



**Working Paper Series No. 019**

**Prosecuting Sports Violence :  
The Indonesian Football Case**

Topo SANTOSO

University of Indonesia  
Asian Law Institute, National University of Singapore, Singapore

[toposantoso@yahoo.com](mailto:toposantoso@yahoo.com)

ASLI Visiting Fellow  
(25 October 2010 to 24 November 2010)

**February 2011**

The **ASLI Working Paper Series** is published electronically by the Asia Law Institute, whose Secretariat is based at the Faculty of Law, National University of Singapore.

© Copyright is held by the author or authors of each Working Paper. ASLI Working Papers cannot be republished, reprinted, or reproduced in any format without the permission of the paper's author or authors.

**Note:** The views expressed in each paper are those of the author or authors of the paper. They do not necessarily represent or reflect the views of the Asia Law Institute or of the National University of Singapore.

Citations of this electronic publication should be made in the following manner: Author, "Title," ASLI Working Paper, No. #, Date, [www.law.nus.sg/asli/pub/wps.htm](http://www.law.nus.sg/asli/pub/wps.htm). For instance, Chan, Bala, "A Legal History of Asia," ASLI Working Paper, No. 101, December 2009, [www.law.nus.sg/asli/pub/wps.htm](http://www.law.nus.sg/asli/pub/wps.htm).

**Asia Law Institute**

c/o Faculty of Law,  
National University of Singapore  
Eu Tong Sen Building  
469G Bukit Timah Road,  
Singapore 259776  
Tel: (65) 6516 7499  
Fax: (65) 6779 0979  
Website: <http://law.nus.edu.sg/asli>  
Email: [asli@nus.edu.sg](mailto:asli@nus.edu.sg)

**The Asian Law Institute (ASLI)** was established in March 2003 by a group of leading law schools in Asia. Its goal is to facilitate academic exchanges as well as research and teaching collaboration among colleagues from the thirteen founding institutions. The establishment of ASLI stems from the recognition that the diversity of legal traditions in Asia creates an imperative for Asian legal scholars to foster greater engagement with each other through collaborative research and teaching. The acronym "ASLI", which means "indigenous" in the Malay and Indonesian languages, represents the commitment of the founding institutions to establish a truly home-grown law institute in Asia. The ASLI membership has grown beyond the founding members and includes 33 new member institutions.

# PROSECUTING SPORTS VIOLENCE : THE INDONESIAN FOOTBALL CASE

TOPO SANTOSO<sup>1</sup>

## ABSTRACT:

This paper focuses on the implementation of criminal law provisions (particularly those relating to crimes against the person) to incidences of violence in contact sports such as football. There is considerable debate over the question of whether the criminal law should be invoked in such cases. On one side of the debate are those who reject the use of the criminal law and prefer to use the so-called 'lex sportiva,' or internal sports regulations. On the other side are those who consider the criminal law to be an appropriate tool for dealing with the most egregious cases. In Indonesia, there is uncertainty about the way in which law enforcement officials should handle cases of sports violence. The criminal law is rarely invoked in such situations, and the standards of the system of criminal justice are ambiguous. To date, only one incident involving sports violence has reached the courts – in the form of the two connected cases of *Nova Zaenal* and *Momadao*. The two sides of the debate have been polarized by these cases, with one side denying that the law should ever be applied to incidences of on-pitch violence, and the other failing to provide clear guidelines with respect to when it is appropriate for the criminal law to intervene. This paper considers the relevant cases, together with the five considerations applicable to any incident of sports violence, as laid down in *R v Barnes*, ie: 1) the type of sport; 2) the level at which it is being played; 3) the nature of the act and the degree of force used; 4) the extent of the risk of injury; and 5) the state of mind of the defendant. The paper concludes that while it is probably impossible to establish general limits in terms of acceptable conduct, it is possible to determine on a case-by-case basis whether or not these five criteria have been satisfied.

