

## Sports legal order and civil liability Comparative law comments

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### **Introductory comments**

Athletics, this human activity which, as it is said, takes place somewhere between work and play (free time)<sup>1</sup>, may concern many aspects of life, of many people, and not of course just those who in some way participate in the eventual athletic activity, but also of others.

It is considered that sport contributes in public health, since participation in it ameliorates physical condition of a community's participating members, but also reinforces the equal, non discriminatory, socialization, by way of group work, discipline and fair play<sup>2</sup>. Thus justice, absolute equality of conditions and impartiality, constitute the fundamental principles of athletics<sup>3</sup>.

The need to safeguard the above principles, in the frame of athletic activity, provoked the effort to set rules, which should regulate this activity and its eventual consequences. Thus, the institution of athletics was developed and appears already, almost everywhere, as more or less governed by rules. It presents, as the French sociologist *Georges Vigarello* mentions, the myth of a "counter-society" (*contre-société*), of a representation originated in society<sup>4</sup>. Besides, as *Vigarello* rightly says: "Athletics remains one of the first institutions which is systematically presented as an example: it refers to the great values of our society, using though on the other hand administrators and arbitrators specifically formed, in order to render those values respected, it has recourse to lists of awarded and tables where to record and expose hierarchies. Hierarchy at this point, is being announced, controlled and brought forward"<sup>5</sup>.

Besides, the fact is often emphasized that sport constitutes a solid means of promotion of the feeling that one belongs to a community, of an identity, that is. In the case, thus, of athletes, members of a national team in international athletic events, their national identity constitutes a fundamental element<sup>6</sup>.

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<sup>1</sup> S. Gardiner/M. James/J. O'Leary/R. Welch/I. Blackshaw/S. Boyes/A. Caiger, *Sports Law*, 13.

<sup>2</sup> R. Craufurd Smith/B. Böttcher, *Football and Fundamental Rights: Regulating Access to Major Sporting Events on Television*, *Eur.Pub.L.* 2002, 111-112.

<sup>3</sup> B. Agozino, *Penal Discourse and the Ethic of Collective Responsibility in Sports Law*, *Int'l J.Sociol.L.* 24 (1996) 171, mentions that, the juridical regulations of football are characterized by elements resembling to the investigation led by the French penal judge, while they do not resemble at all to the ideal of the gladiators' fight, between formally equal parties, which is taking place before the English judge. He points out that both traditions constitute variations of the Enlightenment's ideas, on the need to rationalize the law and to abandon the arbitrary and pre-modernist exaggerations while governing the social behaviour.

<sup>4</sup> G. Vigarello, *Du jeu ancien au show sportif. La naissance d'un mythe*, Paris 2002, 156.

<sup>5</sup> G. Vigarello, (note 4), 207.

<sup>6</sup> S. Cornelius, *European Imperialism in Sport*, *Int.Sports L.J.* 2003/2, 28, 29.

## ***The role of law in athletics***

As it is rightly mentioned, the function and the importance of sport varies according to the cultural frame inside which it takes place<sup>7</sup> – besides, according to one opinion, sport itself is a cultural good<sup>8</sup>, or at least it must be made one<sup>9</sup>. And exactly because it plays different roles in different cultural frames, it is maintained that it can reproduce power relations.

As far as the issue of the role of law in sport is concerned, it is observed that its importance is being constantly accrued. As it very eloquently is pointed out, “the jurification of sport not only is being tolerated as a real fact, but further more it is set as a requirement for the formation of its conditions”<sup>10</sup>. Of course, the development of the sports law all over the world, presents an heterogeneity, and this fact does not come as a surprise.

The observation that comparative sports law is in infants age and that any comparative study completed by now, deal only with some specific issues, is absolutely true<sup>11</sup>. Anyway, one finds out that many sports issues are common for most legal systems, but also that their regulation by those systems varies<sup>12</sup>.

Unfortunately, one more time it is found out that, again, there are very few comparative law studies concerning the sports regulations in countries other than those of the “west” world<sup>13</sup>. Principal reason for that fact, remains the scarce accessibility to the legal systems of those countries, and perhaps also a prejudice about the complete difference between them and the “west” legal systems. However, the fact that there are eventually big, fundamental differences between legal systems compared in their entirety or in specific juridical institutions of them, should not obstruct the comparison<sup>14</sup>, since, anyway, the basis should be the “legally important social problem”<sup>15</sup>. That is, by comparing legal systems, according to the “classic” comparative law one adopts a functional method<sup>16</sup>: one examines regulations of these legal systems, which regulations have the same function<sup>17</sup>.

