

**THE STATE SYSTEM AND THE SPORTS SYSTEM IN  
ITALY: LEGAL PLURALISM AND INTERNATIONAL LAW<sup>1</sup>.**

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<sup>1</sup> The title recalls and develops the contents of the talk at the meeting “*I rapporti tra ordinamento statale e ordinamento sportivo*” (Relations between the State system and the sports system), Florence, 2.12.2011.

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## **1. INDIVIDUALS, GROUPS AND THE STATE.**

In general, when dealing with matters relating to sports law reference is made primarily to the specific characteristics of the sport and the relevant law.

There is no denying that these specific characteristics exist; at the same time, however, it is equally undeniable that they are quite frequently exaggerated.

Shortly, we will see that this tendency to exaggerate is very probably not completely by chance. Regardless of this, however, it is fairly obvious that any form of emphasis is not a good way of dealing with a problem, since it implies distorting the terms of the problem itself.

Clearly, moreover, this applies even more when dealing with what for sports law is, so to speak, the problem of problems, i.e. the question of the relationship between the sports system and the State system.

It seems to me, therefore, that the best way to avoid the danger of exaggeration and distorting is to place the matter in a wider context than that of sports law.

Since that which we define as the sports system refers to a collection of regulations issued by the social group that deals with sports activities, the context must be that of the relations between social groups and the State<sup>2</sup> or, rather, between individuals, groups, and the State, given that in the West, ever since the French revolution, relations between the State and "partial associations"

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<sup>2</sup> \_ This approach has also been employed for sports groups in particular by G. ROSSI, *Enti pubblici associativi. Aspetti del rapporto fra gruppi sociali e pubblico potere*, Naples, 1979, passim.

of any type are generally conditioned by the position of the individual who is simultaneously part of both the former and the latter<sup>3</sup>

The Italian Constitution is no exception here.

It is true, in fact, that Art. 2 of the Constitution (with significant discontinuity compared to the constitutions of the liberal era) sanctions the pluralistic principle and, therefore, guarantees and protects social formations. It is equally true, however, that this provision does not safeguard social formations in virtue of some intrinsic value they may possess, but rather because they are functional to the protection of inviolable individual rights.

In short, therefore, the pluralistic principle is instrumental to the implementation of the personalist principle<sup>4</sup>.

## **2. THE INTEGRATION OF SOCIAL GROUP SYSTEMS**

These two principles, and the relationship between them that is sanctioned by the Constitution, have a series of corollaries.

First of all, if the protection of groups is functional to the protection of the rights of the individual, it is fairly obvious that belonging to a group does not imply the limitation of these rights.

This in turn, however, does not lack problematic implications.

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<sup>3</sup> \_ There is obviously a great deal of related literature, but an essential historical classification can be found in N. BOBBIO, *Libertà fondamentali e formazioni sociali. Introduzione storica*, in *Pol. dir.*, 1975, pp. 431 and ff.

<sup>4</sup> \_ To this regard, the constitution seems to agree: see, amongst others, L. PALADIN, *Diritto costituzionale*, Padua, 1988, pp 566, E. TOSATO, *Persona, società intermedie e Stato*, Milan, 1989, pp 225 and ff, E. ROSSI, *Le formazioni sociali nella Costituzione italiana*, Padua, 1989, pp 190 and ff, and, as a summary, V. CRISAFULLI, L. PALADIN, *Commentario breve alla Costituzione*, Padua, 1990, p. 115.

If, in fact, the State has to intervene in the groups in order to protect the rights of their members, there is the risk of overpowering the social formations and, therefore, of them no longer being functional to the protection of the inviolable individual rights<sup>5</sup>

Over the past decades, quite a satisfying balance seems to have been established between the needs regarding protecting the individual and groups in the context of unincorporated associations.

As we know, the unincorporated association is a figure that has marginal importance in the Civil Code, but that in the Republican experience has taken on great concrete relevance, since the most important social formations in the social and political life of the country, the political parties and trade unions, have adopted this form.

The balance that was created derives from a combination of two factors.

The first is the considerable freedom of the associations to establish the regulations that govern their existence, and the relations between the members; in other words, to creating, so to speak, their own system.

This freedom is acknowledged in paragraph 1 of Art. 36 of the Civil Code (“The internal system and the administration of associations not recognized as legal persons are regulated by members’ agreements”), and can certainly be considered as guaranteed by the same pluralistic principle<sup>6</sup> (provided, of course, that the inviolable rights of association members are not violated).

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<sup>5</sup> \_ To use an expression which Lombardi Vallauri is fond of, we could say that here we have a problem with a problematic solution. This point is explained with particular clarity by V. ONIDA, *Le Costituzioni. I principi fondamentali della Costituzione italiana*, in G. AMATO, A. BARBERA, *Manuale di diritto pubblico*, Bologna, I, 1997, p. 103: “It is clear that State intervention regarding protection of the individual may require or entail limiting the freedom of the social organisation or interference in its internal life; on the other hand, the absence of intervention may allow for a violation of the individual rights guaranteed by the constitution.”

<sup>6</sup> \_ On this matter, constitutional law does not provide completely univocal indications, but from the sentences which, in the eighties and the nineties, declared the unconstitutionality of laws that established the nationalisation of welfare and

The second factor is a guideline of the Court of Cassation dating back to the '60s, based on which the association systems have been translated into comprehensible terms from the point of view of State law, i.e. as an expression of the contractual relations between members; since these can be exercised before State judges, they can guarantee citizens protection also as part of the association<sup>7</sup>

In short, unincorporated associations enjoy complete autonomy, but they do not have any self-governance in legal terms.

Therefore, as Pizzorusso pointed out, “every individual, in his role also as subject of the internal system of the social formation, (may) exercise his rights before a judge, including those which derive from the system of the social formation itself”, in consideration of “the relationship of integration which exists between the State legal system and the independent systems of the social formations operating *secundum* or *praeter legem* within the Italian State...”<sup>8</sup>.

