first form is that the international Olympic committee (IOC) admitted that the international individual sport federation, and the international federation of individual sport project is in the Olympic Games, this is the most close to the international individual sport federation, federation of international sports management Olympic sports, including the manage-

[8] X. Ru, *Historic Probe into the Origin of the Correlation between the International Olympic Games and International Special Sports Association*, in *Journal of Shenyang Physical Education Institute*, 23, 1, 2004, p. 22 s.

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ment of the referee. According to 2004 statistics, the most closely connected international sports federations have 35, including 28 summer Olympics and 7 winter Olympics[9]. In this type of international sport federation, problems of international weightlifting federation, the international sports referee selected and management of the football league belong to federation of internal management, such as the international weightlifting federation sports training, the referee to determine the world championship, referee, etc.[10]; FIFA often hosts international umpire training classes and sets up the umpire to administer the referee[11]. In the second form, international Olympic federations have been recognized by the IOC but not included in the IOC competition. Such as the world pool alliance (WCBS), the world karate federation and so on. For example, the referee in the world billiards league is in contact with members and retains a qualified international referee roster in WCBS and MSE activities[12]. The world karate federation is set up by the umpire committee to administer the referee. The third form is, the international sports federations has not obtained the international Olympic committee (IOC), and not included in the events of the international Olympic committee (IOC), which is with the international Olympic committee (IOC) relation close degree lower international sports federation. International federation of sumo federation, international federation of sports federation (IFS) referees and referee rules[13].

The technical problems of the Olympic Games are usually carried out by individual sports organizations, and the judges are no exception. Individual organizations send invitations to international referees before the games, and organize them to work on the referees who run the competition. But those who work as assistant referees, such as the inspector, the spotters and the recorder, are sent by the

[9] *Ibidem*.

[10] Official Website of China Olympic Committee. International Weight Lifting Union(2004)[EB/OL]. *www.olympic.cn/sports/union/international/2004/0326/24599.html*.

[11] Official Website of China Olympic Committee. International Weight Lifting Union(2003)[EB/OL]. *www.olympic.cn/sports/union/international/2003/1016/24626.html*.

[12] International Billiards Federation. International Billiards Federation [EB/OL]. *www.wcbs-billiards.org/about-us/*.

[13] International Sumo Confederation. International Sumo Confederation [EB/OL]. *www.ifs-sumo.org/pdf/Code_of_Prevention.pdf*.

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host country. The cost of the referees who are invited to work for the Olympic Games will be charged by the OCOG. During the Olympics, they lived in the Olympic village rather than in the hotel. They enter the stadium on the basis of their identity CARDS, but they cannot enter the athletes' Olympic village. The Olympic Games require that the referee be impartial and accurate and subject to the supervision of the international sports organization, technical committee and arbitration commission. The unjust judge will be charged or replaced[14]. Therefore, the management and selection of the judges of the international Olympic Games are held by the technical committee composed of representatives of individual international sports federations.

Described by above knowable, the current international competition referee selected and management are not independent of the units of sports contests, and teams do not have any interests and origin, by has the subject qualification to independence and exercise of sports competition referee behavior of professionals, can accept the units employ of sports contests, engaged in sports competition justice behavior, with independent legal person status of the business institutions[15]. At present, international competitive sports have no third party professional referees.

3. Corruption is the behavior of seeking for personal interests by abusing the public rights[16]. The nature of corruption is seeking for personal interests by taking the public rights. To put it simple, it is the personal interest pursuit with rights[17]. The recent years have witnessed an increasing attention from the public to the sports corruption, which has become a cancer affecting the justice of international sports justice. In the contest between Chinese Team and Italian Team

[14] Central People's Government of the People's Republic of China. Referee [EB/OL]. *www.gov.cn/test/2007-04/12/content_1059347.htm*.

[15] Q. Guo, J. Xiang, J. Zhong and X. Wang, *Trial Discussions over the Establishment of the Third-party Professional Referee Organ* [J], in *Journal of Jilin Institute of Physical Education*, 32, 1, 2016, p. 2 s.

