2.2 Case studies in the use of expertise in sport governance

Sport governance depends on no small part upon experts. In the next two sections we take a deeper look at the use of experts in sports governance and some of the challenges faced by sport organizations.

2.2.1 WADA investigations

This section discusses the use of expertise by WADA, the World Anti-Doping Agency in two contexts. It first looks at WADA's procedures for investigating alleged corruption at the institutional level, using the example of the WADA investigation into alleged doping by Russian sports authorities. Second, it looks at the issue of burden of proof in determining anti-doping violations related to alleged violations by individual athletes.

WADA and Alleged Institutionalized Russian Doping

In 2016 WADA selected an independent person to investigate alleged state-sponsored doping at the Sochi 2014 Winter Olympics and other events. The investigation was on a fast track, with an initial report due less than 2 months after the process began, so that the report could inform decisions about participation in the Rio 2016 Olympics (Source: https://goo.gl/JlTJqu).

The investigation's Terms of Reference set out the goals of the investigation and how it would operate. The ToR explained that "an Independent Person (IP) has been appointed" (Source: https://goo.gl/8i7yVO) -- this is Richard McLaren, who also recently served with Dick Pound on the WADA Independent Commission that looked into earlier allegations of systemic doping in Russian athletics. McLaren is a long-time WADA collaborator, CAS (Court of Arbitration for Sport) arbitrator and has a stellar resume in the world of sports governance.

The notion of independence has come up as an important issue in the structure of the Sochi investigation. WADA explains:

> Sir Craig Reedie acted swiftly to name Richard McLaren further to requests received by the former director of Moscow's anti-doping laboratory, Dr. Grigory Rodchenkov; and, whistleblower, Vitaly Stepanov. Dr. Rodchenkov and Mr. Stepanov – that are the informants for this investigation -- both expressed concerns regarding 'independence'. These are sentiments that were echoed by Beckie Scott, the Chair of WADA's Athlete Committee. Dr. Rodchenkov and Mr. Stepanov indicated that, in light of a perceived conflict of interest -- given that the

> allegations relate to the Sochi Olympics and that WADA is funded by the International Olympic Committee (IOC) – they would only provide evidence in their possession to an independent person. (Source: https://goo.gl/uawJLg)

But what is an independent person in this context? If you dig a bit deeper, behind the words, you'll find that WADA's Sochi investigation is not really independent and instead should be considered an internal investigation.

There is nothing wrong in organizing an internal investigation - organizations do this all the time. However, it is misleading to label such an internal activity as independent. Let's dive into some of the details.

The ToR for the McLaren investigation does not define what it means to be an Independent Person. The ToR states:

> The IP will be bound by the Conflict of Interest policy adopted by the WADA Executive Committee in May 2011, and in this light, are required to complete and sign a Statement of Independence and Interest in accordance with such policy. (Source: https://goo.gl/NlilG7)

It turns out that the WADA Conflict of Interest Policy was not publicly available. WADA provided it to me upon request. Here is what WADA states about COI:

> Every person who is subject to the Policy shall, in the exercise of his or her functions on behalf of WADA, be free of undue influence or other factors which may give rise to a conflict between his or her own interest or the interest of any other person and that of WADA. (Source: https://goo.gl/zGOHEV).

As we will learn in the next lecture, the WADA COI Policy is so imprecise and circular that it does not mean much at all and stands in stark contrast to the more developed COI policies of IOC or IAAF.

Burden of proof

Another area where guidance is needed on expertise is on the evaluation of evidence. For instance, the standards that WADA's Laboratories must follow in anti-doping are described in a January, 2015 document called "International Standards for Laboratories" (Source: https://goo.gl/a6Z1jR). That document explains that drug tests administered under the provisions of the WADA Code need only be stored for a minimum of 3 months. That includes positive tests - adverse analytical findings in WADA's jargon.

There is an exception (5.2.2.8):

> If the Laboratory has been informed by the Testing Authority that the analysis of a Sample is challenged, disputed or under longitudinal investigation, the Sample shall be stored frozen and all records pertaining to the Testing of that Sample shall be stored until completion of any challenge or investigation (Source: https://goo.gl/a6Z1jR).

