

THE MEANING AND SCOPE OF SPORT AS A (HUMAN) RIGHT AS ENSHRINED IN THE OLYMPIC CHARTER

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In the August 2021 version of the Olympic Charter, the Fourth Fundamental Principle of the Olympic Charter reads as follows:

“The practice of sport is a human right. Every individual must have the possibility of practising sport, without discrimination of any kind and in the Olympic spirit, which requires mutual understanding with a spirit of friendship, solidarity and fair play.”

This Principle was slightly altered for the current version of the Olympic Charter, adopted at the 141st Session of the International Olympic Committee, in Mumbai, India, in October 2023. The text is now reads as follows:

“The practice of sport is a human right. Every individual must have access to the practice of sport, without discrimination of any kind in respect of internationally recognised human rights within the remit of the Olympic Movement. The Olympic spirit requires mutual understanding with a spirit of friendship, solidarity and fair play.” (Emphasis added)

The amended text retains the statement that sport is a human right. We agree with this option, in line with the approach of Pierre COLLOMB¹, who argues that sport is a human activity in the full sense of the term, because in it, man puts his most precious asset, i.e. his body, into play. The truth is that this approach is unparalleled in any other binding international human rights instrument, such as the Universal Declaration of Human Rights, or the European Convention on Human Rights. Although the statement that sport is a human right is copied almost word for word, in Article 1 of the UNESCO International Charter of Physical Education and Sport, UNESCO, which is entitled: “The practice of physical education, physical activity and sport is a fundamental right for all”, particularly in paragraph 1 thereof:

“Every human being has a fundamental right to physical education, physical activity and sport without discrimination on the basis of ethnicity, gender, sexual orientation, language, religion, political or other opinion, national or social origin, property or any other basis.”

Secondly, it is evident that the legislator wanted to stress the nature of this personal right, which cannot be viewed as a mere possibility, or as something

1. « Lecture transversale des textes relatifs aux droits de l’homme appliqués au sport », *Sport et Garanties Fondamentales : Violence - Dopage*, Coord. Nathalie KORCHA e C. PETTITI, Institut de Formation en Droits de l’Homme du Barreau de Paris, 2003, p. 47.

hypothetical, or potential, but must be effective, via guaranteed access to sport activity.

There is also a reference to human rights, as recognised internationally, combined with a link with the Olympic Movement. In this way, the IOC, acting via a Fundamental Principle of the Olympic Charter, manages to impose human rights as recognised in Public International Law, i.e. human rights as enshrined in international legal instruments adopted by States, on the various constituent parts of the Olympic Movement, via their obligation to comply fully with the Olympic Charter (cf. the Seventh Fundamental Principle of Olympism, and Rule 1.4, both in the Olympic Charter). In this context, access to sport activity must be ensured in a manner that also complies with other human rights, as enshrined in international human rights law.

We also consider that the express and limitative reference to the Olympic Movement has another objective. For by encapsulating the right to sport within the context of the Olympic Movement, the persons addressed by the right are players and athletes involved in competitive federation sport, within the Olympic pyramid with the IOC and the Olympic Games at its apex, immediately above the international sport federations, and the National Olympic Committees, which are the three main constituent parts of the Olympic Movement.

For example, consider the definition of the Olympic Movement in the Third Fundamental Principle of Olympism:

*“The Olympic Movement is the **concerted, organised**, universal and permanent action, carried out under the supreme authority of the IOC, of all individuals and entities who are inspired by the values of Olympism. It covers the five continents. **It reaches its peak with the bringing together of the world’s athletes at the great sports festival, the Olympic Games. Its symbol is five interlaced rings.**”* (Emphasis added)

The Fifth Principle also refers to the Olympic Movement as an overall framework of organised sport:

*“Recognising that sport occurs within the framework of society, **sports organisations** within the Olympic Movement (...)”* (Emphasis added)

This is also evident from the said Seventh Fundamental Principle, which refers to a relationship of membership, which arises on recognition by the IOC:

*“**Belonging to the Olympic Movement** requires compliance with the Olympic Charter and recognition by the IOC.”* (Emphasis added).

