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FROM THE DESK OF THE EDITORIAL BOARD

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Dear Readers,

We are excited to embark on the third year of the Journal of Sports Law, Policy, and Governance (JSLPG). Over the past three years, JSLPG has undergone a transformative evolution in terms of its character, quality and leadership.

Our journey commenced in 2020. JSLPG remains steadfast in its commitment to contributing to the growth of sports law and policy in India and building a diverse readership of those interested in this growing field. We extend our heartfelt appreciation to both our former and current leadership members who have steered JSLPG with dedication and diligence.

The current issue of JSLPG is the most diverse issue in our publication's short history, encompassing a wide range of topics in sports law, policy, and governance. This issue delves into various subjects, including spectator liability for hooliganism, the intricacies of doping and sex-testing policies, and contemporary issues in sports.

In our commitment to embrace the modern digital landscape, this issue also explores the dynamic gaming industry, addressing ethical, policy-related, and governance challenges.

Looking ahead, we aspire to expand our international presence with contributions from around the world and an expanded editorial and advisory board. We extend our gratitude to our well-wishers and to the Centre for Sports Law Business and Governance at Jindal Global Law School, O.P. Jindal Global University, India, for their unwavering support, without which JSLPG would not be able to consistently release quality publications.

Our deepest appreciation also goes to our Editors, Executive Board, and Peer Reviewers, for their consistent support. We express our gratitude to our Patrons, who have been guiding lights for the journal.

We look forward to your feedback on this issue and contributions in future issues of JSLPG. Thanks for reading.

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The puzzle of 'good' sport governance in a multicultural world

Joshua McLeod[1] and Shaun Star[2]

As the world has become more interconnected over recent decades, sport has emerged as an important medium for cultural exchange, diplomacy, and social unity. Inherently international, sport is played between countries and, as the Olympic Charter prescribes, aims to foster friendship among nations. The responsibility of international sports governing bodies in this global context is to establish governance frameworks that are both consistent and fair for the diverse range of organisations and actors that participate in sport.[3]

Establishing and enforcing uniform governance arrangements across different cultural contexts has proven to be a difficult challenge, however. For example, organisations such as the International Olympic Committee (IOC) and Federation Internationale de Football Association (FIFA) strive for sport to be independent of political interference, but this has been complicated in countries where sport and society are closely controlled by the government, particularly when local customs and norms are in play.[4] Moreover, Western ideals commonly advocate for gender equality in sport governance, including equal pay and opportunities; however, such initiatives encounter resistance in some non-Western cultures where traditional gender roles remain deeply ingrained.[5] Further, while Western sports bodies often prioritise transparency and open governance, those in Confucian societies like China may prefer a more discreet

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[3] Geeraert (2019).

[4] McLeod and Star (2020).

[5] De Soysa and Zipp (2019).

approach, grounded in relational trust.[6] These divergences can complicate cooperative governance efforts.

These cultural tensions highlight the complex relationship between universal governance standards and localised norms in contemporary sport. The issue raises pivotal questions about the feasibility and implications of applying standardised governance frameworks within culturally diverse settings.

The central thesis of this editorial is that 'good' sport governance in a multicultural world requires a nuanced balance between global standards and local cultural norms. Henry (2021) alluded to this argument, noting that Western principles — which primarily include democratic processes, transparency, accountability mechanisms, and social responsibility[7] — should not be considered universally transferable to non-Western contexts.[8] Henry cautioned against the global imposition of these principles by international sports governing bodies and introduced the concept of 'multiple modernities'. This means that modern good governance in sport can take different forms, and that local cultural norms can and should influence how governance is implemented in sport. Henry's argument suggests that acknowledging these 'multiple modernities' allows for a more culturally sensitive approach to governance that respects and integrates local customs.[9]

The concept of multiple modernities in sport governance requires further exploration and understanding — what exactly do multiple modernities of sport governance look like in the contemporary sport environment? Previous issues of this journal have offered some insight on this topic.[10] A series of articles examined divergence in the composition of boards in national sports federations. Specifically, board size, diversity, and occupational backgrounds of directors in sports federations were found to vary significantly across national contexts. This literature broadly concluded that there is no one-size-fits-all approach to effective board composition. That is, no one approach is inherently better than another and context is key.[11]

[6] Girginov (2019).

[7] See Geeraert (2018) for a detailed discussion.

[8] Henry (2021).

[9] Ibid.

[10] Star and McLeod (2021).

[11] See the Journal of Sports Law, Policy and Governance 2021 issue. See also, McLeod et al. (2021); McKeag et al. (2023).

Other literature has analysed and compared data on board composition in national sport federations across Western and Eastern countries.[12] The authors advocate for further empirical research to compare and contrast the realities of board composition across cultures and countries, allowing for scholars to better understand how, and importantly why, various governance practices are applied in different jurisdictions.

Beyond board composition, the concept of multiple modernities would appear to extend into systemic and organisational governance structures. Different cultures have distinct approaches to governance structures that reflect their unique values, traditions, and social norms. For example, Western culture emphasises democratic decision-making, while Asian cultures lean more towards hierarchical authority. The challenge lies in integrating these divergent approaches when a global sport governance model is necessary.[13] An uncritical imposition of Western democratic norms across varied cultural landscapes requires thoughtful consideration in terms of what it seeks to achieve and the values that underpin it. Communication practices also present an arena for cultural variance, and are influenced by values related to inclusivity, hierarchy, or individual autonomy. Transparency may not necessarily be a one-size-fits-all concept; rather, it may need to be adapted to local cultural contexts. However, arguably, this adaptation should not compromise overarching goals of accountability.[14] The question of what transparency is, and how universal it is as a governance principle, is a significant question for sport governance practitioners and leaders to consider.

While the argument for multiple modernities of sport governance seems strong to us, its boundaries require careful critique. Emphasis on cultural difference might lead to relativism, where all cultural practices are seen as equally valid. This perspective may be problematic, especially when addressing practices that might conflict with human rights principles or ethical standards. Additionally, without careful consideration, the concept might be misused to justify practices deemed unethical or discriminatory under the guise of cultural uniqueness. These criticisms demand careful reflection and balanced consideration in pursuing a multicultural approach to sports governance.

[12] McLeod et al. (2021); McKeag et al. (2023).
[13] Wang et al. (2005).
[14] Henne (2015).

Based on the aforementioned perspectives and critiques, there is a great need for further investigation of this topic. Key areas for future research include understanding the interaction between local and global norms, mapping how local practices interact with global standards, and developing a nuanced appreciation of cultural differences in sport governance. As discussed above, this should include evidence-based research across Western countries and countries in the Global South. It is critical that voices of different stakeholders involved in sport governance are brought out through qualitative research methods. Research could also focus on developing culturally specific best practices that resonate with local cultures without compromising globally accepted ethical and governance principles. Another avenue could be to further build on research that examines the ethical boundaries of cultural relativism.[15]

It should be noted that the framing of international sport regulations and governance norms by Western stakeholders has been criticised in other areas of sport policy (including in the context of international anti-doping policy).[16] Striking a balance between recognising cultural differences and local practices on the one hand, and the need for consistency and harmonisation on the other, is an enduring challenge for sport policy makers.[17]

In conclusion, the quest for 'good' sport governance in a multicultural world is a complex yet significant puzzle. Understanding how to govern sports effectively in a global context is not a task that can be accomplished without in-depth research and a genuine commitment to recognising the complexities of various cultural landscapes. A core ambition of the *Journal of Sports Law, Policy and Governance* is to build knowledge in this area. Indeed, the articles in this issue — and recent issues — provide insights into the development of policy and governance across diverse national contexts. These explorations collectively contribute to a richer understanding of the world of sport governance, embracing the opportunities and challenges presented by the multiculturalism that characterises our global society.

[15] Giulianotti (2014).

[16] See, Star (2023); Dimeo and Møller (2018).

[17] Henry (2021).

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Good governance in national sport organisations: Board composition and interpersonal dynamics

Jacob Colangelo[1]

Abstract

Governance in sport has become a central talking point due to a variety of high-profile corruption scandals. The purpose of this paper is to examine contemporary good governance practices for national sport organisations (NSOs), specifically in relation to board composition and board dynamics. This review paper illuminates the configuration of board composition factors (board size, term limits, diversity (e.g., of gender, age, and skills) and independence) that research indicates is required to enhance board functioning. This paper discusses the importance of boards being strategically as opposed to operationally focused, as well as the need to carefully manage passion, which is uniquely prevalent on sport boards. Additionally, the socio-behavioural aspects of boards including cohesion, climate, conflict, power, and the CEO-board relationship are discussed as vital antecedents of effective board functioning. Using the information in this paper, sports administrators and governance actors will be able to better understand and implement good governance within a board setting and help NSOs strive to operate in a manner that is in line with the expectation of its members and wider society.

Keywords

Sport Governance, Board Composition, Board Dynamics, National Sport Organisations

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1. Introduction

Governance in sport has become a key focus for sport management academics and practitioners over the past decade. The growing commercialisation and complexity of sport throughout the world has enhanced the value of sport through the introduction of functions such as managing commercial rights, engaging with fan and participants, promoting social inclusion, and encouraging healthy lifestyle choices.[2] Due to these changes, the actions of sport governing bodies create significant socioeconomic impacts on wider society.[3]

Dowling et al. (2018) acknowledges the definitional ambiguity of sport governance, suggesting the breadth of the concept.[4] This paper will adopt the definition of governance defined by Ferkins et al. (2005): "the responsibility for the functioning and overall direction of the organisation and is a necessary and institutionalised component of all sports codes from club level to national bodies, government agencies, sport services organisations and professional teams around the world".[5]

Calls for good governance arguably reached the sporting world much slower than other sectors due to the existence of regulatory autonomy within the industry.[6] Autonomy refers to sport organisations' ability to determine their own structures, governance and sport rules.[7] However, growing concerns about sport governance standards have emerged from broader societal concerns surrounding governance and high-profile corruption scandals specifically within the context of sport. Examples include the Fédération Internationale de Football Association (FIFA) corruption scandal,[8] sexual misconduct in USA Gymnastics[9] and the Russian doping scandal.[10] These events have led to greater public scrutiny and societal expectation for sport organisations to take steps to restore the public's trust and reduce unethical behaviours within sport.[11]

[2] Geeraert and van Eekeren (2022).
[3] Geeraert et al. (2014).
[4] Dowling et al. (2018).
[5] Ferkins et al. (2005), p.245.
[6] Geeraert et al. (2014).
[7] Chappelet (2016).
[8] Boudreaux et al. (2016).
[9] Armour and Axon (2017).
[10] Harris et al. (2021).
[11] Chappelet and Mrkonjic (2019); Dowling et al. (2018).

The importance of good governance cannot be understated. Over the last three decades, sports industry has undergone significant commercialised and garnered considerable influence in broader society.[12] Thus, the absence of good governance within sport has the potential to have substantial negative repercussion on both, the wider society and the sports industry itself.[13] The presence of good governance serves as a preventative measure that mitigates risk of governance issues arising, including its resistance to corruption.[14] While good governance does entirely remove the possibility of governance issues arising within organisations, the presence of poor governance certainly fosters an environment where governance issues can fester. It is evident that there is a need for continued research in the field of governance. Such research expands broader societal and management understanding of sport governance and its best practices, safeguarding sport from individuals and groups with ulterior motives.

The purpose of this paper is to examine contemporary good governance practices for national sport organisations (NSOs). Specifically, this paper aims to analyse good governance practices concerning board composition and board dynamics. Firstly, this paper will explore good governance concepts related to the composition of a board. Secondly, it examines the effectiveness of strategically focused boards. Thirdly, it will address the role of passion in sports boards. Finally, this paper will explore the five concepts of board dynamics.

2. Board composition

Boards are integral for achieving organisational objectives and maintaining organisational integrity. Therefore, it is pivotal for boards to be structured in a way to maximise their effectiveness while adhering to good governance principles.[15] Good governance practices related to board composition can be theorised to be classified into two broad groups. The first group comprises practices that contribute to better decision making, introduce a variety of skills to the board and ultimately enhance board performance. The second group can be seen as checks and balances that ensure independence, transparency, and autonomy within the NSO board. The following sections will discuss various aspects of board composition in depth.

[12] Geeraert et al. (2014).
[13] Ibid.
[14] Geeraert (2019).
[15] Ingram and O'Boyle (2018).

2.1. Independent directors

Independence ensures that board members act in the best interest of the organisation rather than their own personal interests. An independent board is essential for good governance and strategy enhancement because it prevents conflicts of interest, ensures objectivity in decision-making, leads to transparency and accountability, and effectively serves as a liaison between members and management.[16] Independent directors do not hold a personal stake in the organisation's business and are not a part of the executive team, nor are they involved in day-to-day operations of the organisation.

An independent director is defined as a non-executive director who is not a member of management. Independent directors are crucial to include on organisational boards because they are the best positioned to monitor and discipline NSO management.[17] They do not have managerial pressures that executive board members may experience,[18] allowing them to contribute a more objective perspective to the decision-making processes, which can increase stakeholders' confidence in the organisational processes.

2.2. Term limits

Term limits are considered a preventative measure to limit the monopolisation of power of an individual on a sport board. Tenures of presidents and executive members lasting more than two 4-year terms may result in a detrimental concentration of power.[19] It has been recognised that the longer individuals hold leadership positions, the greater the influence they can accumulate.[20] This resulting monopolisation of power can transform decision-making into an authoritative process rather than one comprising diverse thought.[21]

[16] Ferkins and Shilbury (2012).
[17] Masulis and Mobbs (2014).
[18] Bhatt and Bhattacharya (2015).
[19] McLeod and Star (2020).
[20] Ibid.
[21] Ibid.

Term limits also assure that elections are real contests, provide opportunities to implement new problem-solving ideas, and prevent concentration of power.[22] High rates of re-election stem result from the significant advantage incumbents over new candidates due to their seniority in power.[23] Examples of individuals who have amassed significant power due to constant re-election include Sepp Blatter during his 17-year reign at FIFA and, in India, Vijay Malhotra's 44-year reign as President of the Archery Association of India.[24] Even after long-serving board members resign or are serving a cooling off period, there is a significant risk for powerful individuals to install proxies to exercise decisions on their behalf after their resignation or during the cooling off period.[25] From a democratic perspective of board elections, term limits provide individuals a real possibility of being elected, enabling underrepresented or overseen groups to hold office positions.[26]

Although the introduction of term limits has been noted as a good governance practice both in academia and practice, the policy can be viewed as a waste of talented individuals and experience. Individuals who serve additional terms undertake significant and strenuous effort for public benefit.[27] There is a potential for a highly productive administrator to be replaced by a significantly less competent individual.[28] The potential to lose competent individuals can be considered as an acceptable trade-off to mitigate the power monopolisation by individuals and encourage new ideas and innovation within the sporting organisation.

2.3. Board Size

Corporate boards with more than twelve members have been found to be ineffective, and these large boards have been associated with lower organisational value.[29] Smaller boards, on the other hand, have demonstrated better decision-making ability because of better communication and coordination.[30] Currently, there is no definitive consensus regarding an

[22] Cohen and Spitzer (1991).
[23] Geeraert et al. (2014).
[24] McLeod and Star (2020).
[25] Ibid.
[26] McLeod et al. (2021).
[27] Cohen and Spitzer (1991).
[28] McLeod and Star (2020).
[29] Jensen (1993); Yermack (1996); Eisenberg et al. (1998).
[30] Jensen (1993).

ideal board size that guarantees enhanced boards performance. However, NSOs may consider several factors, including membership size and operations, when proposing board limits for sporting organisations.[31] Scholarly literature suggests that large boards can lead to less effective decision-making due to increased complexity in communication and management. In contrast, smaller boards tend to make decisions more quickly, resulting in less bureaucracy and more agile responses necessary to meet the rapid demands of the dynamic modern sports business.[32] Furthermore, literature recommends that the optimal board size for NSOs vary between the range of 6 to 12 members, with an odd number of members facilitating decision-making when relying on a voting system for resolutions.[33]

While it has been addressed the impact of large board sizes has been discussed, NSOs must also consider that imposing a cap on board size may limit the mix of skills and diversity of perspectives available on a board. These factors contribute to a more effective decision-making process, making boards more potent.[34] It is essential to strike a balance between having sufficient board members to stimulate diverse thinking and recognising that increasing board size can diminish decision-making effectiveness.

2.4. Board diversity

It has been asserted that diverse groups have a broader range of knowledge, perspective, and information, benefitting board performance when compared to homogenous groups.[35] In addition, gender balance and racial diversity have been shown to improve the effectiveness of board performance and strategic control, ensuring representation for groups that may have historically been excluded from such roles within sporting organisations.[36]

[31] Mak and Kusnadi (2005); Eisenberg et al. (1998).
[32] McLeod et al. (2021a).
[33] Ibid.
[34] Geeraert et al. (2014).
[35] Ely and Thomas (2001); Cox et al. (1991).
[36] Terjesen et.al. (2009); Nielsen and Huse (2010).

2.4.1. Gender diversity

Research demonstrates that boards benefit from gender diversity. A diverse composition enables constructive and open debates, leading to better decisions making due to the inclusion of women, who bring different perspectives to discussions.[37] Geeraert et al. (2014) identified that fifteen of the thirty-five Olympic sport governing bodies analysed in their research lacked female representatives within their executive committee, and only 12% of all executive members of the sport governing bodies were female.[38] These thirty-five Olympic sport governing bodies included team and solo sport governing bodies, sport event governing bodies, special task bodies, and representative bodies of predominately a global or continental level. [39] Studies affirm that female inclusion on boards results in improved governance, with boards featuring three or more women being more effective in implementing corporate strategy, conflict of interest rules and code of conduct.[40]

A common practice to increase gender diversity in governance is the introduction of gender targets and quotas. These targets set a minimum number or percentage of a gender on a board, with quotas being a mandatory measure.[41] While contemporary research has not determined an ideal gender board membership percentage. there is overarching evidence that greater gender balance leads to better board performance.[42] The Australian Human Rights Commission recommends t a minimum of 40% representation of each gender should be represented on a board,[43] commonly referred to as the 40:40:20 target.

It is important to acknowledge that gender diversity faces challenges in the sporting sector, where gender inequality has been normalised.[44] Traditionally, women have been excluded from leadership roles, and masculine hegemony has been prevalent within the sporting industry[45]

[37] Fondas and Sassalos (2000); Zelechowski and Bilimoria (2004).
[38] Geeraert et al. (2014).
[39] Ibid.
[40] Ibid.
[41] Adriaanse and Schofield (2014).
[42] Ibid.
[43] Australian Human Rights Commission (2010).
[44] Cunningham (2008).
[45] Messner (1992).

and sporting organisations.[46] This hegemony has produced sexism and gender bias, undermining women's capabilities.[47] Research suggests that boards with a minimum of three women board members are crucial for advancing gender equality.[48]

Contemporary sport management must also consider the future involvement of non-binary people, who do not fit traditional gender categories.[49] The sports sector has lagged in incorporating non-binary individuals, but their inclusion of sports board can be accepted in future.[50]

2.4.2. Age

While research indicates that age diversity on a board does not significantly impact an organisation's performance, the common rationale for encouraging young leaders within a boardroom and even establishing age limits is to promote board refreshment and new ideas.[51] Promoting cognitive diversity and perspectives, organisations are incentivised to recruit younger individuals, who are typically underrepresented on boards, by establishing a board characterized by a diverse range of age groups among its directors. This phenomenon underscores the importance of fostering intergenerational diversity within board compositions. However, it is important to balance the recruitment of younger members with the benefits of experienced leaders, who often possess extensive knowledge and expertise advantageous to NSOs.[52]

2.4.3. Skill diversity

When selecting board directors, sporting organisations should consider their expertise in sports, ability to provide strategic direction, financial management skills, legal and compliance expertise, marketing capabilities, business acumen, communication skills and their ability to

[46] Anderson (2009).
[47] Hindman and Walker (2020).
[48] Adriaanse and Schofield (2014).
[49] Gibson and Fernandez (2018).
[50] Proud2Play Impact Report (2020).
[51] McLeod and Star (2020).
[52] Adriaanse and Schofield (2013).

engage with stakeholders.[53] Ferkins and Shilbury (2012) undertook a thorough analysis of New Zealand's NSOs and found that having a range and mix of skills, including a hybrid board composition, was crucial for board members perception of their organisation's strategic direction and overall managerial satisfaction.[54] The concept of a hybrid board composition pertains to a constitutional provision that permits the inclusion of individuals into the organisational board through co-option.[55] The hybrid board composition preserves the democratic principles of an election process while also facilitating the inclusion of additional board members to address skill gaps when necessary. Ultimately, the inclusion of individuals with varying skills can help sporting organisations effectively respond to the ever-evolving challenges of the sports industry, ensuring that a variety of voices and backgrounds are taken into account in the decision-making process, thus positioning the organisation to make the best decisions.

It is crucial for NSOs to enact structures within their board that promote good governance, while maximizing both board and organisational output. As discussed in this paper, sporting literature suggest optimal board size for NSOs varies between 6 and 12, with a minimum of 40% of one gender to be comprised of board members.[56] While the structure of a board can be pivotal to organisational success, the socio-behavioural aspects of a board also play a significantly role for both organisational success and board performance.[57] In essence boards can be structured to enhance performance, but without effective interaction between members and management of board dynamics the performance gained through its structure would be rendered ineffective.

3. Effective boards are strategic

Governance has been considered as one of the most influential factors contributing to the success of non-profit organisations.[58] In contrast to the resource rich commercial organisations, non-profit sporting organisations have traditionally been governed by a volunteer board. These

[53] McKeag et al. (2023).
[54] Ferkins and Shilbury (2012).
[55] Ibid.
[56] McLeod et al. (2021a); Australian Human Rights Commission (2010).
[57] McLeod (2020).
[58] Balduck et al. (2010).

boards operate to direct the limited resources and limited staffing capacity of the organisations. Due to their limited staffing capacity, it is imperative for these boards to work effectively to maximise output for sporting organisations. Consequently the volunteer boards are required to attract individuals with significant expertise, as this expertise can be a non-profit sport organisation's most critical asset.[59]

In academic literature, there is growing consensus that boards should decide, rather than simply ratify, the strategic direction of the organisation they represent.[60] This trend suggests that boards should have greater involvement in the strategic decision-making.[61] To function as a strategic board, the individuals comprising the board are required to think and act strategically, possess knowledge of the sport, and demonstrate analytical and impartial thinking.[62] Additionally, the organisation must have a clearly articulated strategy, in which the board has been actively involved in its development.[63]

3.1. Passion on boards

Emotions play important role as they impact the attitudes and behaviours of individuals and groups within the organisation.[64] Emotions, therefore, have a profound impact in the boardroom because "boards are first and foremost groups of human individuals".[65] While there are a various definitions of passion that has been utilised in academic literature, this paper adopts Vallerand et al. (2003) definition of passion as a "strong inclination toward an activity that people like, that they find important".[66]

As sport boards are typically composed of volunteers, passion has been found to be an important source of motivation for directors to serve on these board.[67] The passion involved in sport boards is a clear differentiation from corporate boards. However, it is essential to note

[59] Ferkins et al. (2009).
[60] Cornforth (2003).
[61] Parker (2007); Pye and Pettigrew (2005).
[62] Ferkins and Shilbury (2012).
[63] Ibid.
[64] Barsade and Gibson (2007).
[65] He and Huang (2011), p.1120.
[66] Vallerand et al. (2003), p.757.
[67] Zeimers et al. (2022).

that while passion is required for voluntary boards, it can also introduce challenges. Board members must be aware that excessive passion can potentially impact group dynamics and decision-making negatively. The hybrid board composition can aid in reducing the gap between skills and passion, as co-opted individuals have no direct links with the organisation. However, it cannot entirely eliminate the potential challenges posed by excessive passion.[68]

Despite the potential negative impacts, passion should not be avoided. Literature acknowledges that passion can have a positive on board cohesion and climate. However, its intensity needs to be carefully managed to create a positive dynamic within the board.[69] For example, Zeimers et al. (2022) found that through increased discussion and respect, managing passion may help board to improve idea generation, cohesion, decision quality and processes, and eventually board performance.[70]

4. Board dynamics

Board members depend on each other, in various ways to accomplish both their individual and organisation's goals. As previously discussed, the board plays an integral role in the success of the organisation.[71] Boards must, therefore, interact effectively with each other to ensure the organisation's success, as a dysfunctional board can hinder the progress of the NSO.

4.1. Cohesion

Board cohesion, defined by Jackson & Holland (1998), refer to dhow the board develops its members, cares after the group as a whole, fosters togetherness.[72] Academic literature has found that cohesion contributes to both organisational performance[73] and board performance.[74] Parker (2007) found that cohesion allows for open discourse during difficult situations, as it

[68] Ibid; Zeimers et al. (2023).
[69] Ibid.
[70] Zeimers et al. (2022).
[71] Balduck et al. (2010).
[72] Jackson and Holland (1998).
[73] Griffin and Abraham (2000).
[74] Parker (2007).

encourages board members to respect one another and engage in informal conversations.[75] Further, group integration around tasks has been noted as an essential aspect of board cohesion. Cohesion can positively impact board member satisfaction and the perception of the board's effectiveness to its members.[76]

Two types of board cohesion, social and task cohesion have been identified in literature. Social cohesion refers to the degree to which members of a board like each other and interact accordingly.[77] It is related to the environment that is created by the board, and how board members interact with each other. Task cohesion refers to how well a board can work together in order to achieve common goals, task, or achievements.[78] This type of cohesion creates a goal for the board members to strive towards.[79]

While both types of cohesion influence perceived board performance, task cohesion was found to be a stronger predictor.[80] As discussed above, cohesion is pivotal for organisational performance, however, a board cannot function as an effective strategic board if its individual board member's needs, such as group cohesion and clear expectations of board roles, are not being met.[81] Therefore, NSOs must be mindful of the impact of cohesion on the overall performance of the organisation and its board.[82]

4.2. Climate

In an organisational context, climate refers to the shared perception of the working environment or "the way things are done."[83] Regarding board climate, it relates to how board members interact during meetings.[84] While cohesion portrays the long-term togetherness of the board, boardroom climate focuses on the environment of a board meeting, how comfortable

[75] Ibid.
[76] Doherty and Carron (2003); Hoye and Doherty (2011).
[77] Richardson (2013).
[78] Schneider et al. (2012).
[79] Ibid; Richardson (2013).
[80] Doherty and Carron (2003).
[81] Hoye and Doherty (2011).
[82] Ibid.
[83] Anderson and West (1998).
[84] Schoenberg et al. (2016).

board members feel about making contributions to discussion, and how board members act in their meetings.

