

## **Special Workshop No. 20: "The Jurisprudence of Sports"**

THE WORKSHOP WILL TAKE PLACE ON TUESDAY, 9TH JULY 2019 IN THE MORNING. WE WILL START AT 9.00 AM IN ROOM MUSEGGSTRASSE 304. THE WORKSHOP IS PRE-READ AND PAPERS WILL BE SENT OUT ON REQUEST.

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### **Workshop Description:**

There is recognition that law and sports (as games) bear strong similarities. Both can be understood as systems of rules, with a judge/referee who has the power to issue punishments/penalties. And the rules of cricket and rugby are known as 'laws' in English. This workshop aims to discuss jurisprudential issues in sports, falling under the broad themes of justice and fairness (equity/Billigkeit).

### **Possible topics:**

- Sport as a legal system
- Types of rules (formal rules and informal rules/conventions; constitutive rules; regulative rules; penalty-invoking rules/Strafregeln, playing rules/Spielregeln, eligibility rules, conduct rules, tournament rules)
- The role of the referee (DECISION: final OR appeals process; scope of authority; VAR; enforcement/non-enforcement of rules)
- Rule breaking (intentional/accidental; strategic foul; dangerous play; negligence – recklessness; cheating)
- The nature of a player's consent (to abide by the rules; assumption of risk; conventions)
- Issues about the application of law to sports (lex sportiva).

**Language:** English

### **SCHEDULE: Tuesday, 9<sup>th</sup> July, start: 9am**

- George Letsas & Saladin Meckled-Garcia (UCL/UK): "When we Practice to Deceive? A Value-Based Account of Cheating in Sports and Games"  
Commentator: Steve Greenfield
- Anna Di Giandomenico (Teramo/Italy): "The Overlap Between State Legal Systems and Sports Legal Systems: The Case of Doping"  
Commentator: Maren Behrens

10 Minute break

- Steve Greenfield (Westminster Law School/UK): “Rethinking the Juridification of Sport: Identifying the Cognitive Dimension”

Commentator: George Letsas

- Maren Behrensen (Münster/Germany): “Why Video Review in Football Isn’t Working (Yet)”

Commentator: José Luis Pérez Triviño (Barcelona/Spain)

**Format of the workshop:** pre-read – papers can be obtained on request. Each paper is allocated 40 minutes for presentation, response and discussion. We start with the presenter giving a brief summary of their own paper (5-10 Minutes), followed by a response from a commentator (up to 10 Minutes) and finally Q&As from the audience.

### **ABSTRACTS:**

**George Letsas & Saladin Meckled-Garcia (UCL/UK):** “When we Practice to Deceive? A Value-Based Account of Cheating in Sports and Games”

Is suddenly serving underarm in a tennis tournament, on match point, an example of cheating? Is it cheating to give a false name or identity when joining a chess tourney? How about “faking-out” a whole rugby team, by feigning a touch-down for a restart and, with the ball still in play, running through the bemused ranks to score? Why are those cases harder than a football player faking injury with a blood capsule to get a substitution or a cyclist getting their blood changed via transfusion in the middle of a competition? The concept of cheating in sports and games is central to their regulation, yet its definition is elusive (Russell 2014). Take definitions that appeal to the breaching of a written rule, or even its breach for advantage (Gert 1998). Rules are not always written; their content is not fully determined; and some written-rule breaking is not clearly cheating, such as minor tactical fouls in football (Fraleigh 2003). More complex layering of rules, with some rules telling us not to break other rules (e.g., Berman *unpublished manuscript*), will not get us much further. How we identify the existence and content of such meta-rules is mysterious, as is why those structures are relevant to cheating. They do not tell us what is “cheat-ish” about an act of cheating – what makes it a distinctive kind of *wrong*, rather than merely a distinctive kind of rule breach. On the other hand, general standards of wrongdoing, such as mistreatment, will not explain why a given action, say distracting an opponent in a chess match, is wrongful in that specific sport or game, versus in another such as a ‘staring contest’, rather than generically wrongful. Stealing from your opponent’s locker is generically wrongful. In this paper we identify insurmountable problems with written rule- or convention-based accounts of cheating (however intricately layered the rules or conventions). Instead we introduce a value-based account that analyses cheating in terms of unfair advantage. However, our view is innovative in that it distinguishes between a) values that are distinctive to a specific sport or game - the “excellences” any of these distinctly allows people to exhibit and enjoy - versus b) a value of fairness, the breach of which wrongs another person. We argue that

