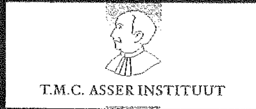
The International Sports Law *Journal*



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White Paper on Sport

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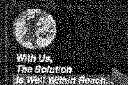

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Is the Professional Athlete's Right to Privacy Being Tacitly Ignored?*

by **Janwillem Soek**

Should a professional athlete put up with out-of-competition doping controls? One may question whether exceptions are permissible for professional athletes with regard to the right to privacy that is guaranteed in human rights treaties.

What is the legal basis for out-of-competition doping controls?

In February 1999, at the end of the first World Conference on Doping in Sport attended by representatives from the sports organisations and governments from many countries, a motion to set up the World Anti-Doping Agency (WADA) was adopted. This organisation subsequently drew up the World Anti-Doping Code (WADC), which now forms the basis of the doping regulations of almost all sports organisations. As governments cannot be legally bound by a non-governmental document like the WADC, it was agreed that a convention would be drawn up under the auspices of UNESCO in order to allow the governments to formally ratify the WADA and the WADC. On 19 October 2005, during a General Conference of UNESCO, the International Convention against Doping in Sport was adopted. The WADC is incorporated in that convention. On 1 February 2007, the convention came into effect in 30 countries - including the Netherlands. Pursuant to Article 15.2 of the Code, the WADA, the IOC, the national sports federation of the athlete and the doping organisation of the country in which the athlete resides can perform out-of-competition doping controls on the athlete for the use of drugs. Article 14.3 of the code stipulates that athletes who are nominated for such testing are required to inform the anti-doping bodies about their current and future whereabouts, the 'whereabouts information'. The WADA tells the reader of its website that "Because out-of-competition tests can be conducted anytime, anywhere and without notice to athletes, they are the most effective means of deterrence and detection of doping and are an important step in strengthening athlete and public confidence in doping-free sport."

Human rights

The countries which ratified the UNESCO convention allowed private anti-doping organisations to invade the lives of their subjects anytime, anywhere and without notice. To what extent does this far-reaching authority relate to Article 8 of the European Human Rights Convention? Section 1 of that article stipulates that "Everyone has the right to respect for his private and family life, his home and his correspondence". Section 2 adds that "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The right to privacy can only be suspended under very specific conditions and then only when it is in accordance with a law and is necessary in a democratic society. With some good will, a violation as described in Article 15.2 WADC can be justified on the basis of the protection of health or morals or for the protection of the rights and freedoms of others. However, any discussion is purely academic because violating the privacy of persons pursuant to Article 8 (2) is only reserved to "a public authority". An anti-doping organisation is a private company and not "a public authority". It is not clear why national governments could have accepted provisions in the WADC which are in conflict with the Human Rights Treaty.

Pursuant to 8(2), a government can force persons on its territory to relinquish certain human rights for a certain time. Pursuant to this provision, this weapon is not granted to an association, such as a sports organisation. Yet the WADC approved by the governments does force athletes to relinquish their right to privacy.

An elite cyclist under contract may only practise his profession, i.e. participate in competitions, if he has a licence from the UCI or from his national association. The licence is only granted if the athlete declares irrevocably that he will undergo any anti-doping test according to the provisions in the sports regulations, so also out-of-competition doping controls "conducted anytime, anywhere, and without notice". Obtaining a licence is not voluntary; on the contrary, without a licence the cyclist cannot practise his profession and as an employer cannot be expected to employ a cyclist who cannot practise his profession, his days as a professional cyclist are numbered. When applying for a licence, the cyclist faces a dilemma. Relinquishing his right to privacy, gives him the right to work; choosing the principle of right to privacy means relinquishing his right to work.

Although sport emerged from the same civilization as the one which produced the Human Rights Treaty, it is apparently difficult for the sport movement to give human rights their due place in the statutes and regulations. Doping may be considered "the scourge of sport", but it cannot be tackled by violating provisions in international treaties, even if the various governments tacitly allow it.

* Previously published in World Sports Law Report, January 2008, p. 3.

The Legal Basis of the Olympic Charter*

by **Alexandre Mestre****

If it is true that, in Sport, there is no event more universal than the Olympic Games, it is no less true that, in Sports Law, there is no text more universal than the Olympic Charter.

The existence of rules was already fundamental to the Olympic Games in ancient times, whether to establish who could take part in or be present at the Games, or in order to govern the conduct of training and the technical details of the competitions. The Olympic Truce already included the idea that, at least during the Games, it is the Olympic rules and principles, whether written or unwritten, which must prevail.

The rules governing the Olympic Games in the Modern Era were not however a priority for Baron Pierre de Coubertin, so that, it is only in 1908, i.e. 14 years after the creation of the International Olympic Committee (IOC) that internal regulations were drafted: the "IOC Directory". Moreover, they merely established basic principles regard-

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** Sports Lawyer at PLMJ - A.M. Pereira, Sáragga Leal, Oliveira Martins, Júdice e Associados, Lisbon and a Member of the Board of Directors of the Portuguese Olympic Academy.

ing the appointment of members of the IOC and the periodic organisation of the Games. The Directory made no provision concerning the selection of organising cities or the criteria applicable to the inclusion of a particular sport in the Olympic Programme.

