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Mottola, M. & Wolfe, L. (2000). 'The pregnant athlete' in Drinkwater, B. (ed.). *Women in sport*, pp 194-207, Oxford: Blackwell Science.
Mutrie, N. & Choi, P. (2000). 'Is 'fit' a feminist issue? Dilemmas for exercise psychology'. *Feminism and Psychology*, 10, 544-551.
Naffine, N. (ed.). (2002). *Gender and justice*, Aldershot: Ashgate/Dartsmouth.
Opie, H. (2001). 'Medico-Legal issues in sport: The view from the grandstand'. *Sydney Law Review*, 23, 375-404.
O'Toole, M. (2000). 'Physiological aspects of training' in Drinkwater, B. (ed.). *Women in sport*, pp 77-92, Oxford: Blackwell Science.
Sex Discrimination Commissioner. (1993). *Sex Discrimination Act 1984*: Future directions and strategies, Canberra: Australian Government Publishing Service.
Shaffer, D. (2000). *Personality and Social Development* (4TH ed.), Belmont: Wadsworth/Thompson Learning.
Swedan, N. (ed.). (2001). *Women's sport and rehabilitation*, Gaithersburg: Aspen Publishers.
Theberge, N. & Birrell, S. (1994). 'The sociological study of women in sport' in Costa, M. & Guthrie, S. (eds.). *Women and sport: Interdisciplinary perspectives*, pp 323-330, Illinois: Human Kinetics.
Townson, N. (1997). *The British at Play - a social history of British sport from 1600* to the present, Bucharest: Cavallioti Publishers.
Vertinsky, P. (1990). *The Eternally Wounded Woman*, Manchester: Manchester University Press.
Wearing, B. (1998). *Leisure and feminist theory*, London: Sage Publications.
Wynne-Thomas, P. (1997). *The history of cricket: From the weald to the world*, Norwich: Stationery Office.

54 Section 111 Anti-Discrimination Act 1991 (Qld); s.56 Anti-Discrimination Act 1992 (NT).
55 Duthie, M. (2004). 'Aussie Rules - defining equal opportunity in sport'. World Sport Law Report, 2(2), 13-16.
56 (1999) EOC 92-981.
57 (1999) 15 VAR 183.
58 [2004] VCAT 158, para. 13.
59 Wearing, B. (1998). Leisure and feminist theory, London: Sage Publications.
60 Australian Law Reform Commission. (1994). As above, see n53.
61 Sex Discrimination Commissioner. (1993). Sex Discrimination Act *1984: Future directions and strategies*, Canberra: Australian Government Publishing Service.

Sport in the European Constitution

by **Alexandre Mestre***

The signature on 29 October 2004 in Rome of the Treaty establishing a Constitution for Europe was an important step, not only for the European Union (EU), but also for European sport. For the first time in European Union history, sport was integrated in the primary law of the EU. Finally, we have a specific legal basis for sport.

Article I-17 in conjunction with Article III-282 of the European Constitution makes sport part of the 'coordinating, complementary and supporting action' competences of the EU, which therefore allows for EU support for sport.

Euro-sceptics, who worry about loss of national sovereignty, may find a certain degree of satisfaction in the allocation of this type of competence, as competences in the field of coordinating, complementary and supporting action imply that such action on the part of the EU necessarily follows prior national action. It also means that the EU must accept such national action and the choice of the type of action which the Member States may make.

In fact, those who are sceptical by nature may argue that the legal basis for EU action in the policy area of sport leaves quite a bit of room: room for improvement!

Sport is not recognised in an autonomous, specific or single Article within the Constitution; it has been included in the category of education, training, and youth.

Even though the Commission has stressed that there are five functions of sport which give it its specific nature, namely the social function, the educational function, the recreational function, the cultural function and the public health function, the Constitution fails to do them all justice. It only timidly refers to the first two: the social and the educational function.

Critics might add that Article III- 282 does not contain a horizontal integration clause, which would have been a significant step forward in safeguarding the *specificity of sport*. Such a clause could have been similar to the one provided in Article III-120 concerning consumer protection according to which "*Consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities*".

There is no doubt that it would be enormously helpful if the special characteristics of sport were taken into account in the application of other EU policies. In our opinion, recognising the horizontal nature of sport policy could be the basis not for a 'sport exception' or 'blanket immunity', but for a 'sporting justification', namely safeguarding the uniqueness of sport. This would oblige European actors to take sport into account when framing other EU policies.

Finally, to take the criticism one step further, the legislative and regulatory acts that the EU can adopt in the field of sport are only *soft law*.

However, despite the above, there are considerable advantages to be gained for sport through the European Constitution.

First and foremost, it must be emphasised that the European Constitution forms the basis for an end to the previous EU approach to sport, which was irregular, erratic, reactive and *ad hoc*. Article III-282 refers to the 'European sports dimension' which in itself demonstrates that the EU is concerned about building a European sports policy. Even though this is not the same as a European common sports policy, it could be the start of one.

If we consider the new 'Rolling Agenda' of the European Commission, it appears to envisage an integrated, continuous and permanent intervention of the EU in sport, leaving behind the piecemeal approach of the past which to a large extent depended on the priorities or conveniences of each Council Presidency subject to rotation every six months.