By attempting a comparative survey of the way that the different laws eventually choose to deal with this issue, the relation that may exist between sports legal order and civil liability, or, on the contrary, the completely separate regulation of these issues, one draws various interesting conclusions.

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<sup>7</sup> J.A.R. Nafziger, *International Sports Law*, 77.

<sup>8</sup> J. Stender-Vorwachs, *Sport und Kultur, SpuRt* 2004, 201.

<sup>9</sup> K. Watanabe, *Interpreting Sports with Modern Viewpoint – Sports Law or Norm in the 21<sup>st</sup> century*, in: *Sports Law [Lex Sportiva]*, 83, 93.

<sup>10</sup> A. Fikentscher, *Mitbestimmung im Sport*, 64.

<sup>11</sup> J.A.R. Nafziger, *Globalizing Sports Law*, in: *Sports Law [Lex Sportiva]*, 97, 103 n. 23.

<sup>12</sup> J.A.R. Nafziger, *Foreword*, in: *Sports Law [Lex sportiva]*, 11.

<sup>13</sup> J.A.R. Nafziger/W. Li, *China's Sports Law*, 46 *A.J.C.L.* 453, 455 (1998).

<sup>14</sup> A. Fikentscher, *Mitbestimmung im Sport*, 64.

<sup>15</sup> F. Doris, *The micro-comparative legal research and its utility in the interpretation of the Greek private law [in Greek]*, *Nomiko Vima* 31 (1983) 77.

<sup>16</sup> About the comparative law as a functional method, see E. Moustaira, *Milestones in the course of comparative law. Thesis and antithesis [in Greek]*, 221-224.

<sup>17</sup> E. Moustaira, *Comparative Law. University courses [in Greek]*, 29.

## **Sports Legal Order**

Very often, as it is known, the governments of various countries concede to the athletic governing bodies a kind of legislative competence, as far as sport is concerned. The state, of course, preserves the right of – bigger or smaller - intervention to the thus formed sports legal order<sup>18</sup>. Consequently, as it is pointed out, “the athletic activity may be divided in three parts: the first is regulated exclusively by state legislation, the second by sports legislation, while the third is regulated by both legislations”<sup>19</sup>.

A frequent aspiration of the athletic governing bodies is the biggest possible “freedom of movement” in this legislative ambit and the corresponding restriction of the role of the states’ governments to the simple facilitation of the athletic activities<sup>20</sup>. In some states, the role of the athletic governing bodies in the formation and institutionalization of sports law is extremely important. This possibility of self-regulation, by “internalizing” the respective cost, consequently releasing the state from it, renders the athletic governing bodies, extremely powerful organizations<sup>21</sup>.

A direct consequence, in cases of biggest freedom of legislation conceded to the athletic governing bodies, but also of administration of the athletic activities, is the unwillingness of the [state] courts to judge cases related to this activity, while the foreseen by the athletic governing bodies procedures of adjudication are not “exhausted”<sup>22</sup>. Even afterwards, however, in some countries as the USA, the courts remain unwilling to judge appeals against decisions of athletic governing bodies (Non Governmental Organizations)<sup>23</sup>, appeals based on the constitutional clauses *due process*<sup>24</sup> and *equal protection*<sup>25</sup>.

In other countries, notwithstanding the fact that the principle of athletic governing bodies’ autonomy is largely in force, this autonomy is somewhat

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<sup>18</sup> A unique phenomenon of state interventionism in west European states, Greece, according to A. Malatos, Judicial control of disciplinary authority in sports, *Epitheorissi Athletikou Dikaiou* 1992, 373, 374.

<sup>19</sup> A. Malatos, Introduction to sports law: Sports legal order, *Epitheorissi Athletikou Dikaiou* 1992, 175, 187.

<sup>20</sup> T. Kerr, Freedom of movement in Sport inside and outside the European Union, in: *Freizügigkeit im Europäischen Sport*, Zürich 2002, 17-18.

<sup>21</sup> S. Gardiner/M. James/J. O’Leary/R. Welch/I. Blackshaw/S. Boyes/A. Caiger, *Sports Law*, 195-196.

<sup>22</sup> On the one hand, the sports governing bodies aim at the exclusivity of the specifically foreseen for sports, arbitral procedures, while on the other hand, the athletes, prefer to have recourse to the state courts, preferably of the state, of which they are nationals, see B. Heß, Hochleistungssportler zwischen internationaler Verbandsmacht und nationaler Gerichtsbarkeit, *ZZPInt* 1996, 371, 372.

