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Sports Law: *Some Introductory Considerations*

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ABSTRACT

With the rise of importance of sport as a social phenomenon in recent decades, more public attention has been paid to the issue of the legal nature of the rules governing social relations in sports. The issue raised above are only a part of a much broader topic that involves questions of relations of a classical Westphalian state and changes in the international community as well as issues of the essence and manifestations of law. The traditional theoretical approach, based on the principles of Westphalian sovereign state and state centralism, does not allow the possibility of existence of sports law because the law does not exist outside of the state. The modern theories of legal pluralism represent a different approach and see one of the most powerful examples of non-state law in sports law. If the concept of the existence of sports law is accepted, it is important to determine its contents. From temporal and quantitative distance, sports organizations are autonomous and main creators of the rules of conduct in sport. However, since the second half of the 20th century the state has had bigger and more important role in the regulation of sport.

KEY WORDS: *Sports Law, Lex Sportiva, Legal Pluralism, State Regulation of Sport.*

INTRODUCTION

With the rise of importance of sport as a social phenomenon in recent decades, more public attention has been paid to the issue of the legal nature of the rules governing social relations in sports. Are those just non-binding rules of conduct prescribed by the civic associations within the general right to freedom of association? Do such rules have a binding force in the national legal system only if the state determines so? Are they perhaps a part of a distinct legal order? The questions raised above are only a part of a much broader issue that involves questions of relations of a classical Westphalian state and changes in the international community as well as issues of the essence and manifestations of law. First of all it

has to be seen who are the creators of the rules of conduct that regulate the social relations in sports.

Sport organizations are the main creators of the rules of conduct that regulate the social relations. The conditions for the rise of modern sport were created in the 19th century along with the economic and cultural changes caused by the industrial revolution and urbanization and the development of modern capitalist countries of the Western Europe and the United States of America (1). Modern sport is an organized competitive physical play (2). Basic preconditions for its existence are standardization of the rules of conduct and organizing sports competitions. The

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development of international sport has created the need for a clear and unique rules regulating behaviour in sport and international competitions. The states in that period of time, as the most organized part of the community that provided the rules of conduct in society, did not consider it necessary to approach the regulation of social relations in sports. The role of the regulator of social relations in sport was taken over by another form of organized society – non-governmental organizations. The solution of this problem was found in the establishment of national and international sports organizations that were autonomous and independent from the state, and they assumed the role of the creator of the rules of conduct. The main feature of the international organization of sport is a specific pyramid structure. Athletes and their clubs are at the bottom of the pyramid, followed by the national federations and the international federation is on top. Today, most sports have their umbrella International Federation, which is solely responsible for the regulation of a given sport. In recent decades, these organizations have received the special name – a global sports organization (GSO). Forster and Pope were the first to introduce this term (3). It is about a narrow subset of the international sports organizations. This is a more accurate term because the term "global" is used only for international sports organizations that solely and independently regulate certain sport or sports group, as well as international competition on a global level (the Olympics). For example, FIFA is GSO in football, not the Union of European Football Associations (UEFA), which has a regionally and hierarchically lower position. The consequence of this approach is a fact that in sports such as boxing, which has several mutually competing international organizations, none has the status of a GSO.

Today, after more than a century, GSOs are still the main factor in regulation of sport, but some changes have occurred. The sphere of social relations in the field of sport is not a separate entity as it used to be in regard to the social relations that the state is trying to regulate. The vast commercialization of sports, especially in the second half of the 20th century, the issue of preventing violence, discrimination and doping in sport, have led to the emergence of

overlapping of the social relationship of both spheres. The rise of the state's interest to regulate social relations in sports has been materialized in the form of the adoption of specific legislation on sport, the inclusion of sport in constitutional provisions, as well as the adoption of appropriate legal norms of international law through international conventions.

