

Manifesto: "Stop the Doping Inquisition!"

The upright citizen is bombarded with information about profitable forms of criminality from all sides. They are the subject of discussion in the pub, at parties and in the media. Fraud just is an integral part of human life. Our upright citizen finds solace in the hope that such criminals will get their just deserts. This is cold comfort, however, because many get away with their crimes, as he knows from the news. But if he keeps to the straight and narrow, he will not become victim of allegations and prosecution.

This may be a simplistic portrayal of social relationships, but in its simplicity it seems to reflect the actual situation.

However, there is one category of citizens to which this situation does not apply: professional athletes. In the above paragraph, replace 'upright citizen' by 'honest professional athlete' and the comparison concerning allegations falls short, particularly with regard to the most deadly sin known to sport, alleged doping. Every (professional) athlete is treated like a potential fraudster, a suspect - by the IOC, the doping authorities and the sports federations involved. Tackling doping use has degenerated into a witch hunt on all top athletes. The individual and his personal and working environment are put in the pillory at the slightest suspicion.

As we said above: fraud is part of life. Take the number of IOC members who have had to resign from the organisation in recent years for transgressions of this kind. In terms of percentages, many more IOC members than top athletes have been caught at fraud. But the IOC does not subject its honourable members to the same suspicion as it does those ordinary top athletes.

Worldwide, all organisations which represent sport in some form or other seem to have forgotten that sport had begun with sports men and women, which then spawned the need for associations, umbrella organisations and event organisers. Furthermore, the competition between these bodies to be or become the biggest, most powerful and richest has created an unhealthy rivalry which has relegated the interests of the athletes in question to the background. The fact that, for example, without athletes the IOC, ASO and UCI would be redundant, is no longer realised in these circles. Top athletes concerned should also draw this rather simple conclusion. They are the most important party to shape the top sport sector. In this respect, they should follow their recreationally-minded brothers and sisters who have turned their backs *en masse* on organised sport. "The wheels can stop turning if your powerful arm wants them to!" If there is one professional group that can prove that solidarity criterion in practice, top athletes can.

Chain gangs

When we mention the International Cycling Union (UCI) and the organisers of the Tour de France (ASO) the last reader will realise what was the direct motive for our message. Although the abuses described here are not limited to cycling, let us focus now on the Tour de France, the arena for the chain gangs of the road and the shop window for parties who want to spread their power over cycling as widely as possible. Most worryingly, they present themselves as moral crusaders claiming that if they come to power or remain in power, an atmosphere of purity will be created. The last Tour de France offered a taste of the meaning and consequences of this ambition.

Doping tests before and during the Tour have made clear that cyclists can claim no rights whatsoever. The inspectors are known as 'doping hunters'. Every cyclist is suspect. Anyone who proves his innocence today must be available tomorrow for the next test. Anyone caught by the doping hunters was and is treated like dirt by them, the sporting organisations and their employers (sponsors). The devastating result was the disqualification of the yellow jersey rider for allegedly telling lies, without taking into consideration the seventeen recent tests which had all showed that the victim had not used doping. Obviously, regulations have become more important than their aim.

Thus far the 'new Tour', which the present authorities are planning. A new future based on a scandalous past. Because the treatment of athletes by doping hunters bears a strong resemblance to the inquisition which victimised so many people eight hundred years ago. Replace the term 'doping' by 'heresy', inspectors by inquisitors and church authorities by IOC, doping authorities, sports associations and organisations like ASO, and you have your comparison.

Medieval practices

Of course the situation back in the Middle Ages was even worse; every citizen was a suspect. Failing to attend an interrogation, giving a hesitant answer, making one suspect move and you were found to be a heretic. And heretics were severely punished. Burning heretics at the stake was a popular public spectacle for those who did not yet stand accused, because even then there was no solidarity among cyclists, sorry, citizens.