Any athlete, who believes that an adverse finding has occurred with respect to their urine or blood sample, must -- as a matter of procedure -- immediately challenge or dispute the finding in such a manner that it requires the sample to be preserved. These samples will otherwise be destroyed. In contrast, all Olympic drug tests are stored for 10 years, in hopes of finding future evidence of guilt among dopers who initially escaped detection.

A second significant regulation in the lab standards is the reversal of burden of proof upon an adverse analytical finding. This means that upon a positive drug test, WADA presumes that the test is accurate and at that point the burden of proof is upon the athlete to prove that the test is flawed (Source: https://goo.gl/wCTYSs).

Here are the relevant passages from the WADA standards:

Figure 1: Passages from the WADA standards

3.2.2 *WADA*-accredited laboratories, and other laboratories approved by *WADA*, are presumed to have conducted *Sample* analysis and custodial procedures in accordance with the International Standard for Laboratories. The *Athlete* or other *Person* may rebut this presumption by establishing that a departure from the International Standard for Laboratories occurred which could reasonably have caused the *Adverse Analytical Finding*.

[Comment to Article 3.2.2: The burden is on the Athlete or other Person to establish, by a balance of probability, a departure from the International Standard for Laboratories that could reasonably have caused the Adverse Analytical Finding. If the Athlete or other Person does so, the burden shifts to the Anti-Doping Organization to prove to the comfortable satisfaction of the hearing panel that the departure did not cause the Adverse Analytical Finding.]

Source: https://goo.gl/dQzxTs

This is the equivalent, in a criminal setting, to asserting that you are assuming innocent until proven guilty until you are charged with a crime -- at that point, you are assumed guilty until proven innocent. The burden would then be upon you to prove your innocence.

Most criminal justice systems do not work this way. However, anti-doping

regulation does. The combination of destroying evidence on which convictions are based after only a very short time and the reversal of the burden of proof are choices made in sports governance about the evidence on which anti-doping sanctions are levied. Such choices make up an important part of the context for understanding evidence and expertise in anti-doping regulation. These examples illustrate that the decision context for using expertise is typically as important as the expertise itself.

2.2.2 FIFA reform

Let us now revisit issues associated with FIFA governance reform.
At the May, 2013 FIFA Congress, President Sepp Blatter declared that the governance reform process that he had initiated two years earlier had come to a close, “We have been through a difficult time. It has been a test for football and those who lead it. As your captain, I can say we have weathered the storm." (Sepp Blatter, 2013, https://goo.gl/se8BAH).

The storm that Blatter referred to involved an accumulation over the previous years of allegations of corruption and mismanagement of FIFA. The allegations which received the most attention involved the process used to select the 2018 and 2022 World Cup venues, chosen as Russia and Qatar respectively.

Of course, allegations of shenanigans and intrigue at FIFA have a rich history. In 1983, upon learning that the 1986 World Cup was assured to be awarded by FIFA to Mexico even before the process had been completed, Henry Kissinger is reported to have said, “The politics of FIFA, they make me nostalgic for the Middle East.” (Source: https://goo.gl/J18HrF). By 2011 the pressure on FIFA to respond in some manner to the mounting allegations became so great that the organization decided to embark upon institutional reform centered on the creation of what FIFA terms an Independent Governance Committee (IGC).

When the IGC put forward recommendations in 2012, we compared FIFA’s subsequent actions with those recommendations (IGC 2012). We also compared FIFA’s actions with the recommendations of Transparency International (TI, 2011) and those of Mark Pieth (2011), a Swiss governance expert who FIFA hired to develop proposals for reform and then to lead its IGC. We also evaluated the significance of the reforms using the framework of Jean-Loup Chappelet and Michael Mrkonjic (2013).

FIFA’s performance, is summarized in the figure below:

Figure 2: FIFA Reform Recommendation Scorecard

Source: prepared by the author.

What alternative actions did the IGC neglect to recommend?