In addition, it seems to me that here the term "integration" used by Pizzorusso is more appropriate than that of "absorption" which is generally used to indicate the process through which for centuries the State has incorporated, and transformed into actual branches of State law, what were

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charity institutions and Israeli Communities. For example, in sentence no. 396/1988, where it declares that “the principle of pluralism, which in its entirety inspires the Italian Constitution and which, in the field of welfare, is guaranteed, as far as private initiatives are concerned, by the last paragraph of art. 38”, it implies the constitutional illegitimacy of the nationalisation of the I.P.A.B. (Public Welfare and Charity Institutions). And in sentence no. 259/1990 the illegitimacy of Royal Decree 1731/1930 is declared “because it entails the subjection of social formations, which are based on religion, to the penetrating interference of State bodies”. For an evaluation of these lines of discussion see L. FERRARA, *Enti pubblici ed enti privati dopo il caso I.P.A.B.: verso una rivalutazione del criterio sostanziale di distinzione?*, in Riv. trim. dir. pubbl., 1990, 446 and ff.

<sup>7</sup> \_ This matter has been examined in depth by the best civil doctrine: see, for all, F. GALGANO, *Delle associazioni non riconosciute e dei comitati*, in *Commentario del Codice civile Scialoja-Branca*, Bologna-Rome, 1976, passim, and cf. at least also M. BASILE, *L'intervento dei giudici nelle associazioni*, Milan, 1975.

<sup>8</sup> \_ A. PIZZORUSSO, *Persone fisiche*, in *Commentario del Codice Civile Scialoja-Branca*, Bologna-Rome, 1988, p. 213.

originally completely independent normative phenomena (e.g. the military system, maritime law and commercial law<sup>9</sup>).

Unlike the various cases of absorption, associations systems continue to be the expression of the independence of the social groups of reference, but they are connected to the State system thanks to the work of State jurisdiction.

Furthermore, if we consider that the unincorporated association is the general and residual form which social formations are given, we may also speak of a general model of social formation regime.

### **3. THE PARTICULAR EVOLUTION OF SPORTS GROUP SYSTEMS.**

If at this point we return to considering the structure of social groups, we realise that they have evolved in a somewhat different way.

These groups have given themselves a system whose aim is to avoid integration with the State system, and to protect it they created a complex system of self-governance: the sports law.<sup>10</sup>

This occurred also (and, possibly, above all) thanks to a project initiated by Giulio Onesti, President of C.O.N.I (Italian National Olympic Committee) for several decades, who at the end of WW2 also involved the *Rivista di diritto sportivo* to this end. This project consisted in asserting

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<sup>9</sup> \_ See, amongst others, N. BOBBIO, *Teoria dell'ordinamento giuridico*, Turin, 1960, pp 194 and ff, and F. MODUGNO, *Legge-Ordinamento giuridico - Pluralità degli ordinamenti. Saggi di teoria generale del diritto*, Milan, 1985, passim. As regards the absorption of the military system see the well-known essay by V. BACHELET, *Disciplina militare e ordinamento giuridico statale*, Milan, 1962, while regarding the absorption of the norms elaborated by the mercantile classes see F. GALGANO, *Lex mercatoria*, Bologna, 2001, p. 74.

<sup>10</sup> \_ Regarding this, the general system of F. P. LUISO, *La giustizia sportiva*, Milan, 1975, is still relevant, but more recently a wider account can be found in L. FERRARA, *Giustizia sportiva*, entry in *Enc. dir. Annali*, Milan, 2010, III, pp.491 and ff.

the so-called *primacy of sports law* over State law; the principle, that is, by which sports activities must be governed only, or, in any case, primarily, by the norms issued by sports bodies, without interferences from State sources<sup>11</sup>

Moreover, it should come as no surprise that this occurred after in the 1930s sports organisations were nationalised (sports federations were mostly considered public bodies until a few years ago and as yet C.O.N.I.'s nature as a public body has remained uncontested)<sup>12</sup>

From the times of Italian Prime Minister Giolitti, the political class has been aware of the advantages - in electoral and social control terms - that are inherent to a privileged relationship with the management of sports groups and, thus, has constantly acted in favour of the aspirations expressed by the management of the sports world<sup>13</sup>

On the other hand, a similarly favourable attitude towards the management of professional groups has allowed not only great autonomy, but also a series of institutions which imply several forms of substantial self-governance to be established<sup>14</sup>

As we know, over the past decades all professional orders and boards have been able to equip themselves with a *corpus* of ethical norms even without express authorisation from the State legislator<sup>15</sup>

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<sup>11</sup> \_ This is expressed in an essay by G. ONESTI in Riv. dir. sportivo, 1962, pages 124 ff; see also I. MARANI TORO, Giulio Onesti ed il diritto sportivo, ivi, 1981, pp. 417 ff.

<sup>12</sup> \_ The doctrinal and legal debate on the matter is outlined by G. MORBIDELLI, Gli enti dell'ordinamento sportivo, in V. CERULLI IRELLI, G. MORBIDELLI (edited by), Ente pubblico ed enti pubblici, Turin, 1994, pp. 171 and ff.

<sup>13</sup> \_ This approach has been a true constant of Italian political and institutional life, as the detailed investigation by F. BONINI, Le istituzioni sportive italiane: storia e politica, Turin, 2006, passim demonstrates.

<sup>14</sup> \_ See, in relation to this, G. ROSSI, Enti pubblici associativi. Aspetti del rapporto fra gruppi sociali e pubblico potere, cit., passim.

<sup>15</sup> \_ And it is in the wake of this normative autonomy that in recent years orders have begun to issue, without any legislative authorisation, norms which have little to do with professional ethics, and, more recently, even norms regulating the professional specialisations of their members. This is the case with the regulation on the professional specialisations issued by the Consiglio nazionale forense (the Italian Forensic Council), which the Court of Lazio in sentences nos. 5151 and 5152 of 2011 declared null due to violation of the principle of legality. As regards normative powers exercised by

The disputes on the applications of these norms for the professions instituted before the Constitution came into force were assigned to the national councils of the respective professions, each considered special jurisdictions. On the other hand, for the professions instituted after the Constitution came into force – since *ex art.102 Const.* it was not possible to provide for new special jurisdictions - conditioned jurisdictions were often provided for, where access to the State legal system was subordinated to prior undertaking of administrative remedies before national councils (and at times the judging boards present at the disciplinary disputes were integrated by members nominated by the order which the professional plaintiff belonged to)<sup>16</sup>

#### **4. ARGUMENTS FOR SEPARATENESS: THE CLAIMED IRREDUCIBILITY OF SPORT TO STATE LAW CATEGORIES.**

A number of arguments have been elaborated to support the reasons for the necessary separateness of the sports system from the State system.

