Freedom of Expression and Its Limits in Sport

Autor

SUAT CEM ABANAZIR

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DR. ALBERTO CARRIO SAMPEDRO / DR. JOSÉ LUÍS PÉREZ TRIVIÑO

Departament de Dret

Universitat Pompeu Fabra Barcelona

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Abstract

As a social and economic force, sport is an integral part of globalised society. Sport is organised and followed globally. Therefore, the organisation of sport at the hands of sport governing bodies and the use of the idea of politics-free sport bring about specific concerns for freedom of expression, in that, these bodies tend to restrict expressions that are deemed political. This work aims to provide a coherent framework for a defence of freedom of expression in the context of sport. Pursuing that goal, it analyses the particularities of the sport industry as well as the philosophical foundations for freedom of expression. This work argues that a defence of freedom of expression in a globalised sport industry can be made on moral grounds. It also argues that the idea of politics-free sport and the restrictions for everyone involved are the reflections of the interdependence of the market, the state and the sport industry.

Resumen

Deporte, como una fuerza social y económica es una parte integral de la sociedad globalizada. El deporte está organizado y seguido globalmente. Por este motivo, la organización del deporte por las organizaciones gubernamentales del deporte y el uso de la idea del 'deporte sin política', causan preocupaciones específicas relacionadas con la libertad de expresión; en tanto en cuanto estas organizaciones tienen una tendencia de restringir las frases que las asumen políticas. Esta investigación tiene un objetivo de constituir una marca consistente sobre la libertad de expresión en el contexto de deportes. La investigación analiza los soportes filosóficos de libertad de expresión con las particularidades específicas de la industria deportiva cuando intenta a obtener este objetivo. En la investigación se está defendiendo que la libertad de expresión se podrá basar sobre los fundamentos morales ante la industria deportiva globalizada. La investigación también propone que la idea de 'deporte sin política' y las restricciones aplicadas para todas las personas son las reflexiones de la interdependencia del mercado, estado y deporte.

List of Abbreviations

CAS	Court of Arbitration for Sport
CEDB	Control, Ethics and Disciplinary Body
CFCB	Club Financial Control Body
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
IFAB	International Football Association Board
IOC	International Olympic Committee
FIFA	Fédération Internationale de Football Association
MLB	Major League Baseball
MLS	Major League Soccer
NBA	National Basketball Association
NFL	National Football League
NHL	National Hockey League
PFDK	Profesyonel Futbol Disiplin Kurulu [Professional Football Disciplinary Committee]
The FA	The Football Association
SGB	Sport governing body
UEFA	Union of European Football Associations

Introduction

Freedom of Expression and Sport

In the 2016/2017 Season, right after Fenerbahçe drew 2-2 with the team placed at the bottom of the Turkish Football Super League, the then-President of Fenerbahçe Sports Club Aziz Yıldırım told the press, *inter alia*, that even if someone criticises the president or the prime minister of the country nothing would happen to them; whereas if someone criticises the President of the Turkish Football Federation, the Federation itself or the referees, then the Federation sanctions the one talking, with a stick in hand, as if they were elementary school pupils.[1] He was charged for his words[2] and was sanctioned two days later.[3] The events unfolded within a 4-day period. Aziz Yıldırım drew attention to arguably one of the most important issues that has been brought to light in recent years—freedom of expression in sport. It can be argued that his criticism of the situation is spot on because compared to ordinary citizens, stakeholders[4] have less space to manoeuvre in terms of freedom of expression, and they are indeed treated like pupils who are expected to act the way SGBs[5] allow them.

It can be asserted that in the current state of things, a discussion on freedom of expression is more relevant than ever. The means for expressing one's ideas or receiving an expression have gotten much easier in parallel with the ubiquity of social media and the ease in dissemination of texts and audio-visual recordings. Yet, paradoxically, heavy-handed practices on the part of national and transnational institutions are gaining ground on (the ideals of) freedom of expression. The use of the terms 'heavy-handed' and 'institution' here is not coincidental. Braithwaite has stated that, '1984' (in reference to George Orwell's novel of the same name) has indeed arrived due to an increase in governance and that the signs show '[…] increased

[1] Hürriyet Spor Website, 'Aziz Yıldırım'dan Adanaspor maçı sonrası flaş açıklamalar!' [Breaking: Statements by Aziz Yıldırım following the Adanaspor match] (2017) <http://www.hurriyet.com.tr/aziz-yildirimdan-adanaspor-maci-sonrasi-flas-aciklamalar-40336549> accessed 20 August 2019.

[2] Turkish Football Federation Website, 'Disiplin Sevkleri' [Charges Brought] (2017) <http://www.tff.org/default.aspx?pageID=1294&ftxtID=26515> accessed 20 August 2019.

[3] Turkish Football Federation Website, 'PFDK Kararları' [Decisions of the PFDK] (2017) <http://www.tff.org/default.aspx?pageID=246&ftxtID=26526> accessed 20 August 2019.

[4] The term 'stakeholder' shall be used to encompass natural and legal persons who fall within the jurisdiction of SGBs.

[5] SGB shall be used as an umbrella term for all sport leagues, joint ventures, international sport federations, national sport federations, the IOC and national Olympic committees.

delegation to business and professional self-regulation and to civil society, to intranational and international networks of regulatory experts, and increased regulation of the state by the state, much of it regulation through and for competition'.[6] Bearing this in mind, it has to be maintained that just like other industries, sport—despite its claim to be above and beyond it—is a part of the world order. Therefore, technological, societal, political and legal changes affect sport directly.

Sport has intimate links to the global market inasmuch as the 'production' of sport[7] is truly on a global scale. In concrete, international SGBs draw up rules and regulations for a given sport, and its disciplines and tournaments on a global level. The rules of the SGBs have transnational effect, in that, individuals are affected by them in their position both as stakeholders and spectators. In addition to this, mega-events[8] especially have global dimensions. Competitions such as the Olympic Games, the FIFA World Cup and the UEFA European Football Championship are followed worldwide. These competitions, with the help of the changing broadcasting landscape since the 1990s,[9] are followed in billions.[10] Domestic competitions such as the NBA, the English Premier League and the Spanish La Liga also have global audiences. Here, broadcasting and marketing strategies are shaped not just by taking into account the domestic audience but also global audiences. Any given week, the sport calendar is full of events that are national and international in nature. Sport-specific channels and websites allow these events to be broadcast around the globe, giving a throng of options for the sport aficionados. The downside is that the scope and reach of these global and domestic competitions

[6] J Braithwaite, *Regulatory Capitalism: How It Works, Ideas for Making It Better* (Edward Elgar 2008) 4 and 11 (footnote omitted).

[7] T Peeters and S Szymanski, 'Financial fair play in European football' [2014] 29:78 Economic Policy 343, 347.

[8] ''Mega events' are large–scale cultural (including commercial and sporting) events which have a dramatic character, mass popular appeal and international significance'. M Roche, *Mega-Events and Modernity: Olympics and expos in the growth of global culture* (Routledge 2000) 1.

[9] S Weatherill, '"Fair Play Please!": Recent Developments in the Application of EC Law to Sport' (2003) 40 Common Market Law Review 51, 73-74.

[10] FIFA, '2018 FIFA World Cup Russia: Global broadcast and audience summary' (2018) <https://resources.fifa.com/image/upload/2018-fifa-world-cup-russia-global-broadcast-and-audience-executive-summary.pdf?cloudid=njqsntrvdvqv8ho1dag5> accessed 20 August 2019; ESPN Website, 'Euro 2016 seen by 2 billion on TV; 600m watch final' (15 December 2016) <http://www.espn.com/soccer/european-championship/story/3020465/euro-2016-seen-by-2bn-on-tv-and-600m-watch-final> accessed 20 August 2019; The IOC, 'Global Broadcast and Audience Report Olympic Games Rio 2016' (2016) <https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/Games/Summer-Games/Games-Rio-2016-Olympic-Games/Media-Guide-for-Rio-2016/Global-Broadcast-and-Audience-Report-Rio-2016.pdf> accessed 20 August 2019.

point up the global effects of the policies and regulations of SGBs—and for the purposes of this work—, their impacts on freedom of expression of those who take part in, attend, watch or listen to these competitions.

In essence, sport is shaped and nurtured by the latest phase of globalisation—a 'vast and indeterminate topic' with an impact on the nature of various subjects[11]—while in its turn, it is also a catalyst for globalisation. [12] Globalisation, which can be summarised as 'the multidimensional and interactive processes of economic, political, and cultural change across the world resulting in increased social interconnectedness as well as opportunities for social confrontation among people';[13] dictates the terms of politics, international relations, trade, and at times, personal relationships. The connections globalisation creates between states and societies also have an impact on national and international legal regimes and rights. Moreover, fuelled by globalisation, transnational private institutions create and maintain networks of natural and legal persons in order to achieve their goals. The creation and maintenance of these networks are helped by self-regulation, which is binding upon the members of the network and beyond. However, these impacts are not always positive. In light of the foregoing, three points can be presented:

1) Along with positive impacts, globalisation, and accordingly, international trade and globalisation of law can have negative impacts on natural persons,[14]

2) The nation state is not the only actor that regulates regimes; [15] transnational private institutions too, have the power to draw up regulations, adjudicate matters arising from their implementation, finally enforce them, and;

[11] R Cotterrell, 'Transnational Communities and the Concept of Law' [2008] 21:1 Ratio Juris 1, 1.

[12] R Giulianotti and S Brownell, 'Olympic and world sport: making transnational society?' [2012] 63:2 The British Journal of Sociology 199, 203-204; D Rowe, 'Sport and the Repudiation of the Global' [2003] 38:3 International Review for the Sociology of Sport 281, 284-285.

[13] SB Twiss, 'History, Human Rights, and Globalization' [2004] 32:1 The Journal of Religious Ethics 39, 40.

[14] PS Berman, 'Global Legal Pluralism' [2007] 80 Southern California Review 1155, 1181-1182.