[16] Z. He, *Researches on Corruption and Anti-corruption Issues in the Transformation Period of China*, in *Comparisons for the Economic Society Systems*, 1, 2003, p. 19.

[17] J. Ren, *Corruption and Anti-corruption: Theories, Models and Methods*, Beijing, Tsinghua University Press, 2009, p. 21.

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in the Athens Olympic Games in 2004, the Hungarian referee Xidaxi judged the 6 scores that were achieved by the Chinese team to the Italian Team, leading to the result that the Chinese team lost the game with a difference of three swords. In the end, even the International Sword Alliance couldn't tolerate that it cancelled the judgment qualification of Xidaxi immediately and forbid this person to enforce the contest events of the International Sword Alliance. However, the most serious punishment made by the International Sword Alliance for 30 years couldn't overturn of the results of the contest[18]. Yahoo Sport (2014) claimed that ZHENG Mengzhun who plays the key role for creating the legend of football of South Korea had been phasing out the football domain, and he was trying all out to canvass for the official position as the mayor of Seoul. In the ticket worship campaign, his one sentence hurt the eternal pain in the football fans and reactivated their wishes to disclose the historic truths. He said in the campaign that he had totally the ability to get the duty referee of the World Cup at that year, won't he be a good mayor? This raised a storm in the world[19]. News of the Gazzetta dello Sport (On Mar. 23, 2015), the Series A Telephone Gate Event, after 9 years, finally settled. The former Juventus's manager Moggi's part of the crimes were overturned, but he was judged as Sports Fraud, and the guilty penalty for the two of the three judges involved were overturned, and another referee was sentenced to 10-month imprisonment[20]. On the Rio Olympic Games of 2016, the AIBA declared in Switzerland that all the 36 referees for the boxing contest for Rio Olympic Games were forbidden to take the games, and organized special investigation committee to carry out investigations for their disputed performance in Rio Olympic Games. The UK Daily Mirror claimed that the reason for it was that «the referees haven't given

[18] Y. YAN, *What's Uglier than the Stimulants is the Anomie of the Referee* [EB/OL]. *www.people.com.cn/GB/guandian/1034/2734301.html*.

[19] Renmin.Com(2014), *New Evidence for the Bribery in the 2002 World Cup in South Korea: ZHENG Mengzhun claiming that he has got the referee settled.* [EB/OL]. *sports.people.com.cn/2014/BIG5/n/2014/0612/c384328-25137610.html*.

[20] CCTV Sports *It's been 9 years, and the Telephone Gate Event is finally Sentenced Part of Moggi's Charges are Convicted* [EB/OL]. *weibo.com/1819318401/Ca4Tsru0A?mod=weibotime&type=comment#_rnd1503413775026*.

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a full play to their capabilities»[21]. FIFA declares that in the qualifier for the Africa region of the World Cup held in Nov. of last year, the match fixing occurred to the contest won by the South Africa to the Senegal Team, and the duty referee Lambert was forbidden to act as the referee for contests for a lifetime[22]. In Jun. 2005, cash charged from the athletes occurred to the preliminary for wrestling in the 10th National Games, and 3 persons were forbidden to act as the referee for a lifetime[23].

When the sports referees make the injustice judgment to gain the personal benefits, the sports corruption happens. The sports referees' corruptions are not the fresh things under the sunshine, the sports scholars and scholars in different countries are making efforts to create an anti-corruption, justice and harmonious sports campaign.

## 4. Analysis of the Necessity to Build the Third-Party Professional Game Match Referee Organization for International Competitive Sports

4.1. Thibaut and Walker (1975) proposed the «Justice of Procedures». It stresses the justice of procedures and processes during the distribution of resources. They found out that when people couldn't obtain the ideal results, but when they found that the procedures are in justice, they will also accept this result[24]. Rawls, the modern «synthesizer of justice theories», holds that the justice of procedures is a thing lying between the justice of nature and the justice in forms, which requires that the procedures maintain the nature of justice in its regulating and application processes[25]. On this basis, scholars in our country further demonstrated the correlation between the justice

[21] S. Hao, L. Yang, *The Referees for Boxing Event in Rio Olympic Games are Forbidden to be Referees Collectively* [EB/OL]. *sports.people.com.cn/n1/2016/1008/c22158-28758879.html*.