## I. INTRODUCTION

For a long time, there have been various problems in Indonesian football, such as fighting and violence on and off the field, as well as vandalism. Many incidents have also taken place, such as violence committed player to player, player to match referee, player to supporter, official to referee, and official to player. Fighting has also occurred between supporters and between supporters and the public (who were not involved in the football game). Meanwhile, vandalism has often occurred in the form of destroying football stadiums, public utilities, and private belongings.

The abovementioned problem is becoming more and more serious and needs to be analysed to find solutions to deal with it. The problem is found not only in Indonesia, but throughout the world.<sup>2</sup> Discussing all problems involving violence in sports would be very difficult and would require extensive study, because it covers so many considerations, not only juridical or normative aspects, but also sociological or even cultural ones.

Of these many problems, one problem will be discussed in this paper, namely the implementation of criminal law provisions (particularly crimes against the person) in sports violence (particularly in "contact sports" such as football). Today, there still remains

---

<sup>1</sup> Lecturer of Faculty of Law, University of Indonesia

<sup>2</sup> On 29 May 1985, in the Heysel tragedy, Brussels, 39 football fans lost their lives and more than 600 were injured before the 1985 European Cup final between Liverpool and Juventus.

a significant debate as to whether criminal law should be invoked in such cases. One side rejects the implementation of criminal law and prefers to use the so called “lex sportiva” or internal sports regulations, while the other side prefers to use the criminal law.

The opponents of criminal law implementation argue that all aspects of sports events have already been controlled by internal regulations. The use of criminal law will jeopardize the aim of sports, where people will be afraid to participate because of the risk of prosecution. For this reason, criminal law should not be implemented because circumstances are different from those outside the sporting arena. If criminal law applies, it will cause thousands of people to be prosecuted, because in sporting activities there are high risks of injuries being caused. If occurring outside sports events, such injuries could be regarded as criminal acts, particularly assault.

Meanwhile, the proponents of criminal law implementation argue that internal sports regulations cannot make something which is illegal into something legal. This side also argues that what is tolerable, even if it is part of a game or is a risk which is accepted by all sides in a match, and that there are certain actions that fall beyond the standard of acceptable conduct. Such conduct can then clearly be considered a crime.

This paper will focus on the problems arising from the implementation of criminal law in sporting activities. It will try to establish the relevant standards on the part of law enforcement agencies, sports organizations, and athletes to be considered when we face the problem of criminal law as applied to sporting activities. In this paper, I will focus only on football games in Indonesia. Football is the most popular sport in Indonesia, and in the last ten years there have been many incidents leading to debate over the role of the criminal law.

## II. NOVA ZAENAL DAN MOMADAO CASE

In February 2009, two football players, Nova Zaenal (Persis)<sup>3</sup> and Bernhard Momadao (Gresik United), were involved in a fight during a football match between PERSIS Solo and Gresik United in the Indonesian Football league. After the match, the police arrested and detained the players and investigated the incident, following which they were prosecuted by the Solo District Attorney. In March 2010, the Solo District Court found Nova and Momadao guilty of assault and sentenced them to three months imprisonment, with six months probation (a suspended sentence). The court held that the defendants’ conduct had damaged the reputation of Indonesian football. The High Court of Central Java at Semarang agreed with the Surakarta District Court decision, even imposing a more severe punishment, extending the imprisonment to six months with one year of probation/suspended sentence.

Those who approve of the prosecution argue that it shows that no one is above the law and that it will deter participants in sporting events from fighting, and thus will discourage public disorder. Those who disapprove argue that it is sufficient for participants in sports to be governed by the rules of the game. Some people (including high ranking officials of the Indonesian Football Association) claim that: “This is the first and only

---

<sup>3</sup> Solo Football United.

incident - not only in Indonesia but also in the world - in which athletes were prosecuted in a criminal court.”