Let us look more closely at the parallels between the medieval 'legal' practices and the 'pure' intentions of modern-day sports governing bodies with regard to the doping problem. The top athlete is a citizen without rights in the field of doping. The way in which he is treated violates fundamental human rights. There is no precise jurisprudence because of the illegal entwinement of the functions of law maker, law enforcer and judge. The obligation of top athletes to make themselves available to inspectors all over the world is disproportionate to the nature and extent of the doping problem. For top athletes, there is no privacy; by definition they are suspects. The *presumptio innocentia* does not exist: people are guilty in advance and in doubt one must prove one's innocence. And on this weighty note: "*in dubio pro reo*" is never permitted in the procedures and that also applies to "*ne bis in idem*" ('strict liability': no defence possible). Any mitigating circumstances or other nuances are excluded from the judicial proceedings. The discrepancy between punishment and offence also belongs to this summary. A long-term *Berufsverbot* (restraint of trade) is the imminent penalty which for many athletes means the end of their chosen career. And then there is the parallel with the people's court: the media serve its customers by eagerly hanging athletes based on allegations; in the Middle Ages, people flocked to executions carried out on the same flimsy basis.

The media's approach to the doping problem moves between rousing public opinion and an inquisition. Press conferences become tribunals in which the athlete has to defend himself. There is often no insight into the material, leaving everything to overblown tabloid journalism.

For the sake of clarity: we are not appealing for the liberalisation of doping. We consider doping as one of the areas which requires regulation and sanctioning, but then contemporary, modern regulation. With the right of the accused to be able to defend him/herself like any other citizen. And with a proportional punishment, as opposed to dangerous manoeuvres during sports, for example, which are much less severely punished.

Perspective

Sporting organisations defend themselves against criticism with the argument that sport sets its own rules. But that time has gone, because current legislation offers perspectives against medieval practices. For example, the Belgian lawyer Jean-Louis Dupont - famous on account of the Bosman case which led to the breaking open of the transfer system in professional football - says that the so-called sports exception is 'dead and buried'. He came to this conclusion after last July's judgement of the European Court of Justice in Luxembourg in the Meca-Medina case. A judgement which Frank Kuitenbrouwer, legal correspondent of the NRC-Handelsblad, reviewed in detail on 7 August of this year under the title 'The new cycling'. The case was about the 4-year suspension (later reduced to 2 years) for doping of two professional long-distance swimmers. The swimmers contended that this

punishment was in conflict with the EU Law regarding the freedom to provide services.

The Court rejected the argument that the doping prohibition solely relates to the sporting world, which falls outside the rules for economic activity. The court does have the competence to judge whether the repressive measures are really necessary in relation to sports competitions. The Court highlighted two problem areas: the definition of prohibited substances and the extremely severe punishments.

It was a judgement that reinforced the argument of Dr Janwillem Soek, associated with the T.M.C. Asser International Sports Law Centre. In his thesis *The Strict Liability Principle and the Human Rights of Athletes in Doping Cases*, Soek opposes the excessive risk liability of athletes in doping cases. In fact, it is impossible for them to defend themselves. In addition, he realises that an appeal to an athlete's sense of responsibility will not always be sufficient. Rules are required. But in the current situation, the relationship between accuser and defendant is completely unequal, to the disadvantage of the latter. That is contrary to the European Convention on Human Rights, which plays a role in the Court in Luxembourg.

To conclude this legally tinted section of our manifesto, we will quote from Kuitenbrouwer's column: 'a modern inquisition forms a shaky basis for the new cycling.'

Monitoring task

The show of strength from the new inquisitors during the Tour should create the momentum for a strong union of athletes, their employers and their sponsors to defend themselves and achieve the liquidation of the inquisition. This union should point out to nation-

al and European governments that they completely fail to monitor violations of basic human rights. When will they decide the time is right for a modern sports policy? The aim of those signing this manifesto is to create that perspective.

By the way: in the year 2000, the Pope asked people's forgiveness for the mistakes made by the Catholic Church in the distant past. But the Olympic inquisition led by Pope Pound of WADA and all the cardinals in the international sports associations does not consider itself obliged to justify itself to modern society. We do not want to let that continue for 800 years.