[15] P Zumbansen, 'Piercing the Legal Veil: Commercial Arbitration and Transnational Law' [2002] 8:3 European Law Journal 400, 417; B Kingsbury and others, 'The Emergence of Global Administrative Law' [2005] 68:15 Law and Contemporary Problems 15, 23-25.

3) Institutions founded on private law principles can have negative effects on the rights of natural persons,[16] as well as positive ones.

These phenomena might be independent from each other. In the case of (1), the negative effects may take place due to the transactions of states, supra-national bodies or other non-private international institutions. Likewise, (2) does not necessarily bring about the negative externalities of (3); and (3) might occur due to the acts of national institutions, eliminating (1) and (2). In the case of sport, which is a (mostly) private sphere of activities, all three are interdependent. The source of these impacts is that international competitions take place under the auspices of transnational bodies, which bring into force regulations and also take necessary actions if they are violated. The adjudication legs of these institutions are supported by the effective enforcement of the decisions. In the process of organising international competitions, international SGBs encroach upon certain rights of natural persons. National SGBs, too, create similar dynamics. These points will pave the way for the work at hand which will deal with a subject at the intersection of the three phenomena listed above. Every item in the list brings about its own discussion, but for the purposes of this work the coercive power of SGBs and its effects on the freedom of expression of stakeholders, spectators and audiences will be broached, informed by various disciplines and branches of these disciplines.

The Aim and the Scope

In this work, it will be argued that by means of their regulatory autonomy, globalisation and the ideal of politics-free sport, SGBs restrict freedom of expression of stakeholders and other persons. In striving to make that point, it will broach the subjects of the regulation of sport, the coercive power of the SGBs and their negative impacts on the freedom of expression of everyone concerned. Concordantly, these points would shed light into the questions:

[16] For the instances of transnational corporations negatively affecting human rights and the means used to curb them *see generally* SR Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' [2001] 111:3 Yale Law Journal 443. Also *see* D Kinley and J Tadaki, 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law' [2004] 44:4 Virginia Journal of International Law 931, 933; United Nations, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (HR/PUB/11/04, January 2012) <https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf> accessed 20 August 2019; JG Ruggie, '"For the Game. For the World". FIFA and Human Rights' (April 2016) Corporate Responsibility Initiative Report No. 68, 12 <https://www.hks.harvard.edu/sites/default/files/Ruggie_humanrightsFIFA_reportApril2016.pdf> accessed 20 August 2019.

'i) what would be the legal and philosophical foundations for a defence of freedom of expression in sport, and accordingly; ii) what is the nature of the interplay between measures taken by the SGBs against non-commercial expressions and the interests protected by the SGBs?'

These interdependent questions are not aimed at filling a gap in the literature, but rather they strive to contribute to the literature by providing a meaningful framework regarding the philosophical foundations of freedom of expression and their application to the sport industry. It is not ambitious enough to try to come up with an all-encompassing theory of freedom of expression thus it will focus on the sport industry.[17] By taking the relationship between freedoms of association—and thus the interest-driven structure of the sport industry—the reasons for the curbing of freedom of expression for all those of involved in sport are strived to be laid bare. The modest nature of this contribution stems from the facts that, apart from the recent surge in commentaries on the issue concerning the Kaepernick incident—which will be broached in Section 4.5.3—, the use of social media by college athletes in the US and some references to the freedom of expression in investigations covering SGBs' protection of their intellectual property rights, there are few works in this area. The important works on the subject by Wasserman only reflect the situation in view of the First Amendment and the so-called US sports such as baseball, gridiron, ice hockey and college sports. In respect to the relevant areas of this research, the literature tends to focus on the specificity of sport, various aspects of its governance and the exploitation of intellectual property in sport. One can encounter non-academic pieces on news websites and blogs on sport culture and constitutional rights; but an academic discussion on possible arguments for freedom of expression in sport as supported by its philosophical foundations are generally lacking. Finally, there has been a surge in interest in the philosophical dimensions of human rights, the human rights aspect of freedom of expression will also be discussed.

Since the notions of both freedom of expression and sport are both deep and wide, in order to render the research manageable, certain limits have to be introduced. As to the former, the

[17] Such an approach to the subject is akin to Teubner's call for the readjusting of fundamental rights to the rationalities and normativities of private sub-areas of society. G Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (OUP 2012) 134-135 and 141-142.

notion is loaded with meaning, capable of drawing up support from different societies and ideologies. The problem of categorising expressions notwithstanding,[18] freedom of expression may pertain to political expressions and personal expressions that may reflect the moral powers of an individual and 'commercial speech',[19] to name a few. This work will focus mostly on political and personal expressions. Expressions with a religious aspect or expressions that are categorised as commercial speech, obscenities, obscene chants against stakeholders and whistleblowing will not be engaged with. On the other hand, these types of expressions are exemplified and referred to in order to strengthen a point or if they provide the ideal example for a question. As to whose freedom of expression will be broached, a distinction is made between legal and natural persons. The main focus will be on the athletes, supported by examples from the conduct of executive members of clubs and the SGBs. In addition, the statuses of spectators at the sporting venues and audiences following an event through television, radio or Internet streaming are also evaluated. One important limit is that the discussions will assume that all persons are adults. This is, of course, a hypothetical assumption due to the facts that in the women's gymnastics competition the participants are mostly minors and that spectators and audiences of most sports include minors who could also express themselves in a discriminatory manner.[20] However, as a discussion on minors will only serve to lose focus, it will be left out of the scope of this work. Finally, regulations and practices of states such as anti-violence and 'anti-hooliganism' legislation will not be made a subject of discussion; furthermore, club or team policies regulating and restricting spectator conduct will also be left out of the scope.

As to the sport leg of 'freedom of expression in sport', the work covers modern sport in general but shall focus especially on football, as it is currently one of the most popular sports in the world, and home to two mega-events in the shape of the FIFA Football World Cup and the UEFA European Football Championship. The term modern depicts the period after 1990 as the new phase of globalisation in this era has had a profound effect on how sport is governed and

[18] *See* Section 5.3.

[19] Commercial speech is 'speech that is concededly an advertisement, refers to a specific product, and is motivated by economic interest'. *Securities and Exchange Commission v Wall Street Publishing Institute Inc. dba Stock Market Magazine* 851 F 2d 365 (USCA DC Cir 1988) 372 (referring to *Bolger v Youngs Drug Products Corp*).

[20] C Davies and N Dunbar, 'Internal Policing of the Enduring Issue of Racism in Professional Team Sports' [2015] 17 The University of Notre Dame Australia Law Review 59, 72.

marketed. In addition to this, in line with the commercialisation and juridification of sport,[21] literature on the legal aspects of sport has also become more fruitful since then. Nevertheless, important cases regarding the subject before this era, such as the 'Black Power Salute' in the 1968 Olympic Games shall also be touched upon. During the course of the work, SGBs' practices from different sports and countries are compared, in that, the facts of the cases, along with the stances taken by the governing bodies, are compared and contrasted where relevant. In particular, the differences, and sometimes unexpected similarities between the European and the US sport administration, are highlighted. Finally, the practices of joint ventures such as the NBA, MLB, NFL and MLS and associations such as the IOC, FIFA, UEFA, FA and Turkish Football Federation are broached.

UEFA is relatively transparent in its approach to its adjudicatory bodies' case law, so this fact will help in exemplifying arguments for freedom of expression in sport. In addition to the cases before UEFA and FIFA, cases from England and Turkey shall also be analysed where necessary. The analysis of national jurisdictions is the result of the interconnectedness of the international and national SGBs and their stakeholders. It can be claimed that as a part of the global sport governance network, national sport practices replicate the global tendencies. That is, for the purposes of this work, the restrictions of the international SGBs are replicated at the national level. Moreover, as will be argued in the analyses of the *Anelka* case, the effects of a domestic decision may cross borders. England has been selected due to the ease in finding cases that have been decided by the relevant organs, and also due to the English Premier League's popularity around the globe. As to the inclusion of the Turkish point of view, it can be claimed that illiberal practices of both the state and SGBs are important features in the analysis of the relationship between sport, politics and the curbing of freedom of expression. This jurisdiction offers extraordinary examples of restriction by the Turkish Football Federation, some of which have been challenged before the ECtHR.[22]

[21] R Parrish, *Sports Law and Policy in the European Union* (Manchester University Press 2003) 6 and 9; K Foster, 'Global Sports Law Revisited' [2019] 17:4 Entertainment and Sports Law Journal 1, 1.

[22] *Sedat Doğan v Turkey*, App. No. 48909/14, Communiquée le 21 Septembre 2017; *Ibrahim Tokmak v Turkey*, App. No. 54540/16, Communiquée le 7 Novembre 2017; *Deniz Naki ve Amed Sportif Faaliyetler Kulubü Derneği v Turkey*, App. No. 48924/16, Communiquée le 7 Novembre 2017. All reported in HB Gemalmaz, 'Applicability of human rights standards in Turkish football arbitration: the contribution of the European Court of Human Rights' [2019] The International Sports Law Journal 1, 3-4 (online first version).

The Setting

One of the fundamental arguments in this work is that SGBs find themselves a place within both national legal regimes as well as transnational regulatory, adjudicatory and enforcement activities of private institutions.[23] In sport, the state draws up sport policies. However, the SGBs create their (semi-)autonomous systems—which overlap with national and international legal systems[24]—in order to govern their sports and disciplines. The coercive power of the SGBs should not be underestimated because they enjoy a monopoly-like position, which ensures that freedom of expression, in particular political expressions, are curbed at their hands. The prohibition of political expressions by SGBs is backed by the coercive power they hold over the stakeholders, and in certain cases, the spectators. Consequently, the depiction and exposition of the SGBs' position within the legal landscape is an important step towards a deeper understanding of freedom of expression in sport.