In the Indonesian context, the abovementioned claim could be correct, but in other countries the implementation of criminal law in court for sports violence dates back more than 100 years, and the first sports-related criminal case is commonly considered to be *R v. Bradshaw* (1878). The claim that the prosecution of athletes for offences committed during a game has only occurred in Indonesia and that it is the first and only case in the world is thus exaggerated. This exaggeration was probably caused by overcriticism of the harsh application of the criminal law in this case.

Besides *R v. Bradshaw* (1878), there are other decisions concerning criminal law and sports events, such as *People v. Fitzsimmons* (1895), *Commonwealth v. Sostilio* (1949), *R v. Maki* (1970), *R v. Green* (1971), *State v. Forbes* (1975), *People v. Freer* (1976), *R v. Johnson* (1986), *R v. Birkin* (1988), *State v. Floyd* (1990), *R v. Blissett* (1992), *Jensen v. R* (1994), *State v. Shelley* (1997), *People v. Schacker* (1998), *R v. Brownbill* (2004), and *R v. Evans* (2006).

It is thus clear that the criminal law has been used to prosecute and punish athletes who act with excessive violence or are involved in fighting during the course of a game. This development is problematic because there is a conflict between criminal law and sporting law. Prosecutions have been seen as intervention in sport. However, there are reasons to use criminal law, particularly if the conduct goes beyond acceptable standards. Some factors that can be taken into account by law enforcement agencies dealing with violence or fights during the course of sporting events include intention, the consent of the participants, the legality of violence, moral considerations and the need for flexibility in the application of criminal law in sport activities. The approach of my paper is to focus on the criminal law rather than ‘sports law’ or ‘lex sportiva.’

### III. THE “BATTLE” OF TWO GROUPS IN SPORTS LAW

The most common question asked by anyone who works in this area is, “What is sports law?” Answering such a question requires an analysis of how and why the law has become involved in sports disputes and an examination of whether there are any underlying themes or theories that link the disparate legal interventions under discussion into a coherent subject.

This is the challenge facing the law and sport when they interact with one another. It is important to know how sport has evolved to take account of requirements imposed on it by the law, and how the law has provided sport with the legal tools necessary to govern itself effectively and resolve the many and varied disputes to which it can give rise.

When we discuss sports law, we must ask which sports law we mean. There are four important terms grouped into two concepts, namely: (1) Domestic Sports Law and Global Sports Law; and (2) National Sports Law and International Sports Law. For the second category, particularly in Europe, there is added another term, European Sports Law.

The first category, often called *Lex Sportiva*, comprises Domestic Sports Law and Global Sports Law. Domestic Sports Law is defined as “The body of internally applicable legal norms created and adhered to by national governing bodies of sport.” Global Sports

Law is defined as “The autonomous transnational legal order through which the body of law and jurisprudence applied by international legal sports federations is created; in particular it includes the jurisprudence of the Court of Arbitration for Sport and its creation and harmonization of sporting-legal norms.”<sup>4</sup>

The second category is comprised of National Sports Law and International Sports Law. National Sports Law is defined as “The law created by national parliaments, courts and enforcement agencies that directly affects the regulation or governance of sport or which has been developed to resolve sports disputes.” International Sports Law is defined as “The general or universal principles of law which are part of international customary law, or the *jus commune*, that are applied to sports disputes.”<sup>5</sup>

The key distinction between the two groups is that the former is underpinned by a series of contractual agreements entered into by, for example, the athlete, his or her club, the club’s national governing body and the appropriate international sports federation. It is a private contractual order that claims to be making and applying its own set of rules. The latter is the law imposed by a nation state on its citizens, or which is constituted by the treaties entered into by communities of nation states, for example, the members of the EU being bound by the law enshrined in the Treaty on the Functioning of the European Union.<sup>6</sup>

An example of conflict or competition between *Lex Sportiva* and the National Legal System is the conflict between the International Olympic Committee and the Italian government with respect to what type of sanction should be inflicted in a doping case: 1) should it be a two-year suspension, as provided by the World Anti-Doping Code and as the International Olympic Committee demanded? Or 2) should the criminal sanctions (including up to three years' imprisonment) provided by Italian anti-doping law be applicable? The other issue in this case is what institution is authorized to conduct doping tests: 1) the Italian government wanted the country's anti-doping commission to administer the tests, while 2) the International Olympic Committee insisted on conducting its own tests during the Torino Games.