Paul Ruijsenaars, former basketball international, owner of a coaching and advisory agency in Utrecht, board member of ProProf, professional footballers' union, secretary Marathon department, KNSB; **Hidde van der Ploeg** former volleyball international and former coach of the national men's volleyball team, as (sports) correspondent of the *NRC-Handelsblad* he was closely involved in the theme of doping in sport; **Henk Kraaijenhof**, top sports coach; **Egbert Lambers**, solicitor, cycling fan; **Loek Jorritsma**, former chief officer Sports department, Ministry VWS; **Dr. Janwillem Soek**, researcher, associated with the ASSER International Sports Law Centre in The Hague and author of the dissertation "*The Strict Liability Principle and the Human Rights of Athletes in Doping Cases*" (enthusiastic archer); **Jan Rijpstra**, Mayor and former member of the Dutch House of Representatives, sports director; **Harm Swierenga**, senior managing consultant Berenschot, board member of ProProf, professional footballers' union; **Peter Winnen**, former professional cyclist, publicist; **Frank van den Wall Bake**, sports marketing expert.

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Sports Law - Worldwide Enforcement Power Switzerland?

Comments on the Decision of the Swiss Federal Court of 5 January 2007 (SpuRt 2007, S. 63)

by **Georg Engelbrecht***

1. With its decision of 5 January 2007, the Swiss Federal Court has given the FIFA's all-embracing power to impose sanctions its definitive blessing. The decision is short, only three pages long. The sentence, which is unspectacular in itself, reads: "It is acknowledged by Swiss Association Law that the violation of members' duties may incur sanctions such as punishments for clubs or associations". To this end the Federal Court appeals to an article by Riemer. Professor Hans Michael Riemer is Full Professor at the Jurisprudential Institute of the University of Zurich, editor of the association law Article 60 - 79 Swiss Civil Code in the *Berner Commentary*¹ on Swiss civil law, a judge at the Federal Court (2nd Civil Section) in addition to his official duties and Member of the Court of Cassation of the District of Zurich. Riemer's article bears the title: "Sports Law - World Power Switzerland"² - without a question mark.

2. The sanction monopoly of federations, whose members voluntarily or less voluntarily submit to them, also comprises, according to the decision of the Federal Court, of the mandatory implementation of the sanctions: "That the enforcement-like effect of an intended sanction possibility can be produced within an association structure, because the member concerned is required to observe its obligations, cannot be faulted if there are sufficient statutory grounds and does not mean that the association law sanctions violate the state's monopoly on levying execution".³

That is the accolade. Through its highest court, the Swiss state gives the football World Power, FIFA, residing on its sovereign territory, the right, otherwise reserved for the state, to exercise a monopoly on judicial enforcement towards its football subjects, and it does so on a worldwide basis.

3. By this accolade, both national and international hurdles for prosecution and enforcement of contractual agreements in civil law contracts will be mastered - not conquered, but rather knocked down. A normal creditor goes to the national court, makes his claim and consequently orders the bailiff to levy attachment on effects in the house of his debtor, or the Court of Execution to levy attachment and carry out collection of debtor's claims or other rights. The creditor secures the right in arbitral procedures to an arbitral decision, for the implementation of which it requires an enforceability statement from the national Court concerned, both for national cases as well as in international areas.

All this also applies in Switzerland. The Swiss state also claims the official right to the allocated monopoly on levies of execution⁴. The Federal Court does not dispute this, but rather leaves open the still undecided issue of whether a monopoly on levies of execution by the state is part of public order.⁵

4. According to the principles of German law, the matter has always been clear-cut. There is no private enforcement⁶. Enforcement is state responsibility⁷. Only the state is entitled to enforce. It alone assumes

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1 The Federal Court refers in particular to N. 205 et seq. to Article 70 Swiss Civil Code.

2 Sports Law - World Power Switzerland. International Sport Federations and Swiss Law, in: Causa Sport, Die Sport-Zeitschrift für nationales und interna-

tionales Recht sowie für Wirtschaft (CaS) 2004, S. 106 f.

3 Agreeing with Netze, SpuRt 2007, S. 64, but (still) without own examination of the problem: "The Federal Court has rightly established that this sanction authority of a sport federation has nothing to do with the state's monopoly on levying execution".