Transparency International (TI 2011) offers a helpful list of areas where actions are needed:

- Independent reform commission
- Role of national football associations and confederations
- FIFA presidential elections and Congress
- Executive committee
- Financial transparency
- Sponsors, broadcasters and marketing rights
- Judicial oversight

Beyond that summary, there is no shortage of good ideas for FIFA reform, as best practices for good governance in business, governments and in civil society are generally understood. For FIFA the challenge has been how to get from where it is to an organization that implements those practices.

The case of FIFA reform remains a work in progress even in 2017. FIFA benefited from expert advice – some of which it solicited and some of which was offered unsolicited. However, an important lesson of FIFA's experience is that expert advice, whether generated internally or offered from external organizations, can only provide the decision makers with options and information. Ultimately, wise decision making depends upon the making of decisions.

2.2.3 Sex testing

In a high-profile case in 2009, Caster Semenya burst onto the international scene in Berlin with a stunning performance in the 800m. She was immediately investigated by the IAAF, the body that oversees international athletics competition, over concerns about her eligibility to compete in women's events, largely based on her appearance. Semenya was cleared to compete as a woman by the IAAF a year later (Pielke, 2016).

The episode, and the IAAF's poor handling of it, led the athletics governing body to develop a new set of rules for eligibility into women's competition based on testosterone levels. But those new rules were tossed out last year by the Court of Arbitration for Sport, which argued that high testosterone levels in women did not lead to "such a significant performance advantage that it is necessary to exclude them from competing in the female category." (Source: https://goo.gl/O5czh8)

The absence of clear rules has led to a vigorous debate over testosterone or other techniques that might be used to sex test athletes. The IAAF is currently seeking to implement new rules for eligibility in women's athletics: "We must find ways to take into account that sex is not neatly divided into only two categories in the real world." (Source: https://goo.gl/nCqsiw).

However, more than a half-century of attention to this issue has revealed that biological sex is wickedly complex. There is no simple medical test that can readily distinguish males from females in all cases. So how to proceed when experts communicate complexity?

Some observers have recommended a policy of anything goes, in which an athlete simply determines his or her gender when entering a competition and that is that. This approach respects the dignity of the athlete, but presents some practical obstacles. For instance, even though fraud has not been a significant problem in the past, opening up participation to anyone on their say-so could lead to mischief if men enter women's competitions.

Sports organizations are no strangers to classifications challenges. The resolution of such a challenge in a different context offers some guidance on how to deal with segregating women and men in competition.
In elite sport, nationality refers to the country (or political body, as not all sporting nations are independent, sovereign countries) that the athlete represents in competition. Sporting bodies have learned that nationality is not the same thing as legal citizenship. In the pursuit of sporting success, some nations have shown a willingness to issue passports to elite athletes who have very few ties to the country whose name is on their new passport. That practice has forced sports organizations to come up with new rules for governing nationality.

Sporting bodies, wisely, have not waded into the thicket of defining the essence of nationality, lest it open up issues of ethnicity, historical conquest and

subjugation, race, and politics. But these bodies also reject a policy of having no regulations at all to govern eligibility for participation in women's sport events. Nor do these bodies generally rely on legal citizenship. For instance, according to FIFA's rules, citizenship is not a sufficient basis for eligibility to play on national soccer teams. (Source: https://goo.gl/ghBk26)

Sporting bodies have adopted procedural guidelines to reflect the reality of nationalism while avoiding making a mockery of the categorization. Consequently, there are strict criteria for changing nationalities. Some say that they are not strict enough.

As with the issue of sex testing, the procedural guidelines for determining nationality are openly debated and challenged and found by some to be unsatisfactory. But unlike with the sex testing guidelines, sporting bodies do not appeal to scientific criteria or physical appearance to determine nationality (though one could easily imagine the use of genetic tests to determine ancestry for purposes of nationality). The key difference between nationality and sex testing is that those who govern sporting bodies appear to believe in a binary differentiation between men and women, despite scientific evidence to the contrary. In other words, they reject the idea that science can determine Englishness but accept the idea that science can identify femaleness.