Rule 1 of the Olympic Charter (“*Composition and general organisation of the Olympic Movement*”) is even clearer regarding the fact that the Olympic Movement comprises a federative pyramid, with the athletes and players at its base, and the IOC at its apex. This rule is therefore transcribed in full below, given its relevance to the topic of this article:

“1. Under the supreme authority and leadership of the International Olympic Committee, the Olympic Movement encompasses organisations, athletes and

other persons who agree to be guided by the Olympic Charter. The goal of the Olympic Movement is to contribute to building a peaceful and better world by educating youth through sport practised in accordance with Olympism and its values.² The three main constituents of the Olympic Movement are the International Olympic Committee (“IOC”), the International Sport federations (“IFs”) and the National Olympic Committees (“NOCs”).³ In addition to its three main constituents, the Olympic Movement also encompasses the Organising Committees for the Olympic Games (“OCOGs”), the national associations, clubs and persons belonging to the IFs and NOCs, particularly the athletes, whose interests constitute a fundamental element of the Olympic Movement’s action, as well as the judges, referees, coaches and the other sports officials and technicians. It also includes other organisations and institutions as recognised by the IOC⁴. *Any person or organisation belonging in any capacity whatsoever to the Olympic Movement is bound by the provisions of the Olympic Charter and shall abide by the decisions of the IOC.*”

It is therefore necessary to draw the following conclusion, i.e. when the Olympic Charter proclaims the right to sport, as a human right, it does so solely in relation to competitive, organised, and federation, sport.

However, there is another aspect to be considered regarding the meaning and scope of the inclusion of the right to sport in the Olympic Charter, as a human right, on the basis of a systematic interpretation of the Fourth Fundamental Principle of Olympism, transcribed above. This aspect concerns the fact that the IOC includes access to sport activity, as a human right, equality, in the sense of non-discrimination, and sport ethics (in the allusion made to the Olympic spirit and fair play) in the Fourth Fundamental Principle, which is identical to the approach adopted by UNESCO, and also similar to the approach of the Council of Europe² and the European Commission³.

The IOC urges the Olympic Movement to adopt rules and to work to ensure access to sport activity, free of all discrimination.

2. Article 10 of the 2021 European Sport Charter concerns precisely the “The right to sport” and in the respective paragraph 1 it addresses precisely the issue of access to all: “*Access to sport for all is considered to be a fundamental right. All human beings have an inalienable right of access to sport in a safe environment, both inside and outside school settings, which is essential for their personal development and instrumental in the exercise of the rights to health, education, culture and participation in the life of the community.*” Paragraph 2 contains a reference to non-discrimination: *No discrimination on the grounds of race, colour, language, religion, gender or sexual orientation, political or other opinion, national or social origin, association with a national minority, property, birth or other status, shall be permitted in the access to sports facilities or to sports activities.*”

3. “*Sport involves all citizens regardless of gender, race, age, disability, religion and belief, sexual orientation and social or economic background.*” – White Paper on Sport, Brussels, 11.7.2007 COM(2007) 391 final.

The IOC is the body primarily subject to a duty to comply with the principle of equality, in the sense of non-discrimination, for example, in the definition and establishment of the criteria for the selection of the sports to be included in the Olympic Programme, or of cities to host the Olympic Games.

For example, the International Sport federations are required, as another of the three main constituent parts of the Olympic Movement, to act in accordance with objective, non-arbitrary, and non-discriminatory criteria, in the exercise of their power under the Olympic Charter to fix the age limits for the competitions in each sport (Rule 42 of the Olympic Charter). Likewise, international sport federations are required to comply with the principle of equality, i.e. non-discrimination, in the definition of the technical rules governing the various sports (Rule 6.1 and the Bye-Law to Rule 33 of the Olympic Charter). [It is noted that one of the aspects under consideration, in high profile cases, such as the Semenya case (access of an intersex athlete to competitive sport), or the Oscar Pistorius case (simultaneous access to the Olympic Games and the Paralympics by an athlete with prostheses that replace amputated legs), in which the IAAF eligibility rules were at issue, was precisely the principle of equality, i.e. non-discrimination.