There is still competition between these two groups. The ongoing battle between the proponents of internal self-regulation and external legal regulation has been at the heart of the discussion on sports injuries and the criminal law, and is a major theme of this paper. As far as Indonesia is concerned, it seems that this kind of conflict has just started, as can be seen from the Nova Zaenal dan Momadao case. In this case, there is discussion about which “law” should be applicable, Indonesian criminal law (as provided in the Indonesian Penal Code/KUHP), or internal sports regulations in football matches as provided by PSSI or FIFA.

---

<sup>4</sup> Mark James, *Sports Law* (Hampshire: Palgrave Macmillan, 2010) at p. 3.

<sup>5</sup> The second category includes European Sports Law which is defined as “The law created by the institutions of European Union, in particular the European Court of Justice, that affects the regulation or governance of sport or which has been developed to resolve sports disputes.” Mark James, *supra* note 4 at p. 3.

<sup>6</sup> Mark James, *supra* note 4 at p. 5.

#### IV. SPORTS VIOLENCE AND CRIMINAL PROSECUTION

Mark James<sup>7</sup> identified several criminal acts that can be committed in cases of sports violence, the most important of which is common assault. Common assault can be committed in two ways: by assaulting another person or by battering them. Assault and battery have very specific meanings in the criminal law and these will be used for the rest of this section. However the term “assault” is generally used, whichever of the two technical meanings is actually in issue, and in the discussions after this section assault will be used to refer to all crimes committed including those which are technically batteries.

##### A. *Common assault by battery and its implementation in sport*

Common assault will usually be used in situations where the defendant has caused minor injuries such as bruising or grazes to the victim. This happened in *R v. Evans* (unreported) Crown Court (Newcastle), 14 June 2006, where the defendant was accused of having stamped on his victim in a rugby union game. The judge directed the jury to acquit on the basis that the “slight bruise” on the victim’s forehead was insufficient to constitute an actionable injury arising from the normal playing of rugby.

Assault tends to be defined in popular meaning as “an attack”. A more complete definition of assault is: (1) “The threat or use of force on another that causes that person to have a reasonable apprehension of imminent harmful or offensive contact; the act of putting another person in reasonable fear or apprehension of an immediate battery by means of an act amounting to an attempt or threat to commit a battery; (2) An attempt to commit battery, requiring the specific intent to cause physical injury. Also termed (in senses 1 and 2) simple assault; (3) Loosely, a battery; (4) Popularly, any attack.”<sup>8</sup>

With regard to Indonesian criminal law, Common Assault could be compared to “Penganiayaan” or in Dutch “Mishandeling” (Chapter XX, Article 351 KUHP to 355).

Article 352 of the Indonesian Criminal Code concerns light assault by battery, ie, battery which does not result in an illness or obstacle in the performance of official or professional activities. This can be illustrated as follows: If someone (A) hits another person (B) three times on his head, B feels pain but does not get sick and can continue doing his daily job, then A can be prosecuted as committing “light assault”.

It would make no sense to use this offence in football games, because it could result in every athlete being prosecuted. For this reason, law enforcement authorities tolerate minor assaults in sports events.

##### B. *The Offences Against the Person Act 1861*

The vast majority of sports assaults that come before the criminal courts arise from either deliberate foul play or fights and, in the United Kingdom, are often prosecuted under ss. 47, 20 or 18 OAPA (Offences Against the Person Act 1861). There is little need to

<sup>7</sup> Mark James, *supra* note 4, at pp. 109-128.