At the basis of these arguments is the conviction that a sort of radical difference lies between sports activities and other human activities. This difference in turn makes sport irreducible to State law categories.

This order of ideas is ultimately the source of the exaggerations and distortions we spoke of earlier.

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professional orders, I allowed myself to refer to my own *L'attività normativa degli ordini professionali incontra il principio di legalità*, in *Foro amm.— T.A.R.*, 2011, pp. 3177 and ff.

<sup>16</sup> \_ These institutes, and the various aspects based on which they show little consistence with the constitutional principles, were recently studied by M. RENNA, *Professioni e procedimenti disciplinari*, in *www.giustamm.it*, no. 9/2011.

Often this claimed difference is explained in terms of the spiritual value of the phenomenon<sup>17</sup>

For those who are not accustomed to the lexis and conceptology used - above all in the past - by the management of the sports organisations, it could seem an Alexandrianism since it leads to a sort of coincidental and slightly surprising opposition between physicality and spirituality.

In reality this logic is a consequence of the de Coubertin conception of sport, which had declared one of the various 1800 conceptions of the phenomenon, the Anglo-Saxon view, as recreational and educational, with ethical and universalistic purposes which reflect an *ethos* commonplace in the Western managerial classes between the end of the 1800s and the first decade of the 1900s<sup>18</sup>

From a historical point of view this is nothing new: we must remember that in Roman law, services corresponding to literary or artistic activities were not considered as being pecuniarily estimable<sup>19</sup>

But also on this basis such an irreducible difference, with all that it entails, appears to have little foundation.

It seems sufficient to consider that numerous human activities exist whose spiritual value is without a doubt equal or even greater than that of sports activities: but that nonetheless are obviously regulated by State law.

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<sup>17</sup> \_ See, for example, the cited essays by G. ONESTI and I. MARANI TORO, and especially B. ZAULI, *Essenza del diritto sportivo*, in *Riv. dir. sportivo*, 1962, pp. 229 and ff.; cf. P. M. PIACENTINI, *Sport*, entry in G. GUARINO (edited by), *Dizionario amministrativo*, Milan, 1983, pp. 1425 and ff.

<sup>18</sup> \_ See, on this subject, F. BONINI, *Le istituzioni sportive italiane: storia e politica*, cit., pp. 1 and ff., which recalls, moreover, that in the 1800s a number of very different conceptions also existed, such as the Swedish theory (inspired by "preoccupations of a eugenic and racist character") and the German concept ("related to what we could call a national-military preparation", since its aim was to train civilians for military life, which in the 1800's was very widespread throughout continental Europe). On the different values that historically sports activities have taken on see also V. SANNONER, *La Costituzione italiana e lo sport*, in D. MASTRANGELO (edited by), *Aspetti giuspubblicistici dello sport*, Bari, 1994, pp. 13 and f.

<sup>19</sup> \_ We are reminded of this, for example, by M. GIORGIANNI, *L'obbligazione*, Milan, I, 1951, p. 38.

In other words, it remains to be seen why the ownership of an El Greco painting or the authors' rights on a Ungaretti poem, or, in general, the subjective positions correlated to the activities of artists, philosophers, academics, scientists, may be disciplined by State norms, and, as the case may be, exercised before State judges, while the subjective positions of a footballer, tennis player or golf player cannot.

And if we consider the matter carefully, the alleged difference, *etc.*, is no longer valid even from the point of view of the sports institutions themselves: at least since the nineties, when the International Olympic Committee officially allowed the participation of professional athletes – i.e. those who practice sport as a profession, rather than merely for recreation - in the Olympics which, as we know, were open to only amateur sportspersons respecting de Coubertin ideals.

Therefore the managements of international sports organisations now also admit openly that sports activities can be carried out both for ideal reasons and for exclusively economic reasons, even at Olympic level.

## **5. CONTINUED: LEGAL PLURALISM AS PRESCRIPTIVE.**

But the main arguments that have always been used to support the primacy of sports law consist in using Santi Romano's theory of plurality of legal systems to prescriptive ends.

These arguments are presented in different ways, but substantially they are based on this reasoning: a) Romano demonstrated that every social group can give itself its own system; b) the system of sports groups is also a legal system; c) for this reason the State cannot interfere (or rather, according to the most used variant: can interfere only to a limited extent) in the sports system.

Now, even if at times some doubts appear, at almost a century from its elaboration the Romano theory is well known, and can without a doubt be considered as self-evident<sup>20</sup>: it appears unthinkable to me that today we can begin seriously go back to supporting the coincidence between State and law.

Point b) also seems somewhat evident, thanks to the systems in terms of legal pluralism of the norms issued by sports groups proposed since the 1920s by Cesarini Sforza, and in the forties by Giannini, in the *Prime osservazioni sugli ordinamenti giuridici sportivi*<sup>21</sup>.

It is the passage from the premises of points a) and b) to the conclusion in c) that is decidedly debatable, representing, in fact, a real leap in logical terms.

This is due to quite an obvious reason: Romano's theses regard the general theory of law, and, thus, if taken per se, cannot in any way confirm claims of autonomy or independence for any social group.

Furthermore, its use for prescriptive purposes appears quite a curious fate for a theory that, as Orlando already pointed out, represents the result of an investigation "performed strictly from a legal point of view... in order to completely avoid any influence of a philosophical-legal type"<sup>22</sup>.