For the purposes of this work, the SGBs' stance on freedom of expression is the crux of the matter. The sport industry aims to create an insulated sphere that is devoid of any political expression. This aim is supported by the rhetoric of politics-free sport. SGBs—also states and other institutions—argue that sport is for social progress, unity, peace and education; therefore sport and politics must be kept separate.[25] This view tends to be adopted by the athletes, spectators and sport commentators alike.[26] Supported by this idea, international SGBs, through their constitutive documents, regulations and even the rules of the game, restrict certain

[23] Here, care has been taken not to deem these activities 'private regimes' or 'private legal systems', as a heated discussion among the commentators can be witnessed as to what a legal system is, and whether or not the adjudicatory and regulatory practices of transnational legal persons might amount to a legal system. G-P Calliess and P Zumbansen, *Rough Consensus and Running Code: A Theory of Transnational Private Law* (Hart 2010) 112-113; P Zumbansen, 'Transnational Legal Pluralism' [2010] 1:2 Transnational Legal Theory 141, 180-189.

[24] Berman (n 14) 1158-1159.

[25] Former IAAF Vice-President Helmut Digel's contribution to the XIII Olympic Congress offers a significant toning down of the rhetoric of politics-free sport. Digel has argued that '[w]hile the IOC must accept that politics goes hand-in-hand with the Games, measures can be taken to mitigate its negative aspects'. H Digel, 'The Politicisation of the Olympic Games' in IOC [2009] XIII Olympic Congress Contributions 269, 269.

[26] S Henderson, *Sidelined: How American Sports Challenged the Black Freedom Struggle* (University Press of Kentucky 2013) 27; DS Coombs and D Cassilo, 'Athletes and/or Activists: LeBron James and Black Lives Matter' [2017] 41:5 Journal of Sport and Social Issues 425, 427; PR Sailors, 'Zola Budd and the Political Pawn' [2017] 10 Fair Play. Revista de Filosofía, Ética y Derecho del Deporte 69, 71-72 and 75-76.

expressions. In the case of political expressions, the IOC holds the reins tightly by prohibiting any kind of demonstration and political, racial and religious propaganda during the Olympic Games,[27] of which failing to comply results in disqualification or withdrawal of accreditation.[28] Similarly, for stakeholders, FIFA prescribes expression-related offences.[29] On the spectators' side, FIFA prohibits the display and utterance of political slogans.[30] As for UEFA, a general principle prohibits the use of '[…] sporting events for manifestations of a non-sporting nature'.[31] For the spectators in particular, 'use of gestures, words, objects or any other means to transmit any message that is not fit for a sport event, particularly messages that are of a political, ideological, religious, offensive or provocative nature' is prohibited.[32] The common ground for FIFA and UEFA is that they have foreseen specific sanctions that cover any person within their respective jurisdictions who engage in 'hate speech'.[33] Further to these, football presents an extraordinary case where freedom of expression is made a concern in the Laws of the Game, where political, religious and personal expressions are prohibited to be displayed on the equipment and the undergarments of the players.[34]

On the other side of the Atlantic, the cases regarding expressions during pre-match ceremonies point to a tension between freedom of expression of athletes and the policies of SGBs. In the wake of the Kaepernick incident, before the 2018 Season, NFL aimed to take a hard-line stance against expressions by players during pre-match national anthems by prohibiting 'disrespect' for the flag and the anthem.[35] Nevertheless, following a challenge by the NFL Players Association,

[27] IOC, Olympic Charter 2019 Edition, Rule 50 (2) and Bye-Laws to Rule 50 <https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/General/EN-Olympic-Charter.pdf> accessed 20 August 2019.

[28] ibid Bye-Law to Rule 50 (1).

[29] FIFA Disciplinary Code 2019 Edition, arts 11 (2) (b, c and d), 12 (4) and 13 (1) <https://resources.fifa.com/image/upload/fifa-disciplinary-code-2019-edition.pdf?cloudid=i8zsik8xws0pyl8uay9i> accessed 20 August 2019.

[30] ibid 16 (2) (e).

[31] UEFA Disciplinary Regulations Edition 2019, art 11 (2) (c and d) <https://www.uefa.com/MultimediaFiles/Download/Regulations/uefaorg/UEFACompDisCases/02/60/83/56/2608356_DOWNLOAD.pdf > accessed 20 August 2019.

[32] ibid art 16 (2) (e).

[33] ibid art 14; FIFA Disciplinary Code 2019 Edition (n 29) art 13.

[34] IFAB Laws of the Game 2019/20, 60-61 <http://static-3eb8.kxcdn.com/documents/793/103202_200519_LotG_201920_EN_SinglePage.pdf > accessed 20 August 2019.

[35] NFL Website, 'Roger Goodell's statement on national anthem policy' (23 May 2018) <http://www.nfl.com/news/story/0ap3000000933962/article/roger-goodells-statement-on-national-anthem-policy> accessed 20 August 2019.

the strict policy was put on hold.[36] The US Soccer Federation's reactive stance on the matter is also worth noting. Following the US Women's National Team player Megan Rapinoe's support for the protests in the form of kneeling during the National Anthem before an international match the SGB amended its 'Policy'. [37] The Policy Manual now requires 'all persons representing a Federation national team' to 'stand respectfully during the playing of national anthems at any event in which the Federation is represented'.[38] The NBA has a similar provision in its rulebook which commands that '[p]layers, coaches and trainers must stand and line up in a dignified posture along the foul lines during the playing of the American and/or Canadian national anthems'. [39] This stance was confirmed by the NBA Commissioner following Kaepernick's protest.[40] On the other hand, it has to be pointed out that in the NBA political expressions during warm-up are allowed.[41] Finally, MLS has restricted political expressions by spectators within stadiums.[42]

Consequently, in essence, SGBs, as private entities, draw-up certain rules restricting the freedom of expression of athletes and spectators alike. These restrictions are a part of the policy that aims to protect the interests of the SGB, whether structured as an association or a joint venture. It can be maintained that the US Soccer Federation, the NBA and NFL are clearer in their messages to the stakeholders with regards to restricting certain expressions. The flag and

[36] NFL Website, 'NFL anthem policy on hold under standstill agreement' (19 July 2018) <http://www.nfl.com/news/story/0ap3000000941064/article/nfl-anthem-policy-on-hold-under-standstill-agreement> accessed 20 August 2019.

[37] J Carlisle, 'U.S. Soccer's policy requiring players stand for national anthem still in place' (*ESPN Website*, 26 September 2017) <https://www.espn.com/soccer/united-states/story/3214195/us-soccers-policy-requiring-players-stand-for-national-anthem-still-in-place> accessed 20 August 2019.

[38] United States Soccer Federation Policy Manual, Policy 604-1 <https://cdn.ussoccer.com/-/media/project/ussf/governance/2019/bylaws/2019-20-policy-manual-20190530.ashx?la=en-us&rev=2a49dbc8143848cba47c637e4398ed07&hash=1515E0FE993A626A07E9BBC8EC8D23F1> accessed 20 August 2019.

[39] NBA 2018-19 Rulebook, Comments on the Rules, art H (2) <https://official.nba.com/comments-on-the-rules/> accessed 20 August 2019.

[40] Mahoney B, 'Adam Silver expects NBA players to stand during national anthem' (*NBA Website*, 28 September 2017) <https://www.nba.com/article/2017/09/28/adam-silver-expects-nba-players-stand-during-national-anthem> accessed 20 August 2019.

[41] Two examples related to this situation are the warmup shirts worn by players reading 'Black Lives Matter' and 'I Can't Breathe' which condemn separate instances of police brutality against blacks. Aldridge D, 'National anthem is inseparable from politics' (*NBA Website,* 28 May 2018) <http://www.nba.com/article/2018/05/28/morning-tip-national-anthem-history-first-amendment> accessed 20 August 2019.

[42] MLS, Fan Code of Conduct <https://www.mlssoccer.com/fan-code-of-conduct> accessed 20 August 2019.

the anthem are seen as something to be respected and any expression against these are sanctioned. Nonetheless, as argued in this work, although the total restriction of political and personal expressions by the international SGBs' results in treating all expressions equally, in practice, the expressions are discriminated against according to their content, context and viewpoint.

Primary Remarks

A single all-encompassing argument or approach for freedom of expression cannot be a workable solution to the subject at hand, since most arguments or approaches suffer from limited (either self-imposed or due to insufficiency) scope and coverage. This being the case, one of the cornerstones of this work is that the 'suspicion of government' is justified, as the state *is* one of the most important and insidious foes against freedom of expression. In this work, the distrust of government is expanded to SGBs due to their regulatory and adjudicatory practices, along with their coercive power over everyone involved. In effect, the suspicion of government becomes 'suspicion of governance', which reflects an inherent scepticism against SGBs' practices. Another important finding is that the SGBs and society pre-assign specific roles to stakeholders (to athletes in particular) and spectators. In essence, athletes are positioned as depoliticised role models—in accordance with the rhetoric of politics-free sport—, who must keep out of politics, and resultantly, avoid activism both on and off the field. Likewise, spectators and audiences are seen and moulded as 'tame consumers' who have to avoid non-conforming viewpoints.

As Magarian has asserted, '[t]he government and powerful private interests cling to the status quo because they make the status quo. Political dissent, by its nature, challenges the status quo, often very aggressively'.[43] In the same sense, in sport, dissidents are blocked from expressing themselves. However, the state and the supporters of the status quo already have the means and the arena to convey their thoughts within the context of sport through national team competitions, ceremonies in the Olympic Games and expressions allowed or approved by the SGBs. In addition to the consolidation of domestic policy and unity, sport occupies an important role in international relations and the foreign policies of states. Milza's arguments as referred to by Polo, maintaining that sport is, a) a part of and is a reflection of the international stage, b) a

[43] GP Magarian, *Managed Speech: The Roberts Court's First Amendment* (OUP 2017) 34.

means of foreign policy, and, c) a signifier of public feeling,[44] are supported by the practices of the state and SGBs. This brings the subject to a crucial notion set forth by Dworkin,[45] namely 'articulate consistency'. Under this notion, the principles, rules, theories, standards and justifications used in reaching a decision should be also applied in future cases unless the reasons do not permit it. According to Dworkin, the distribution of benefits—according to principles—has to be realised in a reasonably equal and consistent manner. The distributor has to recant previous distributions if they are to change the way the distribution is realised.[46] Throughout the work, due to the contention that expressions are not treated equally in the eyes of the SGBs, especially international SGBs, calls for articulate consistency will be made.