Board performance was linked with the board's openness to discuss and debate issues,[85] a climate of openness and a willingness to adapt,[86] the psychological safety during board meetings (i.e. freedom to express opinion),[87] and an informal and facilitative meeting environment.[88] Informal and extensive discourse, accompanied by a constructive scepticism, was found more frequently in higher performing sporting organisations.[89] Parker (2007) found that an informal approach to discourse can co-exist with greater formalisation in agendas or meeting structures.[90] The climate of the boardroom is a crucial consideration for sporting organisations to monitor to create an efficient and effective organisation.

4.3. Conflict

Conflict is "a dynamic process that occurs between interdependent parties as they experience negative emotional reactions to perceived disagreements and interference with the attainment of their goals".[91] Conflict is inevitable on boards, especially boards with diverse backgrounds that encourage different perspective. Papadimitriou (1999) found that a certain degree of conflict can aid performance, but an excess of conflict can reduce the ability of the board to make decisions.[92] In addition, conflict-averse boards were reported to be better at solving problems.[93] Conflict is needed to question ideas and thinking, however, conflict needs to be monitored so it does not create dysfunctionality in the board, which in turn, will negatively impact organisational performance.[94] As sport is a competitive environment, the notion of conflict within the organisation is more acceptable within sports organisation than any other

[85] Prybil (2006).
[86] Bradshaw and Fredette (2009).
[87] Nicholson et al. (2012).
[88] Parker (2007).
[89] Ibid; Prybil (2006).
[90] Parker (2007).
[91] Barki and Hartwick (2004), p.234.
[92] Papadimitriou (1999).
[93] Ibid.
[94] Bradshaw and Wolpin (1992).

industry. It is therefore important for boards to accept that conflict will arise and implement strategies to resolve and monitor conflict.

4.4. Power

Power refers to the ability for one party to influence another[95] due to legitimate, reward, coercive, expert, or referent power.[96] Power is present on boards in two distinct ways. Power patterns identify how power is distributed,[97] while rent seeking describes behaviour on boards where individuals resist change, after they have been found to be suboptimal on the board, because their removal would reduce their private benefits of control.[98]

Murray et al. (1992) found identified five power patterns: power-sharing, powerless, fragmented, CEO-dominated, chair-dominated.[99] Fragmented and powerless boards were found to have lower board performance.[100] Papadimitriou (1999) noted that fragmented boards lacked performance due to decision-making being difficult and slow.[101] Literature has found that power-sharing boards are more likely to exhibit a positive relationship of board performance, although this has not been universally shared.[102] A power-sharing board was found to be better equipped in addressing and preventing future crisis.[103] CEO and chair-dominated board power patters negatively impact both subjective board and organisational performance.[104]

Rent-seeking has been a persistent issue on some sports board, with rent-seeking including forms of manipulation, bribery, cartel formation, lobbying, and dominance.[105] The practice of rent-seeking is more common within a sporting context because sport or a sporting organisation creates a unique emotional connection with board members, which is not replicated in boards

[95] de Balzac (2011); Slack and Parent (2006).
[96] French and Raven (1959).
[97] Murray et al. (1992).
[98] McLeod et al. (2021a).
[99] Murray et al. (1992).
[100] Ibid; Papadimitriou (1999).
[101] Papadimitriou (1999).
[102] Murray et al. (1992); Hoye and Cuskelly (2003).
[103] Jäger and Rehli (2012); Turbide (2012).
[104] Murray et al. (1992).
[105] McLeod and Star (2020); Choi and Storr (2019).

of other industries. In addition, sports boards may give individuals a sense of prestige and social status that may only be attained as a member of the board.[106] NSOs must be conscious of the notion of rent-seeking involved within sporting boards, and must look to enact checks, such as term limits, to protect the organisation from such practices.

4.5. Chief Executive Officer (CEO) – Board relationship

The Chief Executive Officer (CEO) plays a pivotal role on both the board and sporting organisation. The CEO acts as a conduit between the board and the workforce within an NSO. In academic literature, several papers found that a positive CEO-board relationship is positively associated with performance.[107] In addition, it was found that CEO-board relationships were more effective when leadership[108] and information were shared.[109] It is recommended that both parties invest time and effort into building meaningful positive relationships with each other to ensure positive outcomes for the organisation.[110]

The dynamic of trust also plays a role in the CEO-board relationship. In Reid and Turbide (2012), trust was conceptualised on a scale from complete trust to complete distrust.[111] It was identified that a board needed some level of trust in the CEO, as 100% distrust may result in too much interference from the board in the work of the CEO, thereby hindering the effective operation of the organisation.[112] To optimise the performance of the board, a level of distrust is also required from board members to adequately perform their monitoring duties of the CEO and the organisation,[113] suggesting that a balance must be struck between trust and distrust to optimise organisational performance.[114]

[106] Zeimers and Shilbury (2020).
[107] Hoye (2006); Kreutzer (2009); Turbide (2012).
[108] Ferkins and Shilbury (2012); Morrison and Salipante (2007).
[109] Hoye (2003a); Morrison and Salipante (2007).
[110] Hoye (2006).
[111] Reid and Turbide (2012).
[112] Ibid; Hoye (2006).
[113] Ibid.
[114] Bradshaw and Fredette (2009).

4.6. Final reflections on board dynamics

It is evident that the socio-behavioural aspects of a board significantly contribute to both the organisational success and overall board performance within an NSO. As discussed in this paper, task cohesion has been found to be a better predictor of board performance than social cohesion, with findings also indicating that increased task cohesion also predicted the level of effort put into board performance, in relation to fulfilling their roles on the board.[115] The climate of high performing boards found that informal and extensive discourse, accompanied by a constructive scepticism, aids board performance.[116] In addition, a degree of conflict can aid performance, however, conflict must be managed, as an excess of conflict can reduce the ability of the board to make decisions.[117] While Murray et al. (1992) identified five power patterns in boards, a power-sharing board was found to be better equipped in addressing and preventing future crisis.[118] The relationship between the CEO and the board needs to be prioritised with a balance between trust and distrust to optimise organisation performance,[119] while enabling board members to fulfil their monitoring duty.[120]

5. Conclusion

This paper aims to establish contemporary good governance practices for board composition and board dynamics within the sport context. Throughout this paper it has been established that it is essential for NSOs and their board members to be knowledgeable of the good governance practices involved with board composition and dynamics. NSO boards have distinctive characteristics, with boards being of a voluntary nature and filled with passionate individuals. This paper has highlighted the need for board composition and intragroup board dynamics to be considered in NSO governance models while also emphasising the relationships between board factors and NSO performance. While board composition and board dynamics may be viewed as mutually exclusive practices, it should be noted that poor governance within composition or dynamics will likely result in the overall dysfunction and decreased board

[115] Doherty and Carron (2003).
[116] Parker (2007); Prybil (2006).
[117] Papadimitriou (1999).
[118] Murray et al. (1992).
[119] Bradshaw and Fredette (2009).
[120] Reid and Turbide (2012).

performance. Therefore, it is pivotal to ensure proper governance practices are in place for both board composition and board dynamics to ensure optimal board performance within NSOs.

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Examining the interplay between the spectator rights, obligations, and sports viewership protection

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Abstract

The paper recognises that although, the stakeholders in sport share an inter-dependency, there is a divergent level of understanding of the civic responsibility that they share towards each other. This article delves into the intricate interplay between spectator rights and responsibilities within the realm of sports, examining the measures implemented to preserve and protect the sports viewing experience. It explores how to strike a balance between promoting respectful behaviour, ensuring safety, and enhancing fan engagement while fostering inclusivity in the sports fan experience. It also scrutinises the psychology behind spectator violence and emerging areas such as esports and fan-parks. In conclusion, this article elucidates the intrinsic link between spectator rights and responsibilities in sports, emphasising the necessity for collaboration among governing bodies, athletes, and spectators to ensure event integrity and safety while upholding values of respect, responsibility, and sportsmanship. It further highlights the importance of adapting sports policies to emerging domains like fan-parks and esports, promoting spectator rights and a unified message of integrity across all sporting contexts.

Keywords

Hooliganism, spectator rights and obligations, sport integrity and violence

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1. Introduction

The enthusiastic participation of millions of people in athletic events worldwide every year highlights the significance of sports in contemporary society. "Sports" is defined as all forms of physical activity, which, through casual or organised participation, aim to express or improve physical fitness and mental well-being, form social relationships, or achieve results in competition at all levels.[2] The pursuit of skill and play within sports not only captivates audiences but also kindles a sense of collective unity. This, in turn, promotes growth, practice, and widespread engagement within the realm of sports, affirming its enduring relevance.[3] Hence, sports have transcended their recreational roots to become not only a profession contributing to the economy but also an integral part of individual lives.

Another critical facet is the cultural representation associated with sports, where teams and athletes symbolise their communities, societies, and nations, thereby empowering the spirit of their constituents. This collective identity often surpasses the significance of individual players, forging a profound sense of belonging among those they represent. This passion finds expression and transcends into the enthusiastic and cherished active involvement of supporters, patriots, and fans, who consider their respective teams as an extension of their own families. Consequently, these ardent supporters share an equal enthusiasm for both participating in and supporting their "sports family".

However, while this sense of belonging and involvement is admirable, it can also escalate into acts of aggression, both from players and spectators, potentially jeopardising the safety of the spectators and onlookers alike. This brings us to the concept of "spectator rights" which represent the right of the viewers to engage in sports as viewers without any hinderance. Conversely "obligations" are principles imposed on the spectators or players to ensure the protection of the rights and interests of all involved parties. This paper aims to investigate the significance of spectator rights and responsibilities in the context of sports as well as the measures taken by stakeholders to safeguard stadiums.[4] This paper sets out the obligations of players and challenges the threshold of the duty that they owe on and off the field. Following

[2] Council of Europe (n.d.).
[3] Matveev (2005).
[4] Coakley and Dunning (2000).

this, the scope of the applicable law will be compared with its application. Despite only a limited number of cases appearing before the Courts that involve player and spectator duties, the jurisprudence that they have developed is discussed to understand the tension between different stakeholders. Thereafter, this paper, we will delve into the responsibilities of spectators when attending sporting events, with a particular emphasis on FIFA laws. Specifically, this paper will examine how fans should behave while watching football matches. The importance of striking a balance between ensuring respectful behaviour, safety knowledge, and engagement, while striving towards establishing an entertaining and inclusive atmosphere for sports fans will be discussed. It will be concluded that spectator rights and responsibilities are interconnected, requiring collective efforts from governing bodies, athletes, and spectators to ensure the integrity and safety of sports events, fostering an environment of respect, responsibility and sportsmanship.

2. The obligations of players towards the safety of fans and spectators during sporting events

Players bear some responsibility of ensuring the safety of spectators but only insofar as their actions on the field can influence the behaviour of supporters within the stadium. Consequently, they should be obligated to take precautions to prevent any violent or aggressive behaviour that may endanger spectators. One way that players can contribute to spectator safety is by refraining from provocative behaviour on the field or court, such as making obscene gestures or using offensive language towards opponents, referees or spectators.

2.1. Ethical aspects of Cantona's actions

Eric Cantona, a prominent figure in the football community, especially during the 1990's in the English leagues, garnered attention for his fierce spirit on the field, along with some criticism. However, there was an instance where a spectator went to great lengths to distract him and his team by making racist comments. This, led to a furious battle between the spectator and Cantona, ultimately resulting in Cantona assaulting the spectator. Cantona's physical assault of a fan unquestionably violated ethical (and legal) standards expected from professional athletes. His actions, both on and off the field, undermined the values of fair play, respect, and self-control. Cantona, a player with a significant influence both on and off the

field,[5] displayed unsportsmanlike behaviour that reflected negatively on the integrity of the game and showed a lack of respect for the rules. Despite violating ethical standards, Cantona received mixed responses from the public and the media. While some supporters applauded his actions as defiance against perceived arrogance and hostility from other spectators, many found his actions inappropriate.[6] This polarised response highlighted the complexity of public opinion and the tendency to praise behaviours that challenge established norms, even when they raise ethical concerns.

Cantona was found guilty of assault and initially sentenced to prison, which was later commuted to community service upon appeal.[7] The culpability of the spectator must be considered if such a person has interrupted a game by making racist comments. Accordingly, it is important to examine the involvement of both parties. Condoning either of these two actions – alleged racist comments and an act of physical assault - represents a severe breakdown of civic responsibility.

2.2. The ambit for the issue to be taken to court

The question of whether sporting incidents should be subject to legal scrutiny is a sensitive one, sparking debates. Some argue that acts of violence within sports should be addressed internally, citing that sport has its own rules and regulations. They believe excessive legal intervention would undermine the autonomy and self-regulation of sporting organisations.[8] In contrast, others advocate for legal examination of illegal behaviour, especially in the context of sports events, to uphold justice, safety, and well-being for all involved. They argue that an act of violence is a violation of public rights, and thus, the courts should be involved.[9]

The law is clear that acts of violence violate public rights (i.e., right in rem) therefore, the only adjudicatory body to punish such offences should be the courts. Sporting authorities themselves can impose civic penalties. Differentiating between types of contact within the sport and the intent behind them, sporting authorities should determine when an incident falls beyond their

[5] Rodrigues (2015).
[6] Livings (2016).
[7] Ibid.
[8] Yongman (2012).
[9] Standen (2009).

purview and refer it to the courts. Moreover, punitive damages can be awarded to emphasise the authorities' commitment to enforcing a Code of Conduct in prestigious arenas.

3. The provision of legal defence for stadiums and matches and spectator rights

3.1. Notable jurisprudence

In the case of *Loughran v. The Phillies,*[10] the court upheld the trial court's summary judgment based on the "no duty" principle, which places responsibility on athletes and recreationalists for their own safety, acknowledging the inherent risks in their activities. On 5 July 2003, Philadelphia Phillies centre fielder Marlon Byrd threw a ball into the stands after catching the final out, unintentionally hitting spectator Jeremy Loughran, causing head injuries and multiple hospital trips. The court ruled that spectators assume the risk of being hit by a baseball, considering it a recognised risk within the game when actions like these are widespread, frequent, or expected in the game. The court acknowledged that even a casual baseball fan would anticipate that players often throw keepsakes to fans, making it a recognised risk within the game. Consequently, the court applied the "no duty" rule, affirming the trial court's decision, and found the Phillies and Marlon Byrd not liable.

This theory protects sports organisations, teams, and players from legal liability for injuries caused by inherent hazards. It requires spectators to be cautious and informed about event risks. The "no duty" rule exempts defendants from protecting against common, frequent, or foreseeable hazard.[11] This, has now evolved into the baseball rule, wherein if the team has afforded certain level of protection, where a foul ball is likely going to hit to the spectators, then the players would not be liable for the injury. Despite, the spectators shifting closer into the field within the stadium, the Courts have upheld this contentious rule.[12]

While the spectators may bear a general liability for foreseeable actions or regular occurrences in sports,[13] laws have been enacted on national and global levels to address concerns about the

[10] Jeremy Loughran v. The Phillies and Marlon Byrd (2005), 888 A.2d 872.
[11] Ibid.
[12] Grow and Flagel (2018).
[13] Augustine (2009).

level of stadium protection, providing standard safeguards against fan violence and other risks.[14] These laws aim to prevent sports spectators from encountering potential dangers while also safeguarding stadiums from the damage that may be caused by disorderly fans. For instance, the Federation Internationale de Football Association (FIFA) has stringent regulations controlling stadium security measures during major football events.[15]

3.2. Laws and regulations enacted by sovereigns and sporting authorities

The Sports Fan Violence Prevention Act (SFVPA) has recently been passed by the Congress of the United States of America.[16] This Act mandates that all professional sports leagues that operate within its jurisdiction give the utmost importance to the protection of their fans from acts of hooliganism that are carried out by supporters inside match venues.

Spectators attending sporting events have specific rights, including the right to receive appropriate treatment from security staff upon entering the stadium, access to first aid, and the right to be in a safe atmosphere free from physical harm.[17] They are also accountable for behaving appropriately throughout the events they attend.

In the event that spectators see other fans participating in violent or abusive behaviour, they are expected to report it to the security officers who are present at the venue. This allows for prompt action to be taken against hooligans, ensuring the safety of other sports fans.[18] Additionally, they should support their teams without engaging in harmful activities within match venues or making derogatory comments about opposing teams.

Regulatory authorities have taken measures to enhance stadium safety. FIFA and the Union of European Football Associations (UEFA)[19] are two of the governing bodies in football that have taken various steps to improve the safety of stadiums, including:

[14] Schofield et al. (2018).
[15] FIFA (n.d.).
[16] US Legal (n.d.).
[17] Felton (2022).
[18] Swenson (2012).
[19] UEFA Safety and Security Regulations (2019).

1. Establishing comprehensive safety laws that address topics such as crowd management, emergency evacuation procedures, and the structural integrity of stadiums.
2. Carrying out safety inspections on a regular basis in order to locate and address any potential dangers or risks that may be present within stadiums.
3. Providing training programs for stadium workers, security personnel, and emergency responders in order for them to properly manage any safety situations.
4. Implementation of severe security measures, such as bag checks, closed-circuit television surveillance, and the presence of trained security staff in order to provide spectators with a safe environment.
5. Implementing ticketing and access control systems to prevent overcrowding in stadiums or event venues.

UEFA in the EU has acknowledged the significance of stadium safety and has enacted legislation to address concerns pertaining to the administration of stadiums and seating[20] in the following areas:

1. Minimum standards for seating arrangements are outlined in the regulation. These standards include providing sufficient space between seats, clear aisles, and unimpeded sightlines to ensure the comfort and safety of spectators.
2. Accessibility: The Act places an emphasis on the requirement that stadiums provide accessible seating alternatives for those with disabilities. These seating options must conform with accessibility requirements and must include spaces designated specifically for wheelchairs.[21]
3. Evacuation plans: The directive requires stadiums to prepare and frequently update detailed evacuation plans so that in case of an emergency, spectators can be evacuated in an orderly and safe manner.

3.3. The Hillsborough incident and the laws enacted as a result of the disaster

The Hillsborough catastrophe, occurred on 15 April 1989 during the Football Association Challenge Cup semi-final match between Liverpool and Nottingham Forest at the Hillsborough

[20] Ibid.

[21] Shirley (1980).

Stadium in Sheffield, England.[22] Tragically, it resulted in the deaths of 96 Liverpool fans due to overcrowding and poor crowd control.[23] This tragedy had a tremendous impact on measures taken to ensure spectator safety and led to substantial modifications in the following areas:[24]

1. The architecture of the stadium and the infrastructure of the stadium: The disaster spurred a re-evaluation of the stadium's design, with an emphasis on improving crowd flow, access points, and the general infrastructure to prevent overcrowding and ensure safe evacuation.
2. Management and control of crowds: The tragedy underlined the necessity for adequate crowd control measures, including appropriate allocation of resources, qualified security staff, and enhanced communication systems to protect spectators' safety at the event.
3. Changes to the legal system and judicial proceedings: The disaster at Hillsborough led to a protracted legal process, numerous inquiries, and subsequent changes to the legal system. Notably, the inquest concluded that the 96 victims had been killed in an unlawful manner. They attributed the tragedy to a lack of police supervision and inadequate safety measures within the stadium.

The tragedy at Hillsborough Stadium served as the catalyst for the adoption of all-seater stadiums in the English football league. Following an investigation led by Lord Justice Taylor, it was determined that the addition of seating would improve both spectator safety and crowd control. The Football Spectators Act of 1989 enacted in the United Kingdom mandated that all Premier League and Championship clubs have all-seated accommodations by August of the following year.

In order to monitor and ensure the safety of spectators at designated football events, the Football Licensing Authority was founded. This organisation was succeeded by the Sports Grounds Safety Authority.[25] In the early 2000s, there was a rise in the number of individuals and organisations that voiced their support for the establishment of designated standing areas with restricted access. Despite this, the authorities insisted that stadiums with no standing room were the safest choice.

[22] Dickie (2018).
[23] Nicholson and Roebuck (1995).
[24] Ibid.
[25] Woodhouse and Tyler-Todd (2023).

Subsequently, in 2017, there was a shift in attitude towards safe standing, and the authorities began monitoring developments at clubs that had implemented safe standing zones. An increase in the number of people calling for change can be attributed to developments in stadium architecture and technology as well as the fruitful implementation of safe standing in other nations. In 2018, the Department for Digital, Culture, Media, and Sport (DCMS) Commissioned an evidence-based study to investigate the associated risks and potential solutions for safe standing. After completing the review, the authors concluded that additional studies were needed to establish an evidence base for modifying existing policies.

In 2019, the manifesto for the Conservative Party included a commitment to work towards achieving safe standing. In 2021, the Safe Grounds Standing Association (SGSA) conducted its own independent investigation, leading them to the conclusion that the placement of barriers or rails in locations where spectators stand might improve both safety and behaviour.[26] In January 2022, standing was permitted in licensed portions of five clubs that were considered as "early adopter" clubs. The Football Spectators (Seating) Order 2021 was responsible for bringing about the adjustment. The SGSA has certain requirements for obtaining a safe standing license, and clubs can submit applications to the SGSA in order to develop safe standing sections within their stadiums.[27] However, if these requirements are not satisfied or a license is not obtained, the condition that everyone must remain seated is still in effect.

4. Spectator obligations

The spectators at sporting events contribute support, energy, and passion to the world of sports, making them an essential part of the industry. Nevertheless, spectators are expected to uphold certain responsibilities and civic duties in addition to enjoying the excitement of the event.

[26] Welford et al. (2021).
[27] Ibid.

4.1. The spectrum of obligations for a spectator

4.1.1. Show respect for the game's participants, officials, and other spectators

Respect for the players, officials, and fellow spectators is a fundamental obligation that falls on spectators. Spectators have a fundamental duty to display respect. This includes abstaining from using abusive language, refraining from chanting that is racist or discriminatory, and behaving in a polite manner. The regulations of FIFA make it clear that any sort of discrimination, including racism, is expressly forbidden, and they urge spectators to encourage an environment that is fair and sportsmanlike. In the event that these requirements are not met, the offender may be subject to punishment, such as being kicked out of the event or facing legal repercussions.

An illustration of this obligation can be seen in the form of a banner that was displayed by a group of fans at the 2018 FIFA World Cup.[28] The banner contained offensive language that was directed at a particular player. As a consequence of this occurrence, the National Football Association was issued sanctions, shedding light on the critical importance of eliminating all forms of prejudice in football arenas.

4.1.2. Awareness of safety procedures and compliance

Spectators have a duty to put both their own well-being and to respect other spectators. This includes avoiding banned areas, following the stadium laws, and obeying crowd control measures. Other examples of this include adhering to safety requirements according to stadium regulations. Additionally, spectators should maintain situational awareness, particularly during crowded events, in order to reduce the likelihood of accidents and create a safe atmosphere for everyone present.

In 1985, the Heysel Stadium disaster occurred during the European Cup final match between Liverpool and Juventus.[29] During the match, a wall caved in because of excessive crowding and fights that broke out between opposing fans, leading to the tragic deaths of 39 individuals.

[28] FIFA (2018).

[29] Elliott and Smith (1993).

This catastrophe brought to light the crucial importance of the safety of spectators and resulted in significant improvements to the infrastructure of stadiums, the security measures, and the management of crowds.

4.1.3. Adhere to the principles of fair play and ethical behaviour

Spectators are expected to abide by the rules of fair play and ethical behaviour. This means supporting their side in a way that is beneficial and productive without resorting to acts of violence, aggressiveness, or unsportsmanlike conduct. The FIFA regulations encourage fans to foster an environment that promotes fair competition, respect for opponents, and enthusiasm for the game itself.

The "Icelandic Clap" that occurred during the 2016 UEFA European Championship serves as an excellent illustration of the positive impact that spectators can have. The Icelandic crowd showed their solidarity and good sportsmanship by clapping in unison with each other,[30] illustrating how spectators can contribute to a memorable and uplifting experience at sporting events.

4.1.4. Communicating concerns regarding safety and inappropriate behaviour

Spectators have a responsibility to report any concerns regarding safety, inappropriate behaviour, or any type of unlawful action to the appropriate authorities or event organisers. It is possible for spectators to make a contribution to the overall safety and legitimacy of the event by maintaining vigilance and taking preventative measures. It is helpful to create a safe and welcoming environment for all guests if occurrences of violence, racism, or other infractions are reported as they occur.

An example of this responsibility can be found in 2019 when a spectator at a match in the English Premier League reported hearing racial insults aimed toward a player.[31] The issue was quickly addressed, leading to the identification and exclusion of the responsible individual.

[30] Smith (2016).
[31] Ibid.

This case highlighted the importance of observant spectators in combating discrimination and maintaining inclusive environments at sporting events.

4.1.5. Environmental responsibility

During sporting events, spectators should be conscious of the impact that their actions have on the surrounding environment. This includes utilising authorised recycling facilities, properly disposing of garbage, and supporting environmentally responsible efforts advocated by the event organisers. Fans can help reduce the negative impact that athletic events have on the surrounding environment by adopting eco-friendly behaviours. For instance, the Green Goal program[32] that was implemented during the 2006 FIFA World Cup.

4.1.6. Showing respect for Intellectual Property

Spectators have a responsibility to show adequate courtesy toward the intellectual property rights associated with sporting events.[33] This includes not recording, transmitting, or distributing content that is copyrighted without permission, such as live match footage or official event goods.

4.1.7. Consume alcohol in a responsible manner

While drinking alcohol is often a part of the experience of attending sporting events as a fan, it does come with certain obligations. Alcohol should be consumed in moderation, and spectators should avoid drinking to excess, as this can lead to conduct that is either disruptive or hazardous.

FIFA in collaboration with national and municipal authorities, is responsible for enforcing restrictions surrounding the sale and consumption of alcohol on-site at matches.[34] The purpose of these regulations is to protect the general public, put an end to violent behaviour, and keep order within the stadium. It is important for spectators to be aware of these laws, to drink in

[32] United Nations (2005).
[33] Bejtullahi and Dumi (2017).
[34] Ibid.

moderation, and to refrain from engaging in acts that could put their safety or the safety of others in jeopardy.