Of course, Romano's theses have allowed us for the first time to realise that all social groups are also producers of legal norms equal to the State, which, ultimately, is no other than the institution

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<sup>20</sup> \_ As regards its influences and those of other Romano doctrines, the studies published in P. BISCARETTI DI RUFFIA (edited by), *Le dottrine giuridiche di oggi e l'insegnamento di Santi Romano*, Milan, 1977, are still valid. Recent considerations regarding the influence of the theory of the plurality of systems on Italian public law can be read in A. MASSERA, *Il contributo originale della dottrina italiana al diritto amministrativo*, in *Dir. amm.*, 2010, pp. 761 and ff.

<sup>21</sup> \_ W. CESARINI SFORZA had previously proposed this system in *Il diritto dei privati*, which was first published in *Riv. it. sc. giur.*, 1929, pp. 43 and ff. (although I have used the third edition of this text, published in Milan, 1963) and then rediscussed the matter in a note published in *Foro. it.*, 1933, I<sup>o</sup>, pp. 1381 and ff., *La teoria degli ordinamenti giuridici e il diritto sportivo*. The essay by M. S. Giannini was published in *Riv. dir. sportivo*, 1949, pp. 10 and ff.

<sup>22</sup> \_ See E. ORLANDO, *Recenti indirizzi circa i rapporti fra Diritto e Stato (Ordinamento giuridico – regola di diritto – istituzione)*, p.17 of the extract from *Rivista di diritto pubblico e la Giustizia amministrativa*, 1926.

of a group that has historically had particular success: and, thus, that between each phenomenon there is no incommensurability even from a legal point of view.

This can without a doubt lead to the recognition of autonomy (or, perhaps, independence) of the groups, *etc.* (in concrete terms, legal pluralism without a doubt forms part of the cultural baggage of the members, and, thus, has represented one of the sources of inspiration of the pluralistic principle *ex art. 2 Const.*).

But from here we cannot pass *tout court* to stating that social groups *must* be able to produce regulations that prevail over State norms, or that the groups *must* have a certain amount of normative jurisdiction in certain sectors: for example, it is as if from the consideration that subjective law is the figure of general theory, we were to infer that Joe Bloggs *must* be the holder of a certain subjective right.

It is not by chance that Giannini in *Prime osservazioni* – which still today provides sports systems, in terms of legal pluralism, that are both more refined and more coherent with Romano's theses - without a doubt does not suggest such an inference<sup>23</sup>

It appears therefore quite evident that here we are dealing with a use of legal pluralism that could be defined ideological: and furthermore the institutional occurrences of the 1900s demonstrate that the ideological uses of this theory may even lead to consequences which are the complete opposite to those claims from the supporters of the primacy of the sports law.

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<sup>23</sup> \_ We should really have a separate discussion for Cesarini Sforza, since he used the law created by social groups as an example of the notion of law of the individuals proposed in the abovementioned book. However, as we have seen in § 2 of the text, Cesarini Sforza's theses do not seem to confirm the subsequent evolution of the relations between the State system and that of the social groups, despite the fact that the text of art. 36 of the Civil Code was very probably formulated from the point of view of legal pluralism, as is pointed out by G. VOLPE PUTZOLU, *La tutela dell'associato in un sistema pluralistico*, Milano, 1977, p. 7, and A. FUSARO, *L'associazione non riconosciuta. Modelli normativi ed esperienze atipiche*, Padua, 1991, pp.79 and ff.

A common line of thought, for example, considers Romano's theories to a certain extent functional to an integration of non-State institutions and systems into the State, through the “restoring of the systems to the unity of the State”<sup>24</sup>

In order to be fully comprehensive, we should say that, having made these considerations, it is obvious that in order to justify such interference even the efforts which at times are made to demonstrate that the sports system would be an original system rather than a derived system appear scarcely useful<sup>25</sup>

Also from Romano's point of view it is evident that the fact that a system originally (excuse the repetition) has an original character certainly cannot prevent it from afterwards being absorbed by part of (or integrated into) another system.

If it were not so, today we would not have the military system code *ex* legislative decree no. 66/2010, the maritime law or even the fifth book of the civil code: all of which are State law systems that reconnect to phenomena of absorption.

And if it were not so, no form of protection within the association would be possible, since in the past even the systems of unincorporated associations were formed without conditioning from State law, which since the early 1900's considered associations legally irrelevant<sup>26</sup>

But perhaps the danger that such reasoning can be taken out of context may be appreciated adequately when we remember that, since Romano had (rightly) pointed out that "a revolutionary society or a criminal association" may be an original legal system<sup>27</sup>, at times we find ourselves

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<sup>24</sup> \_ M. CORSALE, Pluralismo giuridico, entry in Enc. dir., Milan, 1983, XXXIII, p.1016; on this subject also cf., amongst others, G. D. FALCON, Gli <scritti minori> di Santi Romano, in Riv. trim. dir. pubbl., 1976, pp. 672 and ff., V. ANGIOLINI, Costituente e costituito nell'Italia repubblicana, Padua, 1995, p.8, P. RESCIGNO, Manuale del diritto privato italiano, Naples, 1996, pp. 22 and f.

<sup>25</sup> As we know, the term 'derived system' generally means that it is subordinate to another system, since its existence is conditioned by this latter, while the original system is *superiorem non recognoscit*.

<sup>26</sup> We are reminded of this, for example, by M. BASILE, L'intervento dei giudici nelle associazioni, cit., p.138.

<sup>27</sup> S. ROMANO, L'ordinamento giuridico, II<sup>a</sup> ed., Florence, 1945, p.160.

considering whether the mafia should be considered a system or not, and what the concrete consequences of this qualification would be<sup>28</sup>.

Discussions of this type end up being decidedly futile, since it is obvious that criminal groups were mentioned by Romano - as by others before him – merely as *exempli gratia*, with no claim of ennobling such phenomena, or legitimising them at a State law level: and, thus, it is obvious that on this level by qualification of said groups as institutions with their own original system we cannot elicit even the minimum consequence<sup>29</sup>

## **6. THE PARTIAL IMPLEMENTATION OF THE THEORY ON THE SEPARATENESS OF SPORTS LAW INTO STATE LAW: LEGAL POLICIES AND LAW NO. 280/2003.**

Over the last decades the theories on the separateness of the sports system have managed to condition the very evolution of the State system.