The totality of the rules of conduct that regulate social relations in sports in relation to their authors could be divided into private and public segment. The public segment is made of the legal norms of the national legislation and legal norms of the public international law. As far as the public segment is concerned, there are no doubts about its legal nature – classical norms of national and international public law are at issue here. In practice, the real problem is the lack of attention towards the public segment and placing the main focus on the private segment.

The situation is quite different when the private segment is at issue. This is about the rules of conduct prescribed by the GSO within the autonomy of sport, which have universal character i.e., are applied everywhere where the given sport takes place. These are primarily the rules that are directly related to a given sport and serve to its unification – the rules of the game and the rules of fair play, as well as the rules of conduct that are not directly related to a given sport but are of organizationally functional and administrative character, and finally the decisions of sports arbitration bodies, primarily the Court of Arbitration for Sport with its unofficial system of precedent.

In order to determine the term of the totality of the legal rules that govern social relations in sport is necessary to analyse certain academic approaches to the subject. The very use of a given term implies the appropriate approaches and definitions. The traditional approach does not accept the possibility of legal creation such as sports law. In contrast to the traditional approach, the modern theory of legal pluralism argue that codes of conduct issued by the international sports organizations have the character of legal norms as part of a separate legal system that is independent of the state. Nowadays, the use of different terms and approaches in the theory is noticeable, but their

common feature is the partial coverage of the given phenomenon.

TERMS AND LEGAL NATURE OF THE RULES OF CONDUCT IN SPORT

Traditional Approach – Law and Sport, Law in Sport. Proponents of the term “law” and “sport” and “law in sport” clearly indicate that the rules of the sport, which are introduced by the GSO, do not have the status of legal norms, but there are only legal norms of national legislation and eventually legal norms of public international law that are applied in sport. This approach denies the transnational status of norms prescribed by the GSO and they are reduced to the generally recognized right of an association to self-regulate their internal affairs, under the condition that they are not in conflict with legal norms. In other words, sport is a form of leisure activity that is fully regulated by the existing legal norms that belong to various existing legal areas e.g., contractual, administrative, labour, criminal or tort law. Some authors simply point out that sports law is nothing more or less than law as applied to the sports industry, or directly points out that there is no such thing as sports law.

Traditional approach involves only the horizontal application of the existing state law to other social relations, without vertical observation that allows the existence of more than one legal system. The basis of this approach is the principle of the Westphalian sovereignty and legal positivism where there is no possibility of existence of law outside of the state and the law which is not based on a monopoly of physical force (4-6). There are similar dilemmas within the other forms of non-state law and their study has gained importance with the sudden popularity of the theory of legal pluralism in the late 20th century. The oldest source of disagreement and disputes is the *Lex mercatoria*, and recently it has been the law of Internet or in the spirit of the popular Latin neologisms – *Lex informatica*. The well-known case of the “law of the horse” is the best example of the amount of resistance to the existence of various forms of non-state law. The allusion of law of the horse is connected to Easterbrook, who at the Conference on the Internet Law in 1996 expressed the view that it seemed that there existed the law of the

horse rather than the law of the Internet. In his work, “Cyberspace and the Law of the Horse,” he explains the use of the term law of the horse as follows:

Lots of cases deal with sales of horses; others deal with people kicked by horses; still more deal with the licensing and racing of horses, or with the care veterinarians give to horses, or with prizes at horse shows. Any effort to collect these strands into a course on “The Law of the Horse” is doomed to be shallow and to miss unifying principles. (7)

Modern Approach. For legal theorists who consider that the rules of conduct in sport are legal norms and that they form an independent legal system, the question of its scope and term is at stake. There is no agreement on this question in the legal theory. Dilemmas on the naming of the corpus of legal rules that govern social relations in sport reflect similar disputes as in determining the legal nature of sport rules. The aforementioned dilemma is based on the wrong approach. The error is in neglecting the dualism of the sports law. The study of the rules of conduct in sport contains “irresistible” specific quality that could one-sidedly and in a biased way focus scientific research of a given phenomenon. The crisis of the Westphalian system of sovereign states and popularity of the theory of legal pluralism that accept possibility of existence of non-state law give special importance to the autonomous regulation of sport by the sport organizations. In addition, the state regulation of sport is a product of the late 20th century. The consequence of the above is the predominant position of the private segment of sports law in the scientific literature.