cheating must be understood as a purposefully deceptive action that breaches both sets of values simultaneously. It seeks an unfair advantage over other participants using means that prevent those participants planning for, or preventing, that advantage if they themselves act solely in ways that exhibit the excellences distinctive of the sport or game. It is because cheating wrongs one's opponents in gaining accolades that should come from exhibiting the excellences of the game, whilst in fact subverting those excellences, that it is both wrong and specifically wrong as a matter of the sport/game in question. Some deceptions, on this definition, are cheating but others, those that exhibit the excellences such as skilfully faking a shot at goal in basketball, are not. It follows from this view that cheating does not need written or conventional rules, but it does form a ground for introducing clarificatory rules that facilitate pursuing the excellences. We show this view is plausible by applying it to a number of difficult concrete cases, such as the examples cited above. We also show how the approach has explanatory power in distinguishing cheating from bad sportspersonship, loophole-ing, non-cheating rule breaking, non-cheating deception, innovative plays, and from general moral wrongdoing. There is a dominant thread of jurisprudential thought that takes games as paradigms for convention-based or norm-based analyses to which analysing the nature of law can be analogised. This paper shows how a value-based account might work not only in defining cheating, but also in explaining the relationship between the written rules of games and their value-based point. Our concluding sections draw out these aspects of the view in a way that shows how cheating works in other normative practices, such as the law.

**Anna Di Giandomenico** (Teramo/Italy): “The Overlap Between State Legal Systems and Sports Legal Systems: The Case of Doping”

We often detect the overlap between state legal systems and sports legal systems: in fact, they often rule the same case. This overlap can concern either the matter ruled, either the norms adopted: an overlap, which is not without problems, because of the distinctive features, characterizing these legal systems.

In this regard, the case of doping appears emblematic. In recent years, in fact, in addition to be in the sphere of interest of sports legal systems, it has been the subject of regulatory discipline by many states. To these regulatory disciplines, we can add the UNESCO Convention, whose principal achievement is the substantial uniformity in the regulation of the case all over those state legal systems, in which the Convention entered into force.

Now, given the essential unlawfulness of doping within sports legal systems (in my opinion, totally unquestionable), because of the *vulnus* caused to the fairness in sports competitions, the regulatory discipline put in place by sports legal systems achieved a substantial uniformity, even thanks to the adoption of WADA Code since the beginning of 2000s. A very strict regulation, which, among the many hypotheses, assimilates the mere possession of doping substances, without a medical prescription, to their consumption. A very strict regulation on one hand, due to the intrinsic unlawfulness of doping, and, on the other hand, allowed by the conventional nature of each sports legal system. A very strict regulation, which highlights, however, some critical knots (for example, just think to the substantial lack of differentiation between adult sportsmen and minors, for that concerns their responsibility and subsequent disciplinary measures).

Considering state legal systems, before entering into merit, it seems important to underline how sport does not fall within the area of regulatory competence of all states, being considered as an activity belonging to the private sphere of citizens. And, if the normative discipline of sport is not considered to be within the regulatory competence of state, *a fortiori* it can be said as regard doping: can we really consider the fairness in sports competition as a general interest of the state, and therefore worthy of protection? Given and despite this preliminary remark, we detect a series of legal texts in the matter (especially at a supranational and international level). These texts, on one hand, underline the pedagogical function of sport, as useful tool for education to democracy, prevention of pathological behaviours, and/or integration of migrants and people with disability (see in this sense, at a European level, TFEU, the previous *White paper on sport*, as well as COE Conventions in the field of sport). On the other hand, they focus on the fight against some s. c. pathologies of sport, like doping and manipulation of sports competitions (for that concerns doping, just recall the COE Convention and the UNESCO Convention).

As regard the regulatory discipline by single state, at a general level, many perplexities arise, considering the abovementioned lack of regulatory competence in the field of sport, detected in many states. At a more specific level, the discipline of doping by state gives rise to further legal issues. In this sense, just think the difficulty of identifying an interest, whose protection by state can be considered well founded. Can we consider the fairness in sports competition worthy of protection by state? If not, what is the interest, which calls for a state regulatory intervention? Health protection in the age of self-determination?

Further and finally, focusing on international UNESCO Convention on doping, we underline the importance of such a Convention, whose entry into force led to a substantial uniformity of normative discipline by those states, which adopted it. However, the analysis of UNESCO Convention texts reveals several legal issues. Among them, it is sufficient to highlight how the Convention definition of doping and that one of the first version of WADA Code are substantially the same. Now, even if states recognize to have a regulatory competence in the field of sport, I wonder how it is possible to assimilate doping substance consumption to its mere detention (especially in those states in which doping constitutes a criminal offense, as in Italy). In this regard, I wonder if this substantial overlap between sports legal systems definition of doping and that one of state legal systems does not give rise to a true legal aberration. More, I wonder if this overlap does not hide another more important question, such as the opening of a way towards an ethical characterization of Law, *de facto* denying one of the fundamental and distinctive feature of Law, as it was outlined by Enlightenment onwards .