Articulate consistency has a close link to (again Dworkin's argument for) equal concern and respect for individuals. Combined with the contention that the moral powers—in the form of rationality and reasonableness[47]—of all individuals involved have to be shown equal concern and respect; it is argued in this work that, within the context of sport, articulate consistency should be brought to the forefront, and thus all political expressions should be allowed regardless of their content. The mutual support of these notions results in a universalist approach to freedom of expression where every person would have the freedom to express themselves, or receive information regardless of their country of residence or country of origin. In that, the fact that a state or culture restricts certain expressions does not become a foundation for limiting or negating the individuals' freedom of expression. Therefore, even if a regime does not allow certain expressions to be disseminated, the moral powers of the individuals would act as a foundation for freedom of expression of the individuals who are citizens or residents of a restrictive regime. Hence, this work will adopt the 'orthodox' view that persons *qua* persons have inherent and equal (human) rights.

Nonetheless, the points made do not lead to an absolutist view that does not allow limits on freedom of expression. The absolutist approach is refuted by commentators and rejected by

[44] J-F Polo, 'Istanbul's Olympic Challenge: A Passport for Europe?' in G Hayes and J Karamichas (eds), *Olympic Games, Mega-Events and Civil Societies: Globalization, Environment, Resistance* (Palgrave Macmillan 2012) 69.

[45] Schauer, too, claims independent creation of the notion if not to originality. F Schauer, 'Must Speech Be Special?' [1983] 78:5 Northwestern University Law Review 1284, 1296 (footnote 62).

[46] R Dworkin, *Taking Rights Seriously: New Impression with a Reply to Critics* (Duckworth 2005) 88.

[47] *See* Section 2.5.

international conventions and national courts alike and this situation reflects in sport's position as regards to freedom of expression. It is argued that libellous expressions may present grounds for restrictions. Moreover, with the help of the notion 'clear and present danger', freedom of expression in sport may be limited by taking into consideration the imminence of harm and the possibility of a rebuttal of the expression. Furthermore, face-to-face insults and discriminatory expressions should be grounds for sanctions as per the moral powers of the targets of these expressions. Moreover, spectators' expressions and actions that stop the game should also be restricted. An important argument is that perceived, potential or distant harm to the interest of the SGBs, the feelings of stakeholders or a certain group of persons cannot be the sole parameters for restriction. The harm to the interests of the SGBs and the states that host mega-events present the foundation for the weighing between the autonomies of the hosts, the SGBs, and their stakeholders and spectators which means that the autonomies of the hosts and the SGBs always trump that of the latter. The taking into account of the feelings of the stakeholders or a certain group is detrimental to freedom of expression because stakeholders who are not open to criticism, as well as the lowest common denominators of a society, become the barometers for an expression. It is further argued that society has to bear with any expression, even if it is despicable, hurtful and in general unwelcome.

On the hate speech front, hate speech that is a part of public discourse is to be protected but because of the position of the athletes, a more protective stance is adopted regarding discriminatory expressions against them. As to the limits, the contentions of the previous paragraph, ie face-to-face expressions, are mostly reflected in the broaching of this important subject. Moreover, specificities arising from the venues in which the competitions are held in, and the regulations of the SGBs, provide for more protection for stakeholders and spectators who become targets of discriminatory expressions outside the public discourse. It has to be added that the unequal treatment of expressions at the hands of the SGBs is a point to be discussed in the case of hate speech, and therefore the views of international SGBs regarding expressions with links to history are to be critically discussed.

So it all comes down to the question of whom exactly benefits from the practices regarding freedom of expression. It can be maintained that 'freedom not to associate' is utilised in overriding autonomies of the stakeholders and spectators. As associations and joint ventures, SGBs uphold their interests and values. Concordantly, the SGBs do not want to be associated

with certain expressions as per their well-being. SGBs aim to utilise their freedom not to associate to the fullest, and in this way strive to protect the brand image and goodwill of itself and their competitions. Similarly, in the NBA, MLB, NFL and NHL, the Commissioners have broad discretion with a view to safeguarding the 'best interests' of these joint ventures.[48] Consequently, the intertwined notions of freedom of association, brand, and freedom not to associate lead to SGBs defending their interests and values to the detriment of the freedom of expression of stakeholders, spectators and audiences. The interests of associations outweigh the interests of society. Further, states help protect SGBs' interests through the creation of special legal regimes during mega-events. Therefore, expressions that are perceived to be to the detriment of the interests of SGBs are restricted. While this may be an acceptable reason for restricting certain expressions, the fact that SGBs allow and condone conforming and non-dissenting expressions—thus creating an imbalance between dissenting and non-dissenting expressions—makes one suspicious of their sincerity. Political and discriminatory expressions are deemed to have no place within sport, and yet SGBs go on to 'other' certain expressions, prohibiting them and utilising their coercive power if the prohibitions are not observed. Therefore, an important outlet for expressing discontent and being informed of this discontent is closed off for good. The institutions benefiting from the creation of this sanitised environment are the states, the market and the SGBs. The state benefits from restricting dissenting expressions because an important forum for getting one's message across is rendered non-functional. The market too benefits from the restrictions. The basis of this suggestion is that due to the fact that the dissemination of contentious expressions in a polarised world is restricted, the risk of alienating consumers and sponsors is reduced. When the market and the state policies are favourable, the well-being of the SGB increases. Consequently, the restriction of expressions creates better chances of sticking to the political status quo as well as the marketing and consumption of sport.

[48] CJ McKinny, 'Professional Sports Leagues and the First Amendment: A Closed Marketplace' [2003] 13 Marquette Sports Law Review 223, 234-236.

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Chapter 1 – Sport Governance, Autonomy and Discipline

In this chapter, an overview of organisation, regulation, adjudication and enforcement in sport will be presented. The chapter will take the autonomy of SGBs and their coercive power[1] as its bearings. Although it will have a Eurocentric approach due to the fact that most international SGBs, including the IOC, are based in Europe, implementations in the US will also be exemplified, as they will be of use in the cases regarding the NBA and NFL.

1.1 Sport Governing Bodies

In modern sport there is no uniform manner of organisation and SGBs have different ways of organising. In addition to this, national federations and leagues have different ways of administering their activities. Two prominent models have impacted how SGBs are constituted. The first one brings joint ventures[2] to the forefront, and it especially includes professional sport leagues in the US such as the MLB, NHL, NBA and NFL. In this model, SGBs are horizontally integrated, meaning there is no strict hierarchy between the league and the competitors who make up the league. [3] In addition to this, these leagues are 'closed leagues' where new competitors to the league are accepted by a decision of the existing league members[4] and where there is no promotion or relegation.[5] The second category is argued to resemble a 'pyramid'[6]

[1] Mansbridge and others' interpretation of coercive power is illuminating. 'We understand power in general as A's preferences or interests causing (or changing the probability of) outcomes, and coercive power as A's preferences or interests causing B to do (or changing the probability that B will do) what B would not otherwise have done through the threat of sanction or the use of force'. J Mansbridge and others, 'The Place of Self-Interest and the Role of Power in Deliberative Democracy' [2010] 18:1 The Journal of Political Philosophy 64, 80 (citation omitted).

[2] SF Ross and S Szymanski, 'Open Competition in League Sports' [2002] Wisconsin Law Review 625, 630; RD Blair, *Sports Economics* (CUP 2011) 47-48.

[3] JAR Nafziger, 'A Comparison of the European and North American Models of Sports Organisation' [2008] 3-4 The International Sports Law Journal 100, 103.

[4] T Peeters and S Szymanski, 'Financial fair play in European football' [2014] 29:78 Economic Policy 343, 348.

[5] Ross and Szymanski (n 2) 626.

[6] European Commission, 'The European Model of Sport. Brussels: Consultation Paper of DGX of the European Commission' (1999) 2-4 <http://www.bso.or.at/fileadmin/Inhalte/Dokumente/Internationales/EU_European_Model_Sport.pdf> accessed 20 August 2019.

where authority is diffused from the top in a vertical and hierarchical manner.[7] Despite its shortcomings, this structure continues to garner support from international SGBs such as the IOC, FIFA and UEFA as the contention of a hierarchical structure within sport is seen as a defence against challenges to their political and legal autonomy.[8] The common feature of both structures is that SGBs are mostly private entities that take part in regulatory and economic activities and are constituted according to the laws of the jurisdiction in which they are residing.[9] More importantly, they are founded with a certain aim of organising and administering competitions. As will be argued in this work, this specific aim sets the tone in protecting the interests of the SGBs.

1.2 Autonomy of Sport

Sport is not governed in a vacuum. SGBs, both national and international, have relationships with public authorities that may appear in the form of states, institutions of states, or as in the case of the EU, transnational legal orders. In these relationships, both sides have an effect on the other, legally and financially. Nonetheless, the SGBs' goal to be free from intervention has created tension between the parties, and this is where autonomy of sport comes into the picture. In that regard, García and Weatherill state that the notions of 'the specific nature of sport' and 'the autonomy of sports federations' have been the centre points of defence of the sporting movement.[10] At the heart of the concerns is the assertion that sport is better off when it is insulated from other actors. The desire to be insulated from especially politics and state courts has moved the SGBs to implement proactive strategies,[11] of which the former is central to this work. That being said, the three sides of the argument, namely SGBs, the states and the EU—all *regulators* within their jurisdictions—also act as partners in financial, legal and sporting issues.

[7] B García, 'Sport governance after the White Paper: the demise of the European model?' [2009] 1:3 International Journal of Sport Policy and Politics 267, 270-271.

[8] ibid 273-278.

[9] M Wathelet, 'Sport Governance and EU Legal Order: Present and Future' in S Gardiner and others (eds) *EU, Sport, Law and Policy: Regulation, Re-regulation and Representation* (TMC Asser Press 2009) 69; L Casini, 'Global Hybrid Public-Private Bodies: The World Anti-Doping Agency (WADA)' [2009] 6 International Organisations Law Review 421, 427.