4.2. Disorderly conduct at athletic events

Hooliganism is an age-old phenomenon associated with football matches worldwide. Hooliganism involves groups of supporters that participate in disorderly behaviour within sports stadiums, which can escalate to violence or the destruction of property and, in some cases, the loss of life. Hooliganism has been linked to football matches for a long time. In addition to causing severe injury and even death in certain cases, acts of hooliganism have the consequence of wreaking havoc on public property, upsetting the established social order, and putting tourism endeavours in jeopardy.[35]

There are several distinct forms of hooliganism, the most common of which involves fans verbally abusing players or officials while they are on the field of play. Another form of hooliganism is physical assault, either between competing fan groups or directed against police officers patrolling the stadiums during major sporting events.

Hooliganism poses significant concerns within the world of sports, not only affecting the overall fan experience but also leading to various unintended consequences:[36]

1. Risk to safety: Hooliganism puts the safety of players, referees, and innocent spectators at risk, which is the first and most important concern. The use of force in the form of physical attacks, the hurling of objects into the playing field, or the instigation of riots can result in serious injuries or even the loss of life. Protecting the integrity of sporting events requires ensuring the well-being of all participants.
2. Destruction to infrastructure: Hooliganism frequently leads to property destruction, including vandalism committed against stadiums, public buildings, and businesses located in the surrounding area. These destructive activities can place a considerable financial burden on athletic organisations as well as local communities, which diverts resources that could have been used to improve the overall sporting experience or address other societal needs.

[35] Case and Boucher (1981).
[36] Madensen and Eck (2008).

3. Reputation and the impact on the economy: The unfavourable reputation that is linked to hooliganism might discourage potential sponsors, investors, and broadcasters from aligning themselves with the sport. This could, in turn, result in a reduced financial assistance, broadcasting rights, and revenue sources for sports organisations. Additionally, cities or nations that have a reputation for hooliganism may see a drop in tourists, negatively impacting the local economy.
4. Deterioration of fan culture: Hooliganism can erode the positive aspects of fan culture, encouraging an environment of animosity and aggression rather than brotherhood and sportsmanship. This makes it less likely for families and casual fans to attend matches, which in turn reduces the potential for the fan base to grow and become more diverse. The decline and eventual disappearance of an active and welcoming fan culture will have a negative impact on the general ambiance and passion around athletic events.[37]
5. Obstacles in the legal and law enforcement systems: Challenges within the legal and law enforcement systems arise when addressing hooliganism. To effectively combat this issue, law enforcement agencies and the judicial systems must allocate significant resources, diverting their attention from pressing matters. This reallocation of resources may hinder their ability to efficiently combat other forms of crime and maintain public order.

Hooliganism can have a significant psychological influence on players and officials, leading to elevated levels of tension, anxiety, and terror in the players and authorities involved. This could potentially hinder their performance, ultimately affecting the overall quality of the game. In addition, episodes of hooliganism might deter individuals from pursuing careers as players, officials, or coaches, which further reduces the talent pool available within the sport.

Hooliganism is a reflection of broader societal issues, such as social unrest, inequality, and discontent, and it has repercussions for society as a whole. In order to address these underlying problems, a comprehensive approach that goes beyond the bounds of the sporting world is required. By addressing the underlying problems, society as a whole stands can benefit from enhanced social cohesion and reduced levels of violent crime.

[37] De Biasi (1998).

Governments worldwide have implemented various policies in an effort to prevent and reduce the risks associated with hooliganism during sporting events. These measures include increased police presence within stadiums and the appointment of stewards tasked with diplomatically maintaining crowd control and using non-violent techniques when necessary. In addition, the authorities have the ability to prevent individuals who have been found guilty of partaking in violent crimes from ever attending a match again, and in the most extreme circumstances, this can lead to legal action being taken against the perpetrators, which typically results in substantial prison sentences.[38]

4.3. Psychology of fan violence in sports

There have been several different hypotheses developed to explain the occurrence of fan violence, sometimes attributed to specific traits of fans. One of these hypotheses is known as the instinct theory, and it proposes that spectators may use sporting events as a risk-free way to unleash their potentially dangerous emotions. Freud (2021) proposed that people in a crowd could develop a dependent and frustrated reliance on a leader, which could result in the abandonment of moral principles and potentially violent behaviour.[39]

The frustration-aggression theory is another school of thought, and it postulates that feelings of frustration can give rise to acts of aggressiveness.[40] Fans who deeply identify with their team may feel a sense of frustration and an unfulfilled sense of identity if their team performs poorly or loses when the stakes are high for both. Studies on spectator violence towards officials have shown that this frustration can escalate to aggressive behaviour on the part of the spectators.[41]

According to the hooligan addiction theory, violent acts can take place even when there is no intention to do so. Some extreme fans may develop an addiction to violent activity since it provides them with a sense of fulfilment and stimulation comparable to that experienced while taking narcotics.[42] These individuals may find that the act of planning and participating in violent activities gives them an emotional high.

[38] Crown Prosecution Services (2022).
[39] Freud (2021).
[40] Breuer and Elson (2017).
[41] Ibid.
[42] Ward (2002).

When analysing fan violence, crowd dynamics and the nature of the event itself are both important factors to consider. The emerging norm theory proposes that individuals adjust their behaviour so that it is consistent with the norms and expectations of the group.[43] In the setting of sporting events, violence may occur not because of irrationality or a desire to live vicariously through the game but rather because supporters regard it as legitimate or expected within the audience. This can make fans more likely to engage in violent behaviour.

According to the principle of contagion, members of a group can unknowingly become infected with an emotion, particularly when affected by an agitated leader.[44] The increased arousal spreads across the crowd, which results in a weakened capacity for rational reasoning and the possibility of violent acts being committed by individuals in the mob.

According to the convergence theory, when people gather together who share similar values and perspectives, their inhibitions decrease.[45] This, in turn, can encourage the display of aggressive feelings. People who go to athletic events may feel more emboldened to engage in violent behaviour when they are surrounded by those with whom they sense they have characteristics and attributes. In addition, sporting events may attract those who are prone to aggressive behaviour.

The concept of a collective mind in society is emphasised by collective mind theory; nevertheless, opinions regarding the level of rationality possessed by this mind vary. Le Bon (1895) contends that the collective mind is intellectually inferior and that it can cause people to become impetuous and lose judgment when they are in crowds,[46] but Durkheim (1893) believes that the conscious collective is the one responsible for establishing moral order.[47] According to the collective mind theory, the mechanisms that cause violence in a crowd include anonymity, contagion, and suggestibility. These three factors are believed to be interconnected.[48]

[43] Arthur (2013).
[44] Nemeroff et al. (1994).
[45] McPhail (2007).
[46] Le Bon (1895).
[47] Smith (2014).
[48] Ibid.

According to Smelser's value-added hypothesis, there are six factors that determine the level of violence in a crowd.[49] These factors include structural conduciveness, structural strain, the growth and spread of generalised beliefs, precipitating circumstances, mobilisation, and the operation of social control. Additionally, these determinants include the growth and spread of generalised beliefs. Each determinant places constraints on the ability of the subsequent determinant to function, and collectively, these constraints contribute to the possibility of fan violence.

Research that is based on Smelser's theory typically makes the assumption that there is a rationale behind fan violence, in which supporters believe that force may remedy wrongs that they perceive to have been committed.[50] The fatal crush that occurred at Hillsborough Stadium in England was investigated using this paradigm.

Overall, these theories and notions shed light on the qualities of fans as well as the dynamics of crowd behaviour, which contributes to an increased understanding of why fan violence occurs during sporting events.

4.4. Extended protection to sporting activities outside the scope of the stadiums

4.4.1. Fan Parks: The responsibility that comes with fan parks

Fan parks are vibrant locations where sports fans gather to cheer on and celebrate their favourite teams or athletes. Governing authorities use fan parks as a way to encourage fan participation and to improve the overall fan experience. Fan safety and experience can be improved by fostering diversity, creating secure spaces to spectate, and facilitating activities that encourage interaction.

The value of fan parks as an extension of the experience offered at stadiums must to be acknowledged by the governing organisations. They should work along with the relevant local authorities, event organisers, and sponsors to ensure that fan parks have the necessary infrastructure, facilities, and services. This includes provisions for seating, large screens for

[49] Spaaji (2015).
[50] Ibid.

live broadcasts, alternatives for food and beverage, restrooms, and sufficient safety precautions.

Even though governing bodies are not directly responsible for organising fan park events, they are nonetheless able to exercise influence and provide direction throughout the planning process. They are able to provide rules, best practices, and support to ensure that fan park events retain a high degree of organisation and are in alignment with the spirit of the sport.

Additionally, regulatory organisations have a responsibility to safeguard the safety and security of fans, which extends beyond the limits of the stadium where the event is being held. In order to successfully implement proper safety measures in fan parks, it is vital to work together with local law enforcement agencies and event organisers. This involves the provision of emergency medical services, crowd management, and alternative preparations for unexpected events.

4.4.2. Expansion of the governing body's jurisdiction

Governing bodies have the authority to regulate the sports they oversee. Even while the activities that take place at fan parks may not fall under their direct control, they nonetheless can exert influence and oversight over those areas. They can enforce codes of behaviour, monitor compliance with license and sponsorship restrictions, and take action against any infringements that may take place at fan parks.

When it comes to the sport's branding and marketing, the governing bodies frequently have a vested interest in guarding the reputation and maintaining the integrity of its brand image. Fan parks greatly contribute to the exposure and appeal of the sport, which has caused governing bodies to extend their jurisdiction in order to ensure that branding requirements are followed, that unauthorised commercial activities are reduced, and that the sport's image is maintained.

Moreover, governing organisations have a part to play in encouraging appropriate fan behaviour and opposing behaviours that could potentially damage the sport's reputation. Although governing organisations do not have direct control over fan parks, working together with those who create fan parks can assist in fostering inclusiveness, sportsmanship, and fair play.

In addition, governing bodies have the ability to oversee licensing agreements and broadcasting rights to make certain that fan parks adhere to legal standards and serve the commercial interests of the sport. This involves keeping an eye out for any illegal streaming or distribution of anything that is protected by intellectual property rights.

5. What about esports?

The control and monitoring of events are foreseeable and predictable in physical venues for sporting events, wherein the rights and responsibilities of the participants, stakeholders and members of the sporting community are to an extent protected or afforded to take immediate action to protect. However, the situation becomes more complex when each viewer is hidden behind a screen and untraced of their presence. Esports governing bodies such as the International Esports Association (IESA) have developed a Code of Conduct and a process of handling discrimination and misconduct, yet its ability to be enforced is dubious.

In a recent example, a YouTube streamer, to boost his popularity and viewership to attract sponsors, had intentionally caused a crash of an aircraft that he flew, while streaming the same.[51] This incident speak highly of the psychology of the participants in the online forum to take actions which puts them or others in danger. While a player's ethics can be influenced by restrictions on the material they can post online and the gaming interface itself, the challenge of controlling spectator's rights and responsibilities remain unresolved. The types of speech that is circulated, or the high incidence of trolling or stalking cannot be limited by one such governing authority. The risk that it carries is by and large going to effect and influence the mental orientation of each person online. For example, the player being disturbed with hurls of hate speech or material derogatory to them, while in the process of gaming, or the continuity of the comments spilling over the space than being able to access the rights resources while playing an esport. The dynamic of this issue is unworked, and hinges on the threat of cyber-crime and threats online. The co-operation of essential members who have the adequate infrastructure and capability to monitor such issues is essential for such rights to be enforced.[52]

[51] Clayton (2023).

[52] Kelly et al. (2022); Chanda et al. (2021).

6. Conclusion

The rights and obligations of spectators during athletic events are not mutually exclusive. They are entitled to receive proper care, access to first aid, and to be in a secure environment. Despite the "no duty" rule, which applies in limited circumstances, governing bodies and the stadium management still bears responsibility for the risks associated with spectators attending the event. The implementation of all-seater stadiums and EU legislation on stadium management have contributed to an improvement in the safety of spectators and on evaluation gives the impact that the bodies are indeed conducting certain actions on their own to mitigate any grave human threat or injury and foul happening during sporting events. Similarly, it is demonstrable that since the actions of a player hold high influence on the behaviour and conduct of spectators, and taking a learning impact from the Eric Cantona instance, that despite all protections within a sport, if a player themselves behaves unruly and conducts themselves outside the ethical lines of the sport, they may be subjected to trial under the domestic laws.

There are arenas of sports which genuinely require the cooperation of governing bodies and organisers. Some of these areas are recent upsprings in sports and mechanisms need to be set-up for evolving areas of sport policies where spectator rights are not as well protected, such as fan-parks or esports. An understanding of the psychology behind spectator violence should help them management and governing bodies to better create policies for the protection of spectators both inside and outside the stadium. It could ensure that these stakeholders could build on written codes for the spectators by conjointly working with the teams and players, to ensure that a message of solitude and integrity is also prescribed amongst the viewers.

There are also obligations on spectators. It is their role to maintain good behaviour, report any instances of aggressive or abusive behaviour, and refrain from making inappropriate comments or engaging in harmful activities. Within the spirit of the game, spectators must be considerate of every individual's participation, recognising the values and skills represented. Their responsibility in upholding these minimum standards will significantly contribute to promoting safer and more inclusive participation in sports.

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An analysis of systemic sport governance structures in Australia

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Abstract

This article compares the Federated Model (FM) and the Unitary Model (UM) of sport governance, focusing primarily on the Australian sporting landscape. While the FM is characterised by decentralised power distribution, local responsiveness and decision-making independence from regional affiliates, the UM encompasses a centralised administration system, common strategic alignment, and enhanced efficiency. Through a multi-dimensioned analysis considering power distribution and strategic direction, collaboration and cohesiveness, and efficiency and productivity, the UM emerges as potentially better suited to modern sporting bodies due to streamlined resource management and centralised financial control, sponsorship, and marketing efforts. However, implementing governance change in sport is a challenging endeavour, particularly in tradition-based sporting nations like Australia. Thus, the One Management Model (OMM) is examined as a middle-ground solution combining the benefits of both approaches. Ultimately, sport governance requires continuous adaptation, accountability, and a tailored approach based on the needs of each sport, and the socio-political landscape in which it operates. Experienced sport business leaders recognise that no one-size-fits-all governance structure exists.

Keywords

Sport governance, federated model, unitary model, one management model.

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1. Introduction

This article aims to compare the two major models of sport governance, the Federated Model (FM) and the Unitary Model (UM). It commences by defining these and summarising the key aspects of their historical background, philosophy and current trajectory, before examining their strengths and weaknesses concerning three main categories within the context of National Sporting Organisations (NSO): 1) power distribution and strategic direction, 2) collaboration and cohesiveness and 3) efficiency and productivity. Moreover, it discusses the suitability of the models in adapting to today's fast-paced, interconnected and changing sporting business landscape, and finalises with some concluding remarks. Despite the relevance of governance as a global practice in sport, this article focuses primarily on analysing the Australian sporting landscape and various relevant case studies are examined. To maintain an industry perspective of sport governance practice, the analysis contemplates insights and observations from well-respected Australian sport business leaders.

2. Defining the models

The systematic or federated nature of sport governance has its roots in the traditional approach to how sport has been managed predominantly in decentralised countries (i.e., Australia and Canada), in which NSOs are responsible for controlling sport within their boundaries whilst collaborating with international federations.[2] This business structure can be defined as a complex interconnected network of organisations seeking to allocate resources, exercise control, and coordinate activities.[3] In sport, the FM involves NSOs governing a network of regional, state and local legally autonomous entities functioning as separate businesses, thus creating various layers of administration.[4] Sports operating under this model are characterised by a 'bottom-up' direction to funding, whereby each tier of administration collects fees from members and shares a portion of these with the upper tier.[5] Moreover, the delegate representative structure of board composition is a crucial aspect of the FM, as it

[2] Australian Sport Commission (2015).
[3] Shilbury et al. (2013).
[4] Ibid.
[5] Australian Sport Commission (2015).

involves the appointment of board members who act as delegates aiming to represent the interests of their respective entities.[6]

Conversely, a unitary governance system (e.g., used in China and Ireland)[7] typically encompasses a national government exercising authority over all regions within a country, whilst granting limited powers to the constituent regions or states.[8] In a sporting context, the NSOs oversee all state member associations which function as its branches, and the state committees are limited to performing an advisory role whilst providing local guidance.[9] Under this model, the NSOs' members may vary from individual entities to clubs or affiliated competitions, and there is an absolute lack of a board at a regional or state scale (at least in a decision-making capacity).[10] Additionally, the UM adopts a unified structure in which core sport management processes such as strategic planning, reporting, finances and commercialisation are centrally unified, hence minimising inefficiencies and resource duplication.[11]

The next section of this paper aims to compare both governance models concerning the advantages and drawbacks highlighted by numerous sport academic experts. The analysis is organised within three main managerial perspectives (power distribution and strategic direction, collaboration and cohesiveness, and efficiency and productivity), illustrated through the discussion of relevant industry case studies.

3. Comparing the models

3.1. Power Distribution and strategic direction

Federated and unitary models of sport governance offer unique strengths and weaknesses for sport organisations regarding strategic planning, power distribution and decision-making. In the FM, regional bodies hold significant autonomy with decision-making power distributed

[6] Shilbury et al. (2013).
[7] McKeag et al. (2023).
[8] O'Boyle and Shilbury (2016).
[9] Australian Sport Commission (2015).
[10] O'Boyle and Shilbury (2016).
[11] Australian Sport Commission (2015).

across multiple levels of each organisation. This decentralised structure fosters a greater sense of local control and responsiveness to regions, allowing for more tailored programs and approaches that cater for local needs.[12] In contrast, the UM of sport governance concentrates power at the national level, with strong and centralised NSOs responsible for decision-making across the country. With power centralised in one entity, regional diversity and local demands may be overlooked, and decisions may not sufficiently incorporate local communities' unique perspectives.[13] This becomes particularly relevant in geographically extensive countries like Australia, in which exerting control of a sport in remote territories without the support of power delegation seems an arduous task. Moreover, the elimination of advisory regional councils might go against the democratic constitutions on which sporting networks are based potentially becoming a detriment in facilitating grassroots consultation and engagement.[14]

Regarding strategic planning, the FM has been historically known to struggle with the challenge of establishing a shared strategic direction among its affiliated bodies. According to Ferkins and Shilbury (2010), usually, entities within a federated system develop their own strategic plan, which may be loosely linked to the national governing body's overall strategic direction, but not always wholly aligned with national objectives.[15] Developing and implementing strategic plans is considered one of the essential tasks for NSO board members, and the UM appears better positioned to effectively oversee this process.[16] This can be attributed to a natural optimisation in the decision-making process in unitary models of sport that comes as a result of power centralisation and the removal of added layers of bureaucracy.

3.2. Collaboration and cohesiveness

As the sport industry professionalises over the years with volunteer decision-makers and full-time paid staff competing for a balance between sport commercialisation and community participation, the need for collaborative governance has increased. Shilbury and Ferkins (2015) stated the FM based on delegate decision-making, despite having all constituted entities sharing

[12] O'Boyle and Shilbury (2016).
[13] Ibid.
[14] Ibid.
[15] Ferkins and Shilbury (2010).
[16] O'Boyle and Shilbury (2016).

a commitment to developing a sport within a nation, is packed with tensions.[17] They also highlighted genuine cooperation is often absent despite the foundational principles indicating this as essential to appropriate sports governance practice, and indicated its absence might give rise to distrust, fragmentation, and even legal disputes. This lack of cohesiveness among the sporting network can be explained due to the affiliated entities' capacity to operate independently and prioritising represent their regions' interests rather than those of the sport as a whole.[18] Similarly, the fact sport is a uniquely passionate industry with decision-making processes driven by passion adds to making cohesiveness uniquely challenging within federated models. Research has unveiled that passion holds a vital place as an emotional factor affecting the functioning of sport boards and can potentially lead to disruptive effects on cohesion and conflict, ultimately impacting federated models and the ability of entities to collaborate.[19] Bowls Australia (BA) and Touch Football Australia (TFA), two NSOs embedded within the federated Australian sporting culture, are two excellent examples to illustrate the dynamics mentioned above.

Shilbury and Ferkins (2015) developed an 18-month case study aiming to explore the relevance of collaborative governance within a traditional Australian NSO such as Bowls Australia (BA). The discussion paper highlighted the regional affiliates' lack of alignment and unwillingness to implement BA's strategic vision and policies implemented in the early 2010s seeking a transformation from an old amateur version of the sport to a more contemporary and professionalised approach.[20] Despite BA's long-term strategic plan, it was evident to the researchers that the professionalisation of the sport was not being comprehended and executed at the same pace across the sport due to the contrasting visions among the different state member associations regarding how bowls should be developed in their regions. Consequently, BA's board of directors were subject to an intervention designed to enhance a more collaborative culture among its members, as discontent and resentment were perceived as major cultural barriers that were preventing them to achieve its urgent organisational transformation.[21] Such intervention was predominantly performed through educational

[17] Shilbury and Ferkins (2015).
[18] O'Boyle and Shilbury (2016a).
[19] Zeimers et al. (2022); Zeimers et al. (2023).
[20] Shilbury and Ferkins (2015).
[21] Ibid.

workshops aiming at shifting from old governance structures and behaviours to a more whole-of-sport and collaborative approach to decision-making.

Similarly, O'Boyle and Shilbury (2016a) conducted a sport governance research case study examining governance practices from 21 state and national level organisations from Touch Football Australia's (TFA) sporting network. TFA affiliate board members disclosed that before this organisation transitioned to a UM in 2005, conflict and absence of unity were constant barriers to collaboration within the governing body and most of the affiliates would rather manage their affairs as an independent entity.[22] The study also encountered that despite the existence of collective policies and processes defined by TFA's national entity, regional members developed over the years their own regulations as the national entity's vision was not aligned with theirs. This lack of alignment caused numerous instances of problematic interactions between regional affiliates and the national body of touch football in Australia, ultimately jeopardising the development of the sport in the country.

In contrast, the UM of sports governance promotes greater cohesiveness due to the centralised nature of the decision-making process. Since there is a single governing body, policies are implemented coherently and equitably across the sport, leading to greater cooperation and common goal alignment.[23] Furthermore, eliminating a board's authority at the state level will inevitably strip board-to-board tensions, especially in situations where trust is low, and past conflicts have limited the progress of the sport.[24] This change may indirectly enable NSO boards to solely concentrate on fulfilling their mandated strategic roles, while the CEO and top management team can focus on managing the sporting network. For instance, TFA executives perceived an overall increase in trust and collaboration among affiliates after the organisation transitioned to the UM in 2005, and disclosed conflict was no longer present in the decision-making process of affairs concerning regional development of the sport.[25]

3.3. Efficiency and productivity

Resources and processes are often duplicated in sporting organisations working under the FM, whereas sports operating under the UM are perceived to incorporate better productivity

[22] O'Boyle and Shilbury (2016).
[23] O'Boyle and Shilbury (2016a).
[24] O'Boyle and Shilbury (2016).
[25] Ibid.

practices. As a consequence of the 'bottom-up' direction to funding and management within governing bodies administered under the FM approach, core sport management processes such as strategic planning, reporting, finances and commercialisation are inevitably duplicated, reducing the ability of a sport to maximise its revenue and operate as a sustainable business.[26] This limitation has been observed in a variety of national sport contexts beyond Australia, including India.[27] Considerable time and financial resources are invested in the multi-level fee collection and distribution processes within NSOs operating under the FM, hindering organisational efficiency as these efforts could be better employed towards the business's strategic objectives. Consequently, the FM of sport governance fosters an organisational culture in which each layer of administration operates as debt collectors rather than promoters of leadership and support focused on core sport processes. Moreover, the FM can result in role ambiguity within affiliates where it is unclear which entity has responsibility for certain tasks, resulting in inefficiencies and lack of accountability.[28]

On the contrary, the UM of sports governance fosters resource and process efficiency by reducing bureaucratic layers in the decision-making and auditing processes, implementing better practices and decreasing overlaps in roles and responsibilities.[29] As a result, NSOs adopting this model can naturally experience financial benefits, thus guaranteeing the sustainability of their business model. Referring to the example of TFA, affiliate board members assured of being more financially secure and stable with the newly-implemented UM in 2005, and attributed this to cost efficiencies, economies of scale, centralised services, audit removals and collaboration.[30] Additionally, they highlighted the benefits of eradicating the administrative burden in financial processes such as resource allocation and payments, as these were managed directly from TFA's national office rather than separately by each regional association. As representatives from the Victorian regional affiliate of TFA stated in O'Boyle and Shilbury's (2016a) article '*I am here to try to grow the sport, not to look after the finances.*'[31]

[26] Australian Sport Commission (2015).
[27] McLeod et al. (2021).
[28] O'Boyle and Shilbury (2016).
[29] Ibid.
[30] Ibid.
[31] Ibid.

4. Which model is most appropriate for contemporary sporting bodies?

In the current fast-paced and changing business landscape, contemporary sporting organisations should strive for maximising their productivity and desired outcomes, hence adhering to evidence-based governance structures that best suit this interest is paramount. Sports organisations have recognised the advantages of presenting a comprehensive view of their purpose that encompasses marketing, sponsorships, fundraising, government programs and financial management.[32] Rather than focusing on local interests, successful sports are now developing national sponsorships and marketing campaigns optimising their impact, efficiency and return on investment.[33] This broader perspective also creates opportunities for consolidating procurement related to investment and fundraising. Investors in both the public and private sectors are interested in obtaining a clear understanding of a sport's financial situation which can only be attained through centralising the financial management practice, thus guaranteeing consolidation of financial statements.[34] It seems the UM is better suited to tackle contemporary challenges in sport governance, whilst effectively dealing with the duplication of resources, competing outcomes and lack of collaboration among national and state organisations.