[22] W. Zhou (2017), *The Referee Blowing the Black Whistle in Africa is Forbidden to Participate into the Games for a Lifetime* [EB/OL]. *hlj.ifeng.com/a/20170323/54912570.shtml*.

[23] China News (2005) Com., *Black Whistle Showed in the Wrestling Preliminary of the 10th National Games. Three Referees are Forbidden to Participate in the Games for a Lifetime* [EB/OL]. *www.chinanews.com/news/2005/2005-06-30/26/593086.shtml*.

[24] J. Rawls, *Theory of Justice*, China Social Science Press, 1988, p. 11.

[25] Y. Li, L. Long and Y. Liu, *Progress of the Organization Justice Sense*, in *Psychology Science Progress*, 11, 1, 2003, p. 79.

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of procedures and justice in nature. The justice of procedures is the basis and precondition for the justice in nature, and none of these two should be neglected. Secondly, the justice of procedures is the component for the judicial justice. Thirdly, the justice of procedures is not only equipped with the functions and values of guarantee, it maintains the independent appealing values itself[26].

The International Sports Arbitration Institute is set for handling the disputes in the sports settlements, which shows that the justice of the referees for international sports is in question. There is no a third party professional referee institution in international athletic competition to exercise the referees power. The referees have not be divorced from all international sports individual association. This has violated the basic principles of the fairness of sports referees. It is not only necessary but also urgent to found a third party professional referee institution in international athletic competition with procedural justice. Therefore, it's the important issue to be considered at the moment that how can we found a fair professional referee institution.

4.2. The specialization development of the sports referees is inseparable to the development of the entire sports industry. The sports referee is a profession posing high requirements on the comprehensive qualities as the physical capacities, experience and psychological state. Let's take football, the first sports in the world, as an example, the football referees require at the age of 45. One excellent referee is selected among tens of thousands. The referees retire early, and it takes a long time to be a referee, therefore the specialization of referees need a large scale and long-term sports population to support its selection. As a result, it needs a perfect management mechanism and organ to assign and manage the referees. Take China as an example, In Mar. 2015, the officials in China clearly stated that the "three steps" strategy of football started. The football cause of China is developing rapidly, and the football population has undergone a certain development. the Chinese Football Association (On Aug. 18, 2017) plans to promote series of measures to explore for

[26] W. Chen, W. Chen, *Why the Judicial System Needs to Insist with the Justice of Procedures* [EB/OL]. *news.ifeng.com/exclusive/lecture/special/chenweidong/*.

the new techniques and new means for the enforcement of referees and improve the overall level of the professional league, such as establishing the professional referee system, trying the video-assistant referee technology, expanding the international cooperation among the referees' group, establishing the Chinese Football Referees Training College by cooperating with sports colleges and enhancing the education and training work for the referees' group[27]. This is only a professional specialization development for referees. The international sports referees development generally includes the training in the various international sports associations and the training within the league. Looking from the long term, these are far from enough for the development of professional referees in the world sports.

4.3. A sports referee is a profession. Because of its high professional requirements, long time and high demand for sports market, sports referees can take the profession as a lifelong career pursuit and a mean to make a living, referee professionalism is the only path of professional development and professional sports industry. We can take Chinese super sports event as an example: The part-time referees who are law enforcement have no base salary, the main law enforcement is 6000 RMB, assistant referee and the fourth official subsidy are 3000 RMB. If the league enters the season, according to the average weekly law enforcement, the referee's monthly income is 24,000 RMB. For example, in the premier league, the salaries and bonuses of these professional referees are around 70,000 pounds per season. The average annual salary of a Japanese J league referee is about 120,000 US dollars five years ago. In 2009, the major leagues began to try out professional referees, and by 2012, they had a slightly lower annual salary, but the average was around 100,000 US dollars[28]. At present, according to Chinese 10 times of the state sport general administration on July 1, 2015, director of the office approval, shall enter into force as of January 1, 2016 the measures for the adminis-