**Steve Greenfield** (Westminster Law School/UK): “Rethinking the Juridification of Sport: Identifying the Cognitive Dimension”

The original writing around the juridification of sport adopted a rather simplistic perspective on whether the law should ‘cross the touchline’ or not. It was essentially a response to a contention of increasing legal intervention in respect of both civil and criminal claims. This was a dispute between traditional black letter lawyers such as Edward Grayson (1989) who advocated the rule of law as the primary arbiter of sports field clashes and those on the other side claiming to view sport and law from a socio-legal perspective (for example Gardiner & Felix, 1995). There was also an

unsurprising academic/practitioner divide reflected in the debate. The argument was about how and when the law should be involved, in reality the *extent* of legal intervention. Those arguing for a more limited role for sport still applied legal concepts of consent and recklessness. Discussing the infliction of deliberate harm Gardiner and Felix still saw a role for legal intervention:

‘If internal disciplinary mechanisms fail to deter such conduct, the criminal law may be an appropriate though limited tool. The determining factor is consent.’ (Gardiner & Felix, 1995, 201).

This view is now outdated as physical contact sports *at the professional level* have largely managed to exclude the criminal law through effective internal disciplinary regimes that have quasi legal characteristics, even for those examples of deliberately inflicted harm. This dispute, about the role of law has largely been resolved at the highest level though may still persist in amateur sport where prosecutions may still occur.

The debate about the juridification of sport has similarly moved on and this paper takes as its starting point the end of Foster’s influential 2006 piece. In his conclusion he identifies three key features of juridification. The first relates to the fact that sport is not a void without rule based sources and power. The third concerns the balance of power and how it is affected by the juridifying processes. It is however the second of these features that provides the link to the idea this paper develops:

‘Two, juridification describes a change of mindset; an internalisation of obligation. This accepts the notion that ‘I must do this because I’m legally obligation to do so’, or ‘an impartial person would act quasi judicially in these circumstances’. It also embraces an orientation to use the law as the first choice in settling disputes.’ (Foster, 2006, 37).

The importance of Foster’s contribution was that it moved the definition beyond the imposition of external norms to consider the internalisation of legal norms, a process he defined as; ‘more domestication rather than colonisation’. In a similar vein Carlsson has sought to develop and progress the juridification of sport analysis through both examples of insolvency in Swedish football and the effect of the juridification of sport on law itself as part of a process of ‘sportification and trivalization of law’. In his piece on insolvency Carlsson (2009) adopted a definition of law to encompass; ‘the legal system and a legal rationality’. Rationality is an important part of the framework for this paper.

This paper further develops the idea of the ‘legal mindset’ with respect to sport and draws from two distinct sources. First the idea of *legal consciousness* the adoption of which in itself implies a critique of the legal end of socio – legal studies. As Cowan notes:

‘The primary concern of legal consciousness scholarship is the study of society, rather than the study of law per se - hence the critique of a ‘law-first’ approach.’ (Cowan, 2004, 929).

The essence of this approach is to privilege the subjectivity of legal experience:

‘Legal consciousness research seeks to understand people’s routine experiences and perceptions of law in everyday life. (Cowan, 2004, 929).

Applying this concept to the juridification of sport the question becomes; how do those involved (juridified) **perceive** the role of law? This moves beyond Foster’s ‘obligation to law’ and acting ‘quasi judicially’. This paper explores the source of this obligation and how those involved ‘view’ the influence of law upon their role in sport (in this case coaches and other volunteers) and the impact on their behaviors. The

departure from Foster's position is to move to a more thorough consideration of the 'mindset' perspective and address it in a way not originally conceived. This understanding of a changing subjective perspective requires content analysis and the overarching framework for analysis is the concept of 'concerns about litigation'. This idea that started life as litigaphobia and moved onto fear of litigation has been developed from empirical work primarily with the medical profession in the USA. That professionals have developed worries or anxieties about becoming the defendants in civil claims also appeared in the UK, a letter to the BMJ in 1954 from FM Sandford noted; 'unless High Court judges and coroners adopt a more rational approach to medical errors and refrain from gratuitous criticism none of us will approach our work with courage or imagination, to the inevitable detriment of the patient.' Sandford also noted that on a recent visit to Denmark he had observed that the Doctors he spoke with were not handicapped by fear of either litigation or the coroner. The research suggests that physicians and others have adopted defensive practices as law or rather concerns about litigation become a central feature. Behaviour is altered despite the fact that litigation is extremely unlikely and requires negligent actions. It has been argued that those involved in the delivery of youth sport may be under similar pressure and exhibit similar defensive practices (Greenfield 2011, 2013).