The provisions of the Olympic Charter regarding the National Olympic Committees, include a provision, which seeks to prevent unfounded discrimination that prevents those with sporting merit from competing in the Olympic Games, i.e. Paragraph 4 of Rule 44 (*"Invitations and entries"*), which provides that:

"An NOC shall only enter competitors upon the recommendations for entries given by national federations. If the NOC approves thereof, it shall transmit such entries to the OCOG. The OCOG must acknowledge their receipt. NOCs must investigate the validity of the entries proposed by the national federations and ensure that no one has been excluded for racial, religious or political reasons or by reason of other forms of discrimination." (Emphasis added)

The dual approach described, which ensures, on the one hand, that athletes are entitled to participate in competitions, and on the other, that their participation is subject to the prior confirmation of the equality of all competitors – is reinforced by the IOC in *Implementing Provision of the IOC Code of Ethics – Basic Universal Principles of Good Governance within the Olympic Movement. In Principle 5 ("Support to Athletes")*, paragraph 5.1. (*"Athletes' rights and responsibilities"*) provides as follows:

"Appropriate measures should be taken to adopt and implement the Athletes' Rights and Responsibilities Declaration."

The right of athletes to participate in sports competitions and within applicable rules including competition laws) shall be protected. No form of discrimination on whatever grounds, be it race, colour, sex, sexual, orientation, language, religion, political or other opinion, national or social origin, property, birth or other status, shall be tolerated." The *"Athletes' Rights and Responsibilities Declaration"* was adopted in 2018. This declaration does make express reference to

a right to sport, but refers to the capacity and opportunity of athletes and players to take part in sport, free of all discrimination:

“This Declaration aspires to promote the ability and opportunity of athletes to:

1. Practise sport and compete without being subject to discrimination on the basis of race, colour, religion, age, sex, sexual orientation, disability, language, political or other opinion, national or social origin, property, birth or other immutable status.”

It is noted that the source of the idea of an “*opportunity*” to compete, rather than a right to compete, may be the United States of America⁴, where it was decided that there is no right to compete in organised sports competitions, and where Congress declined to legislate a right of athletes to compete internationally, but instead opted to establish an “*opportunity*” to compete⁵. This option was adopted when Congress was called on to counterpose the rights of athletes to choose the sport in which they wish to compete, and “*organisational rights*”, i.e. the right to determine the eligibility of athletes, or players, or of the team to which they belong, to compete in a competition⁶, i.e. factors such as age, weight, and amateur, or professional, status, and obviously the performance of the athlete, or player⁷.

This approach is in line with an arbitration award of the Court of Arbitration for Sport in Lausanne, which could not now be so assertive, in the light of the bolstering of the text of the Fourth Fundamental Principle of the Olympic Charter. In a case in September 2000⁸, in which the Panel decided that: “(...) *there is no rule of “fairness”, to be derived from the Olympic Charter's acknowledgement that the practice of sport is a fundamental human right, which would under such circumstances create an outer time limit of Olympic ineligibility.*”

We consider that the approach that should now be adopted, in accordance with the Olympic Charter, is that access to competitive sport under the auspices of the Olympic Movement, and the conduct of competitive sport, should be viewed as a human right. However, the implementation of the principle of equal-

4. Cf. James A.R. NAFZIGER, *International Sports Law*, Second Edition, 2004, pp. 130-131.

5. *Idem*, p. 324.

6. Cf. Robert DAVIS, “Olympic Competition: an opportunity to participate or a privilege with obligations”, *Sports & European Community Law: International Implications*, Ed. D. PANAGIOTOPOULOS, Atenas, ION Publishing Group, 1997, p.157.

7. It is the athletes and players themselves that prioritise performance and sporting merit. Cf. article 2 of the Universal Declaration of Players Rights, adopted by the World Players Association: “Every player has the right to access and pursue sport as a career and profession based solely on merit”.