[27] Website of China Football Association. Exploring for the Referees' New Techniques and New Means (2017). Improving the Overall level of the Professional League[EB/OL]. *http://www.fa.org.cn/news/other/2017-08-18/523359.html.*

[28] SOHU, *Our International-level Football Referees are Working Part Time* [EB/OL]. *http://www.sohu.com/a/156905029_815111?qq-pf-to=pcqq.c2c.*

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tration of sports contest judge, China's management of the referee also belongs to the national association of an individual sport (hereinafter referred to as the national association of an individual), the provinces, autonomous regions and municipalities directly under the central government and local individual sport association (hereinafter referred to as the local individual association) is responsible for this project, the region corresponding technical level referee qualification certification, training, examination, registration, sending punishment, and so on. (hereinafter referred to as the technical level certification) supervision and management work[29]. China's sports association referee management set with reference to the developed countries such as Britain, a mature professional referee management should by special agencies to manage by the referee, not to be handled by each single item association.

4.4. Scientific management cannot be separated from specialized management agencies to be responsible for just, fair and open project, as well as the management of referees. The professional requirements of the re referees requires that the referees should be trained in a specialized and scientific way so as to train scientific and effective referees on a large scale. According to our country's «sports competition referee management method» and the Chinese football association to explore new technology and new means of referees improve the overall level of the professional league, plans to launch a series of measures, not to the cultivation of the professional referees for united, long-term management, nor from the sports competition and competition both sides benefit, host of the shackles of related party, therefore, it is difficult to guarantee the impartiality of the referee in the arbitration. At present, the management of referees at home and abroad does not meet the requirements of scientific management, which leads to the problem of corruption.

## 5. The Construction Principles of the Third-party Professional Referee Institutions in International Competitive Sports

[29] The Central People's Government of the People's Republic of China (2016), The order of the National Department of Sports. No.21[EB/OL]. *http://www.gov.cn/gongbao/content/2016/content_2979724.htm*.

5.1. The two sides of a sports competition are competing in a traditional social contract. As Rawls put it in his book the theory of justice: Justice as fairness could be together to make the choices of the most general and select primary principles of justice, these principles govern all subsequent criticism and transformation of system. Then, after chose a justice, we can speculate that they have to decide a constitution and the establishment of the legislature to enact a law, etc., all of which shall conform to the original agreed to principles of justice[30]. Sports is a part of social system, so it must be based on the fair first, if there are any partiality of sports on the program orientation, it has violated the Olympic spirit and not conducive to the prosperity and stability of the international sports industry. It is not only necessary but also urgent to find a third party professional referee institution in international athletic competition with procedural justice. Therefore, it's the important issue to be considered at the moment that how can we found a fair professional referee institution.

As the referee has the neutral position in the competitions, the process of selecting match must be consistent with procedural justice, which means all links of the whole selecting process must be overt & transparent, process publicity, and results releasing. The present referees of Olympic Games and other large-scale sports competitions are selected from the organizers, the International Sports Federation and the host country with a certain proportion. There is lack of certain understanding for public on the openness and transparency of selecting.

5.2. The athletic competition referees are with the nature of public welfare and impartial law enforcement, so the selection, assessment and management of referees should come from the non-profit institutions. Therefore, the income from professional referee services in society sports, in addition to the necessary expenses and staff labor remuneration, should be invested in the service quality improvement and other institutions construction continuously. Moreover, the non-profit purpose is also the need of impartial law en-

[30] J. Rawls, *Theory of Justice*, cit., p. 11.

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forcement. Otherwise, it will be developed into the gainful sports referees corruption and lose the essential meaning of fair refereeing[31].

