



22nd Congress of the International Association of Sports Law (IASL)

17-18 November
2016

Sochi, Russia

The Russian Paralympic Athletes Ban: Legal Issues

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INTERNATIONAL
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RUSSIAN INTERNATIONAL
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Presentation Overview

- ***Introduction***
- ***An Essential Reconstruction of Facts***
- ***Legal Issues***
- ***Final considerations***



Introduction

- a) It is not in question the condemnation of doping, because it infringes the fundamental principle of sports competition***
- b) It is not in question the reliability of McLaren Report***
- c) There is no intention to question the judgment***
- d) Rather there is the intention to re-open a debate on sports justice, its principle and its administration in order to confer to it a condition more appropriate for contemporary age***





An Essential Reconstruction of Facts The McLaren Report

- a) On May 18th 2016, WADA engaged Richard H. McLaren, as an Independent Person, in order to investigate about the presumed Russian state manipulation of the doping control process.***
- b) The Report conclusion were:***
- The Moscow Laboratory operated, for the protection of doped Russian athletes, within a State-dictated failsafe system***
 - The Sochi Laboratory operated a unique sample swapping methodology to enable doped Russian athletes to compete at the Games***
 - The Ministry of Sport directed, controlled and oversaw the manipulation of athlete's analytical results or sample swapping***





An Essential Reconstruction of Facts The Arbitration Award

- a) On August 23th, 2016, the three member arbitral tribunal delivered an Arbitration Award, by which the appeal filed by RPC was dismissed***
- b) The Arbitral Award arguments were:***
- a violation of the RPC membership obligations has been detected***
 - although there is no evidence of a RPC direct involvement, it failed in complying with obligations deriving from IPC membership***
 - the IPC decision was not disproportionate***
 - Russian para-athletes were not parties in the dispute: their ban is a direct consequence of RPC membership suspension***



Legal issues

- a) The story as a whole and, more specifically, the arbitral award raise many legal issues that affect the sports legal system: issues that require in-depth consideration, if we do not want to lapse into a legal system more characterized by injustice than by justice.*
- b) They are legal issues having a general nature, as well as specifically related to the case into discussion.*





Legal issues: the necessary brevity of trials time

- a) It's important to stress the extreme brevity of the trial vicissitudes as whole, despite the extreme complexity of the issue, also considering the sheer number of people and institutions involved: from the delivering of McLaren Report (18 July 2016) to the delivering of the arbitral judgment (23 August 2016), passed very few days***
- b) This is a critical issue arising from the scope itself of the sports legal system. If the sports legal system is established in order to regulate competitions, their regular course needs that every legal dispute is decided within a very short amount of time.***
- c) This is a necessity of brevity of judgment times, which inevitably affects their accuracy and justness, especially as regard those disputes where several people and /or teams are involved***
- d) I wonder until we can reconcile the need for an administration of justice as quickly as possible with an increasing level of complexity of the sports phenomenon***





Legal issues: the conventional nature and the derived ethical nature

- a) The conventional nature of sports legal system allows that it acquires that ethical character which distinguishes it in an essential manner***
- b) An ethical feature emerging as soon as we observe that it is established in order to grant the fairness in sports competitions***
- c) Complying with this feature implies acceptance of all the rules put in place by the same, even if a significant limitation of personal freedom may derive from this acceptance, even if this implies the exclusion of clean athletes from very important world games***





Legal issues: the conventional nature and the derived lack of sovereignty

- a) The conventional nature of sports legal system highlights another critical legal issues, consisting in its lack of sovereignty of sports legal system, whose regulations take effect only upon those that are recognized and recognize themselves as part of the sports legal system***
- b) Quid ius for those not belonging to sports legal system? Despite their often crucial role in facts under judgment, they end up enjoying a sort of impunity, which appears at least scandalous***
- c) Considering the sum of these consequences, I wonder how long we may tolerate this state of affairs. May we truly consider this legal system as a justice system?***





Legal issues: the strict liability criterion

- a) *The Arbitration Award highlights the spread of the regime of strict liability in the sports legal system***
- b) *The spread of such a liability criterion within the sports legal system grounds on its distinctive ethical feature: being assumed as basic and fundamental principal the fairness of sports comparison, every threat to it has to be sanctioned, regardless of the subjective element of fault or culpable intent***
- c) *This a criterion that denies the principle of personal responsibility: a principle accepted within state legal orders cum grano salis, and, when applied, always scholars discussed critically about it***





Legal issues: The strict liability criterion

- a) **It appears interesting to note how in sports legal system this criterion is ordinarily applied in cases related essentially to situations and facts of individual**
- b) **Moreover, in the WADA Code there is no trace of provisions ruling liability of sports Federations and/ or bodies: an exclusion of charges that may be interpreted as a recognition of the need to use carefully this criterion, despite its spread in Sports Law**
- c) **Remembering the RPC suspension because its not fulfilling membership obligations, I wonder if we can consent such an extension of strict liability.**
- d) **Not an individual strict liability, but a strict liability of a sports Federation, ascribed because of the doping rules' infringement made by an entity (RUSADA) not directly under control of the Federation: a kind of squared strict liability, that ended up to affect individuals. If RPC is responsible for RUSADA negligence and has been punished for its lack of watch, what kind of liability can be ascribed to WADA, because of its lack of control?**





Final considerations

- ***This dispute gives us the opportunity to open a discussion about the state of affairs for all that regard sports justice, considering also that the growing and the spread of sports practice in the world maybe call for a more complex and structured than previously existing system of justice.***
- ***In fact, the analysis of the judgment revealed some critical issues, at a general level, that there cannot be challenged, if we care about the future of a sports justice that can truly be said that.***
- ***Focusing on the latter, the widespread of use of strict liability criterion may be admitted if circumscribed to individuals, , but, when it is extended to punish Federations and/or sports associations some perplexities arise.***
- ***Remebering how the Panel argued that “the measure taken was also a powerful message to restore public confidence”, do we really think that this is a message conveying a truly sense of justice?***
- ***Or, rather, it is transmitted the conception of a justice as a club brandished to strike the unlucky culprit?***



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Final considerations

- *In my opinion, it is time to reopen a reflection on sports justice, its principle and its administration in order to confer to it a condition more appropriate for contemporary age.*
- *Who want to pick up the gauntlet of this interesting challenge?*



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Thank you for your attention!

Спасибо за ваше внимание!

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