Private segment of sports law, i.e. legal norms adopted and sanctioned by GSO, are a form of a non-state law and as such should be classified as a separate legal system in relation to the state law. The dilemma could only exist in relation to the public segment where there is the same creator of legal norms – the state. The question could arise whether the given legal norms possess enough specifics to be extracted into a separate legal group.

The following terms could be found for the rules of conduct in sport, as a special area of law: *lex sportiva*, *lex ludica*, *public international sports law*, *European sports law*, *transnational sports law* and *global sports law*. What all the mentioned terms have in common is a different meaning with respect to both essence and scope. Their analysis could assist a lot in determining the essence and scope of sports law.

Lex sportiva. "Oldest" and most commonly used term for denoting rules of conduct in sport is *lex sportiva*. The term is a Latin neologism (8) or a "new Latin word" that originated during the Renaissance or later i.e., the word *sportiva* does not exist and has no meaning in the Latin language. Word *sport* has its origins in the archaic English word "disport," which comes from the French word "desport," which means recreation, pastime, enjoyment. Its root was formed from the Latin prefix "de(s)," meaning "down" or "away from", and the Latin verb "port" meaning "to carry". Therefore, the basic meaning of the English and French words would be to draw the attention down from the ordinary, the mundane, the serious (9-11).

Dilemmas about the term *lex sportiva* had already started with the question of who was its creator i.e., when did it first appear? Authors who engage in this question most frequently cite McLaren, who claimed that the creator of the term is Matthieu Reeb, Secretary General of Court of Arbitration for Sport (CAS) who employed it in his Collection of CAS Awards for 1986-1998.(12) The fact is that Reeb used the mentioned term in the official publication of the Olympic Movement – Olympic Review in the number XXVI-19 from February to March 1998 (13). Siekmann (14), also rises doubts on the original use of the term by the aforementioned author, stating that according to his research, Michael Stathopoulos president of the International Association of Sports Law (IASL) used the term *lex sportiva*: in 'Proceedings of the IASL Fifth Congress held from 10 to 12 July 1997. In his opening speech in the Greek language, Stathopoulos stressed the analogy of *lex mercatoria* and *lex sportiva* and the importance of sports law (15).

Today, it remains unclear in the legal theory who was the first to use the term *lex sportiva*? Our research on this matter indicated that the

oldest mention of the term was officially found in the Olympic Review number 313 in 1993. This is a publication of the final speech of Judge Mohammed Bedjaoui at the Conference "Law and sport" held in 1993 in Lausanne, organized by the Court of Arbitration for Sport. In his speech Bedjaoui, summing up the contributions of the participants of the Conference, pointed out:

"let us hope that this *Lex Sportiva* proposed by Ms Hahn does not suffer all the avatars of the *Lex Mercatoria* that she mentioned, and of which the late Mr Berthold Goldman was the impenitent eulogist."(16)

The use of the term that represents the Latin neologism derives from the desired analogy of many authors and supporters of the term with another form of non-state law – *lex mercatoria*. In the past and even today, *lex mercatoria* has had mythic proportions by some authors who accepted its existence. It is a law that emerged independent of the state, based on the need for efficient trade, with its own bodies to resolve disputes and most importantly, with a high degree of efficiency and acceptance. The studies of *lex mercatoria* and its existence as an autonomous legal order culminated through the theory of legal pluralism, which argues that state law is not the only law, and that multiple legal systems could exist on the same territory (17-20). As examples of such legal orders, along with *lex mercatoria*, the following were mentioned as separate parts of the *lex mercatoria* family: *lex petrolea*, *lex maritime* and *lex constructionis*, along with the most recent examples of the independent legal systems *lex informatica* and *lex sportiva* (21-23). Along with the fact that the Latin neologisms were used, the common for all these phenomena is that they represent forms of non-state and supranational regulation of certain social relations.

