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Dispute Resolution, Legal Reasoning and Good Governance: learning lessons from appeals on selection in sport

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Abstract

Research Question: How do legal norms and reasoning processes, in relation to selection appeals, underpin the concepts of good governance and professionalism in sport?

Research Methods: This is primarily a theoretical paper that outlines the reasoning techniques and methodology of law as an academic and professional discipline in interpreting, explaining and understanding arbitral decisions related to selection in sport. It draws upon four exemplar cases from the UK dispute resolution body, Sports Resolutions, to illustrate the over-arching norms and principles inherent in legal reasoning and demonstrate how they form part of the normative framework for good governance.

Results and Findings: This paper demonstrates how legal reasoning processes, exemplified by dispute resolution cases, provide indicators of good governance in sport. It suggests that a basic understanding of key legal norms and the legal reasoning process would reduce the likelihood of arbitration and appeal against decisions made by SGBs. It concludes that there should be greater dissemination of arbitration decisions by dispute resolution services and that these decisions should be used as education and professional development tools to illustrate the way in which legal norms and reasoning processes are applied.

Implications: This paper demonstrates the importance of legal norms and reasoning processes to the concept of good governance in sport. It illustrates how better knowledge and understanding of the way in which arbitral judgements are reached could facilitate improved policy creation and implementation, thereby enhancing good governance, increased professionalism and more robust decision making within SGBs.

Keywords

Governance; dispute resolution; legal reasoning; arbitration; athlete selection;

Introduction

Selection for international competition provides a fertile area for the legal scrutiny of sporting governing bodies' (SGBs) processes and decision making through the medium of dispute resolution services such as the Court of Arbitration of Sport (CAS). Duval (2016) has previously provided a comprehensive overview of the jurisprudence of the CAS on the subject. However, despite Duval recognising the need for increased professionalism in decision making surrounding selection policy, he did not elaborate on what professionalism might mean in this context, nor consider how such increased professionalism might result in improved governance behaviours more widely.

Through an analysis of four dispute resolution cases on selection in sport, this paper will demonstrate how an understanding of legal norms and reasoning processes can act as a normative guide towards good governance and increased professionalism. It is based on the premise that the extent to which an SGB is subject to a successful legal or quasi legal claim against it is a measure of the effectiveness of governance policies and processes and therefore an indicator for the practice of good governance itself.

Theoretical framework

The term 'governance' has been recognised as being extremely difficult to define (Callahan, 2006; Dowling, Leopkey, & Smith, 2018); it can be used in a number of different ways with subtly different context dependent meanings and for different and specific purposes.

Nevertheless, there are now well-established sets of good governance principles in sport utilised in both literature and policy (Chappelet and Mrkonjic, 2013, Mrkonjic, 2016), all of which articulate a slightly different concept of good governance in sport (ASOIF, 2016; Henry & Lee, 2004; Parent, Naraine & Hoye, 2018). Despite these variations, they generally reflect a core of well accepted aspirational principles about the processes and policies of

SGBs that revolve around accountability, transparency, democracy, treating stakeholders fairly and equally and ensuring there are checks and balances on those wielding power. In more recent studies, SGBs have been measured against these principles by reference to more specific indicators (either by volunteering information or being observed externally) to provide a picture of how well SGBs have achieved good governance aspirations (Geeraert, 2015; Geeraert, 2018; ASOIF, 2017; ASOIF, 2018).

These principles of good governance (and indicators of them) highlight a tension between the commercial interests of sport and the ethical expectations of sport as a moral and educational tool (Beech, 2013; Naha & Hassan, 2018). Nevertheless, few studies seem to consider or explain the role that legal norms and reasoning processes play in this framework and how they provide a means of objectively determining 'good' or 'bad' governance practice in adjudicating between these two competing values. If the ultimate question around good governance or 'better' governance is how 'ought' organisations behave (Chappelet & Mrkonjic, 2013), then express reference to, or detailed consideration of, legal norms as part of the framework in deciding what is good or bad, seems conspicuous by their absence.

This omission may be understandable for two reasons. First, sport has historically sought (and to an extent been granted) autonomy from external influences including the general law (Lewis, 2014). As a result, external 'law' is seen as a distant concern since there is an assumption that sport makes its own 'laws'. Second, legal norms tend to be most prominent when *individual* decisions are scrutinised, and an individual's rights or life is affected (usually *ex poste*), rather than in the context of decisions about policy or processes.