What would a procedural approach to determining eligibility for participation in women's events look like if it were modeled on nationality guidelines? Here are some thoughts:

- Legal status alone would be insufficient, and it may or may not be necessary (currently some countries recognize men and women, others recognize a greater number of genders, and still others have no formal policy regarding gender status).
- Participation in the men's or women's competitions would be determined initially by the athlete in the first instance of participating in organized national or international elite competition segregated into men's and women's categories. This would, in almost all cases, take place at the youth or junior level.
- On reaching senior competition and legal adulthood, the athlete would sign an affidavit testifying to his or her gender.
- Consistency in participation in men's or women's competitions would be required from the first instance through senior (i.e., adult) competitions.
- In those cases where an athlete wishes to change gender categories, policies and procedures would cover this contingency.
- Challenges under this approach would focus on whether procedures were followed for determining eligibility, not on medical tests or examinations, and certainly not on the "essence" of femininity based on criteria of physical appearance or biological markers.

Becoming an elite athlete is a monumental achievement, requiring years of commitment and effort. It also requires some luck in having the physical capabilities necessary to achieve success at the highest levels of competition. Many exceptional athletes have exceptional physical characteristics. Some athletes have appearances that may challenge or be at odds with conventional gender norms.

An approach based on procedure over substance in this case is responsive to scientific evidence. Any effort to implement a biological test to distinguish men from women is bound to fail in the sense of producing false positives and false negatives. Such failures have been shown repeatedly to violate human dignity. A policy consistent with scientific understandings and evidence would eschew any such test.

2.2.4 Technological augmentation

Sport must increasingly conform the issues of technological augmentations to both people and sports, and the challenges that they pose for rule making. In humans, such improvements can be the result of surgery to reshape (like laser eye surgery) or strengthen (such as replacing a ligament with a tendon) the body to aid performance, or to add biological or non-biological parts that the individual wasn't born with.

One well-known case of technological augmentation involved the South African sprinter Oscar Pistorius, who ran in the 2012 Olympic Games on prosthetic blades below his knees (during happier days for the athlete who is currently jailed in South Africa for the killing of his girlfriend, Reeva Steenkamp) (Pielke, 2016) . Years before the London Games, Pistorius began to have success on the track running against able-bodied athletes. As a consequence of this success and Pistorius's interest in competing at the Olympic games, the International Association of Athletics Federations (or IAAF, which oversees elite track and field competitions) introduced a rule in 2007, focused specifically on Pistorius, prohibiting the "use of any technical device that incorporates springs, wheels, or any other element that provides the user with an advantage over another athlete not using such a device." (Source: https://goo.gl/2TQwMf). Under this rule, Pistorius was determined by the IAAF to be ineligible to compete against able-bodied athletes.

Pistorius appealed the decision to the Court of Arbitration for Sport. The appeal hinged on answering a metaphysical question—how fast would Pistorius have run had he been born with functioning legs below the knee? In other words, did the blades give him an advantage over other athletes that the hypothetical, able-bodied Oscar Pistorius would not have had? Because there never was an able-bodied Pistorius, the CAS looked to scientists to answer the question.

CAS concluded that the IAAF was in fact fixing the rules to prevent Pistorius from competing and that "at least some IAAF officials had determined that they did not want Mr. Pistorius to be acknowledged as eligible to compete in international IAAF-sanctioned events, regardless of the results that properly conducted scientific studies might demonstrate." (Source: https://goo.gl/2TQwMf). CAS determined that it was the responsibility of the IAAF to show "on the balance of probabilities" (Source: https://goo.gl/2TQwMf) that Pistorius gained an advantage by running on his blades. CAS concluded that the research commissioned by the IAAF did not show conclusively such an advantage.

As a result, CAS ruled that Pistorius was able to compete in the London Games, where he reached the semifinals of the 400 meters. CAS concluded that resolving such disputes "must be viewed as just one of the challenges of 21st Century life." (Source: https://goo.gl/2TQwMf). They were right.

The most recent controversy involving a Paralympian seeking entry to the Olympic Games involved Markus Rehm, the blade jumper, a German long-

jumper who leaps off of a prosthetic leg. Rehm lost his lower leg in a wakeboarding accident and is the current IPC (International Paralympic Committee) world champion long jumper (Source: https://goo.gl/VrmS8d). His quest to jump in the Rio Olympics in 2016 was turned down by the IAAF several months ago.