[10] B García and S Weatherill, 'Engaging with the EU in order to minimize its impact: sport and the negotiation of the Treaty of Lisbon' [2012] 19:2 Journal of European Public Policy 238, 252.

[11] A Geeraert and others, 'A rationalist perspective on the autonomy of international sport governing bodies: towards a pragmatic autonomy in the steering of sports' [2015] 7:4 International Journal of Sport Policy and Politics 473, 475-477.

For the purposes of this work, an altered version of the outlook of autonomy of sport that is put forth by Geeraert and others will be utilised. Having classified the types of autonomy within the context of international SGBs as 'political autonomy', 'legal autonomy', 'financial autonomy' and 'pyramidal autonomy', the authors go on to broach them separately.[12] Nevertheless, due to the suggestion that likening the sport governance system to a pyramid should be deemed as outdated after the introduction of 'governance networks', which will be analysed in the next sub-section, the term 'hierarchical autonomy' will be utilised. In addition to this, political autonomy and financial autonomy will be elaborated upon under a single heading. The underlying reason is that the relationship between the state, the market and sport has to pave way for an integrated understanding of these types of autonomies. This way of looking at things will neither reduce financial autonomy to 'not relying on external public investment, internal systemic resources or sponsoring from a single commercial partner',[13] nor, in view of the intricate relationship between them, will decouple it from political autonomy. Therefore, political autonomy and financial autonomy will be merged into one.

1.2.1 The State, the Market and Sport

International SGBs seem jealous in guarding their territory from political intervention. For example, the main documents of the IOC and FIFA oblige their members to be independent from third party influence.[14] Likewise, as in the case of FIFA's declaration regarding the Gulf Crisis, which situated Qatar against other states in the Arabian Peninsula;[15] the international SGBs may declare neutrality.[16] The emergence of independence as an obligation has even paved the way for suspension or expulsion of members by international SGBs. FIFA especially has not shied away from using its power to steer football governance within the jurisdiction of its member associations both through threat of suspension and suspension itself, which has had the

[12] ibid 475-482.

[13] ibid 479.

[14] IOC, Olympic Charter 2019 Edition, Rule 27.6 <https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/General/EN-Olympic-Charter.pdf> accessed 20 August 2019; FIFA Statutes 2019 Edition, arts 14 (i), 15 (c), 19 and 23 (a and c) <https://resources.fifa.com/image/upload/fifa-statutes-5-august-2019-en.pdf?cloudid=ggyamhxxv8jrdfbekrrm> accessed 20 August 2019.

[15] HENæss, 'The neutrality myth: why international sporting associations and politics cannot be separated' [2018] 45:2 Journal of the Philosophy of Sport 144, 149.

[16] It has to be pointed out that FIFA's declaration of neutrality in its statutes comes with a caveat. Here, it is stated that 'FIFA remains neutral in matters of politics and religion. Exceptions may be made with regard to matters affected by FIFA's statutory objectives'. FIFA Statutes 2019 Edition (n 14) art 4 (2).

desired effect.[17] However, states do indeed have some kind of ability to intervene; the scope and force of which differs from state to state. As Hughes has correctly questioned, could the level of political autonomy of the Democratic People's Republic of Korea Football Association be the same as the US Soccer Federation?[18] Moreover, there are 'national umbrella organisations' that seek to act as a bridge between national SGBs and the public authorities; which, in some cases, enjoy powers delegated to them by public authorities.[19] As in the case of the aftermath of *Bosman*, politicians, too, enter the fray in the shaping of SGBs' policies and regulations, in effect shaping both sport and the market.[20] Finally, following the Treaty of Lisbon, sport became a limited but official part of EU policy, which goes hand in hand with the EU's 'market competence'.[21]

This situation provides support for the arguments from commentators from different disciplines concerning the relationship between sport and politics. As will be particularised in Sections 4.4 and 4.5 sport and politics are inseparable. On the other hand, there is another dimension to the relationship which was signalled a few lines back with the emphasis on 'market competence'. On the account of its substantial impact on sport, the market too should be added to the equation. After all, the rules of sports such as volleyball, judo, table tennis and football had to be adapted to the needs of television.[22] Moreover, brand image and marketability have become things that should be borne in mind in the production of sport.[23] Global consumption has started to go hand in hand with the production of sport. In that regard, Maguire and Falcous' summary of the situation is invaluable:

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[17] In addition to this, a new kind of coercive power has emerged in the form of cancelling the right to organise a mega-event. HE Meier and B García, 'Protecting Private Transnational Authority against Public Intervention: FIFA's Power over National Governments' [2015] 93:4 Public Administration 890, 900.

[18] Parker quoting J Hughes. C Parker, 'The Role of the State in Sport' in J Beech and S Chadwick (eds), *The Business of Sport Management* (2nd edn, Pearson 2013) 71.

[19] R Siekmann and J Soek, 'Models of Sport Governance in the European Union: The Relationship between State and Sport Authorities' [2010] 3-4 The International Sports Law Journal 93, 94-95 and 102.

[20] Geeraert and others 'A Rationalist Perspective' (n 11) 478-479; DG Dimitrakopoulos, 'More Than a Market? The Regulation of Sport in the European Union' [2006] 41:4 Government and Opposition 561, 570-571.

[21] A Geeraert and E Drieskens, 'The EU controls FIFA and UEFA: a principal–agent perspective' [2015] 22:10 Journal of European Public Policy 1448, 1455-1458.

[22] J-F Bourg and J-J Gouguet, *The Political Economy of Professional Sport* (Gerry Goodman tr, Edward Elgar 2010) 33.

[23] For an in-depth exploration of this argument *see* Section 4.2.

> […] mass consumption, media collusion, integration with transnational corporations, marketing and branding, and diversified accumulation through the sale of ancillary branded products characterise the structural-institutional pattern of global sport.[24]

In view of this, the relationship should be envisaged as a triumvirate of the state, the market and sport. As Gammelsæter has asserted, the legs of the triumvirate are 'interdependent'. There are tensions between the legs, but ultimately the state is an actor in both sport and the market, and the market has transformed the sporting landscape due to the ascendancy of 'business logic'.[25] In this sense, Geeraert and others' presentation of the relationship as a 'governance network' where civil society, the state and the market 'interact' with each other is apt in depicting the current shape of things. The interaction is a reflection of commercialisation of sport and the resultant network made up of business interests and sport. The network is completed but more importantly deeply affected by politics.[26] Therefore it should be asserted that unlike what they declare themselves to be, SGBs are not wholly divorced from politics and states, or for that matter, the market.

For the purposes of this work, this situation is taken as the crux of the matter. The culmination of arguments set out in this work shows that the SGBs aim to restrict the freedom of expression of everyone involved and this stems from the SGBs relationship with both the market and the state. Accordingly, this work will go one step further from the notions of interdependence, interaction and the tension paradigm between the triumvirate, and it will argue that another dimension in the relationship between them also appears in the form of an 'alliance' or 'collaboration'. 'The myth of autonomy', as Allison and Tomlinson have called it, is the idea that sport is devoid of any connections to politics, the market or culture.[27] This myth leads to the

[24] J Maguire, *Power and Global Sport: Zones of prestige, emulation and resistance* (Routledge 2005) 24 [EBSCO version].

[25] *See generally* H Gammelsæter, 'Points, pounds, and politics in the governance of football' in S Chadwick and others (eds), *Routledge Handbook of Football Business and Management* (Routledge 2018).

[26] A Geeraert and others, 'The governance network of European football: introducing new governance approaches to steer football at the EU level' [2013] 5:1 International Journal of Sport Policy and Politics 113, 115-119.

[27] L Allison and A Tomlinson, *Understanding International Sport Organisations: Principles, Power and Possibilities* (Routledge 2017) 38, 80 and 103.

SGBs' restriction of the freedom of expression of everyone involved, and it helps to maintain the aura of neutrality and immaculateness on the part of the SGBs. Nevertheless, as will be seen throughout Chapters 5, 6 and 7, the myth only serves the state and the market. These arguments will be informed by Bourg and Gouguet's assertions that sport has never been politically neutral or politics-free, and it has been always been instrumentalised by both 'political logic', which reflects the competing ideologies and state intervention, and 'economic logic', which shapes sport according to market values and substantial financial stakes.[28] These two notions will be frequently referred to throughout the work.

1.2.2 Legal Autonomy

With regards to legal autonomy, the main goal of international SGBs is maintaining exclusive jurisdiction over sporting matters.[29] In order to realise this goal, SGBs provide for specific provisions in their constitutions. In the case of the IOC, the Olympic Charter states that '[a]ny dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the CAS, in accordance with the Code of Sports-Related Arbitration'.[30] In trying to negate the jurisdiction of national courts, FIFA prohibits recourse to ordinary courts of law for all types of provisional measures.[31] Moreover, it charges member associations with blocking recourse to national courts for football-related matters unless they are provided by FIFA regulations, and provided that there is no binding legal provisions stipulating recourse to ordinary courts in the state where the member association is.[32]

In respect to the 'engagement'[33] of the distinct normative orders of the state and SGBs, the CAS has supported this stance by indicating that the jurisdictions of the states and SGBs do not compete; rather they are 'complementary'.[34] The CAS panel has further argued that it has the

[28] Bourg and Gouguet (n 22) 24-32.

[29] K Foster, 'Global Sports Law Revisited' [2019] 17:4 Entertainment and Sports Law Journal 1, 2-3.

[30] Olympic Charter 2019 Edition (n 14) Rule 61.2.

[31] FIFA Statutes 2019 Edition (n 14) art 59 (2).

[32] ibid art 59 (3).

[33] RA Miller and PC Zumbansen, 'Introduction—Comparative Law as Transnational Law: A Decade of the German Law Journal' in RA Miller and PC Zumbansen (eds), *Comparative Law as Transnational Law: A Decade of the German Law Journal* (OUP 2012) 4.