This is not to say that there are no studies that note the relevance of legal norms to organisational governance. Dowling, et al. (2018) recognise legal norms have 'profound implications' for sports governance, and Bruyninckx (2012) has noted the relevance of the

legal framework in the context of good governance. However, it seems to have been viewed outside the typical normative framework for considering good governance and is underdeveloped in that context. Dowling et al.'s (2018) scoping review, for example, places law in a separate category when reviewing the sports management literature and not central to the concept of good governance itself. Similarly, ASOIF's (2016, p4) *Governance Task Force Report* recognises the [incorrect] perception that SGBs 'somehow operate beyond the reach of the law', but then ignores legal accountability and what that means for transparency when outlining principles of good governance. Furthermore, whilst some degree of publication of information about legal cases may be practised by SGBs under the principle of transparency (limited publication of decisions of disciplinary bodies is a recommendation of ASOIF's (2016) *Governance Task Force*, for example), where that does happen, the effect is to relegate legal accountability to a footnote due to the lack of any further or wider analysis in the literature. As a result, articulating good governance in sport has developed without significant attention to the role that legal norms ought to play. Yet, this is something that is required in developing better governance standards in the future.

There are two key reasons why legal norms should be considered of central importance in the framework of good sporting governance: accountability and compliance. Although almost all principles of good sporting governance recognise the need for accountability, this is almost uniquely focused on democratic accountability, in other words the ways in which SGBs are accountable to stakeholders in general (such as representation on boards, or the ways board members are elected), which are mediate and indirect mechanisms of accountability. This notion of accountability does not include any consideration of the role legal accountability might play, such as, the accountability of SGBs to individual stakeholders (such as athletes) through such legal or quasi-legal mechanisms as are in place. The extent to which SGBs are subject to successful legal or quasi legal claims against it is a potential measure of the

effectiveness of governance processes and policies and therefore an indicator for the practice of good governance itself.

The second area in which legal norms are important is in relation to the individual decision making of SGBs in the implementation and application of policy and processes. If legal accountability is a valid measure or indicator of good governance, then considering how SGBs ensure compliance with relevant legal norms becomes an important consideration in a good governance framework. If individual decisions about the creation and application of policies, rules and regulations may ultimately be 'judged' in some kind of legal forum¹, the legal norms on which those judgements are made need to be recognised and understood by those making the decisions. Accordingly, when considering a good governance framework, it is not enough to simply to say that 'the law' has profound implications on that framework, or that SGBs are subject to 'general principles of law'; it is important to articulate what legal norms the decisions of SGBs may be subjected to and how they might be relevant when considering good governance principles (or when designing indicators to demonstrate compliance with them).

In summary, whilst the external legal regulation of sporting organisations has been thoroughly considered in a sports law context (for example, Gardiner, O'Leary, Welch, Boyes, & Naidoo, 2012; Grayson, 1994; Little & Morris, 1998) and whilst there have been studies in a sports management context that have sought to explain aspects of the legal framework in which sports entities operate (Macdonald & Ramsey, 2016; Serby, 2016; Van Kleef, 2014), the focus of these studies tends to be on specific examples of legal norms in specific contexts - such as the effect of financial fair play regulations (Serby, 2016) - or relate

¹ The recent arbitration between Caster Semenya and the IAAF over female eligibility rules is a good example of the CAS considering the validity of sporting regulations themselves.

to the legal structure of organisations, rather than the decision making framework of those structures. As a result, although there is some recognition of what Grant and Keohane (2005) might describe as 'formally encoded rules' (which serve as an example of what we will describe as 'formal' legal norms) there is little focus on more 'informal' legal norms that the legal profession use to interpret, develop and apply the 'formal' norms and which might be important in developing principles of good governance, particularly when it comes to decision making. Without further elaboration of what the general principles of law and natural justice actually mean in a sporting context, there is little guidance to those within sporting organisations as to the standards by which they will be judged subsequently, *ex poste*.

Clarifying different types of legal norms

Primary legal norms are principally used to describe the legal *rules* that apply in specific, limited situations (Braithwaite, 2002). In a general legal context, these might be rules that are set out in legislation or are recognised by judges in cases. For example, EU rules on freedom of movement are relevant to rules on player transfer, but they have no relevance to decisions made about rules concerning doping. Primary legal norms are specific and explicit in their application.

By contrast, secondary legal norms are those legal *principles* that have general application and the potential to apply in a much wider context (Braithwaite, 2002). For example, the principle of proportionality, natural justice and the interpretation and construction of legal documents may be recognised in a number of different legal contexts. This paper also uses the term 'secondary' legal norms to incorporate other, more 'informal' legal norms that relate to aspects of *legal reasoning* itself. As will be demonstrated through the later case studies, this is pertinent in evaluating decisions of SGBs and in considering principles of good

governance. It is one of the contentions of this paper that the impact of these types of legal norms have not been fully considered in a good governance framework.

Legal reasoning and its relevance to good governance as a secondary legal norm

It may not be immediately apparent why legal reasoning should be treated differently from any other form of reasoning, nor why aspects of the process might demand further clarification and understanding in a governance context, so a brief background to the legal reasoning process is presented below.