It is no coincidence that from the very beginning, the term *lex sportiva* was associated with the decisions of the Court of Arbitration for Sport. The very existence of Sports Arbitration Court and its role in the sport as a body that makes the final decision on dispute resolution is a specific quality that is not common in the

world of international non-governmental organizations. Its independence and separation from other sports organizations has made its decisions and informal system of precedent be the most visible part of the rules of behaviour which governing social relations in sports. With the further development of sports law over time, the term *lex sportiva* has gained wider meaning and became for many authors a collective name for various forms of legal rules of behaviour in sport, more precisely becoming extremely simplified motto (4), with the task to present an independent branch of law in the simplest way. The problem arises with the fact that the term is used frequently but without the accompanying definition, and that nowadays every author has their own idea of what *lex sportiva* covers. The term *lex sportiva* has suffered the fate of other "generally known" terms.

The very use of aforementioned term has several advantages. The first is the historical merit, if the term "historical" is used with respect to the time of its use, for the rapid development of sports law. If the term *lex sportiva* was just a thought in the 1990s, nowadays the term is used in the decisions of the CAS, in articles about sports law and in the international law, in textbooks, lectures, speeches and presentations given by sports officials and at academic conferences that gather experts in a given field (24). A term that was made of the Latin word "law" and headword that related to sport provoked many positive and negative reactions within the legal and other qualified population. It could be said that the term was more accepted by non-legal professions, especially among historians and sociologists. However, the greatest advantage of such a popular and simplified term, under the condition that the compliance about its essence and content is previously reached, is intelligibility and simplicity. Needlessness of translation is an important and desirable feature of each term.

Lex ludica. The term *lex ludica* is another use of the Latin neologisms. Some authors (25, 26) use it to designate a specific segment of sports law. The specific quality of a given segment is contained in the very essence of sport as a social phenomenon and in the fact that sport is an organized competitive play. These are the

game rules and principles of fair play. According to (24), game rules present *hard core* of sports law i.e., the essence of sports law. All other rules are in function of the undisturbed conduct of the competition and activities of sports organizations. As with the term *lex sportiva*, the word *ludica* has no meaning in Latin language. The closest word is *ludus* meaning game or fun. The author of the term is the Italian professor Massimo Coccia who used the term as chairman of the CAS Panel in its decision No 98/200, regarding the case of AEK Athens and SK Slavia Prague v. UEFA from 1999 (24). The term was not widely accepted for two main reasons. The first is the risk of potential improper understanding of the term *ludus* and the other one is more a reflection of the ignorance of the matter, because there are a small number of authors who have engaged in legal demarcation of the various areas of sports law.

Public International Sports Law. The term *public international sports law* (27) is relatively rarely used term in papers covering the sports law. Its proper use includes legal norms of the international public law that regulate certain relationships in the sport and are an integral part of the public segment of sports law. As in the case of national legislations, the norms of international public law, which are not specific only for sport but also for other social relationships, should be separated. Thus, there is no doubt that the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Decisions (1958) have an important role in the system of resolving the disputes in sport, but its norms do not constitute the international sports law, as is the case with norms of the International Convention Against Doping in Sport (2005), the International Convention Against Apartheid in Sports (1985), or the Treaty on the Protection of the Olympic Symbols, Nairobi (1981).

International Sports Law. The term *international sports law* is a term, when properly applied, which covers only one segment of the sports law – international public sports law. Its imprecise use is evident both in practice and in literature, even with the eminent writers of sports rights (28) without the addition of the adjective "public" for marking sports law in general. Such use of the term has clear and reasonable goal, to

emphasize the separation from the state, but such an approach could lead to confusion. The term “international law” is generally used for legal norms created by the will of the state through international treaties. In the above-mentioned cases, the correct use would be the use the term “supranational,” “transnational” or even “global.” Equating the sports law in its entirety with a much smaller part – *international sports law*, brings the risk of negating the very essence of sports rights as creations immune to the actions of state and its bodies. In addition, the national courts are bound to apply the norms of international law, but in the case of sports law norms, courts traditionally recognize the autonomy of sport.