5.3. The fundamental purpose of scientific management is to obtain the most institutional efficiency. The traditional casual and loose management of referees in the past is obviously not in line with the scientific requirements of management. The management of the third-party professional referee institutions should also abide by the requirements in other similar institutions, which are systematic management, centralized and decentralization combination, global and dynamic control, economic and efficient management and so on. Cultural traditions and management models of each country should be combined. No matter the centralized or decentralization administrative management mode, as long as to ensure the fair and impartial nature of the third-party professional referee institutions, and give full play to the institutions, as well as take full advantages of the institutions management efficiency, it has implemented the principle of scientific management.

5.4. In the selection of sports referees, it should be with preferential admission. In the management, it should also establish scientific training model to select and employ the referees. In the selection of referees, according to the importance of the international sports competitions, it should preferentially select the referees with high technical level, good professional ethics, professional accomplishment and professional abilities, good reputation, and without any obvious misjudgment, missed judgment, and other major work mistakes in the past large-scale important sports competitions.

The selection principles of international competition referees shall not use host sports referees. If there is any objection in referees election publicity, the validity and accuracy of objection should be examined. If there are any interests in referees election, the principle of avoidance should be adopted in time.

6. The Management Conception of the Third-party Professional

[31] Q. Guo, J. Xiang, J. Zhong and X. Wang, *Trial Discussions over the Establishment of the Third-party Professional Referee Organ*, cit. p. 28 s.

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Referee Institutions in International Competitive Sports with the System of «Concentrated and Decentralized Sports Management»

6.1. International competitive sports third-party professional referee organization in is the organization which is independent of the host country and organization in the international competitive sports competition, has no interests and origin related to the participating teams, is composed of professional personnel who have the referee's qualification and can independently exercise the sports competition referee behavior, can accept the employment of the organizations that hold competitive sports competitions, engages in competitive sports fair adjudication behavior and has a relatively independent status[32]. In view of the fact that the International Olympic Sports Committee has relative international leadership authority, therefore, the International Comprehensive competitive Sports Referee Management Committee should be set up under the International Olympic Committee to manage the international competitive sports third-party professional referee organization, it can be set as the organization which does not belong to any country (or region, other organizations), and it also can be set to provide referee service only for international sports events in some qualified countries, and the international third-party referee organization is responsible for the management and selection of international referees, this will break the current status that the international sports events holding organization may be associated with the interests of the team, make the international referee independent, to achieve a purpose of third-party, professionalism and specialization.

6.2. The international referees in the international individual sports competition organizations are organized into the third party professional referees organization in international sports, in all kinds of sports competitions, the organizers of sports competitions invite international referees in a unified way from the third-party professional referees organizations in the world. All the international referee data of international competitive sports third-party professional referee or-

[32] *Ibidem*.

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ganizations need to be unified into the sports referee big database of the International Olympic Committee referee Management Committee. For example: when holding world-class sports events, the IOC or the World Athletics Individual Championships Organizing Committee chooses and assigns international referees from all the international competitive sports third-party professional referee organizations, the selection basis of the referees is just from the international referee big database.

The record of the international sports third-party professional referee organizations should be filed with the International Olympic Committee or the national sports administrations of all countries, and the daily management of international referees is entrusted to the international competitive sports third-party professional referee organizations. The international third-party professional referee organizations may set up single sports referee division department with different advantages according to their actual situations and the national and local characteristics of their own country, such as soccer referee division, gymnastics referee division, track and field referee division and wushu referee division and so on. The source of the international referee must be an international referee certified and registered by the International Olympic Committee Referee Management Commission. The training and qualification examinations for international referees may be conducted by the International Olympic Committee (IOC) Referees Commission or the national sports administrative departments of their own country or region, international referees, once engaged in the judging work of the international competitive sports third-party professional referee organization, can no longer engage in special sports competitions and coaching work in order to ensure the fairness of the competition judgments.

The international competitive sports third-party professional referee organization is responsible for their international referees' specialized training, examination and application for registration and other management work, is responsible for the rewards and punishments according to their referees' judging behavior, grade good referees and punish poor. If the referees of international sports third-party professional referee organization have judging problems again and again and achieve the cumulative number of times, they can be demoted or cancelled by the International Olympic Committee referee man-

agement committee or the sports administrative department in the country.