Law as a professional discipline is dominated by ‘doctrinal theory’ (Vick, 2004) with the purpose of providing access, certainty and coherence to the system of rules that are relevant to social phenomena (e.g. crime), and ultimately, to the whole legal system. This allows individuals subject to those legal norms to make informed and rational choices; to make better decisions that are in accordance with those norms by which their conduct will be judged in the future. In striving for those goals, however, the decisions of legal institutions (such as courts) can, on occasion, appear perverse or counter intuitive. As Schauer (2009) suggests, the legal reasoning process can result in decisions that are other than the *best-all-things-considered* decision for the matter in hand and, therefore, decisions can run counter to individual notions of fairness and, perhaps, common sense (as well as giving rise to meanings and concepts that are unique to a legal context and potentially contradictory to ordinary language). Essentially, the legal reasoning process requires that decisions are made in a certain way and potential outcomes are constrained by the system of relevant rules and principles. Thus, a better understanding of key norms that influence the legal reasoning process and an understanding of the framework in which legal reasoning operates should provide a better basis for good governance decisions and provide norms that might be relevant to a good governance framework.

The autonomy of sport and the exclusion of legal norms

The autonomy of sport is ‘an assertion that the sports movement alone understands the unique characteristics (or ‘specificities’) of sport, and therefore knows best how to govern and regulate sport that maximises the benefits to society as a whole’ (Giles & Taylor, 2014, p66). We have suggested that one of the reasons for the marginalisation of legal norms in good governance frameworks in sport might be this assertion of autonomy, which results in either a reluctance to recognise the impact of general legal norms or a blind spot as to their relevance. Thus, the recognition that external legal rules affect sports governance is currently very generalist and there is little detail about the actual degree of autonomy which is enjoyed or the effects of external legal norms. The debate over the ‘degree of autonomy’ is one which is on-going in a sports law context (Gardiner et al. 2012, Grayson, 1994; Greenfield & Osborne, 2003) but does not seem to have infiltrated to conversations about good governance.

The way in which disputes between individuals and governing bodies in sport are dealt with provides an obvious example of the assertion of autonomy from external legal norms, but also serves as fertile ground for demonstrating how secondary, external, legal norms should impact the decision-making processes of those SGBs and be relevant to good governance frameworks.

The role of arbitration in creating legal norms applicable to sports governing bodies

In resolving sporting disputes between athletes and SGBs, almost all SGBs now require disputes, including those where recourse to national courts and general law principles may be available, to be dealt with *internally* with an ultimate appeal to an independent arbitration panel (Gardiner et al. 2012; Giles & Taylor, 2014). Although there are significant differences from a court-based system (the main one being that, in theory, the parties have voluntarily decided to resolve their disputes in this way) arbitration can, and often will, represent a final,

binding and legally enforceable decision on the parties. Arbitrators will be appointed in accordance with the agreement of the parties, so they could be experts in the area of dispute, rather than experts in law. However, it is usual for lawyers to be appointed as arbitrators, with non-lawyers holding sporting or technical expertise providing additional input where the parties think this is appropriate (medical experts in the case of doping cases, for example). The inevitable consequence, especially as sports commercialise (and representation by lawyers before arbitration panels becomes more prevalent), is the 'legalisation' of disputes and the consequent increased influence of legal reasoning norms in judging the behaviour and conduct of SGBs.

The most globally recognized dispute resolution body in sport is the Court of Arbitration for Sport (CAS) (Findlay & Mazzucco, 2010) yet individual nations, such as the USA, UK, China, Australia, New Zealand, Canada and Japan have developed their own dispute resolution services as alternatives to CAS. The sanctioning and referral of disputes to independent arbitral panels maintains sport's autonomy and creates space for the development of 'sporting' legal norms within sport itself. However, it is important to realise that sport does not have a free hand here. Despite arbitration being, essentially, an internal mechanism of dispute resolution, arbitration exists (and is validated), at least at some level, by the approval of state-based legal systems (Carlston, 1952). More specifically, in the context of Western societies, it is approved and validated because it falls within the general principle of freedom of contract; that individuals are generally free to contract to what they want and, consequently, are also free to agree the mechanism to settle disputes about that contract in the future. The state based legal system will usually, therefore, recognise the validity of agreements to arbitrate and will be particularly reluctant to interfere in a sporting context (McArdle, 2015). As Gardiner et al. (2012) suggest, courts (at least in England and Wales) have demonstrated the 'most limited level of scrutiny' of sporting organisations when

it comes to adherence to a number of secondary legal norms, such as natural justice. But this deference does have limits: arbitration decisions and the arbitration process should not contravene primary legal norms or fundamental secondary legal norms of that legal system (such as a statutory obligation against discrimination or some irreducible features of natural justice like the right of a defendant to have their side of the case heard).

