

# Penal Law and Sport

by Anne Leroy



Miss Anne Leroy, a student at the Free University of Brussels, has defended a thesis on penal law and sport. She studied under the supervision of Professor Robert Legros and was awarded a degree in criminological sciences. Our friend Mr. Luc Silance, a lawyer in Brussels, particularly recommends this piece of work.

It is set out as follows :

- Introduction: the origins of sport and definitions.
- Relationship between law and sport.
- Liability in sport.
- Doping.
- Violence in sport.
- General conclusions.

With the author's agreement we give below the first part of the chapter covering the relationship between law and sport.

## RELATIONSHIP BETWEEN LAW AND SPORT

### General

During many decades sport developed separate from the law, the two fields being completely isolated from each other. But this period of calm was merely a temporary illusion. "It is true that in limited fields the concessions made by penal law to the needs of sport have now ended; thus boxing fights and exhibitions have been regulated since 1958, while the practise of doping at sports competitions was repressed by the law of 2nd April 1963."<sup>1</sup> Nevertheless, the extent of the legislative void surrounding sports competitions is somewhat surprising. The relative indifference of jurists in fact presents a striking contrast to the constant attention sociologists and psychologists pay to this social phenomenon, the importance of which continues to grow.

Jurists still have some difficulty in uncovering their raw material. However, there is no lack of it : of all human activities, sport is without a doubt one of those with the most regulations.

The milieu is even "hyper-legal" in that, in practice, almost every sporting gesture is qualified in relation to the most precise technical regulations; consider for example the rules which constitute a veritable "Highway Code" for skiing pistes, or the various regulations "whose application in the field requires the presence of an expert whose decision is binding : a referee or a judge. The specifically sporting standards emanate from private institutions which are inter-connected according to a hierarchy which is at times delicately balanced : Olympic, federal, national and international bodies. In certain cases the rules to be applied must be found and a decision made on how to inter-combine them; it is not always easy to find a way through the maze. Once the rules are determined, they should be interpreted in the light of their relationships with the laws and regulations of the state which takes them into account. This shows us what makes the law of sport unique ; it is the acceptance by the legal authorities of states of "private" regulations of exceptionally wide scope. There is also a certain amount of natural reticence on the part of the sports authorities in respect of initiatives which gradually take the control of their discipline away from them : it thus seems to be increasingly common for state courts to be called upon; thus, to varying degrees, laws apply to sportsmen in the same way as they apply to other people."<sup>2</sup>

Since the most remote period of Antiquity, sports regulations have therefore been created above all without interference from the legislator or from the courts. Since that period we can ask ourselves about the manner in which sports regulations are created, what is their legal nature and above all, what are their relationships with penal law.

## Creation of sports law

It would be wrong to think that sports law develops according to a completely different procedure to that followed in the other branches of law. There can be no doubt that very few laws and very few decrees have been passed to regulate the matter.

Nor can the role of case-law be contested. Many decisions are delivered on sporting matters. In the majority of cases these decisions concern problems regarding the responsibility of sportsmen, administrators, organisers of competitions or trainers; some decisions concern cases of doping.<sup>3</sup> However, while it cannot be denied that the law and case-law have a role to play, it is also true that the role played by doctrine is scarcely an important one, and that of custom is almost nonexistent,

The characteristic of the rule of law in the field of sport is that it asserts itself by means of an authority which is non-legislative but recognised at international or national level. It exercises this authority even counter to legislation in certain countries.<sup>4</sup>

Let us quote the example of boxing in western countries ; let us take the example of the exclusion of South Africa from the Olympic movement and from the international sports movement in respect of a large number of sports since the legislation of that country is counter to the principles of tolerance of the International Olympic Committee.

The rule which asserts itself in this way is not the result of the work of the legislator, nor of that of the judge, but it is created by a different power, *“that of the voluntary movement which constitutes the sports movement and in particular by the administrators elected by their peers”*.

*“It is thus a voluntary movement of persons without any political power, which, within its study commissions, decrees and modifies regulations in the light of the experience of national and international competitions and the necessities of the life of the sport in question.”<sup>5</sup>*

It is not therefore a question of orders emanating from a legislative authority set up and modified by another constituted power, but of a private movement which, within itself, decrees regulations, decides to submit itself to them, and makes provision for the authorities responsible for having them respected.