[34] TAS 2006/A/1119 *Union Cycliste Internationale (UCI) c/ Iñigo Landaluce Intxaurraga & Real Federación Española de Ciclismo (RFEC)*, para 49.

authority to replace disciplinary sanction of national nature in order to ensure uniformity. Above all, the panel has stated that a disciplinary measure imposed by a national authority is restricted to national competitions. The effects of the disciplinary measure could go beyond these competitions on the pain of being disqualified from international competitions.[35] Thus, even though there may be anti-doping-related exceptions,[36] in sport if the state does not remain an 'observer';[37] then it could devolve into a spectator.

It can be claimed that with the help of complementarity—itself one of the points of discourse in legal pluralism with differing takes on the subject—[38], SGBs aim to demarcate the competence of national public authorities.[39] Nevertheless, the SGBs' 'autonomy is restricted by the law of the countries in which they operate, above all as regards to competition rules'.[40] As in the case of Australia, the competition law of a state may prevail over sporting issues if the SGB stops sportspersons from competing in competitions organised by other SGBs.[41] Moreover, in France *Code du sport*—while it provides a large margin of independence for SGBs—sets forth standard disciplinary rules to be followed and obliges the federations to notify all changes to its norms to the Ministry of Sport.[42] As to the manoeuvring space of the SGBs, Parrish has fully quoted Beloff and others who have pointed out that ordinary courts have respected the territories of the decision makers of SGBs unless there are compelling reasons to intervene.[43] In that respect, public policy (ordre public), which is also presided over by the Swiss Federal Tribunal deciding on cases regarding CAS awards, along with the core yet ambiguous principle of 'fairness',[44] can

[35] ibid para 50.

[36] L Casini, 'The Making of a *Lex Sportiva* by the Court of Arbitration for Sport' [2011] 12:5 German Law Journal 1317, 1335-1336.

[37] P Zumbansen, 'Piercing the Legal Veil: Commercial Arbitration and Transnational Law' [2002] 8:3 European Law Journal 400, 408.

[38] T Bartley, 'Transnational Governance as the Layering of Rules: Intersections of Public and Private Standards' [2011] 12:2 Theoretical Inquiries in Law 517, 524; F Cafaggi, 'New Foundations of Transnational Private Regulation' [2011] 38:1 Journal of Law and Society 20, 48.

[39] Complementarity should not be overstated because as will be seen in Section 3.2.3.2 private regulation of sport may supplant state-made law.

[40] J-L Chappelet, *Autonomy of sport in Europe* (Strasbourg 2010) 45.

[41] MJ Mitten and H Opie, '"Sports law": implications for the development of international, comparative, and national law and global dispute resolution' [2012] 1 CAS Bulletin 2, 7-8.

[42] B van Rompuy, 'The Role of EU Competition Law in Tackling Abuse of Regulatory Power by Sports Associations' [2015] 22:2 Maastricht Journal of European and Comparative Law 179, 189.

[43] R Parrish, *Sports Law and Policy in the European Union* (Manchester University Press 2003) 16.

[44] *See generally* JAR Nafziger, 'The Principle of Fairness in the *Lex Sportiva* of CAS Awards and Beyond' in RCR Siekmann and J Soek (eds), *Lex Sportiva: What is Sports Law* (TMC Asser Press 2012).

be seen as the two forces in the delimiting of the powers of the SGBs. For example, the annulling of CAS' *Matuzalem* award by the Swiss Federal Tribunal rests on the idea that an unlimited occupational ban on an athlete is contrary to public policy. Finally, matters not covered by a clause authorising CAS for the settlement of a dispute concerning the IOC, Swiss, or other national courts may in extraordinary cases, have jurisdiction. However, the courts are extremely reluctant to accept this jurisdiction due to the international dimension of the IOC and its monopoly on the Olympic Games.[45]

Another limit for SGBs is EU Law. In the *Malaja* case where a Polish basketball player brought a suit before ordinary courts in France alleging discrimination due to their nationality, a judgment in favour of the player led to a change in the foreign player eligibility rules of French sport associations.[46] It can be claimed that this legal coup is similar to the more reverberating ones in the shape of the former European Court of Justice's *Bosman* ruling,[47] the Court of Justice of the European Union's *Meca-Medina* judgment,[48] and the European Commission's *International Skating Union* decision.[49] The underlying reason for this comparison is that it shows the proneness of the SGBs being influenced by outside interventions based on EU law. EU Law along with the national laws promulgated in parallel to it, present important fulcrums for stakeholders who challenge the rules and regulations of the SGBs, so much so that Weatherill has argued that after *Meca-Medina* SGBs only enjoy 'conditional autonomy' in relation to their legislative and administrative actions.[50] The reflection of this situation is that, in theory, SGBs have exclusive jurisdictions where they can take decisions and create regulations insofar as they are proportionate with their objectives.[51] In essence, EU law is applied 'on a

[45] A Duval, 'The Olympic Charter: A Transnational Constitution Without a State?' [2018] 45:S1 Journal of Law and Society S245, S261-264.

[46] DW Penn, 'From Bosman to Simutenkov: The Application of Non-Discrimination Principles to non-EU Nationals in European Sports' [2006] 30 Suffolk Transnational Law Review 203, 218-220.

[47] Case C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman* [1995] ECR I-4921.

[48] In this case, it was iterated that 'rules or practices justified on noneconomic grounds which relate to the particular nature and context of certain sporting events' would not preclude the EU law regarding the freedom of movement of workers as long as they remain within their proper objective; thus not rendering them out of the scope of EU law, *per se*. Case C-519/04 P *David Meca-Medina and Igor Majcen v Commission of the European Communities* [2006] ECR I-6991, para 26.

[49] Case AT.40208 *International Skating Union* [2018] reported online.

[50] S Weatherill, 'Case C-519/04 P Meca-Medina [2006] ECR I-6991' in J Anderson (ed), *Leading Cases in Sports Law* (TMC Asser Press 2013) 143-144.

[51] *Meca-Medina* (n 48) para 42; *International Skating Union* (n 49) paras 138 and 208.

case-by-case basis, requiring compliance with the Treaty provisions but contemporaneously having regard to the specificity of sport'.[52] Finally, as Duval has pointed out, in certain cases CAS panels themselves apply EU law.[53]

On the other side of the Atlantic, US courts present an important example for the IOC's position before a non-Swiss court. In a 1984 case alleging discrimination against female athletes on the part of the IOC, the US Court of Appeals for the 9th Circuit did not apply US law to the Olympic Games, which is organised according to the Olympic Charter (which was deemed by the Court as an international agreement).[54] Wong interprets this as the reluctance of the judiciary to meddle in the world of sport. Nevertheless, the exhaustion of administrative remedies with the SGBs and more importantly the incorrect application of their own rules, may lead to intervention.[55] Olympic ice skater Tonya Harding's case sums up the approach of the courts in the US perfectly, in that, it was indicated that the intervention of courts regarding disciplinary proceedings of a private association would only be possible if 'the association has clearly breached its own rules, that breach will imminently result in *serious* and irreparable harm to the plaintiff, and the plaintiff has exhausted all internal remedies'. In any case the court should refrain from intervening with the merits of the dispute.[56] In addition to the reluctance on the part of the courts, Koller points out that the stance of the federal government also points to a 'legal insulation' for sport; but adds that the fight against doping constitutes an exception to the 'hands off' approach.[57]

Finally, in a dissenting opinion in the case of *Mercury Bay Boating Club v San Diego Yacht Club*,[58] the idea of fairness was the anchoring point concerning a possible intervention of state

[52] S van den Bogaert, 'From Bosman to Bernard C-415/93; [1995] ECR I-4921 to C-325/08; [2010] ECR I-2177' in J Anderson (ed), *Leading Cases in Sports Law* (TMC Asser Press 2013) 99.

[53] A Duval, 'The Court of Arbitration for Sport and EU Law: Chronicle of an Encounter' [2015] 22:2 Maastricht Journal of European and Comparative Law 224, 238.

[54] Duval 'The Olympic Charter' (n 45) S263.

[55] GM Wong, *Essentials of Sports Law* (4th edn, Praeger 2010) 163.

[56] *Harding v United States Figure Skating Ass'n* 851 F Supp 1476 (District Court of Oregon 1994) 1479 (emphasis present).

[57] *See generally* DL Koller, 'Putting Public Law into "Private" Sport' [2015-2016] 43 Pepperdine Law Review 681.

[58] 76 NY 2d 256 (1990).

courts. In this case, while the majority opinion dismissed the allegations of unfairness as it contended that the notion of fairness is distinct in the sporting and legal contexts due to the 'expertise of those knowledgeable in that sport';[59] the dissenting opinion, in essence, underlines the necessity to observe the principle of fairness in a competition and thus argues that the competition itself should have been raced in 'equal terms'.[60] Consequently, when the reasoning in this case is taken into account, it is remarkable to notice that the defences of distinction and the 'expertise in sport' are in line with the international SGBs' assertions in their desire to remain autonomous. Thus, it can be claimed that the idea of sport being a peculiar industry in a legal sense, is not only put forth and accepted in Europe but also defended in the US.

1.2.3 Hierarchical Autonomy

Despite tensions with the stakeholders on the lower echelons of the governance network, international SGBs and their stakeholders still present a system reminiscent of hierarchical governance model where the top organisations exert coercive pressure to the ones below.[61] The pressure is in the shape of legal compliance to 'a complex pyramid of interlinked regulations',[62] and most importantly the constitutive norms of international SGBs. The importance of the binding constitutive norms derives from the fact that they set out objectives to be pursued, principles to be adhered to and sanctions for not abiding by the constitution and the regulations. International SGBs, along with the National Olympic Committees willing to join the Olympic Movement, have to comply with the Olympic Charter, and in its turn, a national association which aims to become a part of the international sport community has to accept the goals, rules and regulations of the international SGB governing its sport. In the same vein, the prospective teams of joint ventures such as the MLB, NBA and NFL have to abide by the constitutions, by-laws and the regulations of the relevant legal person(s). In addition to this, Syzmanski and Ross

[59] ibid 265.