To summarise, whilst it has been suggested that arbitration creates an internal mechanism of resolving sporting disputes and creating sporting legal norms, it is not completely separate from the general, wider legal system of rules and principles. However, it is in some sense 'shielded' from it (Gardiner et al. 2012) and sport itself retains a degree of space and flexibility to determine and interpret, what and how legal norms, particularly secondary ones, are applied and embraced. Consequently, arbitral awards are extremely important in clarifying the legal norms which form part of the good governance framework in which sporting governing bodies should be judged, and in learning lessons from them (Foster, 2006).

Secondary legal norms relevant in a sporting context

Gardiner et al. (2012) identify several secondary legal norms adopted by CAS, and which therefore suggest some form of legal reasoning framework: acting in accordance with its own regulations, taking decisions without improper purpose, taking into account only relevant considerations, acting in accordance with legitimate expectations, proportionality, and natural justice. However, this is not an exhaustive or fixed list. It also does not recognise the role that other secondary legal norms play in areas such as legal reasoning or conventions of interpretation.

With this conceptual framework in mind, this paper uses some relevant case studies in athlete selection (in a UK context) to highlight examples of these secondary legal norms being used

to judge and scrutinise the governance practice and decision making of SGBs in order to suggest how they might provide indicators of good governance principles.

The rationale for focusing on athlete selection (rather than doping, safeguarding, or corruption) is that it is an area which is largely insulated from external rules or norms outside those developed by the SGBs themselves. In theory, an SGB may formulate any selection policy it wishes (although there will be some restrictions related to non-discrimination on protected characteristics enshrined in domestic law), unlike doping or betting cases for instance where responsibility has, effectively, been handed over to external bodies such as the World Anti-Doping Agency (WADA) and the Sports Betting Integrity Forum (SBIF) in addition to wider national and international law. As such, selection policies are largely internal to the governing body itself and do not rely on an external reference point.

Consequently, they serve as a useful context in which to consider how the decisions making of SGBs relates to arbitral decisions, the use of secondary legal norms, and how they should influence behaviours of SGBs in the future.

Before looking at specific case studies and highlighting some of primary and secondary legal norms that are evident in the decision making, it is worth acknowledging, by reference to selection issues in general, two key limitations on the potential normative effect of arbitral decisions to ensure a fuller picture of the particular normative framework in which they are made.

The arbitrator's primary role

In cases related to athlete or team selection, arbitration panels are unable to alter the specific selection criteria as these are the rules to which the parties have previously agreed to determine future conduct. The panels are also generally reluctant to comment on the specific criteria used with regards to ethical norms of selection. In accordance with a rules-based

system of law, the arbitrators' role is not one of determining how the best athlete should be selected, since this is at the discretion of the SGB and was tacitly agreed to by the athlete in seeking selection, but rather whether the selection policies are sufficiently clear and the process is duly followed (Duval, 2016). As noted by a member of CAS on a selection dispute case, it is not within CAS's remit to judge whether the 'right' decision was made on whether the best athlete was selected but rather, whether the decision-making process accorded with procedural justice (CAS 2000/A/260, *Beashel and Czislawski v. Australian Yachting Federation Inc.*, 2000). With this in mind, where the dispute resolution panel rules in favour of the applicant, it will generally refer the matter back to the SGB or national federation rather than provide direct imperatives for change (Duval, 2016; Findlay & Mazzucco, 2010). Thus, although the primary role of arbitration is limited to resolving disputes between the parties by *enforcing* existing norms that they have agreed to, it can also provide an indirect imperative for *creating or changing* norms; both to the parties themselves (by suggesting that they need to change their rules or their processes in the future) and to those external to the award (through dissemination of the reasoning which can be compared with their own policies and processes). As a result, arbitration decisions have the potential to have a significant normative effect on both SGBs and athletes provided that the reasoning is disseminated and explained clearly. Unlike some national courts, however, the potential normative effect is somewhat reduced by the fact that there is no formal recognition of the doctrine of precedent and there is no sense of an absolute obligation for future arbitral panels to follow previous reasoning. Nor, as has been noted above, is there the same requirement and frequency of dissemination, which is important, since it is arguably the reporting and dissemination of judgements that provides normative value for future action.

Dispute resolution in sport - case study analysis

The main UK dispute resolution body is Sports Resolutions which has resolved over 1500 cases between 2000 and 2018, creating a large bank of sporting jurisprudence. Of these, 136 cases are related to the issue of selection and eligibility. Apart from a handful of case study examples on the Sports Resolutions website, details of individual cases are not publicly available. Of the cases we were provided access to, 51 cases were identified as having processed to full tribunal. Of these, thirteen appeals were in relation to doping offences with the majority (8) related to BOC by-law 25 regarding the eligibility of athletes following doping offences, which was overturned in 2012. These cases were not considered for inclusion within the analysis as they referred to external norms (anti-doping policy) outside the SGBs jurisdiction.