For certain jurists, particularly Mr. Silance, these regulations are applied by all the members even if they are counter to certain laws decreed by the legislator. *“Even for the supporters of a strict definition of the law, which would be the whole of the regulations which under the guarantee of social constraint govern the activity of men living in society.”<sup>6</sup>* Sporting regulations correspond to these definitions. It is therefore possible to say that *“sport is controlled by specific legal regulations, whose most surprising characteristic is the way in which they are formed.”<sup>7</sup>*

## Legal nature of sports regulations

Sports regulations contain prescriptions which, definitively, refer to physical persons : athletes, trainers, organisers, etc. But are they legal or not ? For some, particularly Mr. Silance, there can be no doubt about this.<sup>8</sup>

According to Professor Germain, *“many speak out in favour of one or other solution on the basis of, not methodical reasoning, but prejudice”*.<sup>9</sup>

Professor Germain, in order to clearly show the nature of sports regulations, takes up the procedure adopted by Mr. François.<sup>10</sup>

He carefully selects a starting point which no-one would conceivably contest. It is commonly that law is at the least a collection of standards which constitute an obligatory rule of conduct, touching on some sort of behaviour which is imperative and accompanied by pressure in the form of the threat of sanctions.

Now, simple reading through sports regulations shows that they are full of such commandments ; firstly they impose on athletes a host of attitudes in respect of their adversaries, their referees, their trainers, etc.; then they submit to a quantity of directives all those who intervene in various capacities in the organisation and running of the events, finally the clauses concerning the internal functioning of the sport associations exercise a constraint on its members by forcing them to recognise the bodies set up, to respect their responsibilities, to observe their procedure, to bow to their decisions. These prescriptions are confronted by the perspective of various unpleasantnesses awaiting inflictions.

tion on the offender : fine, public censure, suspension, and even pure and simple exclusion. According to Mr. François, "a glance is enough to identify in the sports regulations the formalities which are indisputably common to all legal standards".

Always, according to the same author, "to make the penalty really threatening, those who exercise it have to have power, either their own or delegated, over those who are submitted to it." Now, there is today within each sports association a disciplinary authority which inflicts sanctions on offenders. "Thus, in the world of sport, the effective application of punishments proves the reality of their threat, and thereby the presence of this force necessary for the birth of the rules of law." <sup>11</sup>

These rules suppose on the part of those who carry them out an attachment to those who created them ; this link which unites them can be called cohesion. This cohesion implies that the creators and those affected by the legal standards form a whole which presents a certain amount of unity.

The Italian legal expert Santi Romano reserves the notion of legal order for designating within each institution the synthesis of the organisation and the law. <sup>12</sup>

Since then some authors claim that each sports association which is an institution achieves a legal order which could be qualified as sporting to distinguish it from other orders, particularly that of the state.

The idea of a specifically sporting law is not accepted by those who feel that there is no other law than that of the state as contained in laws and decrees.

*"The principle of the plurality of legal orders is fiercely denied by authors who intend to reduce all the other orders without exception to state law."*

*"Even better. it would be the state which would impress on them their legal character, either that it constitute them directly, or that it merely recognise them."*

*"The only real legal orders to exist would be state and international ones; the others could do no more than belong in a mediate or immediate way to the former, as integral parts of its system, at most its satellites. The law, according to a large number of jurists, is no more than a force, a desire irradiated by the state and by the state alone."*

*"The most recent followers of this doctrine which holds the state to be the ethical being par excellence resort more to statement than to demonstration. It is true that it is hard to see how to give it a theoretical justification if not by accepting on the one hand that substantive law cannot and should not be a product of natural law, and on the other hand that the only body today which is able to interpret and transpose natural law by its own laws is the state."* <sup>13</sup>

## The arbitration clause

Whether we consider the sports regulations as being rules of law or not, the majority of the standards contained in these regulations do not run counter to those of the state. Nevertheless, interferences can arise. In the hypothesis of such a difference, the conflict would be resolved in favour of the state. For the state, to make its laws respected, tends towards the "monopoly of major sanctions", <sup>14</sup> and has at its disposal an equipment of constraints which are "theoretically irresistible": a condemnation pronounced by its courts is liable to be carried out by force, while the will of the sports associations is not. <sup>15</sup>

The legitimate concern regarding discussion incites the members of the sports associations to look themselves for the solution to the conflicts which set them against each other. Within each sports group there are bodies whose role is to settle such contentions. The federations are not at all keen on "letting out of the sporting family" affairs which would then be judged by someone other than themselves. But they are powerless to prevent those affiliated to them to turn to the justice of the state if they insist on doing so. That is why these associations have included arbitration clauses in their regulations.