<sup>8</sup> Bryan A. Garner (ed.), *A Handbook of Criminal Law Terms* (St.Paul, Minnesota: West Group, 2000) at hal. 44.

discuss consent in such cases, because these assaults cannot be said to be an expected part of the playing of the game in question. Although it is technically possible for an aggravated assault such as those under OAPA 1861 to be committed during the ordinary playing of the game, this is extremely unlikely to occur. This is to be compared with the Indonesian Criminal Code Article 351.

### C. OAPA 1861 s. 47 and KUHP article 351

The offence under s. 47 is committed where the defendant intentionally or recklessly assaults another person and causes the victim actual bodily harm (ABH). Put simply, it is a common assault that causes the victim ABH.

With regard to Indonesia, the offence in s. 47 OAPA 1861 may be compared to the “penganiayaan” offence provided in Article 351 of the Indonesian Criminal Code. There are no elements detailed in Article 351, and only the name of the offence is provided. What is defined as the elements of “penganiayaan” can be found in case law (court decisions) and in the opinion of legal experts.

In an old decision of Hoge Raad (Netherlands) dated 25 June 1894, the court held that “battery/mistreatment is intentionally causing sickness or injury.” In another Hoge Raad decision on 21 October 1935, the court held that “the intention should be to cause injury towards body or health.”<sup>9</sup>

In a decision dated 15 January 1934, Hoge Raad stated that “Committing conduct which must be strongly assumed to result in severe injuries is a mistreatment/battery.” It is no matter that the offender has no intent to cause injury but only wishes to escape from police.”<sup>10</sup> According to Article 351 (4) of the Indonesian Criminal Code, “intention to endanger other person’s health” can be categorised as battery.

According to case law, the elements of battery or mistreatment are: intentionally/recklessly, causing or resulting in suffering, causing pain, or causing injury, or intentionally causing illness.<sup>11</sup> Illustrations of causing suffering are pushing someone into the river and soaking the victim,<sup>12</sup> ordering someone to stand for hours under the intensity of the heat of the sun, etc. Illustrations of causing pain include biting, kicking, hitting, etc. Causing injury includes cutting and stabbing until the victim is hurt/injured. “Causing illness to another person” includes opening windows at night to make a sleeping person ill or giving someone intoxicating drinks until he/she becomes sick.<sup>13</sup>

All such conduct must be committed intentionally and without proper or good purpose or go beyond the prescribed limit. R. Soesilo, an Indonesian legal expert, gives the illustration of a dentist extracting his patient’s tooth. This conduct is actually intended to

---

<sup>9</sup> R. Soenarto Soerodibroto, *KUHAP & KUHP, Dilengkapi Yurisprudensi Mahkamah Agung dan Hoge Raad* (Jakarta: Rajawali Pers, 1991) at pp. 211-212.

<sup>10</sup> *Ibid.*

<sup>11</sup> R. Soesilo, *Pokok-pokok Hukum Pidana Peraturan Umum dan Delik-delik Khusus* (Bogor: Politeia, 1984) at pp. 144-145.

<sup>12</sup> See also PAF Lamintang & Theo Lamintang, *Delik-Delik Khusus, Kejahatan Terhadap Nyawa, Tubuh, & Kesehatan* (Jakarta: Sinar Grafika, 2010) at pp. 132-133.

<sup>13</sup> R. Soesilo, *supra* note 11.



cause pain but cannot be categorised as battery because it is in fact good and helpful conduct aimed at curing the patient. A father hitting his children because his children are delinquent would be committing battery because the father intends to cause his children pain, but because the father has the proper aim of teaching his children not act wrongly, the conduct may not be regarded as punishable battery.<sup>14</sup> This is in accordance with the Hoge Raad decision on 10 February 1902, which held that “If causing injury or pain in the body is not the purpose, but only a means to achieve other accepted/legal purpose, then there would be no battery.” For example, within accepted limits a parent or teacher in Indonesia may hit children.<sup>15</sup>