Of the remaining 38 cases within this sample, four were selected to demonstrate the principles of legal reasoning in action. Whilst all the available cases had their own context and application, the four cases were inductively chosen as exemplifying the following common issues found in arbitral decisions on the topic of selection in sport (Duval, 2016)²:

1. Failure to follow selection procedure
2. Failure to consider athlete welfare resulting from changing criteria
3. Failure to provide clear selection criteria
4. Failure to ensure an independent selection panel.

Case 1: Failure to Follow Selection Procedure

² Whilst jurisprudence and case law does not commonly anonymise all cases (since the detail and context provides both transparency and act as precedent), for the purpose of this paper, a decision was taken to anonymise details of the athlete and SGB despite the fact that there may be identifying details on the cases in the wider public domain and in the original case material. Arguably, without some degree of anonymisation, the high-profile nature of some of the cases used may distract from the legal reasoning point that is being made.

The first case selected highlights the importance of adhering, and being seen to adhere, to the selection criteria as they are written even if they seem to go against 'common sense' or superior criteria.

Athlete A appealed the decision of his SGB not to nominate him for selection to the national team at a Winter Olympic Games. It was argued that the selectors had not followed the published selection criteria when selecting the athlete to fill the third and final individual place available. The first two places had been selected by reference to the two highest ranked athletes from the World Cup Rankings. For the third place, the Selection Criteria stated '[t]he Performance Director will take into account performance indicators from the 2013/14 season and other past performances'. Two athletes were eligible for selection for the third and final place and Athlete X was selected over Athlete A. The appeal focused on whether the Performance Director had neglected to properly consider all relevant performance indicators as stated in the criteria.

In evidence to the Appeal Panel, the SGB Performance Director argued that in making the selection decision he continued with the same objective process as for the previous two places which meant the third highest ranked athlete should be selected. This was Athlete X.

The Performance Director recognised that whilst a subjective argument for both athletes could be made using other criteria, he had ultimately taken the view that as the athletes were similar in all of these areas, to make a decision using the World Cup ranking, as had been used for the first two athletes, was the fairest and most obvious objective analysis.

The Appeals Panel found that the Performance Director had not taken the decision in accordance with the Selection Criteria as it had been written, as that required him to take into account information wider than the World Cup rankings. The Appeals Panel recognised that the weight this wider information held was a matter for the Performance Director's own fair

and honest judgment, but that he was not entitled to discard the wider information entirely as his own evidence suggested. The appeal was therefore upheld and the Performance Director was ordered to consider the selection afresh, taking into account other performance indicators.

This case was subject to a further appeal following a reconsideration of the original selection decision, where Athlete A remained unselected. This time however, the Performance Director was able to demonstrate, via a two-page document of written reasons for non-selection against the specified criteria, the justification for his decision. Whilst the Appeals Panel found that there were errors in both the written reasons for non-selection and the SGB's written response to Athlete A's Notice of Appeal, they were trivial in nature and overall did not cast any doubt on the correctness of the selection process followed by the Performance Director and the validity of the second selection decision. The appeal was therefore dismissed.

Case 1 demonstrates that SGBs have a clear duty to follow their written policies and provide evidence that they have been followed. It serves as a useful example of the importance of authoritative rules in decision making and the potential for counter intuitive decision making. The written selection policy creates the agreed authoritative framework from which the decision must be made; it identifies the relevant factors that must be taken into account and potentially those that must not. An individual's sense (or even a collective sense) of fairness, equity and justice is irrelevant, as is the likelihood that the result would have been the same if all the relevant factors *had* been considered. In this case, having stated that other performances would be taken into account in determining selection, it was not within the *legal* competence of the selector to make a decision ignoring other performances. Whilst Gardiner et al. (2012) recognise that this requirement that governing bodies act in accordance with their own rules has been adopted in the CAS jurisprudence there is no explanation of the

underlying reasoning behind its adoption. Even if the selector had reached the same decision having taken into account the weight of the additional factors he was supposed to, the original decision was still 'incorrect' legally, even if, as proved to be the case, it may have been 'correct' from an outcome or efficiency-based perspective. From these non-legal perspectives, the legal decision might well seem counter-intuitive or pointless. The requirement to re-make the decision, even with the same outcome, may seem pedantic, inefficient and potentially contrary to individual notions of justice, but the framework of legal reasoning is primarily to ensure confidence in the system of regulation as a whole (the rule of law), not to ensure economic efficiency or individual justice in a particular case. The benefit of appreciating this should underpin the smooth and effective function of governance bodies and reduce the likelihood of future appeals on the same issue.

The decision also demonstrates that SGBs are legally accountable for transparency in decision making when it comes to the application of existing rules and policies to particular individuals (as well as democratically accountable to members in general). The need to record the factors that were considered (and not considered) is important as an issue of evidence in order to demonstrate that decisions were within the rules.