<sup>23</sup> J.A.R. Nafziger, Comments on Applying International Sports Law in the United States, *Int.Sports L.J.* 2002/3, 9, who say that the central roles of the International Olympic Committee, of the International Sports Federations, of the International Athletic Court, but also of the other Non Governmental Organizations in the sports field, is almost so important as the role of the International Committee of the Red Cross, while applying humanitarian law.

<sup>24</sup> About this clause, which constitutes the only source of personal jurisdiction of the USA courts, see E. Moustaira, *Forum Non Conveniens*, 21, where it is pointed out that innate notions of this clause are *fundamental fairness* and *individual liberty*.

<sup>25</sup> About this clause, which says that no state has the right to deny to a person subject to its jurisdiction, equal protection of laws, see E. Moustaira, *Equality of creditors*, 26.

limited<sup>26</sup>, mainly by courts' decisions. Such is the case of Germany<sup>27</sup>. In United Kingdom too, courts have resisted to any effort of excluding their jurisdiction on issues concerning athletic activities, even on issues of control of the contracts concluded between persons (athletes) and governing athletic bodies. On the other hand, though, they have shown some unwillingness to control thoroughly those bodies' decisions. This fact, as it is noted, has negative consequences as far as the possibility, for example, of the athlete, to have recourse to a court, asking damages by the athletic governing bodies<sup>28</sup>. In Greece, according to the most recent legislation (law 2725/99, as amended by law 3057/2002), [state] courts are competent to judge all issues related to the athletic activity<sup>29</sup>.

Interesting is the issue about whether and how decisions of *self-regulatory associations* should be controlled. The stance of the English courts, for example, depends on where the line between public and private law is drawn, something *notoriously uncertain*, as it is mentioned. It is defined with procedural terms and it is a result of the "confrontation" between the role that such a body plays and the legal nature of its relations with its members. According to a particularly interesting opinion, this stance obscures what essentially is the principal issue, that is: which should be the response of the law when it is confronted with such *mini-systems of collective government*<sup>30</sup>.

### **Civil liability in the frame of athletic activities**

In many national laws it is explicitly defined that the exercise of natural and athletic activities constitutes a person's right<sup>31</sup> – something that is not self-evident in countries with a different "mentality" than that one of the west countries<sup>32</sup>. During and by reason of such activities, it is possible that a damage is caused, either to the athletes themselves or to persons participating in some way, directly or indirectly, in an athletic event.

As a rule, these events are regulated by rules of national legal orders, concerning non-contractual, torts' liability<sup>33</sup>. In case, besides, of athletic

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<sup>26</sup> K. Vieweg, Basic Freedoms and Autonomy in Sport – from the Perspective of German and European Law, in: *Sports Law [Lex Sportiva]*, 285, 286, believes that today this autonomy and the consequent priority over national law, is an anachronism, especially in view of the limitations that European law may set.

<sup>27</sup> A. Fikentscher, *Mitbestimmung im Sport*, 69.

<sup>28</sup> S. Boyes, The Regulation of Sport and the Impact of the Human Rights Act 1998, *Eur.Pub.L.* 2000, 517-518.

<sup>29</sup> D.P. Panagiotopoulos, Greek Sports Law, in: *Sports Law [Lex Sportiva]*, 222, 227.

<sup>30</sup> J. Black, Constitutionalising Self-Regulation, *Mod.L.Rev.* 1996, 24.

<sup>31</sup> J. Gatsi, *Le droit du sport*, 4.

<sup>32</sup> For example in China, where the development of the athletic movement has been directly influenced by political developments, neither the athletes' rights for impartial rules of choice are concretely defined, nor an obligation to reinstate in case that justice's principles are breached, is explicitly recognised, see S. Huang, The Practice of China's Sports Law, in: *Sports Law [Lex Sportiva]*, 116; J.A.R. Nafziger/W. Li, China's Sports Law, 46 *A.J.C.L.* 453-454 (1998).

<sup>33</sup> About French law, see J. Gatsi, *Le droit du sport*, 49-50. As far as the English law is concerned, it is observed that, specifically in cases of injury in the frame of an athletic activity, it is constantly evaluated, see M. James, Sports Torts and the Development of Negligence in England, *Int.Sports L.J.* 2003/2, 17, 19, who points out that an issue, which is not yet adequately studied, but with which in the future jurists will have to deal with, is whether an

activities with foreign elements (e.g. international athletic meetings), the applicable law will be determined by the rule of conflict of laws of the forum in which this issue arises. A rule followed by many countries' conflict of laws is that the applicable law to the torts is *lex loci delicti*, that is, the law of the place where the damaging event took place. And, according to the dominating opinion in most legal systems – but also adopted by the Court of the European Communities –, this law may be, either the law of the place in which the damaging act (or omission) was committed or the law of the place in which the damage occurred.