[60] ibid 276 and 283 (Hancock, Jr. J. dissenting).

[61] Geeraert and others 'A rationalist perspective' (n 11) 481; A Geeraert, *The EU in International Sports Governance: A Principal-Agent Perspective on EU Control of FIFA and UEFA* (Palgrave Macmillan 2016) 54.

[62] MJ Beloff, 'Is there a *Lex Sportiva*?' in RCR Siekmann and J Soek (eds), *Lex Sportiva: What is Sports Law* (TMC Asser Press 2012) 74.

indicate that the commissioner, who acts in a way that bears the 'best interests' of the league in mind, creates efficiency through the creation of 'a kind of vertical separation'.[63]

The main problem with the hierarchical autonomy is a lack of democratic process in rule making. Stakeholders, in particular in the international SGBs, are not represented in a meaningful way. Nonetheless, it is contended that stakeholders such as the International Federation of Professional Footballers (FIFPro) and the Association of European Professional Football Leagues (EPFL) now have more say in the regulation of sport,[64] and these have challenged the hierarchy based governance in SGBs.[65] In the US, the presence of players' unions and the collective bargaining agreement allows for a relatively more democratic organisation. Despite this, the fact that joint ventures are founded by team owners and that Commissioners have broad discretion in every aspect of the running of the leagues which may be seen as the 'biased representatives of the management', the situation is far from perfect.[66] Moreover, the restraint on the powers of the owners and Commissioners and the remedies against the decisions of the Commissioners vary from joint venture to joint venture.[67]

1.3 Coercive Power over Stakeholders

It can be claimed that the disciplining of stakeholders is an important reflection of the legal and hierarchical autonomy of the SGBs as well as the bundle of (transnational) norms that are protected by such autonomy. On the European side, the underlying reason for sanctions against stakeholders can be seen in a CAS case that deals with the improper conduct of the supporters of the Feyenoord Rotterdam football club. Here, the CAS panel indicated that in the case of UEFA:

[63] S Szymanski and SF Ross, 'Governance and Vertical Integration in Team Sports' [2007] 25:4 Contemporary Economic Policy 616, 618.

[64] Geeraert and others 'The governance network of European football' (n 26) 118-119.

[65] *See generally* B García and HE Meier, 'Limits of Interest Empowerment in the European Union: The Case of Football' [2012] 34:4 Journal of European Integration 359.

[66] JSE Lee and JK McFarlin, 'Sports Scandals from the Top-Down: Comparative Analysis of Management, Owner, and Athletic Discipline in the NFL & NBA' [2016] 23 Jeffrey S. Moorad Sports Law Journal 69, 79.

[67] ibid 76-77.

> '[d]isciplinary law implemented in its regulations and directives is essentially a tool which allows the UEFA to create order within the organisation and to assert statutory standards of conduct through sanctions imposed by specific bodies and to ensure their appropriate execution'.[68]

Likewise, in respect to the source of the power to discipline stakeholders which reside in Switzerland, a CAS panel rendered its award on the premise that 'under Swiss law, the right of associations to impose sanctions or disciplinary measures on athletes and clubs is not the exercise of a power delegated by the state, rather it is the expression of the freedom of associations and federations'.[69] In the realisation of this freedom, committees, boards or tribunals within the SGBs themselves are the lynchpins of their disciplinary processes. They are usually founded by the constitution of the SGB and are granted the power to decide on cases within their respective jurisdictions. In the case of the IOC, the Olympic Charter foresees that the Executive Board is entitled to decide on all cases stemming from the Olympics Games themselves,[70] although it may delegate its powers to a disciplinary commission.[71] The football tournament in the Olympic Games is an example of such delegation of power to FIFA. The FIFA Disciplinary Committee, taking the FIFA Disciplinary Code along with relevant FIFA rules and regulations into account, deals with disciplinary incidents in the Olympic Games, including the qualifiers for the competition.[72]

The role of CAS as the 'supreme court for world sport'[73] is crucial in that respect as it serves as an appeals body[74] for sport-related issues[75] where its jurisdiction is recognised by SGBs,

[68] CAS 2007/A/1217 *Feyenoord Rotterdam v UEFA*, para 11.2.

[69] CAS 2008/A/1583 *Sport Lisboa e Benfica Futebol SAD v UEFA, & FC Porto Futebol SAD;* CAS 2008/A/1584 *Vitória Sport Clube de Guimarães v UEFA & FC Porto Futebol SAD*, para 41 (citation omitted).

[70] Olympic Charter 2019 Edition (n 14) Rule 59.

[71] ibid Rule 59 (2) (2.4).

[72] FIFA, Regulations for the Olympic Football Tournaments Games of the XXXII Olympiad Tokyo 2020, art 9 <https://resources.fifa.com/image/upload/1660-regulations-for-the-olympic-football-tournaments-tokyo-2020.pdf?cloudid=vbcdyqocqmpmddrra11o> accessed 20 August 2019.

[73] Mitten and Opie (n 41) 3.

[74] It also acts as first instance arbitration, gives advisory opinions when requested, and act as a mediator.

[75] CAS Code of Sports-related Arbitration 2019 Edition, R 27 <https://www.tas-cas.org/fileadmin/user_upload/Code_2019__en_.pdf> accessed 20 August 2019.

especially international ones.[76] It can be claimed that with the notable exception of France,[77] the disciplinary system resembles what Teubner refers to as a 'closed circuit arbitration' system constructed by 'self-validating contracts'.[78] In the case of international sport, the circuit is not actually closed-shut from the law of the nation-state due to the possibility of recourse to the Swiss Federal Tribunal or the possibility of jurisdiction of national courts either through national process law or 'The Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (the New York Convention);[79] however the contractual aspect makes its mark on the athletes and other persons in the shape of registration for a competition. In concrete, the basis of the acceptance of the jurisdiction of CAS, as well as the rules and regulations of an SGB, is a contract. In order to be able to take part in the Olympic Games, the participants have to sign an entry form where it states that they shall comply with the Olympic Charter and the World Anti-Doping Code. The entry form has another obligation imposed on the participants in the shape of the obligation to submit disputes to CAS.[80] FIFA and UEFA have similar provisions for their competitions where entry forms serve as the basis for the jurisdiction of CAS.[81] Leaving aside the question of whether forced consent to arbitration clauses are legitimate,[82] it should be noted that non-compliance with the acceptance of the authority of CAS

[76] National SGBs may also have references in their statutes which allow certain cases to be decided by the CAS. The football federations of Ukraine, Romania and Mauritania are shown as examples of this situation. D Mavromati, 'National Disputes before CAS' in M Bernasconi (ed), *International Sports Law and Jurisprudence of the CAS:4th CAS & SAV/FSA Conference Lausanne 2012* (Editions Weblaw 2014) 154-155.

[77] P Cornu and others, 'Disciplinary and Arbitration Procedures of the Sport Movement: Good practice handbook - for judicial authorities' (Council of Europe 2017) 91-92 <https://edoc.coe.int/en/module/ec_addformat/download?cle=e0f48a1058f0f0204b22d4a2fd6f18ae&k=30d776e5d92858892bad3b1a9e0e6f5c> accessed 20 August 2019; R van Kleef, 'Reviewing Disciplinary Sanctions in Sports' [2015] 4:1 Cambridge Journal of International and Comparative Law 3, 11-12.

[78] G Teubner, ''Global Bukowina': Legal Pluralism in the World Society' in G Teubner (ed) *Global Law Without a State* (Ashgate 1997) 15-17.

[79] Duval 'The Court of Arbitration for Sport and the EU Law' (n 53) 247 (footnote 195); M van der Harst, 'The Enforcement of CAS Arbitral Awards by National Courts and the Effective Protection of EU Law' in C Paulussen and others (eds), *Fundamental Rights in International and European Law: Public and Private Law Perspectives* (TMC Asser Press 2016) 295-297.

[80] Olympic Charter 2019 Edition (n 14) Bye-Law to Rule 44 (6).

[81] FIFA, 2018 FIFA World Cup Russia Regulations, arts 4 (1) (g), 14 (3), 18 and 43 <https://resources.fifa.com/image/upload/2018-fifa-world-cup-russiatm-regulations-2843519.pdf?cloudid=ejmfg94ac7hypl9zmsys> accessed 20 August 2019; UEFA Statutes 2018 Edition, art 62 <https://www.uefa.com/MultimediaFiles/Download/uefaorg/General/02/56/20/45/2562045_DOWNLOAD.pdf> accessed 20 August 2019; UEFA, Regulations of the UEFA Champions League 2019/20, art 4.01 (b) and (f) <https://www.uefa.com/MultimediaFiles/Download/Regulations/uefaorg/Regulations/02/60/37/12/2603712_DOWNLOAD.pdf> accessed 20 August 2019.

[82] Duval 'The Court of Arbitration for Sport and the EU Law' (n 53) 247-250; M Coccia, 'The Jurisprudence of the Swiss Federal Tribunal on Challenges against CAS Awards' in M Bernasconi (ed),

by the stakeholder—either by a reference to a state court or a tribunal—would be a breach of its contract with the international SGB.[83]

That the seat of arbitration is Switzerland is of strategic importance. The basis of this assertion is the fact that the only recourse against all CAS awards is the Swiss Federal Tribunal,[84] which has a rather limited set of tools for the review of CAS awards. In addition to a lower chance of the setting aside of an award, the fact that freedom of association—that is inherently linked to the regulation, adjudication and enforcement activities of international SGBs—is broader in Switzerland allows SGBs to enjoy more autonomy.[85] Nevertheless, there are instances where the authority of CAS was undermined due to the effects of the EU on the international SGBs. In a dispute arising from a company's stakes in various football clubs in Europe, the non-admission of one of the clubs the company had invested in was challenged before the CAS.[86] Having failed in this forum, ENIC filed a complaint before the European Community, which was duly decided. According to Parrish, this situation shows the limitations of the CAS as *the* authority in sport-related disputes; since the unsatisfied ENIC was able to re-challenge an SGB decision before another forum, which is a part of another transnational institution.[87]

This brings about the question regarding the enforcement of decisions taken within the sport adjudication system. As Verbruggen has put forth, '[t]ransnational private regulation can be effective only if compliance therewith can be enforced vis-à-vis those to which such regulation applies'.[88] The same logic prevails in sport, because an ineffective SGB decision would not create the desired effect on stakeholders and spectators. Thus, ensuring the effectiveness of the decisions taken by disciplinary bodies of the SGBs—and commissioners, in the case of joint ventures—is of considerable importance. Within the context of the hierarchical SGBs, the shield

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International Sports Law and Jurisprudence of the CAS:4th CAS & SAV/FSA Conference Lausanne 2012 (Editions Weblaw 2014) 191-192.