Case 2: Failure to Consider Athlete Welfare Resulting from Changing Selection Criteria

This case highlights the legal principles of ensuring participants have access to the rules and that they are sufficiently stable and certain in their application.

Athlete *B* appealed against her non-selection to the Open weight category in a World Championships. The Open weight category is, as it suggests, a category which has no weight restriction. However, heavyweight competitors tend to be selected for this event as weight is considered a sporting advantage. The appeal was established in relation to changing selection criteria that disregarded impact upon athlete welfare.

The Appeal Panel noted that athletes were presented with three substantially different sets of selection criteria over an eight-month period. The last set of criteria was published after athletes had been selected for all weight categories except the Open weight category and therefore the Open weight category was the only category to which it could apply.

The Appeal Panel also noted that a lack of clarity over the place of past precedent increased athlete confusion. The SGB had previously and consistently selected the best fighter for the Heavyweight category and the second best for the Open weight. It was on this basis, that Athlete *B* believed she would be selected since no information to the contrary had been provided. However, for this competition the SGB adopted a previously unused strategy of delaying the decision for the Open weight until after the first day of Heavyweight competition to allow a fighter that has been eliminated to fight again. No information about this new strategy had been communicated to athletes.

In its summary, the Appeal Panel noted that although both Heavyweight athletes suffered uncertainty due to the incomplete and changing criteria, this uncertainty was exacerbated for Athlete *B* who, by all objective and subjective accounts, was the second-best Heavyweight fighter and therefore put greater expectation on her selection for the Open weight.

Whilst the Appeal Panel did not find that the SGB discriminated against Athlete *B* or showed favouritism to her competitor for selection, they did note that the selection process was unreasonable to all eligible athletes. Athlete *B*'s appeal was upheld on the grounds that the SGB put its interest in winning medals unacceptably above and beyond their athletes' well-being and that changing the selection criteria on this basis was unfair and unjustified.

Case 2 demonstrates that whilst, in theory, SGBs have the sole authority to determine selection policy, they must ensure that it is sufficiently stable for athletes to follow, otherwise it will be unenforceable. It should follow Fuller's (1969) recommendation that rules need to

be published, prospective, intelligible, not contradictory, possible to comply with, reasonably stable through time, and followed by officials. Not having sufficient clarity to access or interpret written policy or finding that policies change unnecessarily and without due warning, diminishes the trust and relationship between the governing body and those under its jurisdiction. In terms of legal norms, to alter the rules without sufficient notification of such change risks offending two secondary legal norms in particular. First, the positivist conception of law and legal reasoning requires that rules should not be retrospective in effect (Hart, 1961). To allow retrospective effect of rules would prevent those subject to them to make rational and informed choices based on them. Rules, by definition, act as normative guidance, and therefore athletes use them to plan and determine their actions. As Collins (1989, p17) asserts, 'The 'rule of law' in a sporting context requires that selection criteria be stated in sufficiently clear language that athletes know exactly what they have to do to make the team.' Second, that strict legal rights and powers should not be enforceable if it is unconscionable, or inequitable, to do so. In other words, it is not legally acceptable for policy on which athletes are expected to rely, to fluctuate according to the changing needs of the governing body and to the detriment of athlete wellbeing. Legitimate expectations are created by the first selection rule, which are then relied on by athletes who act accordingly. If the SGB then changes the rules (which they may have the legal power to do), they may be prohibited from enforcing the new rules if to do so would defeat the legitimate expectations and cause detriment to those subject to them. Whilst it is accepted that the nature of sport will entail disappointment at non-selection, athletes should be able to access clear and stable criteria on how selection will be decided, and in a suitable time frame, to enable effective preparation and goal-setting. Whilst SGBs have performance goals, they also need to ensure they recognise and treat their athletes appropriately and take their duty of care towards individuals seriously (Grey-Thompson, 2017).

In terms of good governance principles, one thing this decision emphasises is that publication of policies and rules is not enough on its own. To ensure that an SGB is not legally accountable when applying its own rules and policies, the steps SGBs take to ensure clear, timely and proper communication of rules will be relevant in providing an indicator of both transparency and equity.

Case 3: Failure to Provide Clear Selection Criteria

The third case focuses on the principles of intelligibility and coherence in the way selection criteria are drafted and interpreted.

Team *C* appealed the decision by their SGB not to enter a team for a home Olympic Games. The automatic host nation place was declined on the basis of a British Olympic Association (BOA) directive that stated only teams or individuals capable of a credible performance during the Games should be entered. The appeal argued that there was insufficient clarity in the selection criteria as to what constituted a ‘credible performance’.

In this case, the SGB selection policy document set out a benchmark score, and a competition at which this score was to be achieved by any team wishing to be considered for entry for the Olympic Games. If the benchmark score was not achieved at this competition, then a team would not be entered for Olympic competition.