Nevertheless, structural change in governance can present many obstacles, especially in the Australian sporting landscape in which the FM has remained largely unchanged for over 100 years.[35] James Sutherland, CEO of Golf Australia, stated the individuals involved in Australian sport, whether they are volunteers or paid employees, possess a deep understanding of the history and constituents associated with their respective sports, a sentiment that creates a substantial obstacle to implementing progress and change, especially in respect to structural changes related to governance practices.[36] This can be associated with what academic literature has defined as 'governance rent-seeking', to refer to circumstances where governance structures persist despite evidence showing they have become sub-optimal as the result of the presence and actions of parties that resist change because it would diminish their personal

[32] Australian Sport Commission (2020).
[33] Ibid.
[34] Ibid.
[35] Sutherland (2021).
[36] Ibid.

benefits derived from control and power of traditional structures.[37] However, Sutherland acknowledges finding a "common ground" among the various affiliates and stakeholders and recognising that the shared objectives and strategies for success in sport outweigh any opposition that may arise during transition periods of shifting from traditional governance approaches to more contemporary ones.[38]

To alleviate the transition toward a full centralisation of management, various NSOs are adopting the One Management Model (OMM), a hybrid governance structure aiming to leverage the benefits of the FM and UM. The governance structure is mainly based on an FM in which centralised services and management structures support the organisation, while state member associations operate independently.[39] As highlighted in 2015 by the Australian Sports Commission Governance Reform in Sport discussion paper,[40]Triathlon Australia (TA) successfully implemented the OMM for the governance of their sport in Australia. The stakeholders at TA have shown genuine dedication to enhancing the organisation and there is a robust alignment across all levels of the NSO. This alignment is demonstrated through practices that have fostered trust, transparency, integrity, collaboration, and recognition schemes within the organisation. As a result of this, TA has achieved several positive outcomes such as adopting a collective targeted investment approach, implementing shared services, developing a unified strategic plan for the sport, establishing more straightforward organisational processes, and adopting a collaborative approach to budgeting, where resources are distributed based on merit to projects that resonate with the paramount strategic priorities of triathlon.

Moreover, to improve efficiency, reduce costs and eliminate inefficiencies associated with managing multiple organisations, Australian Sailing (AS) and state and territory associations agreed to a new national operating model in 2016, known as 'One Sailing'.[41] This new model focuses on three principles: 1) a unified national governance structure, 2) resource management optimisation and 3) an efficient approach to delivering services to clubs whilst implementing national policies. The CEO of AS, Ben Houston, affirmed the implementation of the OMM for

[37] McLeod et al. (2021a).
[38] Sutherland (2021).
[39] Australian Sport Commission (2015).
[40] Ibid.
[41] Houston (2020).

the governance of AS revolves around building trust through effective communication.[42] AS board president plays a crucial role in this process by consistently engaging with each of the state affiliates' presidents, creating a transparent platform for sharing decisions made by the board and fostering discussions on issues impacting the sport. Through this collaborative approach, the board and state members' presidents work together to develop and execute the sport's strategy.

Furthermore, to ensure good governance and align with contemporary best practices, sporting organisations need to question traditional approaches and conduct comprehensive evaluations of current governance structures to identify inefficiencies and develop strategies for improvement. The optimal sport governance structure varies depending on the needs of each sport, NSO and the socio-political landscape in which it operates, hence each sporting organisation should be accountable for determining what structure is suitable for its sustainability.[43] Sport administration and governance is an ongoing process requiring continual change and adaptation to meet the changing needs of stakeholders,[44] and therefore there should not be a fixed endpoint or a generally accepted best model in sport governance.

5. Conclusion

In conclusion, sport governance is a continuous process that requires constant adaptation to the changing business scenario and demanding stakeholder needs, and sports organisations must be accountable for determining the most suitable structure to achieve their goals. While the FM is characterised by decentralised power distribution, local responsiveness and decision-making independence from regional affiliates, the UM is characterised by a centralised administration, common strategic alignment, and enhanced efficiency. As discussed, the contemporary sporting landscape demands better productivity practices that could be derived from streamlined resource management, collaboration and through the centralisation of financial management, sponsorship programs and marketing campaigns, making the UM as the theoretically better-suited model for modern sporting bodies. Nevertheless, changing governance practices can be challenging, especially in well-established tradition-based

[42] Ibid.

[43] Australian Sport Commission (2020).

[44] Sutherland (2021).

sporting nations like Australia, wherefore the OMM may offer a potential middle-ground solution combining the benefits of the FM and UM. This is why experienced sport business management professionals have determined there is no optimal sport governance structure as it would vary depending on the needs of each sport, NSO and the socio-political landscape in which it operates.

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Whistle to Gavel: Examining the Supreme Court's intervention in All India Football Federation's governance

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Abstract

In August 2022, the Supreme Court of India (SC) passed an order that terminated the mandate of the committee of administrators that was governing the day-to-day administration of the All India Football Federation (AIFF), in response to the suspension of the federation by Federation Internationale de Football Association (FIFA). The authors provide a background to the non-compliance of AIFF with the National Sports Development Code of India, 2011. They further analyse the subsequent intervention of the Delhi High Court and the Supreme Court to address governance issues within the federation, and the circumstances that ultimately led to its suspension by FIFA. The case commentary will explore how the approach of the Supreme Court in terminating the Committee of Administrators differs from past intervention by courts in India. The authors also provide a comparative analysis of the kinds of court intervention taken in respect of other sports federations. Finally, the authors trace the impact of the decision of the Supreme Court on similar disputes pertaining to the administration of sports federations in India.

Keywords

All India Football Federation, FIFA, Football, Committee of Administrators, Governance, Court Intervention

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1. Introduction

Rising concerns of administrative irregularities and non-compliance with the National Sports Development Code of India, 2011 (Sports Code) by the All India Football Federation (AIFF) led the Supreme Court of India (SC), by an order dated 18 May 2022, to appoint a three-member Committee of Administrators (CoA) to undertake day-to-day administration of the AIFF while a new constitution for the AIFF was prepared and elections held thereunder. The appointment of this CoA and its functioning as an unelected governing body for the AIFF were seen by Federation Internationale de Football Association (FIFA) to constitute 'third party interference', which led to the AIFF's suspension by FIFA. In light of such suspension of the AIFF by FIFA, the SC, by an order dated 22 August 2022, terminated the mandate of the CoA and set out a path of reform for the AIFF.

Recent years have seen a rise in the intervention of courts in the affairs of several National Sports Federations (NSFs) through the appointment of CoAs to oversee the administrative affairs of such NSFs. This case commentary will focus on SC intervention in the administration of the AIFF and the decision by the SC to terminate the CoA in response to the suspension by FIFA, and will consider the merits of this revised approach and its impact on other NSF administration disputes that may be presented before courts in India.

2. Background

October 2017: The elections to the AIFF Executive Committee (EC) were set aside by the Delhi High Court (Delhi HC) in its judgment dated 31 October 2017,[3] on grounds that the elections were not in compliance with the Sports Code and the Model Election Guidelines.

To remedy the defect in the conduct of elections, the Delhi HC appointed Mr. SY Quraishi, former Chief Election Commissioner as the Administrator-cum-Returning Officer, and ordered for the elections to be conducted in accordance with timelines and conditions set out in the judgement.[4] In the same year, the SC stayed the operation of the Delhi HC judgement through an interim order and appointed a two-member CoA comprising Mr. Quraishi and Mr. Bhaskar

[3] Rahul Mehra v. Union of India and Ors, 2017 SCC Online Del 11391.
[4] Ibid.

Ganguly, former Indian football captain and international football player. The CoA was directed to draft a constitution in compliance with the Sports Code and Model Election Guidelines, and conduct elections in line with the Sports Code.[5]

May 2022: On account of continued non-compliance with the Sports Code by the AIFF, as well as irregularities in the election process, the SC reconstituted the CoA to a three-member committee comprising former Justice Anil Dave, Mr. Quraishi and Mr. Ganguly. It was ordered that the reconstituted CoA would take charge of the governance of the AIFF until the conduct of elections to the EC in accordance with the new constitution and the Sports Code.[6]

July 2022: FIFA took notice of the appointment of the CoA to oversee the governance of the AIFF. AIFF stakeholders and the CoA assured FIFA that the new constitution would be finalised by July 2022, and the elections would be conducted by September 2022. FIFA stated that failure to adhere to these timelines would attract a ban of the AIFF.[7]

In light of FIFA's involvement, the final draft of the AIFF Constitution was presented before the SC. However, member associations of the AIFF raised several objections, specifically in respect of the composition of the electoral college. Despite the uncertainty surrounding the composition of the electoral college, the SC ordered the CoA to promptly conduct elections, setting a deadline of 28 August 2022.[8] However, as the new constitution had not been finalised as per the timeline agreed to by FIFA, on 6 August 2022, FIFA threatened to suspend the AIFF and revoke the hosting rights of India to the FIFA Under-17 Women's World Cup 2022, due to the perceived third-party influence in the governance of the AIFF.[9]

August 2022: Due to continued delays in the finalisation of the constitution and uncertainty in the administration of the AIFF, FIFA officially announced the suspension of the AIFF on 16 August 2022. FIFA cited violation of FIFA statutes by AIFF, on the grounds of third party interference in the administrative and governance affairs of the AIFF. Shortly after the

[5] All India Football Federation v. Rahul Mehra and Ors., Special Leave to Appeal (C) No(s).30748-30749/2017, order dated 10 November 2017.

[6] All India Football Federation v. Rahul Mehra and Ors. Special Leave to Appeal (C) No(s).30748-30749/2017, order dated 18 May 2022.

[7] Vasudevan (2022).

[8] Menon (2022).

[9] Ibid.

suspension, the SC suspended the mandate of the CoA and restored administrative control to the AIFF.[10]

3. Decision of the Supreme Court

Taking note of the suspension by FIFA, the SC changed its approach towards exercising administrative control over the AIFF. This was to ensure that FIFA's concerns were effectively addressed and the suspension of the AIFF was lifted. In its interim order dated 22 August 2022,[11] the SC heard the Solicitor General's summary of FIFA's concerns pertaining to the governance of Indian football.

The Solicitor General contended that FIFA considered it essential for the elected representatives of the AIFF to conduct its day-to-day administration, and the electoral college of the EC to comprise representatives from member associations belonging to each State and Union Territory in India. It was contended that the AIFF constitution must be compliant with FIFA and Asian Football Confederation requirements. Finally, he also stated that FIFA required the elections to constitute a new EC to take place at the earliest, to ensure that an elected body governs the administration of the AIFF.[12]

To effectively address the aforementioned concerns, the SC issued directions to govern the path forward. The SC directed the elections to be held within a week of the order and appointed Mr. Umesh Sinha and Mr. Tapas Bhattacharya as Returning Officers to conduct the elections. With respect to the administration and management of the AIFF, the SC terminated the mandate of the CoA and directed that an Acting Secretary General of the AIFF shall exclusively look after the day-to-day management of the AIFF.[13]

[10] All India Football Federation v. Rahul Mehra and Ors., Special Leave to Appeal (C) No(s).30748-30749/2017, order dated 22 August 2022.

[11] Ibid.

[12] Ibid.

[13] Ibid.

4. Analysis of the decision

4.1. Why did the SC decide to terminate the CoA?

In the statement issued by FIFA while suspending the AIFF, it stated that the lifting of the suspension was dependant on the termination of the CoA's mandate entirely and restoration of the governance of the AIFF to the EC.[14]

With the ultimate suspension of the AIFF, the SC recognised the impact of the suspension on Indian football. The SC observed that suspension would result in the revocation of India's hosting rights to the FIFA Under-17 Women's World Cup 2022 and would also affect Indian teams selected by the AIFF from participating in international football matches or tournaments. In light of this, the SC appreciated the need for a change in its approach, and accordingly terminated the mandate of the CoA, and directed that the AIFF to take responsibility of the administration and day-to-day management of the AIFF.

4.2. Why did the SC decide to intervene in the day-to-day administration of the AIFF?

It is important to understand the rationale behind the constitution of the CoA to address the governance issues of NSFs. In the initial stages of the five-year period of uncertainty with the AIFF, court intervention was restricted to ensuring that the constitution of the AIFF was compliant with the Sports Code. With growing issues regarding the irregularities within the AIFF, the orders of the courts began to take on the colour of increased intervention in the administrative and governance processes of the AIFF. In the 2017 order of the SC,[15] discussed earlier, the SC appointed a two-member CoA with a specific mandate to prepare a draft constitution and conduct elections in accordance with the constitution and the Sports Code. The intent of this order was not to have the CoA intervene in the day-to-day administration of the AIFF.

[14] Press Trust of India (2022).

[15] All India Football Federation v. Rahul Mehra and Ors., Special Leave to Appeal (C) No(s).30748-30749/2017, order dated 10 November 2017.

The appointment of the three-member CoA by the SC in May 2022 was an attempt to rectify governance issues of the AIFF externally, in the interests of Indian football, while also addressing concerns regarding the non-compliance of the AIFF constitution with the Sports Code. Here, the SC referenced its 2017 order[16] which set aside the elections of the EC. The SC observed that the consequence of the order was that the EC continued to govern the affairs of the AIFF, despite the expiry of its four-year term in December 2020. It was held that the decision to appoint a 3-member CoA to govern the affairs of the AIFF was in response to its state of affairs not being in the interest of proper governance or Indian football.

The appointment of a CoA to address governance issues is not exclusive to the AIFF. Similar situations were observed in the Table Tennis Federation of India (TTFI)[17] and the Hockey Federation of India (HFI),[18] with the Delhi HC appointing CoAs to temporarily govern both entities and bring them in line with the Sports Code.

4.3. Historical approach to correcting irregularities in NSF administration

It is interesting to note that the appointment of a CoA as a mode of rectifying governance issues is a relatively recent occurrence. In the instance of the suspension of the Indian Amateur Boxing Federation (IABF) by its international counterpart, the International Boxing Association (IBA) previously known as Association Internationale de Boxe Amateur (AIBA) in 2012, due to irregularities in its elections, Indian courts did not attempt to intervene or enforce compliance with AIBA Regulations or organise fresh elections. Courts did not intervene even after the IABF failed to comply with repeated requests by the AIBA and the Ministry of Youth Affairs and Sports (MYAS) to conduct fresh elections, which culminated in derecognition by the IABF in 2014 by the MYAS.[19] In place of the suspended IABF, the AIBA granted provisional recognition to Boxing India (BI), as the boxing federation in India. However, BI was not recognized by the Indian Olympic Committee (IOC) which resulted in Indian boxing not having a recognized governing body. Accordingly, the AIBA provisionally suspended BI and appointed an ad-hoc body to address issues related to boxing in India. In

[16] Ibid.

[17] Press Trust of India (2022a).

[18] Aslam Sher Khan v. Union of India and Ors., Writ Petition (C) No. 5703 of 2022.

[19] LawInSport (2015).

light of the fact that an ad-hoc committee of the AIBA was governing boxing in India, a petition was filed before the Delhi HC to resolve the matter.

In 2015, a single bench of the Delhi HC directed the Indian Olympic Association (IOA) to intervene to ensure that either BI or IABF regained international recognition to govern Indian Boxing.[20] As a result of the intervention by the Delhi HC, the AIBA, MYAS and the IOA formally recognized the Boxing Federation of India, a newly constituted body, as the governing body of Indian Boxing.[21]

The difference between the approaches followed by courts in these instances is clear pertaining to the level of administrative control exercised over the day-to-day functioning of an NSF, in response to the threat of or actual international derecognition. In the case of the IABF, the Delhi HC did not intervene to constitute a CoA which would govern the day-to-day affairs of the IABF when irregularities related to the conduct of elections was in clear violation of the Sports Code. The eventual intervention by the Delhi HC was to merely ensure clarity with respect to the governance of Indian boxing, and the responsibility of doing so was handed to the IOC, instead of the court exercising administrative control in the affairs of the federation.

5. Conclusion - Impact of the revised approach on further National sport federation administration disputes

The appointment of a CoA to address governance issues in the AIFF was a significant step in ensuring that it complies with the Sports Code. However, the negative international impact of CoA intervention in the AIFF's functioning has made Indian courts reconsider their reliance on appointment of CoAs as a tool to ensure effective governance practices among NSFs in the future.

The AIFF suspension by FIFA caused the SC to immediately alter its approach with respect to intervening in the administrative functioning of other NSFs. Notably, the SC ordered status quo pertaining to the Delhi HC's decision to appoint a CoA to take over the affairs of the IOA. The SC noted that the appointment of a CoA could result in the suspension of the IOA by the IOC,

[20] Harshpreet Sehrawat v. Union of India and Ors., Writ Petition (C) No. 7874 of 2015.
[21] Boxing Federation of India v. Indian Amateur Boxing Federation and Ors., CS (COMM) 120/2019.

which could have severe consequences pertaining to the participation of athletes from different sports disciplines in international competitions under the Indian flag. This step taken by the SC is a sign of its recognition of the fact that the appointment of a CoA to fix administrative issues plaguing NSFs ran the risk of international derecognition.

As discussed earlier, Indian courts have mandated the appointment of a CoA to administer the governance of NSFs such as the TTFI and the HFI, among others. Indian courts must now consider whether such intervention in the administration of NSFs should continue in order to bring them in compliance with the Sports Code. As seen in the above instance of the IOA, courts may decide to avoid constituting CoAs to govern the administration of NSFs and limit their intervention to specific constitutional matters, such as ensuring the adoption of a Sports Code compliance constitution and holding of elections in a transparent and time-bound manner. This mid-way approach would mitigate the risk of de-recognition by placing the overall administration of the NSF in the hands of elected officials, while ensuring that principles of fair representation, transparency and accountability are built into the practice of the NSF.

As seen in Indian boxing, the decision of the Delhi HC to not interfere with the day-to-day administration of boxing in India did ultimately bear fruit. The IOC and the MYAS worked together with the AIBA to find a solution, ultimately recognizing the BFI as the governing body of Indian boxing, which was compliant with the Sports Code. This sets the template for future interventions, and it is hoped that it is sustainable and leads to fewer governance related interventions in the administration of NSFs.

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From autonomy to accountability for the Indian Olympic Association: Decoding the decision of Rahul Mehra v. Union of India case

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Abstract

Rahul Mehra, a sports activist, initiated a Public Interest Litigation in 2010 that culminated in a landmark decision by the Delhi High Court in August 2022. The case centered around the Indian Olympic Association (IOA) and its non-compliance with the National Sports Development Code of India, 2011 (Sports Code). The commentary analyses the 13 pitfalls raised during the case, highlighting inconsistencies between the IOA's Constitution and the Sports Code. These issues encompassed a wide range of matters, including the appointment of Life Presidents, differential voting rights, electoral college compliance, and the inclusion of athletes and women in sports administration. The Court's decision emphasised the importance of good governance principles in sports organisations, recommending changes to enhance transparency, diversity, and democratic processes. While this judgment is a step in the right direction, it is important that these directives are enforced in practice and consistently adhered to by the IOA and sport governing bodies at all levels of the federated model in India.

Keywords

Sport governance, Indian Olympic Association, Sports Code, age and tenure limits, athlete representation, gender balance

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1. Introduction and factual background

Rahul Mehra, a sports activist, filed a Public Interest Litigation before the Delhi High Court in 2010. After more than a decade, the case received its final decision on 16 August 2022, where a division bench directed the removal of the various clauses from the Indian Olympic Association's (IOA) Constitution that were not compliant with the National Sports Development Code of India, 2011 (Sports Code). The functioning of the IOA was marred by administrative inconsistencies and it was found to be in breach of the Sports Code. The IOA's failure to comply with the Sports Code serves as just one example where National Sports Federations (NSFs) have disregarded the Sports Code.[3] For example, the Supreme Court recently held that the All India Football Federation (AIFF) failed to adhere with the Sports Code, and it ordered the establishment of a Committee of Administration (CoA) to ensure compliance into the future.[4] Similarly, the Wrestling Federation of India (WFI) was suspended by the United World Wrestling (the international governing body for amateur wrestling) for its inability to conduct elections.[5]

The IOA has continued to disregard the Sports Code, the International Olympic Committee (IOC) Charter and the Court orders. The petitioner, primarily, argued for stringent adherence of both the IOA and the NSFs to the Sports Code. 13 pitfalls were raised with respect to the IOA's Constitution, management structure and rules.[6] It was contended that to uphold good governance, facilitate substantial sports promotion, and ensure strong safeguarding of the interests of athletes within the nation, compliance with the Sport Code is critical. This case commentary analyses the 13 pitfalls raised in this case in terms of the inconsistencies between the IOA's Constitution and the Sports Code. It is argued that a stricter enforcement of good governance principles that are enshrined in the Sports Code will only serve to strengthen sport administration and governance in India.

[3] Hussain (2020); Rahul Mehra v. Union of India, W.P. (C) No. 195/2010; All India Football Federation v. Rahul Mehra and Ors, Special Leave to Appeal (C) No(s).30748-30749/2017; S. Nithya v. The Secretary to the Union of India & Ors., 2022 SCC Mad 318; Indian Olympic Association v. Union of India, 2012 DLT 389.

[4] All India Football Federation v. Rahul Mehra and Ors. Special Leave to Appeal (C) No(s).30748-30749/2017.

[5] The Wire (2023).

[6] Rahul Mehra v. Union of India, W.P. (C) No. 195/2010, para 19.

2. Analysing the 13 pitfalls raised in the judgement

2.1. Provision for a position such as 'Life President' is not permitted

The court deliberated on the IOA's decision of 2016 to appoint two politicians facing criminal charges as 'Life Presidents' through a general body meeting resolution.[7] The Court expressed its commitment to upholding the principles of ethics and good governance, in accordance with the IOC Charter, and highlighted the need to safeguard sports autonomy.

The implementation of term limits is an important aspect of good governance in sport.[8] The concept of life presidency is inconsistent with the concept of term limits and has been criticised by judges in India, who have termed it as illegal.[9] Allowing life presidency on a sport governing body would essentially eliminate elections, enabling the appointed life president to hold office indefinitely, leading to the monopolisation of power at the expense of a democratic process.[10] Decentralisation of power is important, otherwise, decision-making tends to lean towards a more authoritative approach, lacking diversity of thought.[11] The longer the tenure of an office bearer, the more likely they are to accumulate greater influence leading to dominance of a few individuals, potentially harming the sport.[12] There are several instances in India where presidents of NSFs have served exceedingly long tenures. For instance, Vijay Malhotra served a 44-year tenure as the President of the Archery Association of India,[13] and Jagmohan Dalmiya has served a 21-year term as the President of Cricket Association of Bengal.[14] Imposing term limits helps minimise allegations of nepotism, bias, and favouritism.[15]

[7] Ibid, para 21.

[8] McLeod and Star (2020).

[9] Dushyant Sharma v. Haryana Wrestling Association, 2012 SCC OnLine Del 157; Narinder Batra v. Union of India, ILR (2009) 4 Delhi 280; Mahipal Singh & Ors. vs. Union of India & Ors., 2018 SCC Online Del 10284; Aslam Sher Khan v. Union of India10, 2022 SCC OnLine Del 1569.

[10] Ibid.

[11] Dushyant Sharma v. Haryana Wrestling Association, 2012 SCC OnLine Del 157.

[12] McLeod and Star (2020).

[13] Hussain (2018).

[14] Paul (2022).

[15] Narinder Batra v. UOI ILR (2009) 4 Delhi 280.

The IOA's Constitution includes provisions for the appointment of Life President (with no voting rights).[16] Such a clause contradicts the Sports Code and judicial precedents. Consequently, the Court declared the post of Life President and similar permanent posts within the IOA as illegal. In contrast, the National Olympic Committees (NOCs) of some countries, namely, Australia and USA provide for life membership and honorary President status.[17] These life members have no voting rights (with exceptions made in cases when voting rights are granted). In this case, the Court's central assertion was that there should be no permanent posts in either an NSF or the IOA. The fixed tenure of executive committee members is consistent with good governance practices in sport and is in the best interest of the sports which committee members represent.

2.2. There cannot be differential voting rights

Clause 10.1 of the IOA Constitution sets different voting rights for different sports bodies. NSFs representing sports included in the program of the Olympic/Asian/Commonwealth Games NSFs and the National Federation of Indigenous Kho-Kho have three representatives with one vote to each; whereas "State Olympic Associations (SOAs) and Union Territories (with Legislative Assembly) Olympic Associations (UTOAs) have two representatives with one vote each".[18] This contrasts with the Sports Code's requirement that "each permanent member is to be represented by two delegates with a vote each."[19] The Court held that the differentiation in voting rights assigns varying significance to different entities, which is fundamentally inequitable and undemocratic, when the IOA's Constitution itself envisions an identical regime for SOAs.[20] Such fractional voting rights, such as half a vote or one-third of a vote, lack legitimacy. This discriminatory voting weightage is not supported by the Sports Code or the IOC Charter and was thus declared invalid. However, as discussed in below section 2.4, the Court held that SOAs cannot be members of the IOA, eliminating their voting rights.

[16] Rahul Mehra v. Union of India, W.P. (C) No. 195/2010, para 23.
[17] Australian Olympic Committee (2022); United States Olympic and Paralympic Committee (2023).
[18] Rahul Mehra v. Union of India, W.P. (C) No. 195/2010, para 31.
[19] Ibid.
[20] Ibid.

In Australia, the Australian Olympic Committee's (AOC) Constitution stipulates that NSFs and state organisations will each have two delegates representing them.[21] Unlike the IOA's Constitution, each delegate of the NSFs will be entitled to one vote on any motion or amendment.[22] There are no differential voting provisions in the AOC Constitution and state organisation do not possess voting rights. This is consistent with the Delhi High Court's recommendation, insofar as each NSF and eligible SOA have an equal vote.

2.3. The IOA's failure to determine the electoral college violates court orders and runs counter to the objectives of the Sports Code

Reiterating its earlier arguments, the Court emphasised that NSFs, including the IOA, must adhere to the Model Election Guidelines. Citing instances of fraudulent elections of the Archery Association and referencing the Sports Code, the Court highlighted the need for robust compliance by NSFs in conducting elections.[23]

2.4. Only NSFs for Olympic disciplines should be members of the IOA with voting rights

The ruling has established a directive that calls for the exclusion of SOAs and non-Olympic NSFs from the IOA to enhance the quality of decision-making which is in compliance with the IOC Charter. A key aspect of this decision is that SOAs lack any substantial role since the NSFs for individual sports already represent the respective state units for those disciplines.[24] The involvement of SOAs members led to an imbalance in decision-making, particularly concerning sports administration and the selection of deserving athletes.