Guo Qiao

*Abstract*

The international competitive sports third-party professional referee organization is created by holding the attitude that the injustice problem must be settled form its bottom choosing and appointing referees. International Olympic Sports Committee has relative international leadership authority, therefore, thus, under the centralized and decentralized sports management system, the author puts up with the idea of building the Third-Party Professional Game Match Referee Organization. The International Comprehensive competitive Sports Referee Management Committee should be set up under the International Olympic Committee to manage the international competitive sports third-party professional referee organization, it can be set as the organization which does not belong to any country (or region, other organizations), and it also can be set to provide referee service only for international sports events in some qualified countries, and the international third-party referee organization is responsible for the management and selection of international referees, this will break the current status that the international sports events holding organization may be associated with the interests of the team, make the international referee independent, to achieve a purpose of third-party, professionalism and specialization.

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# The need to observe the conscionability in the sport contracts

SUMMARY: 1. Introduction. – 2. Definition of conscionability with respect to its opposite concept (unconscionability). – 3. Conscionability in contracts in the field of private law. – 4. Conscionability in sports contracts as a part of contracts in the field of private law. – 5. The contract Performance bond in this field. – 6. Conclusion.

1. Problem statement: based on the will authority of both parties, everyone is of complete freedom in signing contracts and can include any condition in their agreements based on the principle of will authority and liberate contractually (provided that they are not inconsistent with public order and the rules of the governing system on the contract). Thus, the principle of will authority and liberate contractually allows any agreed condition, as if the purpose of singing private contracts is the commitment to its provisions. On the other hand, the parties must have equal states and rights (Langerudi, 1378:688) and consider equality and fairness to avoid the adverse effects due to the lack of fairness and conscionability (Monafi, 1395:132).

In private contracts, since the parties will not accept the obligations of contract if there is no contractual benefit, lack of observing fairness and including conscionability occurs when the contract has no extensional aspect or is of standard contracts. One of the most important standard contracts, in the area of sport rights and sport contracts is among the players or coaches with sport clubs. Sometimes, these contracts are to the disadvantage of a party due to the inclusion of conditions opposite to fairness.

The present study used a scientific approach, library study, and descriptive- analytical method to investigate the concept of con-

scionability, its place in private contracts, its importance in the area of sport, and performance bond.

2. In most studies, conscionability is defined with its opposite concept which is unconscionability. According to an author, describing conscionability especially in a contract that is advantageous for both parties is more difficult to be imagined (Wertheimer, 1992, p. 479). However, it can be said that unconscionable contracts lead to the misuse by the party having a better state. This case can be due to inequality between the two parties or the ability of bargaining. Furthermore, it can be for one party in the contract results which can be unconscionable (Sardoyi, 1391:35). In addition, unconscionability generally refers to the lack of a significant option for one of the parties along the conditions which are illogically in favor of another party (Cicoria, 2003, p. 9). According to an author, an unconscionable contract is so unfair and unusual that cannot be used for performing its provisions by considering the common procedure at the time of signing the contract (Shiravi, 1381, 21). Based on ACL Law, conscionability causes an obvious balance between the rights and obligations of the parties when there is no logical necessity for supporting the legal benefits of the party whom the conditions are in favor of, or when using these conditions leads to loss (financial or non-financial)[1]. The total definitions provided in the field of conscionability showed that conscionability refers to any condition causing the balance in the benefits of both parties (in favor of one party and to the detriment of another one) when the subject is unbearable for the suffering person.

3. Before discussing the subject, it should be noted that since sport contracts are the subset of private contracts, firstly such conditions were studied in private contracts and then the importance of unconscionability in sport contracts was discussed. Therefore, unconscionability was observed in contracts in two forms whether as an independent condition inside the main contract or a dependent condition (Paterson, 2009, 449). If the condition is independent, it will

[1] Under sch 2, s. 24(1) of the Australian Consumer Law, 2011.