The matter is quite complex<sup>30</sup>, but in order to explain briefly we can say that this occurred mainly because when State law had to deal with the matter of qualifying the so-called technical-sports

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<sup>28</sup> \_ As regards the possibility of configuring the mafia as a legal system see, for example, G. FIANDACA, La mafia come ordinamento giuridico. Utilità e limiti di un paradigma, in Foro it., 1995, V<sup>^</sup>, pp.21 and ff. This essay reaches the conclusion that the matter lacks concrete consequences of any importance. Furthermore, we must remember that even though in these debates mainly Romano's theses are quoted, the explicit reference to the mafia as source of a form of law is found in B. CROCE, in Filosofia della pratica. Economica ed etica, Bari, 1932, IV<sup>^</sup> ed., pp. 313 and ff., along with other examples “chosen from amongst the strangest and best in order to cause scandal”.

<sup>29</sup>As revealed firstly by S. ROMANO, op. loc. cit. Of course the use of Romano's theories for examining the illicit associations without meaning to draw consequences in terms of State law is not futile - as Giorgio Cugurra pointed out to me some time ago, A. PIGLIARU, for example, did so in an extremely interesting way in La vendetta barbaricina come ordinamento giuridico, Milan, 1959.

<sup>30</sup> I have tried to describe this in Pluralità degli ordinamenti e tutela giurisdizionale. I rapporti tra giustizia statale e giustizia sportiva, Turin, 2007, pp. 119 and ff.

norms, that is, the norms which govern sports competitions, it was impossible to find adequate instruments in State law categories.

Authors such as Furno and Carnelutti in the mid 1900's attempted to reconstruct the competitions with the instruments of contract law, but they gave up when they realised that the agreement to observe certain game rules does not represent property<sup>31</sup>.

And this is why the United Sections of the Cassation in sentence no. 4399 of 1989 had stated that "as regards the application of technical rules that determine the result of an amateur competition", citizens cannot take a legal position before the State legal system, since the State system has an indifferent behaviour towards this matter, and that moreover is governed by the norms issued by the sports groups: these norms, despite being relevant in the context of the system that expressed them, are not subject to the legal system in the context of the general system".

In reality, the matter is anything but irresolvable even from a State law point of view, since even the norms which govern the competitions can be part of the context of a detailed association agreement, which, as a whole, undoubtedly implies worthy interests regarding protection (today the matter can be dealt with using conceptual instruments which originate from the restoring of the law of unincorporated associations to the State law frameworks, i.e. instruments that were not available when Canelutti and Furno dealt with the matter).

It is clear, moreover, that the question of whether or not the agreements regarding competitions have any value as property is irrelevant if we view the relative activity from the point of view of public interest. As we know, in fact, even after the privatisation of the sports federations introduced by Legislative Decree no. 242 of 1999, the problem of qualifying the activities of

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<sup>31</sup> C. FURNO, Note critiche in tema di giochi, scommesse e arbitraggi sportivi, in Riv. trim. dir. proc. civ., 1952, pp. 619 ff.; F. CARNELUTTI, Figura giuridica dell'arbitro sportivo, in Riv. dir. proc., 1953, pp. 20 and ff.

these bodies in public or private terms reappeared, since art. 15 of Decree no. 242 refers to the "public value" of specific types of activities of the federations<sup>32</sup>

Even less justified appears the guideline of the Court of Lazio, which in the eighties stated that the disciplinary sanctions issued by sports organisations are relevant for State law, and thus can be brought before a judge only when they involve a "stable alteration" of the *status* of those being sanctioned.

At best, in fact, there are no such problems in interpreting sanctions of any type according to the frameworks of State law<sup>33</sup>

Thanks to these legal guidelines, therefore, the sports system has come to have a dual composition, being considered partly integrated in the State system and partly separate from it.

This partial separateness has been confirmed and strengthened *ex lege* over the last decade when, demonstrating benevolence towards sports group managements, the government issued decree-law no. 220 of 2003, converted into law no. 280 of 2003 by an equally benevolent parliament.

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<sup>32</sup> \_ This provision can thus be interpreted in the sense that with it the legislator conferred public powers to private subjects (on the matter see in general, recently, F. DE LEONARDIS, *Soggettività privata e azione amministrativa*, Padua, 2000, and A. MALTONI, *Il conferimento di potestà pubbliche ai privati*, Turin, 2005), or a functionalization by principles, similar for example to that which we encounter in privatised public work - according to G. NAPOLITANO, *Sport*, entry in S. CASSESE (edited by), *Dizionario di diritto pubblico*, Milan, 2006, VI, p. 5683 and L. FERRARA, *L'ordinamento sportivo e l'ordinamento statale si imparuccano di fronte alla Camera di conciliazione e arbitrato dello sport*, in *Foro amm.-CDS*, 2005, pp. 1233 and ff. The matter is further complicated by the fact that the text in force of art.15 of Legislative Decree no. 242 transfers the identification of these activities to the CONI statute: but as regards the matter I allow myself to refer to my own *Associazioni di tifosi sportivi e interessi legittimi*, in *Rass. dir. econ. sport*, 2011, pp. 17 ff.

<sup>33</sup> On one hand, the consideration that criteria such as that of the "stable alteration" are characterised by an irremediable vagueness and it is not by chance that their application to the legal praxis has led to different results.

After the summer of 2003 when, before State judges, a number of football teams contested the results of the recently ended championships, in order to guarantee the separateness of the sports system a formidable series of instruments were prepared with legislative decree no. 220: clauses reserved for sports law regarding technical and disciplinary disputes, the so-called sports preliminary law (a form of conditioned jurisdiction, by which in order to bring disputes not exclusive to sports law before the State judge they must first pass through all the various levels of sports law) and the exclusive jurisdiction of the Court of Lazio regarding all disputes allocated to the administrative court.

If we were not familiar with the peculiar institutional dynamics of Italy it would certainly arouse a degree of perplexity that the judge-rapporteur of the law converting the decree defined a situation which could be resolved before State judges as a "true impending disaster in the world of football".