Out of the 56 NSFs recognised by the Government of India, only 29 pertain to Olympic sports, while the remaining 27 concern non-Olympic sports.[25] Each member from the latter category being granted two votes would amount to 54 votes, creating a voting bloc that could favour previous executive committee (EC) members or their factions who may have facilitated membership for these NSFs. Therefore, the Court held that the notion of voting rights for SOAs

[21] Australian Olympic Committee (2022).
[22] Ibid.
[23] Rahul Mehra v. Union of India, W.P. (C) No. 195/2010, para 32.
[24] Ibid, para 37.
[25] Ibid, para 40.

should be eliminated from the Constitution and only NSFs of Olympic disciplines should be members of the IOA with voting rights.

An analogous situation can be seen in the governance of the Board of Control for Cricket in India (BCCI). In 2015, the Supreme Court established a Lodha Committee to propose governance reforms for the BCCI, which included the adoption of a 'One State, One Vote' policy aligned with the practices of many global sport's governing bodies.[26] However, later in 2018, the Supreme Court revised its stance, recognising voting rights for states with multiple state associations. The earlier rule had inadvertently granted voting rights to states with limited cricketing prominence, leading to concerns about proxy or dummy voting.[27] Therefore, voting rights are to be granted to members that play an integral role in governance.

2.5. Age and tenure limits should be applied to all members of the EC of the IOA and not only to the President, Secretary and Treasurer

The draft National Code for Good Governance in Sports, 2017, and the IOC emphasise extending age and tenure limits to all office bearers. The Sports Code and the BCCI case define a 70-year upper age limit for members of the EC.[28] The rationale for age limits for board member relates to board refreshment, cognitive decline and representation of younger generations.[29] The Court notes that largely the sporting fraternity has accepted this as a reasonable limit.[30] However, the authors argue that there is no rationale for imposing an age limit. Contrasting views emerge regarding age limits in sport governance, as those over 70 bring experience.[31] The honorary nature of roles often deters under-70 professionals to hold board position.[32] Hence, the Court's assessment should have focused on the underlying objective of age limits that regulations are aiming to achieve and their efficacy in achieving it. In India, if the aim is to promote youth representation, it might not be realised if 60-year-olds replace 70-year-olds. An alternative approach could be to forgo age limits and institute a quota

[26] Shekar and Saikia (2016).
[27] Mahapatra (2018).
[28] Board of Control for Cricket in India v. Cricket Association of Bihar & Ors. (2015) 3 SCC 251.
[29] McLeod and Star (2020); CEO Magazine (2020); The Wall Street Journal (2020).
[30] Rahul Mehra v. Union of India, W.P. (C) No. 195/2010, para 50.
[31] McLeod and Star (2020).
[32] McLeod (2018).

for under-40 board members. If the goal is board refreshment, an age limit could seem redundant when term limits already exist.[33]

The practice of imposing the limits on the tenure of the office-bearers of sporting bodies is internationally accepted and considered to be critical for good governance.[34] As discussed above, term limits curb long-term domination of few individuals, fostering democratic representation.[35] The tenure limit is extended to all members in line with the IOC's policy and international standards of good governance in sport.[36]

The duration of term limits remains a subject of debate. Typically, international or national federations conduct elections every three to four years, allowing board members to serve for 9-12 years. In this instance, the Court restricted tenure to three terms, each separated by a cooling-off period, regardless of the post held within the EC. This decision stemmed from the synchronisation of Olympic Games and the IOA's EC's four-year terms. If an office bearer serves two consecutive terms, a mandatory break before re-election is imposed, resulting in a minimum 16-year duration for completing three tenures. This might appear extensive for senior roles in the NSF or the IOA. During this period, athletes from successive generations, participating in around four Olympics and international sports events, could aspire to join the IOA and contribute to sports enhancement.[37]

The use of cooling-off periods for term limitation in India represents an innovative approach. This concept deviates from the conventional norms observed in existing sports governance codes.[38] While the cooling-off period could serve as an effective tool to break down entrenched power dynamics. This approach might inadvertently lead to a situation where board members install proxies to wield influence on their behalf until the cooling-off period culminates.

[33] McLeod and Star (2020).

[34] It is to be noted that not all jurisdictions have imposed a term limit on executive committee members. For instance, Australia does not impose a term limit. See, Australian Olympic Committee (2022).

[35] See also, Narinder Batra v. Union of India, ILR (2009) 4 Delhi 280; Indian Olympic Association v. Union of India, 2012 DLT 389.

[36] Bang (2015).

[37] Rahul Mehra v. Union of India, W.P. (C) No. 195/2010, para 54.

[38] McLeod and Star (2020).

2.6. EC's size should be reasonable and not unwieldy

The IOA's Constitution currently permits the election or appointment of 32 members to its EC, contrasting from the IOC's more streamlined executive board of only 15 members.[39] The Government argues that the IOA's EC and General Body sizes should be reasonable, preventing unbridled discretion with the IOA to add newer categories and members.[40] In scholarly literature, while a specific ideal board size lacks consensus, a range of five to twelve directors is considered optimal for efficient decision-making, avoiding top-heavy structures, and enhancing organisational coherence and performance.[41] The Model Election Guidelines for the IOA also suggest a 12-member EC with seven office bearers and five executive members.[42] Therefore, a small board size is considered to be effective as a good governance principle.[43] Consequently, the Court held that "*General Body of IOA shall be restricted to 90 members i.e., thrice the number of NSFs representing Olympic sports. Its EC strength shall not exceed 15 members comprising 7 Office Bearers and 8 elected sportspersons*".[44]

The Court further delved into board composition, highlighting the need for eminent sportsperson and women representation on the EC. The rationale behind inclusion of eminent sports persons is discussed below. Ensuring women's participation aligns with the IOC's Code of Ethics, which mandates women's representation. The IOA has never had a female President or Secretary General in its 95-year history.[45] Empirical research indicates that western countries exhibit over 30% female representation on NSF boards, while non-western countries like India have lower figures (8.1%).[46] McKeag et al. (2023) argues that a greater gender diversity (between 30% to 40%) in non-western countries like India can be achieved by adopting a policy approach that includes use of quotas as a potential strategy.[47] Additionally, the Court should also actively prioritise and promote for gender balance,[48] as the most

[39] Rahul Mehra v. Union of India, W.P. (C) No. 195/2010, para 56.
[40] Ibid, para 58.
[41] Taylor and O'Sullivan (2009); Ingram and O'Boyle (2018); Linck et al. (2008).
[42] Rahul Mehra v. Union of India, W.P. (C) No. 195/2010, para 60.
[43] McLeod et al. (2021).
[44] Rahul Mehra v. Union of India, W.P. (C) No. 195/2010, para 63.
[45] Ibid, para 62.
[46] Star and McLeod (2021).
[47] McKeag et al. (2023)
[48] Star and Modi (2022) argues that the Madras Court in the Nithya v. The Secretary to the Ministry missed an opportunity to promote gender diversity, which is necessary for achieving good governance in sport in India.

impactful interventions in Indian sport governance have historically stemmed from judicial activism. The Delhi Court in this case advanced equitable representation, mandating women to comprise half of the sportsperson category with voting rights in both the General Body and EC, marking a progressive step.

2.7. No clause that imposes restrictions or undermines democracy should exist, including limitations on who can run for any position

The Delhi High Court acknowledged Clause 11.1.3 of the IOA Constitution and deemed it inherently unlawful and 'monopolistic'.[49] This is due to its restriction on new candidates competing for the positions of President and Secretary General, creating a virtual monopoly for a select few in administrative and decision-making roles. Consequently, the Court mandated the removal of such limiting clauses from the IOA's Constitution.

2.8. No clause that permits a person to hold offices for 20 years without undergoing a cooling-off period

"*Twelve-years in office, is when the final whistle blows*."[50] The reasoning behind constraining tenures to three terms, with cooling-off periods as explained above, is vital. This measure is crucial to curbing power-seeking administrators. The annulment of a 20-year continuous term holds significant importance, particularly in maintaining the spirt of Indian sport through individuals motivated to enact genuine transformation through their entrusted influence.

2.9. Establishment of Ethics, Athletes, Election and Arbitration Commissions, and Ombudsman, independent from the IOA or NSF

The IOC Charter mandates the establishment of autonomous Ethics, Athletes, Election, and Arbitration Commissions, along with an Ombudsman, all of which should logically remain immune to the influence of the IOA. The current Athletes Commission of the IOA contravenes the IOC requirements due to its composition of solely ex-officio members. The Court

[49] Rahul Mehra v. Union of India, W.P. (C) No. 195/2010, para 65.
[50] Ibid, para 66.

referenced the BCCI case as a precedent for the formation and functioning of such independent Commissions.[51] Consequently, these Commissions shall be overseen by former judges of constitutional courts of India and funding should originate from the Government's allocation for NSFs, including the IOA.

2.10. Mandatory inclusion of 25% prominent sportspersons of outstanding merit with voting rights in General Assembly

Clause 3.20 of the 2001 Guidelines and Clause 9.3(xii) of the Sports Code stipulate the inclusion of eminent sportspersons (minimum 25%) within sports federations for a designated term.[52] This clause ensures the presence of at least 25% prominent sports persons with voting rights within an NSF, contributing significantly to its comprehensive functioning. This athlete representation is crucial to retaining expertise and promoting informed decisions by involving sportspersons in critical decision-making process.[53] The United States of America, through the Ted Stevens Act Olympic and Amateur Sports Act of 1987, sets a precedent by mandating at least 20% athlete representation on the Board of Directors of NSFs. The Court noted that neglecting representation of prominent sports persons and female representatives (as discussed above) on EC perpetuates a uni-dimensional administrative framework. Even in the *S Nithya v. The Secretary to the Union of India* case,[54] the Madras High Court issued a directive that leadership positions within sports bodies should be consists of sportspersons only. Additionally, it recommended for inclusion of minimum 75% members within sports federation should be sportspersons. However, the above requirement is argued to be a significantly high threshold that could hinder board diversity within NSFs.[55]

2.11. Individuals facing criminal charges should be ineligible to be a member either of the EC or the General Assembly

The petitioner brought to light a significant flaw in the IOA's administrative structure, allowing individuals charged with offenses that could lead to over two years' imprisonment to

[51] Board of Control for Cricket in India v. Cricket Association of Bihar & Ors. (2015) 3 SCC 251.
[52] Rahul Mehra v. Union of India, W.P. (C) No. 195/2010, para 72-73.
[53] Taylor and O'Sullivan (2009).
[54] 2022 SCC Mad 31.
[55] Star and Modi (2022).

remain IOA members. The Government had rejected two charge-sheeted persons as elected representatives of the IOA.[56] In the current case, the Court highlighted safeguarding the reputation and integrity of administrative bodies, establishing the principle of barring individuals from the IOA or NSFs if they faced charge sheets for offenses carrying imprisonment of two years or more. In contrast, the Supreme Court, through an interlocutory application, amended the BCCI Constitution, altering the disqualification clause for office bearers charged with criminal offenses.[57] The condition was changed to disqualify upon conviction, not charge.

2.12. Individuals seeking re-election for the same position must secure a two-thirds majority

The Delhi High Court upheld a 1975 Government Circular that stressed the necessity of attaining a two-thirds majority for re-election to an office bearer's position.[58] Accordingly, even if a candidate wins an election but fails to secure a two-thirds majority, they cannot be considered for a second term and will be considered to have lost re-election. Consequently, the candidate with the highest votes following the said 'second term candidate' will be deemed elected to the position. The rationale behind the provision to provide a higher threshold for re-election is most likely for promoting board refreshment.

Usually, a special majority (at least 75%) is only required for important matters, such as admission or removal of new members or office bearers. For example, Clause 7.4. of the AOC Constitution specifies that admission of a new member, other than a NSF, requires approval by a special majority in the annual general meeting.[59] Similarly, a special majority is required for removal or suspension of an office bearer[60] or a Recognised Organisation.[61] The United States Olympic and Paralympic Committee also follows a similar practice where a director can be removed for cause with an affirmative vote of at least two-thirds of the voting power of the

[56] Rahul Mehra v. Union of India, W.P. (C) No. 195/2010, para 82.
[57] BCCI v. Cricket Association of Bihar and Ors., IA No 49930 of 2020 in Civil Appeal No 4235 of 2014.
[58] Rahul Mehra v. Union of India, W.P. (C) No. 195/2010, para 83.
[59] Australian Olympic Committee (2022).
[60] Clause 24.3 of the Australian Olympic Committee (2022).
[61] Clause 32 of the Australian Olympic Committee (2022).

director,[62] or can be removed without cause with an affirmative vote of at least three-fourths.[63] Therefore, the Court mandate that board members should only be reappointed if there is two-thirds majority seems to emphasise the importance of diverse and fresh perspective on board. However, there appears to be no clear justification to opt for two-thirds majority (66.67%) instead of three-fourths (75%). The IOC has expressed its reservation over this amendment to the IOA Constitution and suggested to remove it.[64] According to the IOC, a simple majority (more than 50% of the votes validly cast) should be sufficient, like in any election process. This would be consistent with other NOCs that do not provide a higher threshold for re-election of individuals.[65]

2.13. The Sports Code's applicability should extend to the IOA, all constituent NSFs, as well as State and District level associations

The Court noted that it is mandatory for the IOA to comply with the Sports Code.[66] Noting the lack of compliance spanning 47 years, the Court stressed the need to conclude this non-compliance. It underscored that various judgments have established adherence to the Sports Code as a prerequisite for NSF recognition, along with the associated benefits stemming from such status.[67]

3. Conclusion

The purpose of this commentary was to analyse clauses within IOA's Constitution and the alleged violations of the Sports Code. This judgment is significant in advancing effective sports governance within India and firmly establishes the mandatory nature of complying with the Sports Code. While the protracted duration of this petition, spanning 12 years, is unfortunate, the final decision of the High Court vindicates the push – through public interest litigation – for improvements to sport governance in India. The IOA's continued lack of compliance with the Sports Code and accepted good governance principles necessitated the placing the IOA's

[62] Section 3.8 of the Byelaws of the United States Olympic and Paralympic Committee (2023).

[63] Ibid.

[64] Hussain (2022).

[65] Australian Olympic Committee (2022); United States Olympic and Paralympic Committee (2023).

[66] Ibid, para 99.

[67] S. Nithya v. The Secretary to the Union of India & Ors., 2022 SCC Mad 31; All India Football Federation v. Rahul Mehra and Ors. Special Leave to Appeal (C) No(s).30748-30749/2017.

affairs under the purview of a CoA. This decision echoes the Supreme Court's directive in the case of the *All India Football Federation v. Rahul Mehra & Ors.*, pertaining to another NSF.[68] While this is a step in the right direction for good governance practices in India, it is important that these directives are enforced in practice and consistently adhered to by the IOA and sport governing bodies at all levels of the federated model in India.

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[68] All India Football Federation v. Rahul Mehra and Ors. Special Leave to Appeal (C) No(s).30748-30749/2017.

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Field of play & strict liability – CAS 2022/A/9018 UAE Equestrian and Racing Federation & Ismail Mohd v. Fédération Equestre Internationale

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Abstract

The Court of Arbitration for Sport (CAS) has recently decided a case that concerns two pertinent areas of sports arbitration disputes. In CAS 2022/A/9018 UAE Equestrian and Racing Federation & Ismail Mohd v. Fédération Equestre Internationale (CAS 9018), the CAS panel first had to determine the admissibility of the appeals filed by the UAE Equestrian and Racing Federation and the professional trainer Mr Ismail Mohd in consideration of the so-called "field of play doctrine" after the disqualification of a horse had automatically led to Mr Mohd's ineligibility for a period of two months. In addition, this case offers some interesting insight into the discussion on "strict liability" provisions and the possibility of sportspersons to rebut the (scientific) presumption deriving from a strict liability rule. While the discussions concerning strict liability provisions are more prominent in doping-related disputes, this case shows the relevancy to other disciplinary issues and explains how the disputes ae to be solved.

Keywords

Court of Arbitration for Sport (CAS), admissibility of appeals before the CAS, field of play doctrine, strict liability, rebuttal of a presumption

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1. Facts of the case

The facts of the case before the CAS, in essence, maybe summarised as follows: The appeal was brought by the UAE Equestrian and Racing Federation, the national governing body of equestrian sports in the United Arab Emirates, and Mr Ismail Mohd (the trainer), a professional trainer in endurance riding. Endurance riding "*is a test of the Athlete's ability to manage the Horse safely over an Endurance course. It is designed to test the stamina and fitness of the Athlete and Horse against the track, distance, terrain, climate, and clock, without comprising the welfare of the Horse*."[2] It is one of the official equestrian disciplines recognised by the international sports governing body for equestrian sports, i.e., the Fédération Equestre Internationale (FEI), which was the respondent in the appeals proceedings before the CAS. The FEI is a Swiss association headquartered in Lausanne, Switzerland.

The trainer was training a horse that participated in a FEI CEI 1*100 km Endurance Event held in Windsor, United Kingdom. During the event, the horse allegedly stumbled into a rabbit hole and suffered an injury as a result. This injury led to the disqualification of the horse. In addition, in accordance with Article 864 of the FEI Endurance Rules, the trainer automatically received 80 penalty points for the injury suffered by the horse which, in this particular case, led to the trainer's automatic suspension for a period of two months, pursuant to Article 866.1 of the FEI Endurance Rules. This rule provides – in its pertinent parts – that "*[i]f an Athlete or Trainer incurs 100 or more penalty points, the Athlete/Trainer will receive an automatic two-month suspension*."[3]

Both the UAE Equestrian and Racing Federation and the trainer challenged the automatic imposition of the trainer's two-month suspension before the FEI Tribunal that declared the appeals inadmissible due to the "field of play" nature of the decision to disqualify the horse from the competition as a consequence of the injury suffered and the resulting automatic penalty of the trainer. Accordingly, the FEI Tribunal would have no jurisdiction to adjudicate on such a field of play decisions. The UAE Equestrian and Racing Federation and the trainer challenged the decision of the FEI Tribunal before the CAS.

[2] FEI Endurance Rules (2023).

[3] Ibid.

As an initial matter, the CAS panel had to decide whether or not the appeals were admissible in the sense that it had the competence to review the automatic imposition of the trainer's two-month suspension. In other words, the CAS panel had the difficult task to draw a convincing line between a non-reviewable field of play decision and a reviewable "rules of law" decision. Secondly, the CAS panel, *inter alia*, had to deal with the question whether, based on the strict liability provision in question, the causal link between the scientific presumption that a horse's injury in endurance riding is caused by the mistreatment of the horse and that the trainer of that horse must be suspended from the sport as a consequence.

2. Findings of the CAS panel

2.1. The threshold between the "rules of the game" and the "rules of law"

After considering the Parties' submissions, the CAS panel concluded that while the disqualification of the horse from the competition in Windsor, UK, was a field of play decision, which was not contested by the Parties, the automatic two-month suspension of the trainer was not a field of play decision and, therefore, declared the appeals of the UAE Equestrian and Racing Federation and the trainer admissible. In this regard, the CAS panel in CAS 2022/A/9018 stated as follows:

> *… the Panel observes that it follows from the legal authorities submitted by the Respondent in support of its submission that the qualified immunity of field of play decisions is not unlimited and that a distinction must be made between the 'Rules of the Game' and their application, on the one hand, and the 'Rules of law', on the other hand … in the present matter, it is manifest that the attribution of the penalty points and the suspension of the Trainer for having reached the mark of 100 penalty points did not aim at securing a proper and correct running of the competition at which the Horse competed and during which is was disqualified. As argued by the Respondent, these consequences aim at holding a trainer responsible for the appropriate physical and mental preparation of the horses he/she trains. Further, as is apparent from the heading of the Chapter IX of the [FEI Endurance Rules] in which Articles 864 and 866 are included, i.e., 'Disciplinary', these provisions are of a 'disciplinary' nature. They start and continue to produce their effects only after the end of the competition or event*

during which the occurrence that triggered the imposition of the penalty points in question.

Moreover, and in any event, as it is undisputed that the consequences set out in Article 866 of the [FEI Endurance Rules] and applied in the present case affected, inter alia, the Trainer's rights of personality as the two months suspension he had to serve had an impact on his economic/professional activity, the question whether or not these consequences are part of the field of play decision is, pursuant to the jurisdiction of the SFT, irrelevant fir the determination of the admissibility of the Appeal insofar as the FEI Statutes and regulations, particular Article 38 and 39 of the FEI Statutes, do not attribute exclusive jurisdiction to the competent civil courts in Lausanne, Switzerland, to hear the present matter/appeal.

In view of the above, the Panel finds that the 'automatic consequences' against which the Appeal is directed cannot be considered as integral part of the field of play decision rendered by the Ground Jury and that the Appeal is, thus, admissible ratio materiae.[4]

2.2. The strict liability provision and the causal link between the presumption and its consequences

The second important question in this case was whether or not the imposition of the trainer's suspension for two months was proportionate in due consideration of the strict liability provision in place. The nature of Article 866 of the FEI Endurance Rules derived from the fact that this provision provides for an automatic imposition of the penalty points based on the incidents provided for under Article 864 of the FEI Endurance Rules. According to the FEI Endurance Rules, in the present procedure, the injury of the horse is sufficient to establish the trainer's liability, regardless of whether the trainer was at fault or negligence in causing the horse's injury. Article 864 of the FEI Endurance Rules was therefore implemented into the FEI Endurance Rules with the legitimate aim of sanctioning "*the bad training practices that, according to the studies referred to by the FEI, are likely to lead to serious injuries or at least are increasing the risk of those serious injuries to occur in endurance sport*".[5] The question

[4] UAE Equestrian and Racing Federation & Ismail Mohd v. Fédération Equestre Internationale (CAS 2022/A/9018), award of 15 March 2023, para 60, paras 65-67.

[5] Ibid, para 93.

for the CAS panel was, however, whether the causal link between the presumption that the horse's injury was caused by the trainer's mistreatment of the horse was established in this case, considering that, according to the appellants, the horse had allegedly sustained this injury by tripping into a rabbit hole.[6] The CAS panel denied this on the basis of the following considerations:

> *The present Panel shares the view of the panel in CAS 98/222 according to which [a 'scientific presumption' that bad training practices lead to injuries in the horses participating in endurance events] may justify the legal rule sanctioning a consequence of the wrongful act and not the act itself, under the condition that science leaves no doubt that this 'consequence can occur only in one single manner, i.e. by the wrongful act'. However if the scientific presumption at the basis of such a system leaves some room for other causes or acts to have led to the sanctioned consequence, the party relying on such presumption will have to establish that the consequence (the serious injury of the horse) has indeed occurred as a consequence of the misconduct or wrongful act (bad training practices) and a rule, like the one at stake, sanctioning the serious injury of a horse and allowing no discussion of the real cause of such injury, would, according to the Panel, not be justified (CAS 98/222).*
>
> *In the present case, it is not contested that horses may suffer serious injuries due to bad training practices of their trainers. However, the Panel finds that there is no scientific proof that a serious injury like the one suffered by the Horse could only occur due to bad training practices imposed by the Trainer. […] According to the Panel, incidents/accidents do happen and all athletes, might they be the best trained and supported athletes in the world, suffer occasionally injuries whilst training or competing. There is no proof that this would not apply to horses or other animals.*
>
> *The Panel considers that, in view of the above, rules like the one set out in Articles 864 and 866 of the [FEI Endurance Rules], which try to impose strict liability must, if the sanctioned consequence may have another cause than the misconduct or wrongful act these rules try to prevent, leave some room for a deference by the person submitted to such liability. Indeed, without existence of an 'established' causal link between the consequence and the misconduct, there is no possibility whatsoever for a disciplinary*

[6] Ibid, para 60, paras 65-67.

body and/or whether the sanction does not exceed that which is reasonably required in the search of the justifiable aim.

… in a situation like the present, where there are uncertainties as to the scientific cause of the injury, an absolute presumption concerning the causal connexion between the sanctioned misconduct and the injury cannot be upheld. In such a scenario, the burden of proof should be distributed in a legally justified and equitable manner (CAS 98/222) and the person submitted to the liability should in any event have the right to provide evidence rebutting any presumption laid down by the rule of law.

…although it is not scientifically established that an injury like one at hand can only occur due to bad training practices of a trainer, Article 864 of the [FEI Endurance Rules] does not provide a trainer with any right to rebut the non-scientific presumption according to which the injury was due to bad training practices and does not oblige or allow the FEI provide additional evidence supporting the presumption on which its relies. In these circumstances, the Panel considers that the causal link between the sanctioned consequence and the misconduct Article 864 tries to prevent is not established. However, without such causal link, the misconduct is not established and, consequently, no sanction can be imposed without violating the principle of proportionality…[the Panel] cannot cure this violation of the principle of proportionality by applying a procedure or a sanction not set out by the relevant rules without violating the pinciples of nulla poena sine lege and nulla poena sine lege clara.[7]

3. Commentary

This case offers guidance for the determination of two intellectually and practically relevant issues in sports proceedings.

3.1. The threshold between the "rules of the game" and the "rules of law"

The first issue concerns the question of the power of review of sports arbitration tribunals and CAS panels. In particular, Article R57, para 1 of the CAS Code of Sports-related Arbitration (CAS Code) provides that "[t]*he Panel has full power to review the facts and the*

[7] Ibid, paras 99-104.

law".[8] Accordingly, a CAS panels' power of review is, in principle, not limited so that they can determine the facts and the law of the case *de novo* based on the evidence adduced in the proceedings before CAS.[9] CAS panels can further set aside the first instance decision and replace it by a new decision according to Article R57 para. 1 of the CAS Code. However, the field of play doctrine is a recognised exception to the unlimited power of review.[10] This doctrine entails that matters concerning the "rules of the game" shall generally not be reviewed by any adjudicatory body in protection of the integrity of the competition, the expertise of the specifically educated officials and the trust in their judging in the quintessential decision in view of the circumstances of the competition.[11] Adjudicatory bodies shall therefore only interfere with field of play decisions (i) if the applicable rules grant the adjudicatory body such power or (ii) if the decision was taken in bad faith, fraudulently or arbitrarily.[12] Against this background, CAS will generally be reluctant to review decisions related to the rules of the game, while decisions that fall within the ambit of the "rules of law" do not fall within the field of play doctrine and are therefore fully reviewable. The distinction whether or not a decision constitutes a field of play decision therefore proves to be a decisive factor for the success of an appeal. However, the task to draw a persuasive line between reviewable decisions, on the one hand, and unreviewable field of play decisions, on the other hand, is not always easy and is subject to various factors, including the applicable regulations, the integrity of the competition concerned and, as seen in this case, the consequences for a person beyond the competition in which the decision was made in due consideration of the principle of proportionality.[13]

[8] CAS (2022).