According to one opinion, if the athletic governing bodies to which has been “conceded” by the countries lesser or bigger power of autonomous regulation of the issues related with the athletic activities, had dealt with the issue of tort, then the use of the torts' law would have become almost gone by<sup>34</sup>. According to another opinion, somewhat similar to the previous one, maybe that is what should be done, that is, that torts related to athletics should be regulated by the sports legal order (national or international)<sup>35</sup>. Is it so, though? Or, rather, would such a choice be opportune, proper?

If we remain in Europe, we observe that a basic, constitutive idea of the contemporary European laws of extra-contractual liability, is the idea of protection of the individual rights with means supplied by the legal regulations on torts. As it is noted, recent theoretical analyses “revealed” the existence of a structural ambiguity as far as the legal foundation of tort is concerned, that is, whether liability is based on infringement of a legal duty or on the responsibility for the damage caused. This ambiguity is due to the fact that initially the aims of the legal regulations on extra-contractual liability that had been instituted were very different from the contemporary ideas on just distribution of risks, ideas directly connected with the exercise of individual rights.

Thus, an ambiguity is presented, as far as the moral basis of the liability is concerned: It is based, either on the breach of a legal duty or on the responsibility for causing a concrete result<sup>36</sup>.

Looking specifically at the countries of *common law*, where a principal element of the torts is the *duty of care* and its eventual breach<sup>37</sup>, theoreticians

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injured player of a football team may sue his team for eventually having forced him to play while he was injured.

<sup>34</sup> S. Gardiner/M. James/J. O'Leary/R. Welch/I. Blackshaw/S. Boyes/A. Caiger, 693.

<sup>35</sup> L. Silance, *Les sports et le droit*, 199 ff. Referring specifically to the civil liability of persons participating in athletic activities, concerning the relations between them, he considers that the fact that the regulations set by the athletic governing bodies do not mention civil liability, may constitute a regulatory vacuum. He points out that the only thing that is foreseen in some cases, is damages, through a system of insurances, of the costs incurred for injuries caused during a play, without searching for responsibility, not even culpability (p. 205).

<sup>36</sup> N. Jansen, *Duties and Rights in Negligence: A Comparative and Historical Perspective on the European Law of Extracontractual Liability*, *Oxford J.Leg.Stud.* 2004, 443.

<sup>37</sup> J.T. Gray, *Sports Officials and the Law*, *Int.Sports L.J.* 2002/3, 11, refers specifically to the tortious liability of officials, organisers of athletic activities, towards persons participating in those, according to the law of USA, pointing out that, whether a sports official breaches the duty of care that he owes to the persons participating in an athletic competition, constitutes an issue of the usual care, based on the *reasonable official standard*. Moreover, in a suit filed by the person who was harmed, in order that liability is attributed to the “negligent” official, it will have to be proved that this lack of usual care was the *proximate cause of the plaintiff's harm*.

of law point out a fundamental difference, as far as the analysis of this term is concerned, between two different opinions: If we say that A has a duty towards B to be careful not to do the x in some given circumstance, according to the first opinion, with which the majority of the theoreticians sides, A does not really has a duty to take care not to do x. Simply, if he/she negligently does it and thus causes some damage to B, will have the duty to pay damages to B. According to the second opinion, A has a primary obligation to take care not to do x. If he/she breaches this obligation and B endures some damage as a consequence, A will usually have (though, perhaps not) a secondary obligation to pay damages to B<sup>38</sup>. Of course, these opinions are interesting for the other legal systems too, besides those of *common law*<sup>39</sup>.

Which of the two opinions will be adopted, has great importance respectively for the decision about whether civil liability in the frame of athletic life should be regulated by the general law on torts or by the autonomous sports law. That is, what is probably determinative about this issue, is to decide whether it is damages (money, in other words) the most important thing or honoring the owed duty (not to cause damage to others).

The respective regulations, when they are legislative, and moreover part of a Code, have a meaning that is somehow “connected” to the other provisions, since a Code, as a rule, is distinguished (or should be distinguished) for its internal cohesion and consistency. When developments demand (legislative too) reforms, the latter are being undertaken even in the frame of Codes – of course, in that case, more difficultly, since the above mentioned, internal cohesion of a Code obstructs the fragmentary reform<sup>40</sup>. Obviously, the role of judges, of jurisprudence (case-law), is very important. And in the countries of *common law*, which have established and explained in case law some of the terms which are in force in some sections of law, as the one of extra-contractual liability, one does not doubt at all the importance of the judicial interpretation of terms and eventually of legislative provisions.