In reality, it is fairly obvious that this legislative intervention is yet another confirmation of the traditional favour of the political class for the managements of sports organisations<sup>34</sup>

Often the administrative courts of different regions have been suspected of favouring local teams: in order to solve this type of problem it would have been sufficient for the Court of Lazio to take exclusive jurisdiction over sports disputes.

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<sup>34</sup>On the other hand, it could be considered in line with the *esprit du temps*, since over the past years the institutional attitude towards legal problems has often led to measures which deflate the dispute and end up becoming real obstacles as regards exercising defense rights: the most typical example may be the so-called obligatory mediation or conciliation, recently introduced for most civil disputes, which seems somewhat unconstitutional, since in the past the Constitutional Court has admitted the lawfulness of forms of conditioned jurisdiction only and exclusively in particular sectors, and in particular circumstances (for example, in the job sector, the particular intensity of relations between the worker and the employer ensured there were no constitutional censures in the obligatory attempt at conciliation: this institute has recently been rescinded); but probably the periodic halving of the time to start legal proceedings before the administrative court as regards public contracts, and again in this sector, the fixing of a compulsory payment at a much higher rate than that provided for in any other case implicitly follow a deflationary intent. And so, in substance, in order to guarantee the right to start legal proceedings it ends up impeding starting legal proceedings.

While the legal guidelines established in the eighties were limited to reasoning in terms of relevance of certain situations which were subjective for the State system (since the partial separateness of the norms issued by the sports bodies that it derived from behaved like a type of unintentional consequence), law no. 280 of 2003 continues this logic, but at the same time expressly declares the intent to protect the autonomy of the sports system.

For the first time for the State legislator this autonomy is a positive value, stating in art. 1 that “the Italian Republic recognises and favours the autonomy of the national sports system, as a part of the international sports system headed by the International Olympic Committee ...”.

## **7. CONSTITUTIONAL COURT SENTENCE NO. 49/2011.**

As we know, law no. 280 was received with perplexity both by much of the doctrine<sup>35</sup> and by the legal system, since it implies a considerable retreat as regards legal protection in terms of the acts

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<sup>35</sup> \_ Over the past years regarding relations between the State system and the sports system numerous studies have been published with a view to legislative decree no. 220/2003, amongst which see at least L.FERRARA, L'ordinamento sportivo: meno e più della libertà privata, in *Dir. pubbl.*, 2007, pp.1 ff., and *Giustizia sportiva*, cit., G. CLEMENTE DI SAN LUCA, Dei limiti all'autonomia dell'ordinamento sportivo. Riflessioni intorno a calcio e diritto, in *Dir. pubbl.* 2007, pp.33 and ff.; F. GOISIS, *La giustizia sportiva tra funzione amministrativa ed arbitrato*, Milan, 2007, R. MORZENTI PELLEGRINI, *L'evoluzione dei rapporti tra fenomeno sportivo e ordinamento statale*, Milan, 2007, N. PAOLANTONIO, *Ordinamento statale e ordinamento sportivo: spunti problematici*, in *FA-TAR*, 2007, pp. 1152 ff., M. DELSIGNORE, *Sanzioni sportive: considerazioni sulla giurisdizione da parte di un giudice privo della competenza funzionale*, in *Dir. proc. amm.* 2008, pp.33 and ff., A. MASSERA, *Sport e ordinamenti giuridici: tensioni e tendenze nel diritto vivente in una prospettiva multilaterale*, in *Dir. pubbl.*, 2008, pp.33 and ff., T. E. FROSINI, *L'ordinamento sportivo nell'ordinamento costituzionale*, in *Aa.Vv.*, *Fenomeno sportivo e ordinamento giuridico*, Naples, 2009, pp.235 and ff., the contributions of A. ROMANO TASSONE, L. FERRARA, C. FRANCHINI, M.R. SPASIANO, M.A. SANDULLI in *Aa.Vv.*, *Ordinamento sportivo e calcio professionistico: tra diritto ed economia*, Milan, 2009, and also my *Pluralità degli ordinamenti*, cit.

of sports bodies compared to the previous frameworks which, as we have seen, were not particularly respectful of rights.

This led to divergences in legal guidelines, particularly because the Court of Lazio proposed several times a restrictive interpretation of letter b) of paragraph 1 of art. 2 of the law (which assigns to the sports judge the task of defining matters relating to "behaviour which is relevant in disciplinary terms and the issuing and application of the relative sports disciplinary sanction"), while the State Council was firm in interpreting this clause literally<sup>36</sup>

This contrast led to reproposing the matter of the constitutionality of this provision with order 241 of 2010 of the Court of Lazio<sup>37</sup>

With sentence no. 49 of 2011 the Court professed to resolve the matter with a interpretive sentence of dismissal.

The Council, in fact, admitted openly that disciplinary sports sanctions affect constitutionally protected rights, in observing that “the possibility, or impossibility, to be affiliated with, or members of, a sports federation, and the possibility, or impossibility, to be allowed to carry out amateur sports activities, taking part in competitions and championships organised by the sports federations under CONI ... *is not a situation that may be regarded as irrelevant to the general legal system, and, as such, unqualified for its protection. This possibility, in fact, allows the exercising of the fundamental rights of freedom* (including those applied both to the individual *per se* and to the association), as well as *equally important rights regarding ownership relationships* – which takes into account the economic relevance assumed by sport, often

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<sup>36</sup> On the matter see L. MARZANO, La giurisdizione sulle sanzioni disciplinari sportive: il contrasto fra TAR e Consiglio di Stato approda alla Corte costituzionale, in *Giur. merito*, 2010, pp. 2567 ff.

<sup>37</sup> \_On the matter see L. MARZANO, La giurisdizione, cit.

practiced professionally and organised on a business basis - *all subject to consideration also at a constitutional level*".

Despite this, the Court was able to avoid declaring unconstitutional the reserve clause adhering to the interpretation of art. 2 that was proposed in decision 5782/2008 of the Council of State: where it was stated that, when an act of sports bodies influences the legal positions which are relevant for the State legal system, an appeal to annul said act is not admissible before the State judge, but only the indemnification protection "not operating any reserve in favour of sports law, before which the indemnification claim cannot even be availed of".