These clauses can vary from one federation to another. <sup>16</sup> In some cases the federation does no more than encourage the members of the association to take, under penalty of sanction, all disputes concerning the regulations they have accepted to the relevant sports authorities ; in this way, it indirectly prohibits recourse to ordinary legal processes. (E.g. article 131 of the Regulations of the URBSFA, <sup>17</sup> which states that "all members and affiliates of the Belgian Union are obliged under penalty of sanction to submit their differences regarding sport to the relevant

committees and to carry out the decisions taken by them.") According to the UEFA, the player may refer to state justice, but the association may "consider that by having recourse to the natural judge, the player is demonstrating that he dissociates himself from the aim of the common activity, and that he has no more desire to collaborate in the joint effort and, on that basis, dismiss the player." In other cases, it formally forbids recourse to be made to the courts (Statutes of FIFA, article 48; Statutes of the UCI, article 3; Statutes of the FIAC, article 2; Statutes of the FICP, article 2). Sometimes the federation makes the right to recourse to the courts subject to previous consent by a specially designated sport tribunal; experience shows that this authorisation is rarely granted if the point under contention can be decided by a sport regulation. Article 77 of the Statutes of the hockey federation states that "affiliated members undertake to not have recourse to the courts or ask for the intervention of the judicial authorities for any dispute or complaint remaining within the framework of the statutes and regulations of the Association or the rules of the game of hockey, without first referring to the General Council. If the complainant does not respect this procedure before taking action, the General Council may pronounce his disaffiliation straight away without appeal."

The administrators of the sporting world traditionally justify the arbitration clause by the need to ensure that athletes receive rapid and discreet justice, to entrust it to judges who are well aware of their problems, and also to tend towards a certain legal harmony within the international federation. The existence of this arbitration clause is explained above all by the desire of the sports organisations to preserve their autonomy.

But it does happen that someone rebels against the association and turns to the courts. In this case, if the judge does not give any credence to the sports regulations and, putting them aside, orders the execution of state law, the effectiveness of sporting standards is seriously compromised.

On the whole, the sporting communities settle their internal problems themselves. The number of settlements without recourse to the courts and renunciations is appreciably larger than in other sectors of activity, whereas actual trials are the exception. The most numerous cases are those involving sporting accidents; in France in 1975 out of 36 proceedings undertaken, 25 were for compensa-

<sup>1</sup> Simone David-Constant, preface to book by J.-C. Germain, "Les sportifs et le droit": Liège 1975. p. 8.

<sup>2</sup> F. Alaphilippe, "L'activité sportive dans les balances de la justice": Sports et Sciences, Ed. Vigot, 1979, p. 51.

<sup>3</sup> Cass, 16th June 1969, Rev. Gén. Ass. Res. 1970, no. 8358.

<sup>4</sup> L. Silance, "Formation de la règle de droit dans le domaine sportif", La règle de droit, published by C. Perelman. Brussels, Bruylant 1971, p. 293.

<sup>5</sup> L. Silance, op. cit., p. 10.

<sup>6</sup> De Page, "Traité de responsabilité civile", Vol. I, no 1.

<sup>7</sup> L. Silance, op. cit., p. 311.

<sup>8</sup> See for Belgium L. Silance - "Formation de la règle de droit dans le domaine sportif", La règle de droit, study published by Ch. Perelman, Brussels Bruylant, 1971, p. 296-312 : idem, "Les règles du Comité International Olympique et le Droit" JT 1971, p. 694-696 ; idem : "Problèmes juridiques aux Jeux Olympiques - l'exclusion de Karl Schranz", JT 1972, p. 139 ; B. Blanpain : "Vers les indispensables réformes de football belge". For Italy: K. Kanckiria, "Le droit et le sport", Riv. dir. sport, 1964, p. 7 and 6.

<sup>9</sup> J.-C. Germain, "Les sportifs et le Droit", Liège 1975. p. 15.

<sup>10</sup> L. François, "Introduction à un cours d'éducation de la philosophie du droit à l'époque contemporaine", Liège, Libr. F. Tothier, 5th ed. 1973, see also : idem, "Introduction au droit social", Liège, Faculty of Law 1974, p. 93-106.

<sup>11</sup> L. François, op. cit., 95-96.

<sup>12</sup> S. Romano, "L'ordre juridique", Paris, Dalloz, 1975, sections 12-34.

<sup>13</sup> Santi Romano : op. cit. p. 80 ; for the authors who support the thesis of the state as legal order, see in particular the very abundant Italian and German doctrine. Kelsen, among others, states that "the omnipotence of the state in law corresponds to that of God in the world"; and that "law, when looked at closely, appears as a single enormous institution. It is a truth of which we are from now on more or less aware, since we know that law takes its source from the state". Kelsen, "Hauptprobleme der Staatslehre" p. 97 et seq. and p. 405 et seq. "Über Staatsunrecht" in Zeitschrift f. das pr. u. öff. Recht, XL, 1913, p. 9 ; "Das Problem der Souveränität u. die Theorie des Völkerrechts" Tübingen, 1920, particularly p. 13 et seq.

<sup>14</sup> L. François, op. cit., p. 101.

<sup>15</sup> J. Dabin, "Théorie générale du droit pénal", p. 122.

<sup>16</sup> J.-C. Germain, op. cit., p. 25.

<sup>17</sup> Royal Belgian Union of Association Football Societies.

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(to be continued)