## **Conclusion**

If civil liability in the sports field, keeps on being regulated by national laws, there will be differences<sup>41</sup>. And, why not? Variegation, variety of

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A rule usually applied, is the one of the *but for*. But for the negligence of the official, the harm would not have been incurred.

<sup>38</sup> N.J. McBride, Duties of Care – Do they Really Exist? *Oxford J.Leg.Stud.* 2004, 417-419. He calls the first view on duty of care, *cynical view* and those who adopt it, *cynics*, and the second one, *idealistic view*, and those who adopt it, *idealists*.

<sup>39</sup> In South Africa, the legal system of which is considered as a mixed one, that is, influenced by both *common law* and *civil law*, the duty of care is not defined by the *Proximity Test* of the cause, as is the case in the genuine legal systems of *common law*, but on the contrary has been established on the basis of the Roman law's principle *lex Aquilia on culpa*, see A.P. Agbonjinmi, Legal Basis for Coaches Liability in Sport and Recreation, in: *Sports Law [Lex Sportiva]*, 187, 191. About the mixed legal systems, see E. Moustaira, *Milestones in the course of Comparative Law*, 113 ff, and specifically about South Africa's legal system, see E. Moustaira, *Comparative Law. University Courses*, 84-89.

<sup>40</sup> J. Fedtke, The Reform of German Tort Law, *Eur.Rev.Priv.L.* 2003, 485, 507.

<sup>41</sup> About the fact that, in disputes arisen during international athletic events, national laws and international law, which are eventually considered as at the same time applicable, might not be compatible with each other, see D. Sturzaker/K. Godhard, The Olympic Legal Legacy, *Melb.J.Int'l L.* 2001, 241, 248.

regulations, except of difficulties that legal practitioners face at times, offers a scientific richness, which mirrors the various societies, since law constitutes the regulation of people's life in society.

The aim of unification of laws has been restricted, in the majority of cases, to the less ambitious aim of harmonization. In both cases, though, it takes place, either from the beginning in regional level, or, as a result, between certainly less than the whole of the countries of the world. Consequently, there will always be differences; in the latter case, between the unified law and some other laws, of national origin.

Obviously, one can make observations of this kind, in the sports field too, in which many people maintain the necessity, on the one hand of creation of an international uniform *lex sportiva*<sup>42</sup>, which will cover, if possible, all issues concerning athletic activities, even issues of civil liability, which arise in the frame of this activity, and on the other hand of adoption of this *lex sportiva* by as many countries as possible, in order that the regulations be similar, wherever an issue related to athletic activities arises.

In European Union, one observes an augmentation of uniform regulations that member states must adopt. Nevertheless, there has not been proposed, till today at least, a harmonization of the law of extra-contractual liability, specifically for the sports field.

But why should a specific, uniform regulation of the civil liability in the sports field be considered as necessary? Why should the admittedly huge economic interests of this field<sup>43</sup> lead to indifference for the variety of juridical aspects, essentially to indifference for the human being and the way of thinking and understanding the world? But also, how is it possible to demand that the state remains indifferent as far as the regulation of these issues is concerned, just because they concern another society, the athletic "counter-society", as we mentioned at the beginning? The declaration of *Vigarello*: "is it not a duty of the citizens' society to undertake and control, as well as possible, a counter-society which has been born in it?", should we perhaps extend and maintain that, the state may concede a lesser or a bigger autonomy to the governing athletic bodies, does not permit, though, that important, non negotiable, issues of competence<sup>44</sup>, as this one of the civil liability, are extracted by it?

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<sup>42</sup> T. Summerer, Internationales Sportrecht – eine dritte Rechtsordnung?, in: *Festschrift für H. Hanisch*, 267, 279, denies its existence, saying that the regulations of the international sports organizations do not create none authentic legal order, being only a private associations' law, following concession by the state.

<sup>43</sup> Exactly these big economic interests, which are dominating the high level contemporary athletics, do not permit anymore immunity of the athletic governing bodies, according to M. Coccia, La risoluzione dei conflitti nell'ambito sportivo, *Jusport. El Web Juridico del Deporte*.

<sup>44</sup> Given the fact that the aim served by sports is a public one. See D. Panagiotopoulos, Sports legal order in national and international sports life, in: *Sports legal order. Negative phenomena in sports and sports deontology*, 41, 50.