According to the Court this setup would identify "a diversified mode of legal protection" which represents a "not unreasonable balance": presumably (although never said explicitly) among the needs of individual protection and those of group cohesion.

## **8. CONTINUED.**

It is undeniable that merely compensatory protection is better than the total absence of protection which is deduced from the literal interpretation of the clause as according to letter b) paragraph 2 of art. 2 of the law of 2003.

Nevertheless, the solution provided by the Constitutional Court is unsatisfactory for a number of reasons – and on this matter it appears that the first commentators on the sentence generally agree<sup>38</sup>

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<sup>38</sup> \_ Among the first on this sentence: A. DE SILVESTRI, La Corte costituzionale azzoppa il diritto d'azione dei tesserati e delle affiliate, in [www.giustiziasportiva.it](http://www.giustiziasportiva.it), G. FACCI, Il risarcimento del danno come punto di bilanciamento tra il controverso principio dell'autonomia dell'ordinamento sportivo e l'art.24 Cost., in *Resp. Civ. prev.*, 2011, pp. 417 ff., F. PAVONI, La Corte costituzionale esclude il giudizio di annullamento sulle sanzioni disciplinari sportive, *ivi*, pp. 2003

In short, this is mainly because the (far from convincing) motivation behind the sentence does not consider the actual reasons for which the “balance” between the individual’s need for protection and (again, presumably) the group’s need for protection in the context of sports groups may give rise to a radically different setup compared to those which occur in other social groups.

In other words, it is not explained why in sports groups one only has the right to half the protection within the association, when this does not occur in groups which, in the social and economic life of the country, take on incommensurably greater importance, such as trade unions, political parties and even professional groups, especially since the recent guidelines of the Court of Cassation diminished the *deficit* in legal protection compared to the disciplinary sanctions issued by orders or by boards<sup>39</sup>

The regimes of all these groups, in fact, constitute as many *tertia comparationis*, which show that the peculiar configuration given by the Court to protection within the association in the sports sector ultimately clashes with the principle of equality.

And, thus, since the second-rate treatment of the legal claims of sportspersons compared to those of other subjects of the system is unjustified, it is also in contrast with the personalist principle *ex art.2* of the Constitution and with the right of action *ex art.24* Const., and, obviously, if we adopt the public system of the sports bodies' activities, also with *art.113* Const.

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ff., E. LUBRANO, La Corte costituzionale n.49/2011: nascita della giurisdizione meramente risarcitoria o fine della giurisdizione amministrativa in materia disciplinare sportiva?, in *Dir. econ. sport*, 2011, pp. 63 and ff., A. BASILICO, L'autonomia dell'ordinamento sportivo e il diritto di agire in giudizio: una tutela dimezzata?, in *Giorn. dir. amm.*, 2011, pp. 733 ff., A. DI TODARO, La tutela effettiva degli interessi tra giurisdizione sportiva e statale: la strana «fuga» della Corte dal piano sostanziale a quello per equivalente, in *Giur. Cost.*, 2011, pp. 697 ff., I. PIAZZA, Ordinamento sportivo e tutela degli associati: limiti e prospettive del nuovo equilibrio individuato dalla Corte costituzionale, in *Giur. it.*, 2012, pp.33 and ff., as well as the essay by F. BLANDO, S. FANTINI, T.E. FROSINI, A. SCALA, M.R. SPASIANO, A. PALMIERI, A. BASILICO published in the first publication of the new series of rivista di diritto sportivo, which can be read on [www.coni.it](http://www.coni.it) and, also, my own *Gruppi sportivi e tutela endoassociativa*, in *Giur. Cost.*, 2011, pp. 688 ff.

<sup>39</sup> Over the last decade the Court of Cassation abandoned the traditional line of thought on the unquestionability of the ethical norms and, thus, began considering them as a parameter of judging legitimacy: see, on the matter recently S. STACCA, Le garanzie nei confronti del potere disciplinare degli ordini professionali, in *Foro amm.-CDS*, 2011, pp. 3070 and ff.

It is enough to consider that on the basis of the Court's reasoning the legislator could without a doubt consent to the professional orders to disbar members, and thus, to impede them from performing their profession, conceding the profession only protection by way of equivalent measures.

We could say that from this point of view sentence no. 49 ultimately represents the extreme success of the cultural operation geared to affirming the *primacy of sports law*, which, as we have seen, began immediately after the Second World War.

The Council, in fact, was unable to see beyond the conceptual distortions and the actual optical illusions that are the product of this operation and, therefore, to realise that from a legal standpoint there are no real grounds for justifying a configuration of protection within the association in sports groups that is so considerably different from those of other social groups.

## **9. THE "INTERNATIONAL" SCALE OF SPORT.**

In the reasons for the sentence law no. 280 states that the national sports system forms a part of what is defined as "the international sports system headed by the International Olympic Committee": the matter of constitutionality of art.2 of the law is examined and dealt with "regardless of the international dimension of the phenomenon".

Also in consideration of the fact that this "scale" in the past was also used prescriptively by upholders of privileges for the sports world, it seems appropriate to investigate the point.

It does not seem to be coincidental that in sentence no. 49 this aspect of sport is merely superficially referred to and not used to justify the conclusions of the Council.

The concrete importance of the "scale" in question is well known, as are (thanks also to the in-depth and stimulating study that Lorenzo Casini recently dedicated to the matter<sup>40</sup>) the complexity of the international sports system and its dense and intrinsic network of relations and contacts with the various countries and with international bodies, one example of which is the World Anti-Doping Agency (WADA), which is the result of co-operation between the International Olympic Committee and the governments of different countries, and whose work is guaranteed by the convention promoted by UNESCO in 2005<sup>41</sup>

This is obviously an extremely interesting matter (also and above all as regards the evolution of methods of exercising public powers in a supranational context), but the complexity of this system and these relations must not form a distraction, or a screen, for the observer.