The relationship between sport and law has developed from a simple analysis resolving about how much law and where it operates to a more developed inquiry. However this is still operating at the visible level around policies, judgements, the laws of sport and other regulations. This paper starts the process of outlining why what those affected think about law and how it impacts is now the most important dimension to understand the contemporary relationship between sport and law.

**Maren Behrensen** (Münster/Germany): "Why Video Review in Football Isn't Working (Yet)"

The trial runs of video review in football during the Confederations Cup 2017 and the 2017/18 season of the Bundesliga led to controversy – which continues despite the mostly successful use of video review during the 2018 FIFA World Cup and its ongoing use in the Bundesliga. All things considered, it seems fair to say that video review is still less accepted in football than in other sports, such as tennis or rugby. This state of affairs is reflected in the relative abundance of voices who claim that video review will irrevocably alter the nature of football and undermine the referees' authority (such voices are almost entirely absent in tennis, for instance). Other voices pointed out that the practical implementation of video review in the flow of the game was chaotic – this was the case during the Confederations Cup 2017, and to some extent still is the case in the Bundesliga. (In this regard, it will be interesting to see how video review will be handled in the UEFA Champions League during the coming knock out rounds.)

My contention is that the problems with video review in football are not reflective of the use of technology in refereeing per se, but of an unwillingness (or inability) of national and international football associations to implement video review in a straightforward way. The first step toward doing so would be well-defined procedural rules that clearly define when and how video review is to be used – but such procedural rules are currently either lacking or vague.

In order to grasp the significance of procedural rules, we need to consider the role of the referee (in any sport) as both an epistemic and an ontological authority: the referee's decision tracks certain facts about the game (e.g., whether the football completely passed the goal line) and it also creates new facts within the game (e.g., awarding a goal to one of the competing teams). The first aspect concerns the referee's epistemic authority and their epistemic duties (they are supposed to ascertain the actual facts of the matter to the best of their abilities), the second aspect concerns their ontological authority – which explains why epistemically deficient decisions can still be valid within the game (e.g., the referee might award a goal even though they overlooked an offside position, and the goal is still valid).

Before the introduction of video review, the ontological authority of referees was absolute and unchallenged – they had the final say about decisions on the pitch. This authority holds even in the face of their epistemic fallibility – the potential that a decision might be grounded in a misperception does not affect the validity of that decision. (Conversely, it is only the abuse of the ontological authority of referees – e.g., when a referee has accepted a bribe – that could lead to the retrospective annulment of results).

Within this picture, it is tempting to construe video review as mere epistemic tool – a kind of technological prosthetic that helps referees make more accurate decisions than would otherwise be possible. But this view misconstrues what video review is in two important ways:

- 1) It suggests that video review is the (only) accurate representation of reality
- 2) It suggests that the images generated for video review directly translate into decisions

Regarding 1), it should be noted that replays, HawkEye-technology and the like may enhance the epistemic qualities of referees – but that they are not simply depicting a “more accurate” reality that cannot be perceived by the human eye or ear (consider that the HawkEye technology used in tennis shows the most probable trajectory of the ball, not the actual one; or that even slow motion replays may be very hard to decipher in terms of ascertaining, e.g., whether a contact of the ball with a field player's hand was actually a punishable handball).

Regarding 2), it should be noted that the images generated by video review are not fundamentally different from the “real-life” images on the pitch: they need the hermeneutical activity – and ontological authority – of referees in order to become decisions that affect the game (or they need “inbuilt” ontological authority, like the HawkEye in tennis). Consider the example of the handball again: it is the referee (or their video assistants) who must decide whether the contact with the ball was actually “deliberate” or “stemming from an unnatural movement” – and thus punishable. This kind of hermeneutical activity cannot be provided by video technology.

But this does not mean that football is the kind of sport that could not in principle benefit from the use of technology in refereeing. The challenge is, rather, to integrate technology in a transparent and well-defined procedural manner. If an additional video referee is used, for instance, it must be clear when they are allowed or supposed to intervene – and it must also be clear how their judgment relates to the judgment of the main referee on the pitch (e.g., is the video referee's decision binding in cases where video review is used, or does the main referee have the final say; should video review be used for all decision of a certain kind – goals, red cards – or should its use

be limited to the use of “challenges” to be used by the coaches). Currently, football – unlike American football, which has an intricate rule system for the use of video review – lacks a coherent approach to these types of questions. This lack creates a gap in ontological authority; and this gap must be closed if the use of video review is to be beneficial for football.