8. Arbitration in the CAS ad hoc Division, at the Sydney Olympic Games, Case 00/001, *USOC and USA Canoe/Kayak -v- IOC*, judgment of 13 September 2000, § 26.

ity, i.e. non-discrimination, and sport ethics will converge to ensure not only that athletes' access to competitions is not restricted, other than for objective reasons, but also that athletes will not be authorised to compete in competitions, when they have an a priori competitive advantage in relation to the other competitors. [This is not the place to consider the merits of the access of transsexual and transgender athletes and players to sport competitions, however we note that, when the issue is considered solely in terms of human rights, such athletes and players should always be guaranteed access to competitive sport, and that failure to do so amounts to discrimination. However, it may be necessary, in the name of sport ethics, and in order to prevent unjustified positive discrimination, to prohibit, or restrict, their access to competitive sport]. It is of fundamental importance to ensure that merit is always the primary and prevailing consideration in the definition of eligibility rules, but always without discrimination.

The decision of the IOC Ethics Committee, dated 21 October 2003, is a classic example of what could be a good decision in circumstances related to the right to sport. The matter at issue in that case was a decision of the Board of Management of the International Volleyball Federation of 6 May 2003, which had suspended the Argentine Volleyball Federation. The result of this decision was that the Argentinian players were excluded from various competitions, including world competitions, without having committed any offence, as the reasons for the suspension were wholly attributable to acts of management of the Argentine Volleyball Federation. Moreover, the International Volleyball Federation, after having prohibited the beach volleyball players, subsequently authorised them to compete in competitions because they were professional players, but upheld the exclusion of indoor volleyball players from competitions, because they were amateurs.

The Ethics Committee held in its decision that the right to sport recognised in the Olympic Charter cannot be confused with the notion of "sport for all", but nevertheless applies to international high level, or high performance, sport. The Ethics Committee also noted that the Fundamental Principles of the Olympic Charter do not confer an unconditional right to participate in competitions, and that each international sport federation may restrict the right to participate in its competitions, subject to the proviso that this restriction must not be contrary to the Fundamental Principles⁹, and provided that the sport activity is free of discrimination.

The Ethics Committee accordingly decided in summary that (i) the suspension of players was a violation of their right to participate in international competitions, and (ii) that the fact that some players were banned from international competitions on the basis that they were amateurs, was unjustified discrimination.

9. CAS no. 3/03, *ODEPA/PASO -v- FIVB*, judgment of 21 October 2013.

It can therefore be seen from this decision that the right to sport, enshrined in the Olympic Charter as a human right, is not an absolute right: firstly, and because its subjective scope is limited to the constituent parts of the Olympic Movement, it is above all a right that concerns the access and eligibility conditions adopted by sport federations¹⁰, which must not be discriminatory, and secondarily, because the validity of these eligibility conditions must be evaluated in accordance with Sport ethics, in order to avoid improper competitive advantages.

However, the application of the right to sport is not limited to eligibility rules, but also extends to disciplinary penalties imposed for doping, which, like eligibility rules, also prevent athletes and players from competing. Athletes and players, who violate the antidoping rules, are punished because of a violation of sport ethics, and in order to defend public health. This punishment can involve suspension for extended periods, and even lifetime bans, when this is permitted by the relevant legal system (although not in Portugal). An athlete, or player, who is suspended, or subject to a lifetime ban, suffers a restriction, or even complete prohibition of the exercise of the right to sport. This is because this human right is not absolute. Indeed, the preamble of the World Antidoping Code states that one of the aims of the Code and of the World Antidoping Programme is “*To protect the Athletes’ fundamental right to participate in doping-free sport and thus promote health, fairness and equality for Athletes worldwide.*” The right to sport is a fundamental right, but it is subject to the existence of justice and equality between competing athletes and players.

The key to the human right to sport is therefore in the hands of sports organisations, and particularly international sport organisations, and in the way they consider the creation and adoption of the rules governing sport, within the overall framework of the Olympic Movement.

10. LYDIE COHEN, *Le droit au sport des personnes en situation de handicap*, Thèse de doctorat, Université de Limoges. Cf. Presented and defended on 9 December 2022 – copy kindly provided by the author.