[9] Mavromati and Reeb (2015), Article R57, para 12; AC Milan v. Union des Associations Européennes de Football (UEFA) (CAS 2018/A/5808), award of 1 October 2018, para 130 et seq.

[10] Reeb (2002), pp. 680 et seq.; Rigozzi and Hasler (2018), para 25; Aino-Kaisa Saarinen & Finnish Ski Association v. Fédération Internationale de Ski (FIS) (CAS 2010/A/2090), award of 7 February 2011, para 26; Horse Sport Ireland (HSI) & Cian O'Connor v. Fédération Equestre Internationale (FEI) (CAS 2015/A/4208), award of 15 July 2016, para 48.

[11] Horse Sport Ireland (HSI) & Cian O'Connor v. Fédération Equestre Internationale (FEI) (CAS 2015/A/4208) award of 15 July 2016, para. 48; Rigozzi and Hasler (2018), para 25; Beloff et al. (2021), pp. 1207.

[12] Yang Tae Young & Korean Olympic Committee (KOC) v. International Gymnastics Federation (FIG) (CAS 2004/A/704), award of 21 October 2004, para 19; Asian Handball Federation (AHF), Kazakhstan Handball Federation (KzHF), Kuwait Handball Association (KHA) v. International Handball Federation (IHF) (CAS 2008/O/1483), award of 20 May 2008, para 102; M. Beloff et al. (2021), pp. 1210

[13] Lucas Mahias v. Fédération Internationale de Motocyclisme (FIM) (CAS 2018/A/5916), award of 25 February 2019, para 53; Rigozzi and Hasler (2018), para 26.

3.2. The strict liability provision and the causal link between the presumption and its consequences

The other interesting issue that makes this case so interesting is the CAS panel's discussion about the strict liability provision in the applicable rules. At the heart of this discussion is the purpose of a strict liability provision and, in addition, who has to prove what and what are the possibilities to refute the presumption on which the strict liability rule provision is based. The CAS panel has correctly stated that a strict liability rule may be legitimate and proportionate if a (scientific) presumption is given, which, if fulfilled, for example poor training leads to injuries, certain disciplinary consequences may follow from this without the need for proof of guilt. The CAS panel made also clear that, if there are reasonable circumstances that – based on the evidence submitted by the addressee of the strict liability rule – cast doubt on the presumed connexion between wrongdoing (poor training) and consequences (injury), sports organisations can no longer rely on such presumption that was the origin of the strict liability provision. Instead, the burden of re-establishing the initial presumption falls back on sports organisations, as the party who rely on this presumption, to prove the causal link between the presumed wrongdoing and its consequences. In other words, sports organisations must then provide evidence that "*other scientifically possible causes did not lead or could not lead to the forbidden result in this particular case*."[14] This is, however, only possible of the applicable regulations leaves room for an examination of the actual wrongdoing.

4. Conclusion

Sports law is fascinating. A horse's injury during a sports competition triggered intellectually and practically demanding legal questions which require a sound understanding of, *inter alia*, the rules and regulations of sports organisations and specificities of sport. This case encourages us to look at two sports law evergreens which, ultimately, proved not to be a horse of a different colour.

[14] International Triathlon Union (ITU) (CAS 98/222 B.), award of 9 August 1999, para 39.

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National Collegiate Athletic Association v. Alston: A new day in intercollegiate athletics in the United States

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Abstract

A major controversy in intercollegiate athletics, and a major source of revenue for many colleges and universities, involves whether student athletes in the United States can benefit from the commercial use of the Names, Images, and Likenesses (NILs) such as when they are paid to be endorse products or be depicted in video games. In light of legal issues involving the use of student-athletes' NILs, combined with the fact that students-athletes in secondary schools in the United States are now benefitting from such arrangements, this article first examines the legal issues and litigation associated with this topic before reflecting on what it means and how it might shape the coming face of intercollegiate and interscholastic athletics in the United States as well as perhaps elsewhere.

Keywords

Names, Images, and Likenesses, NILs, intercollegiate athletics, student-athletes

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1. Introduction

On 21 June 2021, the United States Supreme Court issued a landmark decision in a case involving intercollegiate sports—a significant, almost unique, attraction in this Nation that is not as popular in other parts of the world. At issue was whether the National Collegiate Athletic Association,[2] the largest body regulating intercollegiate sports could deny student-athletes compensation for the use of what is commonly referred to as their Names, Images, and Likenesses or NIL, as discussed below, a term the Justices did not use in their analysis.

National Collegiate Athletic Association (*NCAA*) *v. Alston*[3] (*Alston*) was an uncommon unanimous judgment by the Supreme Court, a 9-0 opinion authored by Justice Neil Gorsuch, with a concurrence by Justice Brent Kavanaugh.[4] In what was, at its heart, an antitrust case, the Court affirmed earlier orders[5] that the limitations the NCAA placed on the ability of undergraduate student-athletes to receive compensation related to their athletic performances violated their rights under the Sherman Act. First enacted in 1890, the Sherman Act is a far-reaching federal antitrust law pursuant to which "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[6] Moreover, the Sherman Act imposes sanctions on those who violate its provisions, regardless of whether they engaged in anticompetitive conduct.[7]

[2] See NCAA (2023). The NCAA, a member-led organization founded in 1904 as the Intercollegiate Athletic Association of the United States in large part due to stem the violence in college football, an issue Justice Gorsuch discussed in the Court's opinion. The NCAA, which adopted its present name in 1910, oversees the activities of more than 500,000 intercollegiate student-athletes across three divisions as its about 1,100 member schools in all 50 states, the District of Columbia, Puerto Rico, and Canada, compete for 90 championships in 24 sports. See also, NCAA (2023d).

[3] ___ U.S. ___, 141 S. Ct. 2141 (2021).

[4] NCAA v. Alston, ___ U.S. ___, 141 S. Ct. 2141 (2021), at 2166 (Kavanaugh, J., concurring).

[5] In re National Collegiate Athletic Association Athletic Grant-in-aid Cap Antitrust Litigation, 2019 WL 1593939 (N.D. Cal. Mar. 8, 2019), initially, a federal trial court, in an unpublished order, enjoined enforcement of the NCAA's rules limiting education-related benefits available to student-athletes. On further review, the Ninth Circuit, 958 F.3d 1239 (9th Cir. 2020), affirmed in favor of the plaintiffs leading the NCAA to appeal unsuccessfully to the Supreme Court, *cert. granted sub nom.* NCAA v. Alston, ___ U.S. ___, 141 S. Ct. 1231 (2021), *aff'd*, ___ U.S. ___, 141 S. Ct. 2141 (2021).

[6] Sherman Act, 15 U.S.C. § 1. This section adds that "[e]very person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony …."

[7] Ibid. Those convicted violators of violations "… shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

In *Alston,* the Justices agreed that the lower courts properly applied what is known as the Rule of Reason[8] analysis, a judicial construct used in antitrust litigation. Rule of Reason analysis is "a fact-specific assessment of market power and market structure aimed at assessing the challenged restraint's 'actual effect on competition'—especially its capacity to reduce output and increase price."[9]

In *Alston,* the Court found that the NCAA failed to prove a procompetitive justification to justify the limits it placed on the educational-related compensation student-athletes can receive as an unlawful restraint on trade, opening the door for them to receive payments when others use their NILs. In other words, the Court essentially rejected the NCAA's purported, but never codified, rules on amateurism which expect student-athletes to receive nothing in exchange for their participation other than tuition, room and board, and receiving their texts books. That is, the NCAA expected the student-athletes to "play[] for the love of the game"[10] even though their efforts generate significant amounts of revenues for their institutions and the NCAA[11] as well as the large salaries various officials garner.[12] The NCAA's rules, which forbade student-athletes from monetising their NILs seems was in a misplaced ideal that allowing individuals to profit from their efforts would have diminished the never defined concept of amateurism it purportedly seeks to advances.

In the wake of *Alston*, student-athletes have economic freedom possibly opening the door to allowing them all to reap financial benefits, not just the relatively few who earn NIL contracts. Just like all other students on their campuses, student-athletes "can now earn and accept money doing commercial endorsements, appearances and social media posts, writing books, hosting camps, giving lessons and performing various other commercial activities outside of their

[8] Because the trial court judge capitalised Rule of Reason, but the Supreme Court did not, for the sake of consistency, this article retains the original punctuation.

[9] NCAA v. Alston, 141 S. Ct. 2155 (internal citations omitted).

[10] In re National Collegiate Athletic Association Athletic Grant-in-aid Cap Antitrust Litigation, 802 F.3d 1049, 1078, note 22 (9th Cir. 2020).

[11] See, for example, Zimbalist (2023), reporting that "Division I athletics generated $15.8 billion in revenues in 2019.". See also, Associated Press (2022), additionally reporting that prior to the COVID shutdown the NCAA alone generated $1.12 billion in revenues in 2019.

[12] NCAA v. Alston, 141 S. Ct. 2151 (internal citations omitted). Justice Gorsuch pointed out that "The president of the NCAA earns nearly $4 million per year. … Commissioners of the top conferences take home between $2 to $5 million… College athletic directors average more than $1 million annually…. And annual salaries for top Division I college football coaches' approach $11 million, with some of their assistants making more than $2.5 million…."

schools, all without running afoul of NCAA rules."[13] Against this background, the remainder of this article is divided into two substantive sections. It begins by reviewing the judicial history of *Alston* before reflecting on its impact and implications in having ushered in a new day for student-athletes, particularly in higher education.[14]

2. Judicial history

2.1. Federal District Court

Alston began when Shawne Alston, a former running back on the football team at the University of West Virginia, and a former forward on the University of California's women's basketball team, Justine Hartman,[15] filed a class action suit[16] against the NCAA on behalf of a larger group of Division I athletes.[17] Representing the class, the plaintiffs claimed that the NCAA's cap on compensation for student-athletes violated the Sherman Antitrust Act.[18]

In 2019, following four years of extended pretrial proceedings,[19] a federal trial court in California "conducted a 10-day bench trial,"[20] meaning that the case was heard only by a judge

[13] Silas (2022).

[14] While some states have extended NIL to elementary and secondary education, this article highlights the impact of *Alston* on collegiate student-athletes.

[15] O'Connor (2022).

[16] Federal Rules of Civil Procedure, Rule 23(A). In class action litigation, subject to judicial approval, an individual or group of persons represents the interests of a larger group or class if having all members involved is impracticable, questions of law or fact common to the class are present, the claims are typical of the group, and the representatives will fairly and adequately protect the interests of the class.

[17] NCAA (2023a). The NCAA consists of Divisions, I, II, and III. Division I, which provides full scholarships in major revenue-generating sports such as basketball and football; there are more than 350 Division I, which is subdivided into I-A and I-AA, schools fielding more than 6,000 teams providing opportunities for more than 170,000 student-athletes to compete in their sports. The FBS includes major Division I-A athletic programs that compete for the national college football championship and Division I-AA. See Wilco (2020), explaining how the FBS, Division I-A differs from the Division I-AA from the Football Championship Subdivision (FCS) in terms of play-off structure and the numbers of players who can receive athletic scholarships. Some of the NCAA's 300 Division II programs provide scholarships for student-athletes. See, NCAA (2023b), this site did not provide details on the number of participants or sports. Division III, with more than 440 member institutions and 195,000 student-athletes, the most in any division, does not permit athletic scholarships but does offer about 80% of participants some form of academic grants or need-based scholarships. See, NCAA (2023c).

[18] The initial decision in this series of cases is published In re National Collegiate Athletic Association Athletic Grant-in-aid Cap Antitrust Litigation, 311 F.R.D. 532 (N.D. Cal. 2015).

[19] In re National Collegiate Athletic Association Athletic Grant-in-aid Cap Antitrust Litigation, 375 F. Supp.3d 1058 (N.D. Cal. 2019). As identified in Westlaw, Alston resulted in twelve cases in its direct history and a total of twenty-six proceedings, including the Supreme Court's judgment. For the sake of brevity, this article only includes citation for the main cases.

[20] NCAA v. Alston, 141 S. Ct. 2151.

rather than the usual jury situation in American courts. In her lengthy opinion the judge applied the Rule of Reason in determining the relevant market,[21] which, she wrote, consisted of national markets for the student-athletes' labour, wherein each member of the class participated in their sport-specific markets.[22]

Applying Rule of Reason analysis, the court maintained that "an alternative compensation scheme that would allow limits on the grant-in-aid scholarships at not less than the cost of attendance and limits on compensation and benefits unrelated to education, but that would generally prohibit the NCAA from limiting education-related benefits, would be virtually as effective as the challenged rules in achieving the only procompetitive effect that Defendants have shown here."[23] However, the court did allow the NCAA's member institutions to provide assistance beyond tuition, room and board, and books by relying on their Student Assistance Academic Enhancement Funds in excess (AEF) of full cost-of-attendance grants-in-aid, limited only by the aggregate amount the NCAA distributes through these funds each year.[24]

According to the court, the NCAA's rules violated the Sherman Act because "the challenged restraints suppress competition and fix the price of student-athletes' services."[25] In so doing, the court rejected the NCAA's arguments that the promotion of amateurism was a sufficient basis on which to limit education-related compensation and that the goal of integrating student-athletes into their academic communities justified its actions.[26] The court thereby enjoined the rules limiting non-cash, education-related benefits such as those restricting scholarships for graduate school, post-athletic eligibility internships and payments for tutoring on top of grant-in-aid that Division I basketball and Football Bowl Subdivision (FBS) football players could receive as unreasonably restraining trade, in violation of Section 1 of Sherman Act absent evidence that this would have negatively impacted consumers' interest in these sports.

[21] NCAA v. Alston, 375 F. Supp.3d 1066-67.

[22] Ibid, para 1067.

[23] Ibid, para 1062.

[24] Ibid, paras 1072-23.

[25] Ibid, para 1097.

[26] Ibid, para 1102. The *Alston* court noted that while this amount was currently at $5,980, "[m]ost ... are received by only a few student-athletes each year." NCAA v. Alston, 141 S. Ct. 2165 (internal citations omitted).

The trial judge also thought that the NCAA's rules limiting compensation unrelated to education available to student-athletes did not violate the Sherman Act. The judge refused to enjoin policies limiting undergraduate athletic scholarships as well as other compensation related to athletic performance.

On the same day, in a separate order in the line of litigation leading to the appeal to the Supreme Court, in a brief order, the judge permanently enjoined the enforcement of the NCAA's rules.[27] The judge "enjoined [the NCAA] from agreeing to fix or limit compensation or benefits related to education that may be made available from conferences or schools to Division I women's and men's basketball and FBS[28] football student-athletes on top of a grant-in-aid."[29] Dissatisfied with the outcome, both sides sought further review at the Ninth Circuit.

2.2. Ninth Circuit

On appeal, the Ninth Circuit, in a relatively brief opinion,[30] including a concurrence,[31] conceded that the NCAA expressed a legitimate interest in preserving what it describes as its version of amateurism. Even so, the panel affirmed that the trial court did not clearly err in deciding that NCAA failed to establish that anticompetitive effects of its rules intended to preserve amateurism had such sufficient procompetitive effects so as to justify them when subject to Rule of Reason scrutiny. In addition, the court agreed that less restrictive alternatives to the current rules would have been just about as effective in serving its espoused procompetitive purposes of its current rules.

The Ninth Circuit further agreed that the trial court did not clearly err in maintaining that the NCAA's rules limiting compensation unrelated to education that student-athletes could receive

[27] In re National Collegiate Athletic Association Athletic Grant-in-aid Cap Antitrust Litigation, 2019 WL 1593939 (N.D. Cal. Mar. 8, 2019).

[28] To put the significant amount of money at issue in Division I-A sports, the Brief for Respondents, at 5, 2021 WL 859705 (March 23, 2023), namely the class of students challenging the rules at issue specifies that "the NCAA's current broadcast contract for the [Division I) 'March Madness' basketball tournament is worth $19.6 billion; the FBS football conferences' current television deal for the College Football Playoff is valued at $5.64 billion."

[29] In re National Collegiate Athletic Association Athletic Grant-in-aid Cap Antitrust Litigation, 2019 WL 1593939.

[30] In re National Collegiate Athletic Association Athletic Grant-in-aid Cap Antitrust Litigation, 958 F.3d 1239 (9th Cir. 2019).

[31] Ibid, para 1267 (Smith., C., concurring).

did not violate the Sherman Act. Finally, the panel affirmed that the injunction preventing the NCAA from enforcing its disputed rules was not impermissibly vague. Again dissatisfied, the NCAA appealed to the Supreme Court[32] which affirmed in favour of the student athletes.[33]

2.3. Supreme Court

2.3.1. Majority opinion

As author of the Supreme Court's unanimous opinion, Justice Gorsuch began his three-part opinion by noting that the Sherman Act was designed to "'enforc[e] a policy of competition on the belief that market forces 'yield the best allocation' of the Nation's resources."[34] He then recounted how the federal trial court invalidated the NCAA's rules restricting the education-related benefits that institutions can offer student-athletes such as not permitting them to offer graduate or vocational school scholarships but "refused to disturb the NCAA's rules limiting undergraduate athletic scholarships and other compensation related to athletic performance."[35] He next indicated that NCAA alone challenged the trial court's order in the matter at issue.

Following his brief introduction, Justice Gorsuch turned to the first part of his opinion, which he divided into three sections, briefly tracing the history of intercollegiate athletics starting in the mid-nineteenth century, the development of the NCAA, and commercialism. He emphasised that as early as the 1920s, the NCAA was not concerned with amateurism as, commenting that, in particular, "[c]ollege football was 'not a student's game;' it was an 'organised commercial enterprise' featuring athletes with 'years of training,' 'professional coaches,' and competitions that were 'highly profitable,'"[36] characterising it as "a sprawling enterprise….a massive business,"[37] generating large sums of money identified earlier. The remainder of this first section reviewed the earlier litigation.

[32] *Cert. granted sub nom.* NCAA v. Alston, ___ U.S. ___, 141 S. Ct. 1231 (2021)
[33] NCAA v. Alston, ___ U.S. ___, 141 S. Ct. 2141 (2021).
[34] Ibid, para 2147 (internal citations omitted).
[35] Ibid.
[36] Ibid, para 2150.
[37] Ibid.

Turning to the second major part of his order, Justice Gorsuch began his first of three sections by pointing out that the Court would "focus only on the objections the NCAA *does* raise. Principally, it suggests that the lower courts erred by subjecting its compensation restrictions to a rule of reason analysis"[38] because it is a joint venture, meaning that is a business activity involving or more persons or entities engaged in a single defined project. Justice Gorsuch summarily rejected this argument as lacking merit. He continued to rebuff the NCAA's assertion that Rule of Reason analysis was inapplicable because it is "a particular type of venture categorically exempt its restraints"[39] because even competitors such as its member institutions must establish a degree of coordination in order to facilitate competition. The problem as Gorsuch saw it was that the restraints the NCAA imposed simply went too far.

In the second part here, Justice Gorsuch was not persuaded by the NCAA's argument that the Court was bound by its earlier judgments in *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma,*[40] on the organization's ability to limit the extent to which member institutions could broadcast their football games. He rejected the NCAA's position that this case foreclosed the Court's ability to review the limits it placed on student compensation, a topic not at issue in the earlier case.[41]

Justice Gorsuch devoted the third subsection of this part of the opinion to rebutting the NCAA's incredulous claim that it "and its member schools are not 'commercial enterprises' and instead oversee intercollegiate athletics "as an integral part of the undergraduate experience."[42] The NCAA added "that it seeks to 'maintain amateurism in college sports as part of serving [the] societally important non-commercial objective' of 'higher education.'"[43] Gorsuch later remarked that "[w]hile the NCAA asks us to defer to its conception of amateurism, the district court found that the NCAA had not adopted any consistent definition"[44] of this term.

[38] Ibid, para 2155 (emphasis in original).

[39] Ibid, para 2157.

[40] 468 U.S. 85 (1984).

[41] NCAA v. Alston, 141 S. Ct. 2167. In his concurrence, Justice Kavanaugh dismissively made it "clear that the decades-old 'stray comments' about college sports and amateurism made in National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla. … were dicta and have no bearing on whether the NCAA's current compensation rules are lawful.".

[42] Ibid, para 2158 (internal citations omitted).

[43] Ibid.

[44] Ibid, para 2163 (internal citations omitted).

In sum, in again rebutting the NCAA's arguments, Justice Gorsuch ended this part of the Court's judgment by rejecting the limits it placed on compensation for student-athletes as anti-competitive, noting that "until Congress says otherwise, the only law it has asked us to enforce is the Sherman Act, and that law is predicated on one assumption alone—'competition is the best method of allocating resources' in the Nation's economy,"[45] including college sports.

Turning to the final substantive part of the Court's order, which he divided into three sections, Justice Gorsuch responded to other objections the NCAA raised to the trial court's application of the Rule of Reason. In the first part Gorsuch did not treat the NCAA as harshly as he could have because he generally agreed with some of its arguments such as that its interpretation of the Sherman Act does not require it to employ the least restrictive means of achieving its legitimate business purposes. Where he disagreed significantly was in describing the NCAA's rules as "'patently and inexplicably stricter than is necessary' to achieve the procompetitive benefits [it] had demonstrated."[46]

Justice Gorsuch took issue with the NCAA's claim that the Court "impermissibly redefined its product"[47] or redesigned it by rejecting its views about what amateurism requires and replacing them with its preferred conception. He handily rebuffed this contention, explaining that the Court could not defer to the NCAA's understanding of amateurism because the trial judge made it clear that its officials "had not adopted any consistent definition"[48] of the term because the rules and limits it applied on compensation changed markedly over time. He reasoned that the NCAAA made these modifications without regard to "considerations of consumer demand," and that some were "not necessary to preserve consumer demand,"[49] He thereby spurned the NCAA's response because "[n]ne of this is product redesign; it is a straightforward application of the rule of reason."[50]

At the outset of the last substantive section of the Court's judgment, Justice Gorsuch agreed with the NCAA that the judiciary should grant institutions leeway in operating their business

[45] Ibid, para 2160 (internal citations omitted).
[46] Ibid, para 2162 (internal citations omitted).
[47] Ibid.
[48] Ibid.
[49] Ibid, para 2163 (internal citations omitted).
[50] Ibid.

by not micromanaging then. Yet, Gorsuch disagreed with the NCAA that the trial or Supreme Court did so in negating its final three arguments. First, he rejected the NCAA's concerns that institutions could abuse post-athletic eligibility internships because the trial court's injunction afforded institutions considerable latitude in this regard.

Justice Gorsuch next rebuffed the NCAA's criticisms of the trial court for possibly setting the aggregate limit on awards institutions may grant for academic or graduation achievement to that set for parallel athletic awards, currently $5,980 per year,[51] because its rationale for doing so was unclear. He responded that if the NCAA truly sought certainty to ensure that such awards were education-related, it, and its member institutions, were free to set their own criteria.

Third, Justice Gorsuch was not convinced that the NCAA's hyperbolic contention that allowing in-kind educational benefits for graduate or vocational school as well as items such as computers and tutoring could be abused in such a way that institutions would give student-athletes such items as "'luxury cars' 'to get to class' and 'other unnecessary or inordinately valuable items' only 'nominally' related to education"[52] as misinterpreting the trial judge's injunction. Because nothing in the injunction prevents the NCAA and member institutions from limiting in-kind benefits, Gorsuch reiterated that it, as well as individual conferences and institutions are free to impose restriction in this regard that they deem appropriate.

In the final paragraph of his opinion Justice Gorsuch mused that some critics may regard the injunction at issue as not going far enough to rein in the NCAA while others may fear that it went too far in not adequality valuing the role of amateur athletics on college and university campuses. In upholding the injunction Justice Gorsuch rounded out the Court's judgment by agreeing with the Ninth Circuit that "[t]he national debate about amateurism in college sports is important. But our task as appellate judges are not to resolve it. Nor could we. Our task is simply to review the district court judgment through the appropriate lens of antitrust law.' That review persuades us the district court acted within the law's bounds."[53]

[51] Ibid, para 2165.
[52] Ibid.
[53] Ibid, para 2166.

2.3.2. Justice Kavanaugh's concurrence

Justice Kavanaugh, an avid sports fan who has coached his daughter's basketball team,[54] began his relatively brief concurrence, which was much tougher on the NCAA than the Court, with three initial points. He began by observing that the Court did not review the legality of the NCAA's remaining compensation rules, limiting its analysis to having upheld the restrictions that the trial court had already enjoined those restrictions now enjoined.[55]

Second, Kavanaugh reiterated that that while the Court did not address the legality of the NCAA's remaining compensation rules, it established an analytical framework for doing so in the future. Consistent with his desired approach, Justice Kavanaugh believed that the NCAA's compensation rules should be subject to ordinary Rule of Reason scrutiny because "the Court stresses that the NCAA is not otherwise entitled to an exemption from the antitrust laws."[56]

Third, in what must be viewed as a veiled warning to the NCAA, Justice Kavanaugh suggested that there are serious questions about whether those rules can pass muster under the Rule of Reason framework. He based his position on his doubts whether the NCAA can provide a justification by offering a legally valid procompetitive justification for its remaining compensation rules.

Kavanagh next disagreed with the NCAA's argument that consumers benefit from the restrictions it placed on student-athletes as circular logic. He pithily addressed the status quo by stating that "[p]rice-fixing labor is price-fixing labor. And price-fixing labor is ordinarily a textbook antitrust problem because it extinguishes the free market in which individuals can otherwise obtain fair compensation for their work."[57]

Justice Kavanaugh went on to muse about the legality of the NCAA rules that remained in place even in conceding that they were not at issue. As such, he questioned the legality of the remaining restrictions on benefits for college athletes. He made it clear that while those

[54] Allen (2019).
[55] NCAA v. Alston, 141 S. Ct. 2167 (Kavanaugh, J., concurring).
[56] Ibid.
[57] Ibid, paras 2167-68.

restrictions were not before the court here, *Alston* created a framework that could lead to future challenges to the NCAA's restrictions.