It seems to me, in fact, that for our purposes Giannini's lesson is still valid. Giannini first pointed out the connection between the Italian sports system and the international system over sixty years ago, in the previously quoted *Prime osservazioni*.

Being the expert on law that he was, however, Giannini, in making this connection, did not intend to infer that the sports system was in legal need of any specific treatment, but limited himself to explaining that the mainly absentioistic attitude adopted by the national governments towards matters regulated by international sports organisations is a mere fact<sup>42</sup>.

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<sup>40</sup> L. CASINI, *Il diritto globale dello sport*, Milan, 2010.

<sup>41</sup> See L. CASINI, *Il diritto globale dello sport*, cit., 81 and ff.

<sup>42</sup> \_ M. S. GIANNINI discussed this recently in *Ancora sugli ordinamenti giuridici sportivi*, in *Riv. trim. dir. pubbl.*, 1996, cit., p. 674. It should be remembered, however, that at times the claims of separateness of the sports system are justified through arguments of mere fact, such as the expediency of avoiding State interferences in the life of sports bodies in order to avoid the repudiation of Italian bodies and athletes by the International Olympic Committee and international sports federations: this repudiation for example was usually dreaded by the international football federation at State legal interventions in the sports sector. We should remember L. MENGONI's lesson, *L'argomentazione orientata alle conseguenze*, in *Riv. trim. dir. proc. civ.*, 1994, pp. 1 and ff., according to which arguments directed at the consequences cannot be decisive in guiding the interpretation of a normative text: in conclusion, because with arguments of this sort we run the risk that the evaluations end up replacing those of the legislator - in the administrative doctrine see on the matter A. TRAVI, *Il metodo amministrativo e gli "altri saperi"*, in *Dir. pubbl.*, 2003, pp. 865 and ff. Notwithstanding the above, we can make some (obviously, *ad abundantiam*) considerations: first of all remembering that these threats of repudiation

The reason for this position – which, incidentally (and perhaps oddly) seems at times to have been misunderstood by upholders of the *primacy of sports law* - is simple.

The so-called international sports system does not, in fact, depend on an actual international legal organisation<sup>43</sup> since the International Olympic Committee is merely a private association under Swiss law<sup>44</sup>- and it is not by chance that the title of Casini's abovementioned work refers to the *global law of sport*.

This fact, *in nuce*, has not been challenged even by the increasingly tight relationships of the sports bodies with national governments and supranational organisations: substantially, notwithstanding the relevant exceptions (such as the abovementioned activity of the WADA), the general rule is still that issued by Giannini.

Having said this, we should also mention that, according to the Italian Constitution, only the international system, the EU system and the canonical system are regarded as separate systems (being those which are permitted a (partial) waiving of sovereignty) and even these three,

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at times appear instrumental, since in general they are made when State interventions, even if only invasive to a limited extent, are undesired by the international (and national) sports bodies, while on the other hand these bodies have no reaction towards much more invasive interventions, which are desired by the management of the sports groups: such as law no. 280 of 2003. Secondly, also where it is considered that sports groups do not have the right to a treatment which, compared to that of other social formations, is susceptible to be converted into a hated privilege for sports individuals, determined types of State interventions would however be illegitimate, contrary to the pluralistic principle ex art.2 Const. and to that of reasonableness ex art.3 Const.: for example, legislative disciplines that impose technical game rules different to those sanctioned by the international sports bodies would be without a doubt illegitimate. This applies also, therefore, to the arguments of this type, based on the possible consequences and/or evaluations of opportunity, as we say they are trying too hard. Without then considering that the threats of repudiation from the international sports bodies are far too dramatised, a series of very incisive State or supranational body interventions have not created any reaction: typically, the known sentence of the European Court of Justice so-called Bosman of 15.12.1995 (on the matter see, for all, M. CLARICH, La sentenza Bosman: verso il tramonto degli ordinamenti giuridici sportivi?, in Riv. dir. sportivo, 1996, pp. 393 and ff.) that on the basis of certain opinions would have led to the repudiation of all the teams and athletes of the European countries.

<sup>43</sup> M. S. GIANNINI, Ancora sugli ordinamenti giuridici sportivi, cit., p. 672.

<sup>44</sup> \_ On the matter of the configuration of the IOC, moreover, the international doctrine is still in agreement: see, for all, R. SAPIENZA, Il Comitato internazionale Olimpico, in E. GREPPI, M. VELLANO (edited by), Diritto internazionale dello sport, Turin, 2005, pp. 11 and ff.

moreover, are not permitted any waiving of sovereignty that would damage the inviolable principles of the Italian system; this undoubtedly includes the rights protected by art. 2 Const.<sup>45</sup>.

And since the international, or global, sports system is obviously not related to any of these systems its existence (from the point of view of our State system) clearly cannot justify any waiving of sovereignty that may result in a failure to protect the rights of the individual, without considering that, as we have said, such failure would probably not occur even in relation to the international system itself, etc.

Referring again to one of the examples of associative phenomenon used by Cesarini Sforza in *Il diritto dei privati*, we could say that in the context of current State law sports bodies generally find themselves in a situation that is ultimately no different from that of an unincorporated association such as the *Rotary Club*, since this association also has a connection with the international organisation *Rotary International* (although, obviously, the social (and, I would venture to say, economic) importance of these two phenomena differs enormously)<sup>46</sup>

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<sup>45</sup> \_ In this matter, for all, M. CARTABIA, *Principi inviolabili e integrazione europea*, Milano, 1995, spec. pp. 106 and ff., and, more recently, S. CASSESE, *I tribunali di Babele. I giudici alla ricerca di un nuovo ordine globale*, Rome, 2009, pp. 53 and ff.

<sup>46</sup> The statute of the Rotary Club was used by W. CESARINI SFORZA as an example in *Il diritto dei privati*, cit., p. 52, nt. 1. Moreover numerous other infrastatute systems have transnational connections of various types (typically, different for trade unions and political parties – a present-day example is the transnational connections between the socialist parties and working class parties): these connections have not been adopted as supporting arguments for the legitimacy of immunity or privileged situation of these bodies.