The appeal was in relation to the date(s) on which this the score was to be achieved and not the benchmark score itself. The selected competition ran over three days and consisted of two parts: a qualification phase and a final phase. Although Team *C* did not achieve the benchmark score in the qualification phase, they surpassed it on the third day in the final phase. The dispute arose from different interpretations of the policy document that sets out the criteria and whether the benchmark score was to be achieved in the two days of the qualification phase only, or across all three days of competition. The use and significance of

the abbreviation 'CI' used in the selection policy was noted as the cause of the confusion. The SGB stated 'CI' was a standard abbreviation that referred to 'qualification stage' (i.e. the first two days of the event) and therefore the result of the third (or final) day could not be counted. However, witnesses gave evidence that they were unaware of the meaning of this abbreviation and that it was inconsistently applied throughout the Policy document, and across other competition programmes such as the World Championships. Moreover, the two signatories to the policy document gave contrasting interpretations to its wording and the meaning of abbreviation 'CI'. Further discussion during the appeal highlighted that there were several drafts of the policy and that one of the signatories was unaware of changes to the final draft before she added her signature.

The Appeal Panel concluded that despite the SGB acting in good faith throughout, the Policy document was not clear in its wording or use of abbreviations and it was unreasonable to assume that the selection criteria would only apply on the first two days of a three-day competition.

Case 3 demonstrates the importance of clear and intelligible selection policy. As evidenced in the appeal hearing, even those involved in drafting the policy had differing interpretations of the terminology used. The decision serves as a good example of how secondary legal norms on the interpretation of authoritative texts are adopted in an arbitral setting to resolve disputes. Selection policies are not statutes, but they do create a binding set of rules between the SGB and the athletes hoping for selection, and in that sense is essentially no different from any other contract. Accordingly, norms relating to the construction and interpretation of contracts are used to resolve disputes on meaning where there is ambiguity. Case 3 demonstrates a secondary legal norm about construing the meaning of a contract and the importance of identifying an objective determination of the meaning of terms. In contract law (at least in England & Wales), meaning is determined by the 'reasonable' reader with

particular background knowledge, whilst the subjective, *intended* meaning of the writer is largely irrelevant. Furthermore, if the meaning is ambiguous, the construction is likely to go against the person who drafts the contract (or writes the rules) (*Investors Compensation Scheme Ltd. v West Bromwich Building Society* (1998)). For any selection policies or other documentation that might be subject to arbitration in the future, the importance of thinking clearly about drafting documents from the athlete's perspective cannot be overstated. Further confusion during the appeal arose as three different policy documents were presented to the Appeal Panel with disagreement within the SGB over which was the most up-to-date document. This self-evidently demonstrates the necessity for accurate record keeping and ensuring a clear method for labelling and dating documents.

Again, the case would seem to serve as a useful example of a legal norm that provides an indication of good governance principles. For example, the extent to which athletes (as the target audience for selection rules) have input into the drafting of the rules that will affect them, and whether they are clear in their interpretation.

Case 4: Failure to Ensure an Independent Selection Panel

The final case highlights the principles of independence, transparency and evidencing in following selection criteria.

Athlete *D* appealed against his non-selection for an Olympic Games claiming the selection procedure was affected by a conflict of interest on the selection panel. Two athletes were eligible for selection in this event: Athlete *D* and Athlete *Y*.

The SGB argued that their selection policy was dependent on several objective and subjective factors that focused on past performance and future expectations. However, Athlete *D* argued that the selection procedure was unfair because the coach of Athlete *Y* was part of the

selection panel (Coach *K*), inaccurate calculations had been made on his previous performances, and incorrect assumptions were provided about his future fitness.

The Appeal Panel noted that the SGB provided no evidence for its opinion that Athlete *D* might not be able to take full part in pre-Games preparation if selected and that incorrect calculations on athlete performance had been used in the initial selection decision. Whilst the Appeal Panel accepted that the SGB was at liberty to determine its own selection criteria and this may legitimately involve the use of subjective opinion, this was severely compromised by the inclusion of Coach *K* on the selection panel who was in a position to advocate for the selection of his own athlete above other athletes that he did not coach. Although the Appeal Panel had seen no evidence that Coach *K* abused his position, that he was part of the selection panel and that there was no evidence to mitigate against a conflict of interest (i.e. through minutes of the meetings), suggests that the process was unfair on grounds of partiality.