However, if the abovementioned conduct goes beyond the accepted limit, for example if a dentist extracts a tooth without using anaesthetic and or does it for a joke, or if a parent hits his children on the head using an iron, then the conduct will be considered as battery and therefore punishable.<sup>16</sup>

How should the provision be implemented in sports events? In Indonesia only one case has used Article 351 to prosecute athletes, namely the *Nova Zaenal and Momadao* case. In *Nova Zainal Mutaqin*<sup>17</sup> the Prosecutor charged Nova with battery, as regulated in Article 351 (1) of the Indonesian Criminal Code. The defendant demanded the court acquit (*vrijspraak*) or discharge (*onslag van alle Rechtsvervolging*) him for several reasons: (1) the incident occurred during the game between Nova Zaenal and the defendant Momadao was under the jurisdiction of the PSSI regulation and thus his actions did not constitute a crime; (2) Statuta of FIFA, Basic Guidance of PSSI, General Regulation of PSSI concerning Football Match, Disiplinary Code of PSSI, and other regulations issued by PSSI were legal documents and regulated all football matches in Indonesia, and should be regarded as *Lex Specialis Derogat Legi Generali* (Special Law); (3) the essential facts charged were not proven by the evidence presented.

In *Nova Zaenal*, the Surakarta District Court held that all elements of Article 351 (as described in case law/yurisprudensi)<sup>18</sup> had been proven (the elements are intentionally causing pain or injury towards another person). The court held that these elements were proven because it was proven that the defendant chased the victim (Momadao) and hit him in his stomach three times, causing bruises. The judges saw no justification for the acts of the defendant. The judges then imposed a sentence of three months’ imprisonment, with six months’ probation/suspended sentence.

According to the Surakarta District Court Decision, a fight or battery, even though occurring in the field, is still unlawful and the perpetrator can be sentenced. The court agreed with expert opinion from the prosecutor, namely that of Prof. Dr. Nyoman Serikat Putra Jaya from Diponegoro University, rather than that of the defendant’s expert witnesses, namely Hince Panjaitan, a leading proponent of *Lex Sportiva* in Indonesia, and Prof. Dr. R. Jamal Wiwoho.

<sup>14</sup> R. Soesilo, *supra* note 11.

<sup>15</sup> R. Soenarto Soerodibroto, *supra* note 9.

<sup>16</sup> R. Soesilo, *supra* note 9.

<sup>17</sup> Decision No. 319/Pid.B/2009/PN.SKA, decided on 11 Maret, 2010.

<sup>18</sup> Decision of Hoge Raad, 25 Juni, 1894 and 11 Januari, 1892.

In *Bernard Momadao*,<sup>19</sup> the defendant in the preliminary proceedings brought up an exception which rejected the authority of the Surakarta District Court. The defendant claimed that the public prosecutor's charge should be denied or annulled. However, this was rejected by the court. In the main proceeding, the Surakarta District Court held that all elements of Article 351 (1) were proven (the elements being intentionally causing pain or injury towards another person) because the defendant had been proven to hit the victim's head using his right hand, bruising Nova Zaenal Mutaqin's temples. The judge saw no justification. The court imposed three months' imprisonment and six months' probation.

These two decisions, *Nova Zaenal* (Decision No. 319/ Pid.B/2009/PN.SKA) and *Bernard Momadao* (Decision No. 381/Pid.B/2009/PN.Ska, were brought to the appellate court in Central Java High Court in Semarang. The Central Java High Court in both these cases agreed with the ruling of the Surakarta District Court, even imposing a harsher punishment by extending the punishment to a six month imprisonment with one year's probation/suspended sentence. The High Court held that the conduct of the defendant destroyed Indonesian football's image, discouraged sportsmanship and hindered the ability of the victim to play the sport.