The following advantages of the new legal framework can be discerned:

- Sport has finally received a European identity, now that it has been included in the Treaty. We can look forward to a new EU approach to sport, now that sport has become a tool in EU social, educational, training and youth policies.
- It is finally possible to include a heading for sports in the EU budget.
- Advocate-Generals and Judges of both the European Court of Justice and the Court of First Instance can finally derive some guidance from the Treaty on which to base their interpretation or application of EU law in the field of sport.
- The Council of Europe has been recognised as the specific privileged institutional partner of the EU when it comes to the much-needed enhancement of international cooperation for sport.
- Article III-282 may serve to preserve the European sports model, as opposed to the American model with its closed leagues, by providing that the *openness* and *equity* of sport competitions is extremely important. In fact, it can be said that the EU gave a red card to Americanisation, since the new Constitution provides a clear rejection of a free-market model and contends that in the future development of sport, the special features of the European model need

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to be carefully taken into consideration. This mainly refers to the pyramid structure, with clubs at the foundation, regional and national federations (one of each discipline) in the middle, and the European federations at the top.

The EU Constitution is an important step towards defending the EU system of promotion and relegation, vertical solidarity, the interdependence between the different levels, the emphasis on the socio-cultural significance of sport and the continuous changes in the rankings. This European model is the opposite of the closed and hermetic league system, which is based on salary caps, minimised risk of financial loss arising from sporting failure, self-government and over-commercialisation; which is, in sum, an economic, capitalist, free-market model adapted to sport.

In short, what the European Constitution intends to stress is that the advent of new forms of competition which do not comply with the principles of internal equilibrium and solidarity could endanger sport in the EU.

In addition, considering the history of European integration, *soft law* has often proved the starting point for binding legal documents. At present, sport may benefit from support actions, resolutions, recommendations, declarations, action programmes, Presidency conclusions, codes of conduct, joint communications, gentleman's agreements, declarations of principles, pilot projects and guidelines; an impressive list of instruments, which might well form the prelude to eventual mandatory rules.

The new mission of the EU concerning sport, the Open Method of Coordination which was created in Lisbon, could be an important tool for *policy linkage* and allow the EU, although respecting the principle of subsidiarity, not only to stimulate or facilitate policies, behaviours and responsibilities of all the Member States, but also to promote a valuable exchange of good or best practices.

With the new legal context, the EU and the Member States face plenty of challenges, as many strategic guidelines still need to be addressed. Regarding institutional aspects, new bodies could be created in the Council, the European Commission and the European Parliament. Due consideration must be given to the creation of an European Observatory for Sports and of a liaison committee with the task of institutionalising the relationship between the EU and the different international sport organisations, i.e. the IOC, FIFA, UEFA and ENGSO.

Let us recall the words of Robert Schuman: European construction based only on economic aspects is condemned to failure... It therefore seems right to claim that the socio-cultural and integrational qualities of sport should be given a higher priority, now that it is beyond doubt that sport can promote integration within and beyond the borders of Europe!

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What Now for Former Jockey Graham Bradley?

by **Ian Blackshaw and Mark Edmondson***

Introduction

The Jockey Club is no stranger to controversy or indeed the Law Courts. Since its formation in 1752, the Jockey Club has ruled the Sport of Kings with an iron rod with relatively little outside interference. However, times have changed. We now live in the age where human rights have become an integral part of an increasingly litigious society.

Over the years, there have been some legal challenges to the Club's authority, the most recent of which was brought by the brilliant and somewhat colourful character of former jump jockey, Graham Bradley, with Judgment being handed down by the High Court at the beginning of October 2004. In this article, we will look at this important ruling and its legal and practical implications.

The Bradley Case

The Orders and Rules of Racing, which are reprinted annually in May, now runs to some 471 pages, consisting of 22 parts and 22 appendices. This governing code was described by Mr Justice Richards in the Bradley case as a "fascinating document". Bradley had been charged by the Jockey Club with six breaches of the Rules, the most serious of which related to (i) providing false information to the Club's Licensing Committee contrary to Rule 220(vii)(b), (ii) receiving presents in connection with races other than from an owner in contravention of Rule 62(ii)(c), and (iii) offering to give information on certain horses for monetary consideration contrary to Rule 204(iv). The last two of which are not allowed by jockeys, all of whom are licensed annually and, therefore, engaged in a contractual relationship with the governing body. The charges were based on testimony that Bradley himself had given when he appeared as a Defence witness in the case of another former jump jockey, the lesser-known Barrie Wright, at Southampton Crown Court in September 2001.

Wright was charged with certain drug-related offences in connection with being part of the wider circle of the so-called "drugs baron" Brendan Brian Wright (no relation), who is now a fugitive in Northern Cyprus. Barrie Wright and Bradley were old friends and Wright called upon his old friend to give evidence, explaining how funds can be received in return for valuable information concerning horses and their prospects of success, and so on. Bradley had held a licence since 1982 but had retired from the saddle in December 1999 to concentrate on his new and successful bloodstock agency where, amongst others, he had advised footballers Steve McManaman and Robbie Fowler on their racehorses. Importantly, however, since retirement he was no longer a licensed person under the Rules of Racing and potentially, therefore, no longer bound by them. However, his evidence in Southampton appeared to contain admissions of certain breaches of the Jockey Club Rules, covering the period when he was riding. The jockey had been stung by an earlier BBC Panorama programme criticising the Club for its inactivity. Charges, therefore, followed and, at an early stage,

Bradley had consented to be voluntarily bound by the Rules of Racing as this concession would enable the Jockey Club to consider a wider range of penalties under their Rules. The only effective sanction available to the Jockey Club for those not wishing to bow to their authority is to exclude those found in breach from all premises, owned or controlled by them, which would include all of Britain's 59 racecourses and all training yards. This would have made life difficult for Bradley, but now the Club had the option of imposing a financial

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