The growth of the Olympic Games and of the IOC itself compelled an evolution from utopia to pragmatism, with the gradual emergence of so-called Olympic Law, the apex of which was to be occupied by the Olympic Charter, the founding text and fundamental source of the law of the IOC. This was already the position in 1924, although the Olympic Charter was then scattered between various texts. It is only in 1978 that the Olympic Charter was compiled in a specific document.

The concept and scope of the Olympic Charter is clear from its introduction, which states that its purpose is *"(...) the codification of the Fundamental Principles of Olympism, Rules and Bye-Laws adopted by the International Olympic Committee (IOC). It governs the organisation, action and operation of the Olympic Movement and sets forth the conditions for the celebration of the Olympic Games."*

The functions of the Olympic Charter are essentially threefold: (i) it is the fundamental basic document of the Olympic Movement, with a legal status, which approximates that of a constitution; (ii) it defines the rights and obligations of the component parts of the Olympic Movement, with a legal status which is similar to a contract; and (iii) it is the founding document of the IOC (i.e. its byelaws governing its internal organisation - composition; membership rules; governing bodies, etc.)

As far as its structure is concerned, the Olympic Charter, in force as from 7 July 2007, currently amounts to 61 rules - the substantive provisions. These 61 Rules are to be read in conjunction with 31 byelaws, which explain or annotate those rules which may give rise to difficulties or which are particularly terse.

So far as the content is concerned, the Olympic Charter is a heterogeneous legal text, which combines general principles with more technical rules and enshrines both coercive rules and mere standards of conduct. The Olympic Charter is both comprehensive and complex and it enshrines executive powers (e.g. the procedure for the selection of a Games organising city); legislative powers (e.g. the requirements for the alteration of the rules) and judicial powers (e.g. the disciplinary mechanisms with regard to breaches of the Charter, the rules and the byelaws). The Olympic Charter has been carefully drafted, and pays great attention to detail - nothing escapes its scope, not even the Games Protocol. It is also noteworthy that, notwithstanding some rigidity in its amendment procedures, the content of the Olympic Charter is dynamic and has evolved over time, e.g. the removal of the amateur status requirement and the addition of subject matters such as the environment and "governance".

It is the force and transcendence of the Olympic Charter over the entire sporting universe (and more) which we wish to stress in this text. It is indeed amazing that a document issued by a Swiss private corporation has assumed all the features of an international treaty!

The Olympic Charter is a universal text, not because of its legal nature but, rather, because of an extra legal aspect - its moral authority, based on the social, economic and sporting significance of the Olympic Games. The Olympic Charter binding because it is voluntarily accepted, or recognised, by those to whom it is addressed, and comprise a wide-ranging community: private individuals, organisations of various types and others (e.g. States and international sporting federations).

This moral authority alone explains why a Californian court expressed reservations when upholding a state law in relation to the Olympic Charter (1984), or the fact that the EU Council of Ministers adopted legislation *"(...) taking the obligations arising from the Olympic Charter into consideration"* (2003), or the fact that, in Turkey, the "Olympic Law" transposes the Olympic Charter into internal Turkish law, or the fact that the basic laws of sport in force in countries such as Portugal, Spain or France, transpose the rules regarding the protection of the Olympic symbols, which are enshrined in the Charter. Even more noteworthy is the fact that States are formally subject to the primacy of the *Lex Olympica* and to the *ius stipulandi* of the IOC, when bidding for the organization of the Olympic Games.

In this regard, two important decisions of the Court of Arbitration for Sport in Lausanne (which is also under the auspices of the IOC), are particularly striking. They provide that the Olympic Charter *"(...) is hierarchically the supreme corpus of rules, which governs the activities of the IOC"* (the *Beckie Scott* judgment, 2003), in which its rules operate as a true reference standard, which can only be derogated from by more restrictive provisions (the *Nabokov* judgment, 2002). The byelaws of international sporting federations or the World Antidoping Code are good practical examples of this principle.

It follows from all of the above that the Olympic Charter is an atypical legal instrument, but is also unique, powerful, universal and inspiring, all which can also be said of the Olympic Games ...

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On 30 May 2008 the Second International Scientific Practical Conference on "Sports Law: Prospects of Development" was organised by the Moscow State Academy of Law in cooperation with The Football Association of Russia, the Russian Olympic Committee, the Sports and Youth Committee of the Russian Federation Council, the Russian Association for Labour Law and Social Security Law, and the Russian Sports Law Association. Dr Robert Siekmann represented the ASSER International Sports Law Centre at this Conference as a key-note speaker. The picture shows the Luzhniki Stadium in Moscow, where the 2008 Champions League Final took place one week before the Conference.