The reason for the aforementioned confusion is in the essence of sport as a social phenomenon. Because of its competitive nature, sport is by its definition of an international character i.e., cannot be stopped at the state level. However, all the organizational forms of sport are based on national basis. The national sports associations are founded on the principle of one country – one national association. The competitions are held between representatives of the countries. That was the only organizational structure of sport that was possible at the time of its creation in the late 19th and early 20th century, in an international community in which the Westphalian system was practically undisputed. Even today, rare are the competitions where the representatives of countries do not compete. One of the exceptions, and one that proves the rule, are the competitions for the unrecognized states that are conducted by special conditions. The Formula One competition presents a much more important exception and it could indicate the future direction of development of sports at different level. The teams participating in the competition are not the national teams, but represent well-known multinational companies.

European Sports Law. In recent years, especially after the adoption of the Lisbon Treaty, the term *European sports law* started to be used (24, 29-31). In recent decades, the European Union, with its organizational and functional specific qualities, is the international entity that has the greatest ability to influence the autonomy of sport. The decisions of the European Court of Justice, the newly adopted

legal norms of the Lisbon Treaty as well as certain international conventions adopted under the auspices of its authorities, are an integral part of the public international sports law of regional character.

The above-mentioned term should be distinguished from the term *European sports model*. This is a term that also has a basis in the European sports law, but which has to be considered more widely. It is a principle of organization, functioning and development of the sport, which is significantly different from the *North American model*. Basic feature of the North American model of sport i.e., that of the USA, is that sport is an economic branch as well as others, with the main objective of making a profit. Private ownership dominates in the structure of sports organizations. Competitions are organized in a system of closed circuits, without the elimination of clubs, and the administrative boards of the league owner decide on the possible expansion of the number of clubs. The best example of *North American model* is the National Basketball Association (NBA), which is far more influential in basketball in the territory of the U.S. then the International Basketball Federation (FIBA).

Global or Transnational Sports Law. The term *global* (32, 33) or *transnational sports law* (34) appeared in recent decades, and these are the terms with similar meaning. The main task of the use of the above terms is to highlight the essence of a particular segment of rules of conduct in the sport. This is a about a private segment of sports law, which covers majority of the rules of conduct and which by its nature present the base of sports law. It also indicates the event that is an anomaly in the current Westphalian system of sovereign states and international organizations.

In short, it is an autonomous legal order of regulating certain social relations in sport that is based on self-regulation by GSO. In its essence it is a contractual order and, as such, independent of the state and national legislation within its jurisdiction. Within its autonomy, the GSO introduces the rules of conduct, applies them and resolves the disputes that may arise. Reviewing the decisions of the GSO outside of the internal system is extremely restrictive option.

The term *global* could be seen in its basic linguistic meaning – planetary or universally. It was used in that sense of the term by the *global sport organizations* i.e., denoting the organizations that are unique and supreme in a given sport or sporting event. In sports that have more independent supreme sports organizations and mutually share a given sport, there is no GSO. In the same sense the term is viewed in relation to sports law. *Global sports law* is the only law which regulates universally given social relations in sport and it is *transnational* – regulates social relations in sport regardless of state borders.

As with other terms, it is necessary to determine its usage i.e., contents. Only the private segment of sports law is of *global* and *transnational* character. The danger i.e., the possibility of confusion arises from the generalization of the term *global* or *transnational* at all areas of sports law, which might lead to the neglecting of the public segment of sports law – the legal norms of national legislation and public international law that are the product of states and international governmental organizations.