Case 4 focuses upon the independence of selection panels, which is often difficult when national coaches are often also the coaches of individual athletes or teams. Nevertheless, it highlights that SGBs should ensure that selection panels are not unduly influenced by the position of any individual panel member. If a member of the panel does have a conflict of interest, as in the case of Coach *K*, then this member should take no part in any decision upon which that conflict touches, and the panel should ensure that this is duly recorded in any minutes. In terms of general legal norms, this is a good example of the principle of natural justice being adopted and used in an arbitral context.³ Natural justice has two core elements; a right to have an individual's side of a dispute heard and a right to an independent hearing free from bias (Craig, 2012). These are fundamental principles that underpin the rule of law

³ From a common law legal perspective at least, natural justice originated as a specifically public law concept to control abuses of power by the state.

and provide a mechanism for controlling arbitrary decisions and the abuses of power in any context where individual's liberties are in issue. However, the specific rights that this gives individuals will differ from context to context. In the self-regulatory context of sport, there is a good deal of leeway for arbitral panels to determine the extent of rights that individuals have under the banner of natural justice (Gardiner et al. 2012).

In Case 4, the SGB's decision to go ahead with the selection meeting, despite the presence of someone with a potential conflict of interest who may influence the decision, raised the potential for a claim of bias. The decision of the panel potentially helps explain the way in which 'bias' (and therefore, the secondary legal norm of natural justice) will be considered in a sporting context. It was not necessarily the case that the decision was automatically biased because of the presence of someone with a clear conflict of interest. However, the presence of someone with a conflict of interest means that bias will be presumed, unless there is evidence to the contrary. If there is no such evidence then, whether there actually was any bias becomes irrelevant.

Much like Case 1, even if the outcome would have been the same had the 'conflicted' selector not been present, the decision was legally 'incorrect', although it might have been correct from an outcome or efficiency perspective. Secondary legal norms require that justice is not only done, but that it is seen to be done. Whilst 'transparency' is a well-established principle of good governance, few descriptions or indicators related to it recognise the need to publish full reasons for decisions of SGBs. The ASOIF's (2016) Governance Task Force comes closest by recommending that a summary of decisions taken during board meetings are published as well as the decisions of disciplinary bodies. Yet, as illustrated in the cases above, a requirement for giving full reasons for decisions is both a legal norm that SGBs may be judged against, and necessary to allow individuals to hold SGBs, legally, as well as democratically to account.

Conclusion

The cases above illustrate the way in which arbitral judgements are reached and how a greater understanding of legal reasoning processes and norms would have potentially avoided unnecessary legal action and accompanying costs and emotional energy. None of the decisions are particularly tricky or complicated when considered in the light of the primary and secondary legal norms and, when seen under this light, one wonders why the cases reached the stage of the dispute resolution process that they did. As such, it suggests a need for SGBs to embed an understanding of legal norms and processes within the concept of good governance if they are to demonstrate the type of increased professionalism that Duval (2016) and others advocate. Many policies were originally written by those who are not skilled in draftsmanship yet who were expected to hold the requisite skills and expertise to ensure good governance and legal compliance (Ferkins & Shilbury, 2015; Findlay & Corbett, 2003). Ultimately, an absence of necessary skills and understanding of how arbitral judgements are made can mean that decisions made by SGBs lack robustness under legal scrutiny and be costly and stressful for those involved. Recognising the legal norms and reasoning processes that underpin legal judgements should help to ensure that those responsible for drafting and implementing policy, on whatever subject, are adhering to the normative framework on which the legal system, rather than non-legal systems, operates.

In many respects, such guidance is not new. Although previous strategies have been to encourage SGBs to access and appoint legal experts as non-executive members (Australian Sports Commission, 2007; Taylor & O'Sullivan, 2009; UK Sport, 2016), appointing external people with legal qualifications is often expensive and it can be difficult to judge when external legal advice is necessary. An alternative suggestion therefore is to equip those already working within SGBs with the knowledge and understanding of the ways in which a lawyer would approach and resolve the problem. Being able to understand the basic tenets of

legal reasoning is not the same as knowing what the law is on a given topic or what the legal process is. As the four cases showed, a basic understanding of legal reasoning and principles would have reduced the likelihood of reaching the arbitration and decision stage.

In order to facilitate this, there needs to be far greater dissemination of arbitration decisions by dispute resolution services; and for these decisions to be used to illustrate the way in which legal norms and principles are applied and how they relate to principles of good governance. However, the potential for improvement here is limited by the difficulty of access to arbitral decisions (De Marco, 2016). Unlike state-based court hearings, arbitral hearings are usually confidential and there is no requirement to publish or disseminate them (for example, Rule 43 of the CAS Code of Sports Related Arbitration 2016 states that decisions are to remain confidential unless the parties agree otherwise) despite the fact that bodies such as ASOIF's (2016) Governance Task Force recommend the publication of decisions of disciplinary bodies as a means of ensuring transparency. If the legal norms by which the decisions of sports governance organisations are scrutinised remain private, then it is very difficult to know the norms that the decision maker is judged by and it makes education and professional development all the more challenging. Arguably, this needs to change. If good governance and increased professionalism in sport is to improve, it is critical that arbitral decisions are more easily available, and the reasoning behind them more clearly explained, to those working within the sports sector who may be subject to them.

7792 WORDS

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