For Justice Kavanaugh, the "bottom line" was that the NCAA and its member institutions unlawfully suppressed the pay of student-athletes, denying them any remuneration, while collectively generating billions of dollars in revenues annually. He conceded that while the NCAA can set standards about such matters as enrolment and class attendance, its business model using unpaid student-athletes to generate billions of dollars in revenue raises serious questions under the Sherman Act with no clear justification legally defending its remaining compensation rules.

Justice Kavanaugh suggested that ways around this morass in lieu of litigation are legislation and the creation of some form of collective bargaining or other negotiated agreements to provide student athletes a fairer share of the revenues that they generate for their colleges, akin to how professional football and basketball players have negotiated for a share of league revenues. Of course, this final option would present all sorts of logistical challenges in determining how such negotiations would occur at the national, state, conference, or school level in addition to how long agreements would last and who would be covered.

Justice Kavanaugh began the final paragraph of his concurrence by recognising that "the NCAA and its member colleges maintain important traditions that have become part of the fabric of America…." Even so, he concluded that because "[t]he NCAA is not above the law,"[58] the traditions it created cannot justify its having constructed a massive money-raising enterprise on the backs of unfairly compensated student-athletes because no other American business can operate such a scheme without having to comply with the Sherman Act.

3. Discussion

In light of *Alston*, this section examines the NCAA's response and state laws regulating how student-athletes can benefit from using their NILs before reflecting on what it means moving forward in American intercollegiate athletics.

[58] Ibid, para 2169.

3.1. NCAA's response to *Alston*

Not surprisingly, within days of *Alston,* the NCAA adopted an interim NIL policy[59] which provides the following guide to college athletes, recruits, their families and member schools:

- *Individuals can engage in NIL activities that are consistent with the law of the state where the school is located. Colleges and universities may be a resource for state law questions.*
- *College athletes who attend a school in a state without an NIL law can engage in this type of activity without violating NCAA rules related to name, image and likeness.*
- *Individuals can use a professional services provider for NIL activities.*
- *Student-athletes should report NIL activities consistent with state law or school and conference requirements to their school*.[60]

The interim policy allows individual member institutions and conferences to adopt their own additional rules. The interim policy emphasizes that "college sports are not pay-for-play," meaning that student-athletes cannot be paid for participating in their sport, while it "reinforces key principles of fairness and integrity across the NCAA and maintains rules prohibiting improper recruiting inducements." The NCAA's Division I board subsequently approved five clarifications to its interim NIL policy, reviewed as follows.[61]

3.2. Educating and monitoring current student-athletes

This addresses such topics as financial literacy, taxes, social media practices and entrepreneurship. While institutions can provide NIL education to boosters and prospects, the interim policy also asserts that, depending on state laws, institutional officials can require student-athletes to report NIL activities to the athletics department.

[59] See generally, NCAA (2023e).
[60] Hosick (2021).
[61] Durham (2022).

3.3. School support for student-athlete NIL activities

This applies to such items as allowing institutional officials to inform student-athletes about potential NIL opportunities and can work with NIL service providers to regulate "marketplaces" matching individuals with opportunities. The interim policy does forbid officials from negotiating on behalf of NIL entities or student-athlete to secure specific NIL opportunities. While the interim policy permits institutional officials to support their student-athletes by providing stock photos or graphics to either to them or NIL entities or arranging space on campuses where the parties can meet. Moreover, the interim policy allows officials to promote the NIL activities of student-athletes if they or NIL entities pays the appropriate rate for those advertisement but restricts their ability to do so while participating in required pre- and postgame activities as well as on-field or court celebrations and news conferences.

Another aspect of the interim policy prohibits officials from providing free services such as graphic designers, tax preparers, and/or contract reviews to student-athletes unless they are available to the general student body. Similarly, officials may not offer equipment in the form of cameras, graphics software, or computers to support NIL activities, unless that equipment is available to the general student body.

3.4. Institutional involvement with collectives and other NIL entities

In the first of three points, this item enables institutional personnel, including coaches, to assist NIL entities with fundraising through appearances or by providing autographed memorabilia but cannot donate cash directly to them nor can they be employed by or have an ownership stake in an NIL entity. This provision next allows officials to ask donors to provide funds to collectives and other NIL entities if they do not ask that these resources are directed toward specific sports or student-athletes. Finally, the interim policy permits institutional officials to provide tickets or suites at events to NIL entities through sponsorship agreement if their terms in doing so are the same as for other sponsors.

3.5. Enforcement of NCAA rules related to NIL policies

This item directs enforcement officials to review the facts of cases individually but only to pursue those clearly contrary to the interim policy's provisions. The interim policy does clarify

that enforcement staff and the NCAA's Committee on Infractions will presume violations occurred unless institutions clearly demonstrate that the behaviours in question are in line with existing NCAA rules and the interim policy. However, the interim policy does not address what levels of suspicion or burdens of proof are needed to proceed or to be able to discipline violators. This provision added that the focus of this NIL guidance is not meant to question the eligibility of student-athletes on campuses.[62]

3.6. State laws

Following *Alston*, about one half of the states have laws or executive orders in effect allowing student-athletes in higher education[63] to benefits from their NILs.[64] These laws share a variety of the following common features.[65] First, student-athletes are free to enter into NIL agreements and be represented by agents when forming such contracts. Second, there are few, if any limitations on the ability of student-athletes to benefit financially from their NILs except that they cannot be compensated directly by their institutions or sports conferences.

Third, institutional officials generally have discretion to create their own limits on such items such as using team logos or preventing student-athletes from forming contracts with industries including adult entertainment, alcohol, tobacco, firearms, and gambling. Fourth, consistent with the NCAA's interim policy banning so-called pay-for-play, NILs cannot be linked to activities contingent on their athletic participation or achievement. Fifth, laws usually limit the duration of contracts to the periods of student-athletes; eligibility with some dictating that they cannot extend past the time individuals participates in athletics at their institutions. Sixth, NIL agreements cannot conflict existing current institutional contracts.[66]

[62] Ibid. This report identified a fifth item, Third-party Administration of NIL Activities, but refrained from acting on it pending the need for future discussion as legal and political standards evolve..

[63] Nakos (2022). Although it is beyond the scope of this article, as of July 2022, athletic associations in at least seventeen states and the District of Columbia allowed students in secondary schools to benefit from their NILs.

[64] BCS (2023). Further, Arkansas, Missouri, New York, Oklahoma, and Texas prohibit the NCAA from imposing penalties if student-athletes assert their NIL rights. See, Charron (2023), for an update through February 2023. See also, King (2022), reporting that as of July 8, 2022, 29 states have passed legislation regulating or otherwise addressing how student-athletes can profit from their name, image, and likeness. Of those, twenty-four such laws are currently in effect. Those that are not yet in place are slated to take effect by July 2023 at the latest. An additional ten states have proposed legislation pending.

[65] Keller (2023); See also Nakos (2022).

[66] See for example, Wallace (2022), for discussion of various NILs.

4. Final reflections

As an initial observation, it is noteworthy that the Supreme Court Justices placed their ideological divides aside in unanimously rejecting the NCAA's argument that it was a special organization, devoted to "amateurism," exempting it from the limits the Sherman Act sets against entities operating essentially as monopolies. Instead, the Court acknowledged that the NCAA is subject to the same antitrust laws as all other organizations. In fact, as Justice Kavanaugh's concurrence highlighted, the NCAA is unlikely to receive future judicial dispensations from antitrust laws, especially as they apply to student athletes in its seemingly quixotic quest to preserve its vision of amateurism.

Like so many things in life, it seems that allowing student-athletes to benefit from their NILs is something on a mixed blessing as the process of moving forward is likely to be complex and far from certain. On the positive side, NIL laws and policies allow student-athletes, both female and male, not just their institutions, to benefit financially from their efforts[67] that provide their schools, the NCAA, and athletic officials with large sums of money.

A second benefit flowing from *Alston* is that players can monetize their NILs. For example, the largest of all such contract, albeit for a male high school basketball player, is valued at US $7,200,00 while a college football player signed the next highest NIL agreement for an estimated $3,700,000.[68] Hopefully student-athletes will gain financial management skills they can use in life and/ or seek professional assistance to help them take care of their earnings. As a kind of reality check, it is essential to remember that these figures are outliers as only a very select few student-athletes sign such contracts with many not earning anything because advertisers do not use their NILs.[69] Because various states have taken different approaches to NIL, it remains to be seen how consistently policies and rules regulating the income of student-athletes are applied in these jurisdictions and their institutions.

On what may be the downside, due to the NCAA's having failed to plan ahead in terms of affording student-athletes' opportunities to benefit from the commercial uses of their NILs, its

[67] Bilas (2022).

[68] Wojoton (2023).

[69] I express my thanks to my University President, friend, and colleague, Dr. Eric F. Spina, Ph.D. for his thoughtful feedback on this issue and the one below on "free agency."

status is arguably somewhat diminished. In light of the Court's having described the NCAA as "a sprawling enterprise…a massive business,"[70] not all will view restrictions on it as negatives. To this end, critics maintain that the NCAA has acted as a cartel that exceeded its reach[71] by, for instance, attempting to limit the benefits student-athletes could reap from their NILs while the two top college football coaches who benefit from the efforts of their players earn an incredible $9,300,000 and $8,500,000 annually.[72]

The first of a two-pronged potential negative this author fears is the loss of the NCAA's not so "revered tradition of amateurism"[73] that may never really have been in effect at least in terms of the resources sports raised for major institutions. Of course, while it is certainly reasonable for student-athletes to be able to benefit for their efforts, in an era of "one and done,"[74] whereby college basketball players, in particular, have played one season before leaving to earn massive salaries as professionals, where is the limit?

At the same time, because the NCAA had eased its rules allowing student-athletes to transfer institutions,[75] likely in pursuit of more playing time and perhaps greater NIL opportunities, intercollegiate sports risk entering an era of unfettered free agency not unlike the professionals where individuals move from one team to the next with no loyalty to anyone but themselves and their bank accounts. While again recognising the right of players to benefit from their NILs, one wonders how this may impact the educational dimension of "student-athlete" and the profound impact it might have on the face of intercollegiate sports.

With the money in NIL contracts risk turning college athletics into shamateurs[76] who are mercenary professionals in all but name only, one must wonder whether their roles as students be reduced to an after-thought at best. If this comes to pass, will there be any participants in big-time programs who play for the joy of the game as do their friends in Division-III non-scholarship schools who are true student-athletes?

[70] Ibid.

[71] Edelman (2021); Stauffer (2014).

[72] ESPN (2019).

[73] NCAA v. Alston, 141 S. Ct. 2157 (internal citations omitted). See, Banks (2022), for a discussion of amateurism in American sports.

[74] Lynch (2017).

[75] NCAA (2023f).

[76] The Economist (2021).

One could argue that the statement attributed to the Duke of Wellington that the battle at Waterloo was won "on the playing fields on Eaton"[77] may be hyperbole. Still, there is something to be learned from teamwork and group effort aimed at achieving hard fought victories that student-athletes may lose if their participation is motivated primarily by money.

5. Conclusion

Moving forward, this much is certain: college sports in the United States are going to continue to change as *Alston* affords student-athletes' opportunities to benefit from their NILs in ways that had the NCAA had previously banned. As to how much the face of college athletics will be transformed in this brave new world of college sports, stay tuned because it seems that change is the only constant.

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How do you solve a problem like Kamila? Provisional suspensions and protected persons in OG 22/08-010 International Skating Union v RUSADA

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Abstract

This paper explores the Court of Arbitration for Sport (CAS) Ad Hoc Division's ruling in *International Skating Union v. RUSADA,* colloquially known as the Valieva case. It provides the background to the despite and details of the domestic disciplinary body's disposal of it before turning to the arguments advanced before the CAS and its determination of the issue. The paper focuses in particular on the implications of Valieva's status as a protected person, and the implications of that for the imposition of provisional suspensions. It notes how the CAS addressed the failure by the World Anti-Doping Agency (WADA) Code's drafters to ensure that Valieva's 'protected person' status carried tangible protections in this regard, and it highlights the CAS' legitimate role in addressing lacunae in the WADA Code. As the Panel said, doing so is a legitimate exercise in interpretation, not a rewriting of the rules – which, as it also acknowledged, is a role properly left to the sports bodies themselves.

Keywords

Doping, Olympics, WADA, protected persons, provisional suspensions, Valieva

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1. Introduction

To the casual sporting observer, and to frazzled sports lawyers, the 24th Winter Olympic Games were an uncomfortable experience. Against the backdrop of Russia's imminent and (by then) inevitable invasion of Ukraine, the world's best athletes plied their trade in venues that were empty as a consequence of the COVID protocols. The climate crisis meant they were the first Games to use 100% artificial snow, and they were hosted by a country whose dire human rights record made mockery of the argument that sport and politics should not mix. And in addition to those existential sporting concerns there were quite enough disputes to keep the lawyers entertained in the short term. The usual array of crashes, disqualifications, selection disputes, eligibility spats, equipment malfunctions and doping scandals led to several cases before the Court of Arbitration for Sport's (CAS) Ad Hoc Olympic Division[2] which in turn contributed to the ever-growing corpus of 'Olympic Law.'[3] It was just another, surreal, day in the sports law office.

This paper is concerned with the most high-profile, and certainly the most troubling, of those CAS cases – the anti-doping rule violation involving the Russian skater, Kamila Valieva. Its bare facts were troubling enough. A child from a country notorious for its widespread and state-sponsored doping had failed a drug test for a substance capable of doing more harm than good to a young person; but the CAS decision reveals a far more complex and nuanced picture. It confirms many people's immediate perceptions of toxic, potentially abusive, relationships between an athlete and her coaches; but it also highlights shortcomings in the World Anti-Doping Agency (WADA) Code's drafting, along with failures in the testing and results management process which were easy to explain but hard to understand.

[2] Four of those hearings concerned the International Bobsleigh & Skeleton Federation's rules on the allocation of quota places: See Henry v. IBSF (OG 22-003); Edelman v IBSF (OG 22-004); Irish Bobsleigh & Skeleton Association v. IBSF (OG 22-005); Fenlator-Victorian v. IBSF (OG 22-007). Makhnev v. International Ski Federation (OG 22-002) case was concerned with whether the Ad Hoc Division had jurisdiction in respect of the United States Government's vaccine-related visa entry requirements (it did not). The last, Bates v IOC (OG-22/011) case was a failed attempt to challenge the IOC's decision not to hold a medal ceremony in the wake of Valieva's positive test.

[3] James and Osborn (2023).

2. The background

Kamila Valieva is a Russian figure-skater. At the time of the 2022 Winter Olympics, she was fifteen years old. She was a member of the Russia team that won the Olympic Team event but on the day the event concluded, 7 February 2022, a WADA-accredited laboratory in Sweden issued an Adverse Analytical Finding which led to the medal ceremony being 'delayed.' There were early off-the-record assertions that Valieva was the athlete concerned, and that she had tested positive for trimetazidine in an in-competition sample that she gave in late December at the Russian Championships. Her victory in the short programme there had confirmed her selection for the Olympics.

On 8 February 2022, the Russian Anti-Doping Agency (RUSADA) - which was still suspended from WADA because of its role in the country's state-sponsored doping programme - announced that in accordance with the Russian anti-doping rules and Article 7.4.1 of the WADA Code, Valieva had been provisionally suspended.[4] On 9 February 2022, following a request by the athlete for a provisional hearing, the RUSADA Disciplinary Anti-Doping Committee (the committee) announced that it had cancelled the provisional suspension pursuant to clause 9.4.3 of the Russian Anti-Doping Rules (Russian ADR). This rule allowed for a provisional suspension's removal if (inter alia) the athlete demonstrated to comfortable satisfaction that the violation was "likely" to have involved a contaminated product. Removing the suspension would thus allow her to take part in the Olympic individual event on 15 February 2022.

Trimetazidine is a metabolic modulator, similar to meldonium[5] and similarly used in the treatment of heart disease.[6] It is not a substance that one would expect a fifteen year-old figure skater to take, but as the International Staking Union (ISU) pointed out in its submission to the CAS, metabolic modulators are "popular in sports where strength is an important factor, and it can suppress the production of estrogen or prevent the normal conversion of testosterone into estrogen."[7] That is why it is banned. Under the WADA Code, both meldonium and

[4] International Skating Union v. RUSADA (OG 22/08-010), para 15.

[5] As of September 2023, there have been at least a dozen CAS hearings involving athletes' alleged use of meldonium, the most well-known being Sharapova v. International tennis Federation (CAS 2016/A/4643).

[6] European Medicines Agency (2012).

[7] International Skating Union v. RUSADA (OG 22/08-010), para 94.

trimetazidine are prohibited both within and out of competition. They are non-specified substances, which means they are not recognised under the WADA Code as substances which might have been used for purposes other than enhancing sports performance.[8]

RUSADA had ostensibly asked the committee to uphold the provisional suspension "based on the fact that the substance detected… requires the prompt imposition of Provisional Suspension according to clause 9.4.1 of the Russian Anti-Doping Rules."[9] But the committee was persuaded that she had not used the prohibited substance intentionally. It noted that contamination was the most possible reason for her ingesting it (her grandfather used trimetazidine after heart replacement surgery), accepted that she had returned several negative results both before and after the positive sample, and said that any therapeutic effect required a regular intake.[10] However, WADA subsequently noted that her results were also "compatible with the end of the excretion period after a full dose of trimetazidine."[11]

At the hearing where the decision which the ISU and others challenged had been reached, Valieva had been required to show on a 'balance of probability' that the anti-doping rule violation (ADRV) was more likely than not to have happened through contamination. However, the committee noted that because she was under the age of 16 she fell within the definition of a 'protected person' under both the WADA Code and the Russian ADR. This meant that in the ordinary course of events "a lower standard of evidence than a balance of probability is to be applied. The 'protected person' is in fact in a better position according to the Russian ADR and the (WADA Code)."[12] This enhanced protection is evident in comparable provisions of the WADA Code - for example, the standard required of a protected person seeking a sanction reduction on the basis of no significant fault was that of 'reasonable possibility' rather than 'balance of probabilities,' and CAS jurisprudence says that 'reasonable possibility' is "a possibility that is more real than fantastic."[13]

[8] World Anti-Doping Agency (2021), Article 4.2.

[9] International Skating Union v. RUSADA (OG 22/08-010), para 22.

[10] Ibid, paras 23-24.

[11] Ibid, para 71.

[12] Ibid, para 27.

[13] Ibid, para 29. c.f. This is not quite what the CAS has said, however. In another provisional suspension case, Legkov v International Ski Federation (CAS 2017/A/4968), para 176 the Panel said "a reasonable possibility is more than a *fanciful* one; it requires evidence giving rise to individualised suspicion. The standard however is necessarily weaker than the test of 'comfortable satisfaction.'" Fantastic and fanciful are not the same.

The committee decided that she had established to this lower, 'reasonable possibility,' standard that the violation had indeed arisen by virtue of contamination. And because she was a protected person, Valieva would thus be exempt from the usual requirement that the athlete has to explain the presence of the protected substance if they subsequently seek to establish no fault or no significant fault or negligence. Given this general principle that a protected person is in a better position than one not protected, the committee then took the view that "the general principle…can be applied in a similar way…when considering the lifting of a provisional suspension."[14] It lifted the provisional suspension because it was satisfied that there was a reasonable possibility that the ADRV had been caused by contamination.

3. The applicants' arguments

On 11 February 2022, the IOC (later joined by WADA and the ISU) filed an application with the Ad Hoc Division to challenge the committee's setting aside of the provisional suspension. Briefly, the IOC – while noting that as a minor Valieva would indeed benefit from "special evidentiary rules" in the ultimate hearing on the merits – thought there were doubts "as to the level of substantiation" regarding the assertion of contamination through her grandfather's medication and rhetorically wondered "whether other circumstances were taken into account by (the committee)".[15] For its part, WADA noted that under Russia's ADR, a 'contaminated product' is one that contains a prohibited substance that is not disclosed on the product label or in information available in a reasonable internet search.[16] This was important because there was no plausible argument on this occasion that any 'product' had been contaminated in this sense: the athlete's contention was that she and her grandfather had eaten and drunk from the same dishes and glasses, and that she had ingested trimetazidine as a consequence. Her application did not involve any contaminated product, and "this excludes by itself any basis to lift the mandatory provisional suspension."[17] The ISU made similar points and contended that the committee's reasons for lifting the provisional suspension "fell outside the scope of the Russian (rules)." It said the committee had created a new standard of proof for protected persons and "allows also for a special term of 'contaminated product' when it comes

[14] International Skating Union v. RUSADA (OG 22/08-010), para 28.

[15] Ibid, para 61.

[16] Ibid, para 72.

[17] Ibid, para 75. For a plate to be a 'contaminated product' under the Code would be to stretch the bounds of interpretation beyond breaking-point.

to a protected person. It had in effect "provided a sophisticated model of how to escape a rule violation."[18]

4. The respondents' arguments

In response, RUSADA noted that the committee was independent of RUSADA and impartial. It emphasised the detriment to the athlete that had been caused by the delay in the laboratory's analysis and dissemination of the results, which itself was caused by staffing shortages during the pandemic. This had given Valieva very little time to prepare her position and collect evidence, it said. It also noted, crucially, that neither the Russian ADR nor the WADA Code reduced the burden (sic) of proof on protected persons with specific regard to provisional suspensions. As with non-protected persons, it was 'balance of probabilities.'[19]

The athlete's submission also noted the "irregular delay" in the testing process, and she thereafter argued that the Ad Hoc division lacked jurisdiction - the appealed decision's arising during the Olympic games was a "pure coincidence", she said, and the expedited procedure did not give sufficient time to safeguard her due process rights.[20] She also argued that, under the Russian rules, her status as a protected person meant she did not need to prove contamination before the provisional suspension could be lifted; it would suffice if she could show contamination was 'more likely' than any other cause.[21] "The source of inadvertent contamination had been established by (the committee) after careful analysis,"[22] and the committee had agreed that all three of the requirements for lifting a provisional suspension had been met.[23]

The Russian Olympic Committee broadly supported the other appellants' arguments. However, it also stated that the day before the CAS hearing, it emailed the three independent members of

[18] Ibid, paras 89-92.

[19] Ibid, para 102. CAS Panels routinely use 'standard' of proof when they mean 'burden,' to the chagrin of those of us from a common law tradition. The latter identifies the party upon whom the obligation of proof is imposed; the former connotes the evidentiary level that the party bearing the burden must reach.

[20] Ibid, paras 110, 111.

[21] Ibid, para 115.

[22] Ibid, para 117.

[23] Ibid, para 121. The requirements are a) likelihood of success on the merits, b) irreparable harm, c) applicant's interests outweighing those of the opposing party.

the WADA 2021 Code Drafting Team on whether the absence of a reference to 'protected persons' in Article 7.4 of the WADA Code had been deliberate or an oversight.

To recap, Article 7.4.1 stated:

> *The signatories…shall adopt rules providing that when an Adverse Analytical Finding…is received…a provisional suspension shall be imposed promptly upon or after the review and notification…A mandatory provisional suspension may be eliminated if i) the athlete demonstrates…that the violation is likely to have involved a contaminated product…*[24]

One of the independent members had promptly replied to the effect that "there had been no discussion…with respect to the specific issue to coordinate the provisions on ineligibility of protected persons with the provisions on provisional suspension."[25] The lacunae was unintended, and "it was obvious that there should be a coordination between the provisions governing sanctions (including the possibility to reduce sanctions), and the provisions on provisional suspensions."[26] The proper test to be applied by the Panel was "not whether the athlete proved how the substance entered her body, but whether her explanations are 'likely', bearing in mind that as a protected person she does not need to prove how the substance entered her body."[27] Given that, as a protected person, Valieva would not have to show how the prohibited substance entered her body, it was quite possible that "on the merits, the athlete could be sanctioned with a reprimand for no significant fault or negligence without having to prove how the prohibited substance entered her body…any provisional sanction being harsher than the sanction that could be imposed after a full hearing of the case would be *per se* disproportionate."[28]

5. The Panel's determination

First, the Panel determined that the objections to jurisdiction were misconceived. Rule 61(2) of the Olympic Charter states that "any dispute arising on the occasion of, or in

[24] World Anti-Doping Agency (2021), Article 7.4.1 of the Code.
[25] International Skating Union v. RUSADA (OG 22/08-010), para 139.
[26] Ibid, para 141.
[27] Ibid, para 145.
[28] Ibid, para 146.

connection with" the Olympic Games shall be submitted exclusively to the CAS. None of the parties had objected to its jurisdiction, but the athlete had contended that the CAS Appeals Body was the appropriate forum, not the CAS Ad Hoc Division.

However, the dispute was whether the provisional suspension should be reinstated. It was thus "uncontested that the dispute is directly connected with the Games, since the outcome…is relevant for the athlete's further participation,"[29] and it was "irrelevant whether the initial facts at the basis of the dispute may have arisen at a previous stage."[30] In response to her concerns that she had not been able to select an arbiter, as would normally be the case with CAS hearings, the CAS noted that if the case had been heard by the Appeals Body as she wished, it would have been heard by the President of the Appeals Division sitting alone, and she would have still had no say in the Panel's composition.[31] It was a good example of how Valieva's case had necessarily been put together in a hurry and there was an increased likelihood that obvious points would be missed in the furore; but with respect, the people who advised her should have known this would be the case.

The Panel dealt at length with the key issue arising – the consequences of Valieva's position as a protected person, with particular reference to preliminary suspensions. It was uncontested that the Russian ADR properly gave special protections to athletes in that position, and their status as such was discussed in at least ten provisions of the WADA Code. For example, protected persons were subject to reduced periods of unavailability in the event of whereabouts failures or sample evasion;[32] in cases of sample tampering by their support personnel, those individuals would automatically be banned for life;[33] and in violations which involved no significant fault or negligence, the protected person's penalty would normally be at the lower end of the range from a reprimand to a maximum of two years.[34] Note however that Article 10.6.1.3 of the WADA Code does not actually reduce that potential sanction range.