These two decisions were criticized, particularly by PSSI as the central federation of Indonesian football, which argues that the court is not the proper forum to handle such cases, because the sports federation has already laid down appropriate penalties. It claimed that this was the first and only case in the world where athletes had been prosecuted and sentenced in the criminal court.

The court held that, in the criminal law context, the federation's imposition of rules was not sufficient to eradicate unlawful conduct. This argument is very similar to that in *Bradshaw*. In 1878, Bradshaw set the scene for the way in which the criminal law would develop in respect of sports assaults. In directing the jury on whether a foul that had led to the death of an opponent was criminal, or simply part of the lawful playing of the game, Bramwell LJ stated at p.85 that:

“No rules or practice of any game whatever can make that lawful which is unlawful by the law of the land...[If] a man is playing according to the rules and practice of the game and not going beyond it, it may be reasonable to infer ....that he is not acting in a manner which he knows will be likely to be productive of death or injury. But ...if the [defendant] intended to cause serious hurt to the deceased, or ...was indifferent or reckless as to whether he would produce serious injury or not, then the act would be unlawful.”<sup>20</sup>

In *Bernard Momadao*, it was held that disciplinary treatment taken by the referee who supervised the match in form of yellow cards and by the Disiplinary Commission in the form of suspension in the next three matches in the league also could not eliminate the unlawful conduct. The court held that: “...this kind of sanction cannot eliminate criminal responsibility and the criminal action committed by someone involved in the conduct...”<sup>21</sup> However, the disciplinary sanction was taken into account by the judges to consider the form of the sentence. Accordingly, the judges held that the sentence should not be

<sup>19</sup> Decision No. 381/Pid.B/2009/PN.Ska, decided on 23 Februari, 2010.

<sup>20</sup> Mark James, *supra* note 4 at p. 109.

<sup>21</sup> Decision No. 319/Pid.B/2009/PN.SKA, *supra* note 17.

implemented unless the defendant committed another violation within six months (suspended sentence).<sup>22</sup>

There are two decisions which can be compared in this context, namely *Bradshaw* (1878) and *Billighurst* (1978). In *Bradshaw*, Bramwell LJ noted that contacts that were within the ‘rules and practices’ of the sport in question were lawful and could be consented to, regardless of the degree of harm caused to the victim. A hundred years later in *Billighurst* (1978), the court held that injurious conduct that was “of a kind which could reasonably be expected to happen during a game” could be consented to.

In the Indonesian context (where the criminal law mainly refers to Dutch law), the relation between sport and criminal law has also become a subject of debate. One interesting issue in this respect relates to consent. Schonke, van Hattum and van Bemmelen, as quoted by Lamintang, conducted a discussion about a physician who conducted plastic surgery (a treatment which can not be categorized as part of health treatment). According to Schonke, the physician is not criminally liable because the unlawfulness has been removed by the existence of consent from his patient who demanded him to provide the beauty treatment.<sup>23</sup>

In the sports context, the discussion concerning “consent” is also very relevant. According to van Hattum and van Bemmelen, the conduct that actually qualifies as battery loses its unlawfulness if there is consent from the other person (the victim). However, consent has limits. The conduct committed cannot go far beyond the prescribed limit in every individual sport.<sup>24</sup>

The opinion of van Hattum and van Bemmelen may also give guidance about which conduct is acceptable (conduct which does not go beyond the prescribed limits) and which conduct is unacceptable (those actions which go far beyond the prescribed limits). However, it is not very clear whether such opinion is only relevant for inherently ‘violent sports’, such as boxing, or also relevant for ‘contact sports’ such as football. This guidance is also too general, because it has yet to describe what is the standard of “go[ing] far beyond the limits”. With regard to law enforcement, we still need clearer standards, such as what kind of consent is needed to make conduct which is initially a battery lose its unlawfulness, where the offender will thus not be guilty due to the victim’s consent.

## V. CONCLUSION

In all jurisdictions, there is uncertainty in terms of how law enforcement officials should handle sports violence cases. In no part of the world is it common to use the criminal law in such situations. Indonesia, where there is ambiguity in the standards of the Indonesian criminal justice system, is no exception.