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be as if a small contract is inside the main contract. For this reason, it will continue its life with a complete independency (Taqi Zadeh, 1394, 229).

However, if it is dependent, it will be durable like the main contract. The advantage of studying conscionability is that in the first case, if the unconscionability is invalid due to the law governing the contract, the invalidation of the condition will cause no damage to the main contract and it is only in the second case that the provisions of the contract can be invalidated. Another issue is that including unconscionability is only observed in the contracts in which a party is in a weaker status than the other party. Such contracts were manifested in two forms in law: 1) Extension contracts, and 2) Sample or standard contracts. Extension contracts refer to the contracts in which people have no possibility of bargaining under any conditions. Such contracts are on the issues related to the needs of people and are in the monopoly of a person but may be not completely based on the needs of a party at the time of signing (Shiravi, 1378, 74). Sport contracts are of these contract types. There is no certain and fixed rule on the criteria of unconscionability and its identification method. Although the condition may be inherently fair, it may be disadvantageous to a party. However, the most important criterion emphasized by most lawyers was the lack of a serious balance between the rights and obligations of both parties (Katuziyan, 1386, 66) because no normal human has a tendency to be involved in a contract without receiving any benefit on the contract. This issue indicated a kind of injustice and lack of balance in this field or the condition misleading a party or providing a party with the possibility of contract cancellation without any justified reason (Elahiyan, 1392, 9) or any other condition that included in the contract in favor of a party or disadvantage of a party whether it was unfair due to conditions. The question whether this condition is fair or not must be studied separately in both cases.

4. As mentioned, sport contracts are known as one of the most important private contracts. The most important of such contracts are the ones signed between sport clubs and players or coaches. Such sport contracts are inherently a kind of hiring human beings, so that the clubs hire the player or coach for a certain time for a certain

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price. On the other hand, they will be subject to the employee-employer laws[2]. Such contracts, as previously mentioned, are a subset of standard contracts.

It is true that the benefits of parties are considered in these contracts and signed with agreement, some provisions of the contract may be not in favor of the player or coach and disrupt the balance between profits and benefits (because the player or coach must be hired by a club to continue his activities and will not be able to play alone).If there are these conditions, whether as independent or dependent, in the contract, some measures must be provided to prevent its performance. Although in case of contracts between players and clubs, it cannot be certainly identified whether the suffering person is always the player or the coach, in case of the presence of unconscionability in contracts, because sometimes such conditions may be to the detriment of the club.

5. Obviously, if the sport contracts are signed according to the internal rules or between the internal club and player, there will be no general rule on invalid unconscionability in such contracts (Ghanavati, 1389, 154). However, the principle of liberate contractually will not allow the courts to be involved in case of a conflict. In addition, the rule «المومنونعندالشروطهم» is of great respect in our religion. In addition, the principle of contract accuracy and necessity considered any contract required and accurate unless it is not proved or prevents such principles while there is no law in this regard. The reason will be nothing except the preservation of stability and form of contracts (Shahidi, 1388, 23). On the other hand, the balance between the rights and obligations of both parties is of great importance. Regardless of preserving the contractual stability and trust of people to contracts in society, the priority is preserving the rights of these people in society. However, in line with the legal gap in the Iranian law, these conditions were announced invalid in case of proving by the judge due to the European guideline[3] (93/13/EEC) (unfair contract

[2] *http://www.hoghooghdanan.com/component/content/article/82-maghalat/sayer-mavared/1482-1389-05-11-05-36-32.html.*

[3] Unfair contract and the Draft Ec Directive.

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and the Draft EC Directive) in France and many European countries.