[29] Ibid, para 157.
[30] Ibid, para 162.
[31] Ibid, para 163.
[32] World Anti-Doping Agency (2021), Article 10.3.1 of the Code.
[33] World Anti-Doping Agency (2021), Article 10.3.3 of the Code.
[34] World Anti-Doping Agency (2021), Article 10.6.1 of the Code.

It was clear that the WADA Code's drafters had intended to give special treatment to protected persons, and notwithstanding some flaws in the English translation it was equally clear that the Russian rules intended to do the same. The difficulty was that "the RUSADA anti-doping rules and (the WADA Code) are silent with respect to provisional suspensions imposed on protected persons."[35] If the provisional suspension was imposed because of an unintended silence about provisional suspensions and protected persons, she would lose the opportunity to take part in the individual event. This seemed manifestly unfair because in the opinion of the Panel it was "not just possible but likely"[36] that she would receive a reprimand or a very short ban at the full hearing.

There was "a *lacuna*, or a *gap*," in both the Russian ADR and the WADA Code. Consistent with previous case law, it thus fell to the Panel to "ameliorate an overly harsh or inconsistent outcome…'applying the overarching principle of justice and proportionality.'"[37] That was "an exercise in interpretation, not in rewriting rules or making policies that are better made by sporting bodies,"[38] and the Panel decided that provisional suspensions in respect of protected persons should be evaluated as "optional" under both the WADA Code and the relevant domestic provisions. Valieva was entitled to benefit from that, and the option not to impose a provisional suspension should be exercised. She was therefore free to participate in the individual programme.[39]

In reaching that decision, the Panel was mindful of the risk of irreparable harm, the likelihood of the applicant succeeding, and where the balance of interest lie. It also considered the length of time it had taken the laboratory to submit its report, the timing of its eventual release in relation to the ongoing Olympics and the difficulties that caused Valieva in mounting her defence, in addition to the low level of sanction she would eventually face given that the arguments about her grandfather's medication were "more than nugatory"[40] (although let us remember again that no product has been 'contaminated').

[35] International Skating Union v. RUSADA (OG 22/08-010), para 193.
[36] Ibid, para 199.
[37] Ibid, para 200; Puerta v. International Tennis Federation (CAS 2006/A/1025), para 5.
[38] International Skating Union v. RUSADA (OG 22/08-010), para 201.
[39] Ibid, para 202.
[40] Ibid, para 215.

Previous CAS rulings had stated that provisional suspensions could cause 'irreparable harm' when they barred the athlete from participating in a major event[41] such as the Olympics and such a likelihood of irreparable harm had arisen here: if the provisional suspension remained, Valieva would not be able to compete in the individual event. Further, the delay in processing the sample was no fault of hers, and neither was she responsible for the staffing challenges caused to the laboratory by the pandemic.

There was no allegation of improper conduct against the laboratory or anyone else, but WADA's assertion that a processing period of 20 days was merely a 'recommendation' and its contention that the forty-day hiatus was "well within the range of what WADA usually sees" was not well-received by the Panel, and for good reason.

> *Athletes are held to a high standard in meeting their anti-doping obligations and, at the same time, the anti-doping authorities are subject to mere recommendations on time deadlines that are designed to protect athletes from late- or inconveniently arising claims. The flexibility of the recommendations and guidelines applicable to WADA-accredited labs contrasts with the stringency of the rules on provisional suspensions*.[42]

It concluded by saying that "athletes should not be subject to the risk of serious harm occasioned by anti-doping authorities' failure to function effectively at a high level of performance."[43]

6. Conclusion

The Valieva case continues to drag. At the time of writing, and pursuant to a CAS announcement in June 2023,[44] the substantive hearing is due to take place in September. Apparently, WADA still seeks a four-year ban, which flies in the face of the 'protected persons' provisions, and the forfeiture of the Russian team's gold medal. The medal ceremony has still not taken place and maybe never will, at least not in any meaningful sense.

[41] Jamarillo v. CD Once Caldas (CAS 2008/A/1453).
[42] International Skating Union v. RUSADA (OG 22/08-010), para 211.
[43] Ibid, para 220.
[44] Sankar (2023).

Valieva finished fourth in the individual final after an error-strewn performance which drew a childlike tantrum from her ghastly coach – a display of petulance and entitlement which only served to highlight the particular pressures placed on young athletes, especially female athletes in 'appearance sports' and those hailing from countries where winning is akin to a patriotic obligation. In the wake of the case the ISU increased the minimum age for international-event participation in figure skating and other events from fifteen years to seventeen.[45] That is the only good thing to come out of the whole sorry affair, other than the CAS Ad Hoc Panel's valiant attempt to replace chaos with order by ensuring the proper application of provisional suspensions rules to protected persons. The Panel was right to castigate the testing authorities for failings which placed Valieva in an impossible position, but likewise WADA can afford able lawyers. A failure to appreciate that the well-established protections given to child athletes needed to be incorporated into the rules on provisional suspensions was, with respect, as unprofessional as Valieva's advisors failing to appreciate the ramifications of the case being heard by the Appeals Body rather than the Ad Hoc Division.

The ISU's raising the age limit and the CAS clarifying the position in respect of protected persons are as welcome as the delays in sample management and the flaws in legislative drafting were lamentable, but those should not detract from the inescapable reality. Valieva's explanation may not be 'fanciful', but it is far less credible than the alternative explanation which is staring everyone in the face. How much she knew, or didn't know, is, rightly, immaterial given her protected person status; but an explanation of 'I must have licked my grandfather's fork' barely deserves the time of day.

So perhaps the last word should reside with IOC President Thomas Bach. In response to questions from a Russian journalist about whether the IOC was partly responsible for the 'media chaos' and 'hate speech' which was directed at Valieva, Bach simply replied "the ones who have administered this drug in her body, they are the ones who are guilty."[46] Bach gets too many things wrong for a man in his position, but not on this occasion. And let us also remember that Valieva's sample went to Sweden because the CAS had upheld WADA's ban

[45] Burke (2022).
[46] Dunbar (2022).

on the Moscow Laboratory, imposed because of its complicity in Russia's doping programme.[47] It could not be dealt with closer to home.

The Russians doth protest too much; but there is a child at the heart of this case, and that is what turns it from a farce into a tragedy.

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Promoting good governance in sports: A critical analysis of S. Nithya v. The Secretary to the Union of India case

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Abstract

The case of *S. Nithya v. The Secretary to the Union of India & Ors.*, decided by the High Court of Madras on 19 January 2022, marks a significant step towards promoting good governance in the realm of sports in India. The case highlights that sports governance issues have penetrated all levels of the system, and it advocates for transparency, merit-based athlete selection, and the involvement of experienced sports personnel in decision-making processes. The commentary highlights the judgment's significance in terms of compliance with the National Sports Development Code, 2011, the need for statutory regulation of sports federations in Tamil Nadu, and athlete participation on sports boards. It critically analyses the board composition of federations and recommends the restriction of executive board membership to sportspersons. Although a High Court judgment, the decision has the potential to pave the way for increased accountability, representation, and legal regulation towards a more transparent and inclusive sport governance framework in India.

Keywords

Sport governance, athlete representation, transparency and accountability, national sports federations

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1. Introduction

The case of *S. Nithya v. The Secretary to the Union of India & Ors.*,[3] (*S. Nithya*) decided by the High Court of Madras on 19 January 2022, marks a (small but) positive step towards promoting good governance in the realm of sports in India. The judgment, delivered by a single judge bench, addresses issues such as the limits of the existing legislative framework within sport governance in India, best practice with respect to board composition and concerns regarding arbitrary decision-making within sports organisations. It advocates for transparency, merit-based athlete selection, and the involvement of experienced sports personnel in decision-making processes. The case highlights that issues pertaining to sports governance have not only affected national level athletes, but such issues are reflected in every level in the federal sport governance system.

This case note discusses the importance of this High Court decision, with a particular focus on the importance of compliance with the National Sports Development Code of India, 2011 (Sports Code), the requirement of a statutory regulation governing the functioning of sport federations and the need for increased participation of athletes on sports boards. Furthermore, it provides a critical analysis of the judgment's implications, particularly the Court's directives to restrict executive board membership within sport federations exclusively to sportspersons.

2. Factual background and contentions

The petitioner is an accomplished athlete with a strong track record in Discus Throw competitions, having secured numerous medals both within the state of Tamil Nadu and in South India.[4] The petitioner contends that "despite her stellar performance, she was denied entry to participate in the Open National Championships for the years 2017 and 2018 by the Tamil Nadu Athletics Association (the sixth respondent)".[5] The petitioner seeks a writ of mandamus under Article 226 of the Constitution of India, urging the respondents to implement an online registration system for athletics events, disclose athlete funding details, and enforce the Sports Code in Tamil Nadu.[6] The petitioner highlights discrepancies in training camps'

[3] 2022 SCC Mad 318.

[4] S. Nithya v. The Secretary to the Union of India & Ors., 2022 SCC Mad 318, para 2.

[5] Ibid, para 3.

[6] Ibid, para 5.

records and misuse of funds, alleging a lack of strict implementation of the Sports Code in Tamil Nadu that would ensure transparency.[7] It was also argued that there is a lack of sports personnel in decision-making positions within sports organisations, leading to poor management and selection decisions.[8]

The respondents one to three (the Ministry of Youth Affairs and Sports, the Sports Authority of India and the Athletic Federation of India) argued that they had no role in athlete selection.[9] The responsibility of selection lies with state-level sports associations. The Youth Welfare and Sports Development Department, Tamil Nadu (the fourth respondent) against the petitioner's plea that there were no proper safety measures asserted that safety arrangements and accommodations are the responsibility of the Sports Development Authority of Tamil Nadu (the fifth respondent) for the District/State Level Chief Minister Trophy competition.[10] The fifth respondent contended that all the safety measure have been provided for the said competition and its role is limited to sanction grants to develop sports and forwarding complaints (if any received).[11] It further argued that the sixth respondent (the Tamil Nadu Athletic Association) had failed to implement the Sports Code.[12] The sixth respondent countered the petitioner's claims, stating that athlete selection is based on merit and eligibility criteria.[13] They defended their financial management, transparency, and argued that there are practical difficulties in the implementation of an online registration system.[14]

3. Legal framework: Analysing the implications of the judgment

3.1. Power to legislate

The judgment primarily addressed the issue of jurisdiction between the State and Union governments under the Constitution of India regarding matters related to 'sports'. Sports is

[7] Ibid, para 4.
[8] Ibid, para 5(v).
[9] Ibid, para 6.
[10] Ibid, para 7.
[11] Ibid, para 8.
[12] Ibid.
[13] Ibid, para 9.
[14] Ibid.

categorised under Entry 33 of the State List (List II) of the Seventh Schedule of the Constitution of India. This assigns the legislative competency to the states to govern all facets linked to sports at state level. Additionally, the Union Parliament can enact laws concerning sports at the national level by utilising its residual powers,[15] within the ambit of Entries 10 and 13 of the Union List (List I) of the Constitution of India.[16] The government by exercising its executive powers, notified the Sports Code in 2011 (which is an amalgamated version of various order/circulars issued from time to time by the government) to inter alia promote good sport governance practices in India.

Despite the absence of specific legislation pertaining to sports or its development, the Union government externally exercises control over sports entities, with a particular focus on National Sports Federations (NSFs).[17] The Sports Code made annual recognition of NSFs mandatory.[18] Some states (including Kerala, Rajasthan, Himachal Pradesh, and Haryana) have established Sports Councils at various levels, which have the authority to register and recognise sports organisations, including state units of NSFs. These laws pertain to the governance of sports organisations, associations and federations, and the establishment of Sports Councils at both the district and the state-level.

Within the context of this case, the Court emphasised the significance of improving the regulation of sports organisations. In a specific directive, the Court called upon the State government to contemplate the creation of a legal framework that enforces statutory regulation over the governance and operations of all sport organisations, clubs, and associations, including state units of NSFs, across all sports.[19]

3.2. Sports bodies and judicial review

[15] Article 248 r/w Entry 97 of List I of the Seventh Schedule of the Constitution of India vests the residuary power with the Union Parliament to make any law with respect to any matter not enumerated in the State List or the Concurrent List.

[16] Entry 10 of List I provides for "Foreign affairs; all matters which bring Union into relation with any foreign country"; Entry 13 of List I provides for "Participation in international conferences, associations and other bodies and implementing of decision made thereat".

[17] S. Nithya v. The Secretary to the Union of India & Ors., 2022 SCC Mad 318, para 18.

[18] Ibid, para 18.

[19] Ibid, para 44.

The issue here pertains not only to the right of participation in sporting events, but importantly whether sports organisations are amenable to judicial review by the High Court under Article 226 of the Constitution. In various instances, the Supreme Court has held the significance of subjecting sports bodies to judicial review under Article 226 of the Constitution.[20] This conclusion has been reached given the substantial influence and control that NSFs have on sports. The case relating to the Board of Control for Cricket in India (BCCI) serves as a prime example where the Supreme Court has held that the BCCI is amenable to judicial review under Article 226 of the Constitution.[21] Although BCCI did not qualify as a 'State' under Article 12 of the Constitution, it was deemed to be amenable to judicial review.[22] The rationale behind this determination lies in the fact that the BCCI performed functions of a public nature due to its extensive control over the sport of cricket.[23] This encompassed inter alia team selection, rule formulation and selection/control of the cricket players who represent India. The deep and pervasive control over the game and its affairs exercised by sport organisations renders them liable to judicial review as the nature of such functions is not private. Consequently, even private entities undertaking public functions – such as NSFs – fall under the purview of writ jurisdiction as stipulated by Article 226 of the Indian Constitution.

In the present case, the High Court explicitly broadened the scope of judicial review under Article 226 to encompass all sports organisations, including state branches of NSFs, sports associations, and sports clubs at both state and district levels. This shift empowers the public interest and reinforces the principle of accountability across all tiers of sports organisations.

3.3. Compliance with the National Sports Development Code, 2011

The regulation and governance of NSFs in India is governed by the Sports Code, 2011, and the National Sports Policy, 2001 notified by the Union government. The Code currently governs NSFs due to the absence of dedicated legislation, and its validity has been upheld by

[20] Zee Telefilms and Anr v. Union of India and Ors. (2005) 4 SCC 649; Board of Control for Cricket in India v. Cricket Association of Bihar & Ors. (2015) 3 SCC 251; Board of Control for Cricket in India & Anr. v. Netaji Cricket Club & Ors. (2005) 4 SCC 741.

[21] Board of Control for Cricket in India v. Cricket Association of Bihar & Ors. (2015) 3 SCC 251; Zee Telefilms and Anr v. Union of India and Ors. (2005) 4 SCC 649.

[22] Ibid.

[23] Ibid.

various Courts including the Supreme Court.[24] Compliance with the Sports Code is mandatory for the Indian Olympic Association (IOA) and all NSFs if "*they are desirous of regulating and controlling sports in India or using the name of 'India' while representing India within or outside India or availing themselves of various benefits and concessions*."[25] While these sports bodies might be incorporated in various states under the Societies Registration Act, 1860 or the Companies Act, 2013 their recognition as the peak governing body of a particular sport is contingent on their compliance with the guidelines set by the government. There have been several instances where NSFs have failed to comply with the Sports Code, 2011,[26] leading to suspension of their recognition by the government. While the Union government has aimed to incentivise compliance through positive measures, a 'carrot and stick' approach has been adopted, withdrawing these incentives in response to non-compliance with government directives.[27]

3.4. Involvement of sports persons in decision making process

The High Court highlighted that while the Sports Code has provided detailed guidelines for several aspects of board composition, it lacks clarity regarding federation's leadership, such as the President or Chairperson, should possess expertise and experience in their specific field of sport.[28] The Court noted that a Chairperson without adequate experience in that particular sport could result in unequal opportunities and the denial of appropriate chances of success to deserving athletes.[29] The Court referenced the *Kirandeep v. Chandigarh Rowing Association* case,[30] which held that it was necessary to involve sportspeople in the selection process. The reasoning of the single-bench in this case stemmed from the fact that, despite delegating substantial authority to national coaches in participant/athlete selection, the role of the President of the NSF remains pivotal in the appointment of the national coach, in accordance with the guidelines set forth in the Sports Code.[31] Therefore, it is important that the President

[24] Maharashtra Archery Association v. Rahul Mehra and Ors. (2019) 18 SCC 287; Indian Olympic Association v. Union of India, 2014 (212) DLT 389.

[25] S. Nithya v. The Secretary to the Union of India & Ors., 2022 SCC Mad 318, para 23.

[26] Hussain (2020); See also, Modi and Star (2022); Rahul Mehra v. Union of India, W.P. (C) No. 195/2010, para 21.

[27] S. Nithya v. The Secretary to the Union of India & Ors., 2022 SCC Mad 318, para 27.

[28] Ibid, para 30.

[29] Ibid, para 32.

[30] AIR 2004 (P&H) 278.

[31] S. Nithya v. The Secretary to the Union of India & Ors., 2022 SCC Mad 318, para 35.

of the NSF is a person of eminence having experience and knowledge in that particular sport. In this context, the Court issued the following directive:

> *The positions of President, Vice President, and Secretary within every sports Association/organisation, as well as key functionaries within such entities, including those of the state unit of the National Sports Federation, shall exclusively be held by individuals with a background in sports. It is imperative to ensure that a minimum of 75% of the members constituting any sports body/organisation/association/NSF consist of distinguished sports personalities, and these individuals shall be vested with voting rights.*[32]

Despite the above directive of the High Court, the executive officers within the Tamil Nadu Athletic Federation do not consist of sportspersons only.[33]

While the directive proposes a more prominent role for athletes and former athletes in decision-making positions, it is important to recognise that leadership positions solely comprised of sportspersons might not yield the most effective outcomes. The significance of diversity within sports boards is widely acknowledged by scholars.[34] Board skill stands as an key indicator for the effective governance of an organisation, including a sport federation; a diverse and rich skill-set are crucial for both board sustainability and performance.[35] The potency of decisions often arises from a board composed of individuals with varied skills, as opposed to a homogenous group.[36] Such skill diversity provides a wide range of expertise, fresh perspectives, and insights that enhance the board's ability to execute its duties efficiently, particularly in intricate and multifaceted tasks.[37]

Ingram and O'Boyle (2017)[38] caution against an overly sports-centric board composition. They point out that a heightened level of involvement from those with sporting backgrounds might not necessarily be advantageous, given their potential lack of the business acumen necessary

[32] Ibid, para 44(v).

[33] Tamil Nadu Athletic Association (2023). The official website reflects the President and Senior Vice President to be a Public Administrator (IPS).

[34] McLeod et al. (2021); Ingram and O'Boyle (2017); Bhinder and Bhargava (2021); McLeod and Star (2020).

[35] Booth et al. (2014).

[36] Woolley et al. (2015).

[37] McLeod et al. (2021).

[38] Ingram and O'Boyle (2017).

for board success. Furthermore, such directors might predominantly contribute to sport-specific discussions, potentially side-lining other critical matters. Moreover, a disproportionately high number of board member with sporting backgrounds could jeopardise the independence of the board.[39] Independence here refers to the absence of previous affiliations with the organisation or individuals within it. Sporting affiliations may compromise this independence. Introducing independent directors can enhance the diversity of experience and skill sets, facilitating the commercial growth and development of the sport.[40] Furthermore, the term 'eminent former athlete' requires careful definition, as those who retired from active competition decades ago might lack contemporary insights into the ever-evolving landscape of sports governance.

Therefore, it is necessary for sports organisations to strike the right balance between diverse occupational backgrounds, encompassing skills in finance, accountancy, and law, with experience in the sport. The importance of diversity is outlined in Principle 4 of Sports Governance Principles, 2020 provided by Sport Australia.[41] This principle calls for a diverse board in terms of skills and gender. While representation of athletes or individuals with sports background is crucial to ensure that sport's expertise remains embedded within the board given their critical influence in decision-making processes, there is a need for a more balanced approach.

The directive issued by the Court also proposes 75% representation of sportspersons on the board.[42] However, there should be caution against mandating such a high proportion which will adversely impact skill diversity on the board. The institutionalisation of athlete representation in the United States of America under §220522(a)(10) of the Ted Stevens Act Olympic and Amateur Sports Act, 1987, provides that the Board of Directors should contain at least 20% athlete representation, reflecting the importance of athlete representation, but also acknowledging the need for diversity.[43] Similarly, Clause 3.20 of the Sports Code, 2011 provide that "*the strength of such prominent sportspersons with voting rights should be a certain minimum percentage (say 25%) of the total members representing the federation and selection*

[39] McLeod (2019); Modi et al. (2021).
[40] Ibid.
[41] Sport Australia (2020).
[42] S. Nithya v. The Secretary to the Union of India & Ors., 2022 SCC Mad 318, para 35.
[43] Prakash et al. (2021).

of such sports persons should be in consultation with this Department".[44] The Delhi High Court in the *Rahul Mehra v. Union of India* (Rahul Mehra case),[45] noted the above clause and mandated inclusion of 25% prominent sportspersons of outstanding merit with voting rights in the executive committee of the IOA.[46] Considering the Indian context, where 41.1% of board members have a sporting background, compared to countries such as Australia (32.71%), China (24.75%), Russia (62.03%) and the USA (50%),[47] it is important to tread cautiously before mandating a significantly high proportion such as that the proposed 75% of board members being distinguished sports personalities. Such a high threshold would hinder board diversity.

The imperative to incorporate sports perspectives in leadership positions should not necessarily lead to a blanket requirement of sportspersons only. In light of the challenges posed by high levels of political involvement, a thoughtful consideration would be to ban sitting politicians from occupying board positions, aligning with the propositions outlined in the draft National Code for Good Governance in Sports, 2017 and Supreme Court's decision to ban politicians in the apex council of BCCI.[48] This approach carefully addresses the concern without imposing limitations on professionals from other fields, thus fostering a diverse and capable leadership. Scholars argue that the 'deep institutionalisation' of politicians in sports governance in India is an exceptional case and banning politicians is warranted due to the inherent drawbacks associated with political involvement.[49]

Addressing the apprehension surrounding the president's role in athlete selection, a viable solution entails strengthening and implement a comprehensive policy as outlined in the under Annexure XXI of the Sports Code that establishes a structured committee responsible for athlete selection. This committee includes individuals with sporting background for athlete selection.[50] This strategy can be adopted as it highlights the significance of a tailored procedure designed to ensure active athlete engagement in the selection process.

[44] S. Nithya v. The Secretary to the Union of India & Ors., 2022 SCC Mad 318, para 31.

[45] W.P. (C) No. 195/2010, para 72-73.

[46] See also, Modi and Star (2022).

[47] Star and McLeod (2021); McKeag et al. (2023).

[48] Board of Control for Cricket in India v. Cricket Association of Bihar & Ors. (2015) 3 SCC 251.

[49] McLeod and Star (2020).

[50] S. Nithya v. The Secretary to the Union of India & Ors., 2022 SCC Mad 318, para 44(vi) provides that the selection committee should comprise of sportspersons only.

Another important aspect of diversity within board composition concerns gender balance. A review of the office bearers of the Tamil Nadu Athletic Association (TNAA) as provided by the petitioner reveals that out of the 16 office bearers, only one is a women.[51] Empirical research indicates that in western countries there is a representation of over 30% women on NSFs board.[52] Regrettably, the figure is considerably lower in India (8.1%).[53] In the *Rahul Mehra case*, the Delhi High Court emphasised the importance of reaching equitable representation, even mandating that women should make up half of the sportsperson category with voting rights on the IOAs board, marking a significant step towards progress.[54] Therefore, despite the presence of only one female office bearer on the board, the High Court missed an opportunity to promote gender diversity, which is essential for achieving improved governance in sports.

4. Ensuring transparency and accountability and need for legislation

The Court granted the petitioner's plea for the immediate implementation of an online registration system encompassing district, state, and national athletic championships and competitions, that promotes transparency and accountability.[55] Additionally, the demand for online publication of funds allocated and expended on individual athletes for these events holds equal importance to transparency and accountability (especially since such funding from state associations predominantly flows from government). Simultaneously, every association engaged in diverse sports domains must be answerable to the corresponding NSFs. These federations, in turn, must adhere to the obligations outlined in the Sports Code to secure recognition from the Union government.[56] This commitment to accountability is exemplified by legislation such as the Rajasthan Sports (Registration, Recognition and Regulation of Associations) Act, 2005 and the Haryana Sports Council Act, 2016. These statutes highlight the creation of State, District, Block, and Town Sports Councils, enhancing the regulatory framework. Organisations operating at the state or district level can be registered with the State

[51] Ibid, para 13.
[52] Star and McLeod (2021); McLeod et al. (2021); McKeag et al. (2023).
[53] Ibid.
[54] Modi and Star (2022).
[55] S. Nithya v. The Secretary to the Union of India & Ors., 2022 SCC Mad 318, para 38.
[56] Ibid, para 39.

Sports Council, enabling them to access grants. The Court issued several directions to promote good governance, some of which are discussed above.[57]

5. Conclusion

The judgement in *S. Nithya* case heralds a small but important step towards redefining sports governance in India. This case implies that regulating only NSFs would be insufficient. Instead, it is crucial to hold all representative organisations accountable. This accountability should extend to their actions and the financial assistance they receive from the state. The call for transparency and accountability is paramount, reflected in the demand for online registration systems and funding disclosures. It acknowledges the value of sports expertise. However, the authors argue that diversity should not just be limited to board members with athletic backgrounds; a high performing board should include a variety of perspectives that contribute to robust decision-making. While athletic experience is important, excessive representation might lead to a monolithic approach that overlooks valuable insights from others. Striking a balance, where athletes contribute alongside individuals with varied skills and expertise, will likely result in a more effective and well-rounded sports governance structure. Therefore, mandating such high levels of athlete representation on boards is not necessarily the answer.

In conclusion, the focus of the *S. Nithya* case on issues of accountability, representation, and legal regulation is important. Many of the recommendations of the Court provide a useful roadmap of potential reform towards a more robust, transparent, and inclusive sport governance framework in India. However, policymakers and judges should also learn from best practice measures discussed in sport governance literature and implemented in many other jurisdictions across the world. While this decision is a positive step towards better governance, it remains to be seen if the good governance recommendations will be implemented in practice by sport governing bodies in Tamil Nadu, and in India more generally.

[57] Ibid, para 40-42.

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