What about the law and regulations? Indonesia has a relevant statute in the form of the National Sport System (Law No. 3 of 2005). However, this law does not deal with the question of how to distinguish between criminal acts which attract the notice of law enforcement authorities and acts which are considered part of the game and under the authority of sport organization bodies. The main sources of criminal law are codified in

---

<sup>22</sup> *Ibid.* at pp. 57-58.

<sup>23</sup> PAF Lamintang dan Theo Lamintang, *supra* note 12 at p.138-139.

<sup>24</sup> *Ibid.* at p. 140-141.

The Indonesian Penal Code (KUHP), which comprises hundreds of criminal provisions. One of the relevant crimes, also found in other countries, is assault, including Grievous Bodily Injury (Articles 351-355). What is the definition of assault? This is not clear in the Code, and therefore we should refer to *yurisprudensi* (case law) and doctrine (opinion of criminal law experts).

With regard to defences, there is no clear limitation/standard regarding the consent of the participants. Thus far in Indonesia there has been only one incident brought to the criminal court dealing with sports violence in the cases of *Nova Zaenal* and *Momadao*. Meanwhile, the opinion of experts falls into two sides, namely: those who support the use of *Lex Sportiva* and disregard national criminal law, and those who support the implementation of criminal law in specific and limited incidents, ie. conduct which goes far beyond the rules of the game. Unfortunately, the first side seems absolutely to deny that in the field of sport or during the match the state law can interfere, while the other side does not provide clear standards which should be taken into account to determine when the criminal law can be used.

We may have further discussion on important standards mentioned in cases outside Indonesia, such as from *R v. Barnes* (2004). In this particular case, the Appellate Court provided certain important criteria to answer the issue of how to determine what is and is not acceptable conduct as part of the game. There are five considerations in handling sports violence cases: (*R v. Barnes*, 2004), namely: 1) the type of sport being played, 2) the level at which it is being played, 3) the nature of the act, the degree of force used, 4) the extent of the risk of injury and 5) the state of mind of the defendant. All these factors are relevant when determining whether the defendant's conduct is objectively acceptable in the circumstances.<sup>25</sup> Thus, while we cannot establish general limits in terms of acceptable conduct, we may be able to decide on a case-by-case basis whether these five criteria have or have not been satisfied.

---

<sup>25</sup> Mark James, *supra* note 4 at pp. 109-128.

**BIBLIOGRAPHY**

James, Mark. Sports Law. Hampshire: Palgrave Macmillan, 2010. Mark James, Sports Law, Op.Cit, pp. 109-128.

Garner, Bryan A (ed). A Handbook of Criminal Law Terms. St.Paul, Minnesota: West Group, 2000.

R. Soenarto Soerodibroto. KUHAP & KUHAP, Dilengkapi Yurisprudensi Mahkamah Agung dan Hoge Raad. Jakarta: Rajawali Pers, 1991.

R. Soesilo. Pokok-pokok Hukum Pidana Peraturan Umum dan Delik-delik Khusus. Bogor: Politeia, 1984.

PAF Lamintang and Theo Lamintang. Delik-Delik Khusus, Kejahatan Terhadap Nyawa, Tubuh, & Kesehatan. Jakarta: Sinar Grafika, 2010.

Hulsman, LHC. "The Dutch Criminal Justice System from A Comparative Legal Perspective" in DC Fokkema et.all (eds), Introduction to Dutch Law for Foreign Lawyers, Kluwer, Deventer: 1978.

Peter JP Tak. The Dutch Criminal Justice System. CB Nijmegen: Wolf Publishers, 2008.

Standen, Jeffrey. "The Manly Sports: The Problematic Use of Criminal Law to Regulate Sport Violence." Journal of criminal Law Criminology, Vol. 9, No. 3, Summer 2009.