Article (L.132.1) of this guideline stated that unconscionability aimed at creating severe inequality between the rights and obligations of the two parties is to the detriment of consumer. Furthermore, the common law legal system that developed specific rules to directly prevent such conditions and breaking the rights of the weaker party (Unfair contract terms act of 1997)[4]. On the other hand, Article 20 of chapter 2 related to principles of business contracts stated that if any condition included in standard contracts has a characteristic that is usually expected will not be effective. In the Iranian law, perhaps the lack of legislation in this field can be justified by the opposite concept of the principle of good faith, i.e. the lack of good faith to present an acceptable solution (Taqi Zadeh, 1394, 20). Articles 667 and 680 of civil law and Article 339 of business law indicated the recognition of good faith and the need to observe it by the legislator[5] (Eskini, 1388: 183, & Taqi Zadeh, 1394, 20). Some lawyers mentioned the La Zarar (No Loss) rule to find a solution for canceling unconscionability (Monafi, 1395, 13). Regardless of the loyalty of this rule and its juridical importance, the juridical rules are used by the judge when there are included in our rules. While, there is no other rule, except some specific rules, in this field to solve the problem. The last solution in this regard is referring to specific rules that are considered as a legal innovation.

Article 46 of Ecommerce law approved in 1388 stated that using the contractual conditions unlike the provisions of this chapter and applying unconscionability to the detriment of consumer are not effective. Article 179 of the Marine law approved in 1343 stated that any relief and rescue contract signed during the risk and its conditions are unfair to the court may be invalidated or changed by the court. As mentioned, in these two articles, the legislator used two terms of ineffective and invalid. Invalid means that the contract is ineffective in the real world, as if no contract was ever signed. And the term «ineffective» refers to useless. Although, according to some

[4] Unfair Contract Terms Act of 1977.

[5] See Articles 667 and 680 of the Civil Code and Article 339 of the Commercial Code.

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lawyers, invalidation mentioned in Article 46 is a kind of relative invalidation to preserve the rights of consumer. The question is that can we extend these two Articles to similar cases such as sport contracts or not? Some lawyers do not agree with sentence enforcement due to specific rules (Taqi Zadeh, 1394, 26 and 29). By considering the content of such legal articles, it can be found that the reason to such invalid or ineffective conditions and the reason made these conditions unfair were similar not only in sport contracts but also in all private contracts. In this case, if the condition is dependent and extended to the contract, the contract might be invalidated. Even if the opposite opinion is accepted, according to the concept of lack of good faith that was mentioned above, such conditions can be prevented.

6.1. Conscionability is defined with its opposite concept that is unconscionability referring to the conditions which are so unfair and unusual, by considering the governing procedure at the time and place of signing the contract, that the provisions cannot be performed. Although, different definitions were presented in this regard, this definition was of complete totality.

2. Unconscionability is usually observed in the contracts where a party is weaker than the other one (that is called extension and standard contracts and sport contracts are a subset of such contracts). In these contracts, the conditions are whether independent that is not function of the main contract or dependent that is function to the main contract. Furthermore, there is no certain criterion for recognizing these conditions. However, one of the most important methods of recognition is that this condition created a serious imbalance in the rights and obligations of both parties. Although these issues were true, the judge must acquire conscionability in each case.

3. There is no specific rule on violating such conditions in Iran, unlike the law in European countries and America. Using the juridical rules will not be useful until they are not included in the law. However, as previously mentioned, legislator announced unconscionability in two Articles. Despite the disagreement of some lawyers on enforcement of such sentence to similar cases, due to the specific characteristics of these articles and rules, it seems that the will of legislator can be extended to other cases with unconscionability because

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it has no characteristic and can be enforced. In addition, if the opinion of opponents is accepted, there will be still the lack of good faith observed in some articles of this study, so that the performance of these conditions can be prevented.

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*Abstract*

Everyone is of complete freedom in signing contracts and can include any condition in their agreements based on the principle of will authority and liberate contractually. However, sometimes the conditions are included in contracts leading to huge imbalance in the rights and obligations of both parties and loss of one party. Such conditions are interpreted as unconscionability usually observed in extension and standard contracts (e.g. sport contracts). The important point in unconscionability, regardless of concept and nature recognition, is how to prove these conditions in a contract especially in the area of sport and how the judge can prevent the procedure to support the suffering person? In other words, whether the legislator provided the judicial authority with the necessary legal sources to remove these conditions? These issues were analyzed in the present study.

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