CONCLUSION

The author suggests the use of the term *sports law* to denote the totality of rules of conduct that regulate given social relations in sports. We consider that the mentioned term *sports law*, with proper use would create the least confusion in legal theory. An alternative term could be *lex sportiva*, which in a "non-existing" translation should mean the same thing – sports law. This term, again with the proper use and meaning, could have a number of advantages, primarily because of its popularity, suggestibility and no need to be translated.

There are different terminology and content approaches among the proponents of the existence of sports law. The reasons for the lack of theoretical foundation lie primarily in the fact that the sports law is a young and not yet fully acknowledged legal discipline. Regulation of sport competitions at national and international level has become more complex in the second half of the 20th century. Along with the traditional regulator – GSO, there is a growing role of states and international organizations i.e.

strengthening of the private segment in regulating the sport is accompanied by the strengthening of the public segment of regulating the sport. Creation of the hybrid GSO is a revolutionary change in the world of international organizations. All the changes listed above are not accompanied by a proper interest in the study of rules of conduct that regulate social relations in sport at all levels. The first studies of sport as a "legal order" were recorded in the 1920s of the 20th century (35), but practically the appearance of the first works dedicated to sports law in the U.S. occurred in '70s and '80s and in Europe in the early '90s of the 20th century (36). Data from the Association of American law schools – Directory of Law Teachers indicates how much the sports law was still a neglected discipline, in the years 2009-2010 "there are only 120 professors who teach sports law, while there are approximately 340 antitrust law, 1800 constitutional law, and 360 labour law professors" (36).

Sport law in its origin and development has been constantly challenged with theoretical ambiguities and misunderstandings. The legal basis on which its private segments are today raise a number of controversies. First, almost no attention is paid in the legal theory to the GSOs as the major regulators of social relations in sports. Majority of the authors are satisfied with the listing and determination as types of INGOs, without further consideration. Second, setting the rules of conduct prescribed by the GSO as a form of non-state law for many classical legal theorists is "heresy" i.e., something that is impossible because there is no law beyond the state. The essential misunderstanding also accompanies the sport law which comes down to the fact that sport is primarily an entertainment and therefore incompatible with the law, and there are exceptional situations when the law is applied and that is of course the law of the state because there is no other law. In contrast to the aforementioned extremely lack of recognition, one could look at the opposite side. For example, the proceedings conducted before the Court of Arbitration for Sport required extensive knowledge of sports law matters and formal procedures prescribed by the Court itself. The above-mentioned disputes usually have real financial consequences so the special attention is

paid to determining the professional lawyers for sports law. Today, CAS has an extensive arbitration practice, with the informal system of precedent, which counts 2204 decision and 26 advisory opinions by 2013 (37).

Core strength and vitality of sports law are located in general interest of its existence. The private segment of sports law does not have a monopoly of physical force as a state law but it is one of its advantages. The degree of acceptance of its rules is far ahead of the state law. The acceptance does not relate only to individuals but also to the states. Sports rules have no parallel in the international community by the degree of voluntary carrying out. Membership in certain GSO is more numerous than membership in the UN. The Olympic Charter and especially the fight against doping have practically united the humanity. It is no coincidence that the new form of international organization – hybrid international organizations have one of their first appearances on the international stage within the sports law. In this regard, the creation of the World Anti-Doping Agency (WADA), and very efficient performance for a relatively short period of time, suggests possible directions for the development of international relations. Today it is possible to defend the view that the Westphalian state and its international governmental organizations, but

to some extent and international NGOs, have approached their peak, and that the future of international cooperation is in hybrid international organizations. This is why it would be necessary to pay more attention to the emergence and development of non-state law and its various forms, where the sports law takes a special place.

APPLICABLE REMARKS

- GSOs are autonomous and main creators of the rules of conduct in sport
- Since the second half of the 20th century the state has had more important role
- Rules of conduct in sports could be divided into private and public segment
- Benefits of term sports law vs. “law and sport”, “law in sport”, etc.
- Risks of using the term *lex sportiva*.

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