The IAAF cited the fact that Rehm had not shown that he does not receive an advantage by jumped off of his blade. The double negative in the previous sentence might seem confusing, but it is accurate. In announcing the decision, the IAAF's president, Sebastian Coe, explained: "[Rehm] has to prove that the prosthetic that he uses does not give him a competitive advantage and at this stage he has not." (Source: https://goo.gl/EE8qCH).

Rehm's leaps off of his prosthetic leg are among the farthest of any athlete in the Olympics or Paralympics. Is Rehm's incredible jumping capability because he is a remarkable athlete? Because he jumps off a blade? Both? These are the questions that follow Rehm, and are at the centre of debate over his failed quest to compete in the Olympics.

In the Pistorius case, under the rules for inclusion in the Olympic Games, the burden of proof had been on the IAAF, not on the athlete, to demonstrate the presence of an advantage provided by technology.

This precedent was overturned in 2015, when the IAAF introduced a new rule that in such cases reverses the burden of proof. The switch placed the burden of proof on the athlete instead of the governing body. The new rule states that an athlete with a prosthetic limb (specifically, any mechanical aid) cannot participate in IAAF events "unless the athlete can establish on the balance of probabilities that the use of an aid would not provide him with an overall competitive advantage over an athlete not using such aid." (Source: https://goo.gl/jxxhKm). This new rule effectively slammed the door to participation by Paralympians with prosthetics from participating in Olympic Games.

Even if an athlete might have the resources to enlist researchers to carefully study his or her performance, the IAAF requires the athlete to do something that is very difficult, and often altogether impossible—to prove a negative. In contrast, in the case of Pistorius, CAS concluded that "the IAAF rightly accepted the burden of proof" (Source: https://goo.gl/2TQwMf) to show that a prosthetic offered an advantage in order to deny an athlete from participating in the Olympics. Because the evidence produced by the IAAF was "overall, inconclusive," (Source: https://goo.gl/2TQwMf) the IAAF did not meet the burden of proof necessary to disqualify him.

By 2016, the burden of proof to show no advantage gained by the use of a prosthetic leg had been shifted to the athlete. But a German scientist who studied Rehm's jumping ability in early 2016 concluded that it was "difficult, if not impossible" (Source: https://goo.gl/1SmZXh) to show any advantage gained by the use of the prosthetic. Another researcher commented that, in the studies

of Rehm's jumping, "detecting an advantage or a disadvantage is an impossible task." (Source: https://goo.gl/CzjV3B).

So the very same scientific conclusions that allowed Pistorius to participate in London 2012 were used to deny Rehm from participating in Rio 2016. The most important difference between the two cases is not the science but the shifting of the burden of proof from the IAAF to show advantage to Rehm, who must show the absence of advantage. In this instance, showing the absence of advantage is not possible.

Technology forces us to contemplate change. Change can be good and change can be not-so-good. For those who view sport in terms of an ideal of purity, change resulting from technology is a threat. Matt Albuquerque, the founder of a prosthetics company, says that concern over purity masks a fear of losing a competitive advantage: "I've seen it. Able-bodied people do fear this advantage on the part of the amputee. They fear that you aren't just 'normal' again, you're better than human." (Source: https://goo.gl/M4nLSC).

We may be seeing only the beginning of debates over technological augmentation and sport. Silvia Camporesi, an ethicist at King's College London, observed: "It is plausible to think that in 50 years, or maybe less, the 'natural' able-bodied athletes will just appear anachronistic." (Source: https://goo.gl/tLFuU6). She continues: "As our concept of what is 'natural' depends on what we are used to, and evolves with our society and culture, so does our concept of 'purity' of sport." Source: https://goo.gl/tLFuU6).

Both athletes and sport will continue to be transformed by technology. Such transformations will create new capabilities for individuals and demands for and resistance to change. Sport will have to confront this challenge, whether participants like it or not. What sort of medical enhancements should be allowed? Where is the boundary between the Olympics and the Paralympics? Should there even be a boundary?

These questions are just starting to be asked, and the bodies that oversee sport don't yet have answers to them. Drawing on a wide range of expertise will be critical for dealing with these challenges in the years to come.

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