[83] CAS *Landaluce & RFEC* (n 34) para 48.

[84] Coccia (n 82) 172.

[85] R van Kleef, 'The legal status of disciplinary regulations in sport' [2014] 14:1-2 The International Sports Law Journal, 24, 27-28.

[86] CAS 98/200 *AEK Athens and SK Slavia Prague v/ Union of European Football Associations (UEFA)*.

[87] R Parrish, 'Social Dialogue in European Professional Football' [2011] 17:2 European Law Journal 213, 220.

[88] P Verbruggen, 'Gorillas in the closet? Public and private actors in the enforcement of transnational private regulation' [2013] 7 Regulation & Governance 512, 514.

used for the defence of enforcement comes in the shape of a CAS award. In its *Rayo Vallecano* award, a CAS panel upheld a FIFA Disciplinary Committee decision that foresaw points deduction and later relegation to a lower division.[89] The decision of the FIFA body had its basis in the FIFA Disciplinary Code which provided for the said sanctions in cases where clubs failed to pay a player, a coach or a club a certain sum of money in full despite being instructed to do so by a FIFA body.[90] The Swiss Federal Tribunal affirmed the award, indicating that the sanction against the club did not go against public policy.[91] The importance of the award arises from the fact that since natural or legal persons are in the system, they have no chance of avoiding a sanction in the event that they do not comply with an award. A stakeholder may be refused to take part in a competition, or a club may have its points deducted. Similarly, in the case of member associations if they do not enforce the points deduction or relegation to a lower division decisions, they face similar kinds of threats.[92] Secondly, there is a possibility of direct enforcement of decisions regarding selection for national competitions because non-admittance to the roster is also utilised as a sanction. Decisions to include or not include an athlete to the roster of an international competition—as will be witnessed in the case of Hope Solo in Section 4.2—should be seen as the direct enforcement of the discretion enjoyed by national SGBs. Nevertheless, in the *Matuzalem* case, one of the reasons for the annulling of the CAS award due to public policy was the fact that the footballer was banned from all footballing activities by FIFA since the former did not comply with the fines that were imposed upon them. The Swiss Federal Tribunal was of the opinion that the situation 'constitutes an obvious and grave encroachment in the Appellant's privacy rights and disregards the fundamental limits of legal commitments'.[93] Thus, the 'efficient' enforcement system within FIFA was found to be illegal due to its efficiency that limited the fundamental rights of the athletes. It can be claimed that, in line with the contentions of Donnelly, legitimacy was sacrificed at the expense of efficiency,[94] which led to the downfall of the decision.

[89] CAS 2006/A/1008 *Rayo Vallecano de Madrid SAD v Fédération Internationale de Football Association (FIFA)*.

[90] In this case, the FIFA Player's Status Committee.

[91] R Levy, 'Swiss Federal Tribunal overrules CAS award in a landmark decision: FIFA vs Matuzalem' [2012] 3-4 The International Sports Law Journal 35, 35-36.

[92] FIFA Statutes 2019 Edition (n 14) arts 60 and 61.

[93] Swiss Federal Tribunal, First Civil Law Court, *Francelino da Silva Matuzalem v Fédération Internationale de Football Association (FIFA), 4A_558/2011*, para 4.3.5 (English translation of the judgment). Reported in CAS Bulletin 2/2012, 135ff.

[94] P Donnelly, 'We are the Game? Player democratization and the reform of sport governance' in YV Auweele and others (eds), *Ethics and Governance in Sport: The Future of Sport Imagined* (Routledge 2016) 104.

Finally, on the other side of the Atlantic, as a part of the employment relationship, in order to be able to take part in the competitions of joint ventures, 'athletes, in signing standard player contracts, must agree to comply with league constitutions and [collective bargaining agreements]'.[95] In accepting these rules and the collective bargaining agreements, the athletes, in effect, agree to abide by the decisions of the Commissioner. Appointed by the league members, the Commissioner has a special role in maintaining the order, even having authority over the team owners who appoint them.[96] However, appeals procedures differ from entity to entity. For example, whilst in the case of the NFL, the Commissioner's disciplinary decision may only be appealed to the Commissioner's office, the NBA allows for players to appeal certain disciplinary sanctions to an external arbitrator.[97] On the other hand, just like their European counterparts, joint ventures have the power to enforce their decision. Their position as enforcers has two aspects. First, the Commissioner can stop a suspended person from taking part in a match, just like other SGBs. Second, the special relationship between the athletes and the joint venture, and thus the team owners, in the shape of collective bargaining agreements provide for a different way of enforcing fines. In the examples of the NBA and NFL, following the decision of the Commissioner to fine an athlete, the amount of the fine is withheld or deducted from the athletes' salary, and this creates an efficient way of enforcing the decisions.[98] Consequently, the coercive power of the entities—both the teams and the joint ventures that are consist of the teams—is solidified. In this case, the power is solidified by paying regard to the labour relationship between the teams and the players.

[95] CJ McKinny, 'Professional Sports Leagues and the First Amendment: A Closed Marketplace' [2003] 13 *Marquette Sports Law Review* 223, 234.

[96] Blair (n 2) 52. The Association of Tennis Professionals (ATP) and the Professional Golfers' Association (PGA) include similar roles. ibid.

[97] Lee and McFarlin (n 66) 79-80. It has to be added that the disciplinary powers of the commissioners might be checked by courts if the disciplinary power is used partially, arbitrarily or without having regard to due process. A Pacifici, 'Scope and Authority of Sports League Commissioner Disciplinary Power: Bounty and Beyond' [2014] 3:1 Berkeley Journal of Entertainment & Sports Law 93, 97-99; JR Bondulich, 'Rescuing the "Supreme Court" of Sports: Reforming the Court of Arbitration for Sport Arbitration Member Selection Procedures' [2016] 42 Brooklyn Journal of International Law 275, 314-317.

[98] NBA Collective Bargaining Agreement of 19 January 2017, Exhibit A 'NBA Uniform Player Contract', s 6 <https://ak-static.cms.nba.com/wp-content/uploads/sites/4/2017/10/2017-NBA-Collective-Bargaining-Agreement.pdf> accessed 20 August 2019; NFL Collective Bargaining Agreement of 4 August 2011, art 46 s 5 <https://nfllabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf> accessed 20 August 2019.

1.4 Final Remarks

The crucial point in sport governance is that SGBs are private entities that strive to accomplish their goals as provided by their constitutions. In line with these goals and interests, the SGBs sanction their stakeholders through specially drawn up disciplinary processes that utilise specific disciplinary regulations.[99] The disciplinary process that ends with the enforcement of the decision taken by a body or natural person (ie the referee, the umpire or any authorised natural person) within the SGB ensures that the interests of the SGB are protected. In the process, a tension exists between the SGBs' rules and the law of the state they operate in or EU Law which they are subjected to. In addition to this, the SGBs strive to avert intervention on the part of states or their courts. These tensions create a situation where respective autonomies of SGBs are defended through various means. Contrary to what they desire, SGBs are still bound by the orthodox means of law-making along the relatively newer instances of transnational law-making by EU institutions. Moreover, if the dispute resolution mechanisms created and nurtured by SGBs go beyond the limits that are set by national courts and EU institutions, decisions made by these mechanisms might be rendered illegal. Therefore, sport governance is not wholly divorced from municipal law—as in the cases of *Malaja* and *Matuzalem*—or the EU law—as in the case of the SGBs residing or operating in the EU—. Finally, not only are the SGBs far from being divorced from politics, they are an important leg of the triumvirate of the state, the market and sport. Looking at the question of autonomy of sport from this perspective gives support to the idea of 'the myth of autonomy'. This sceptical view of sport will inform the critique of the regulations and practices of the SGBs.

[99] This stance was confirmed by a CAS panel. CAS 2012/A/3032 *SV Wilhelmshaven v Club Atlético Excursionistas*, para 42.

Chapter 2 – Arguments for Freedom of Expression

This chapter will lay the foundations for the discussion on freedom of expression in sport. For the purposes of this work, it can be claimed that without philosophical bases and their application on the subject in general, discussion on the defence of freedom of expressions would not be meaningful. Here, the arguments for freedom of expression are presented with the help of different disciplines such as philosophy, political theory and law. The arguments as put forth by commentators will be divided into categories because such a move will be helpful in discussing their applicability within the realm of sport throughout the following chapters.

2.1 Argument from Truth

The argument from truth, which also includes the advancement of knowledge, is the oldest and one of the most heavily criticised arguments for freedom of expression. In general, it is contended that the exchange of ideas between persons is essential for reaching truth and advancing society's knowledge in general or of the person to whom which the communication is directed to. The place where this exchange takes place is pictured as a 'marketplace of ideas'.[1] It can be claimed that the Anglo-Saxon branch of the idea of discovering truth through dissemination of both falsehood and truth has its roots in John Milton. In *Areopagitica*, Milton presented a case against the authorities' prior approval and licensing of books and pamphlets.[2] The central proposition is put forth as 'Let [Truth] and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter. Her confuting is the best and surest suppressing'.[3] Similarly, John Stuart Mill's goal of finding the truth led to the protection of the expressions of individuals in 'On Liberty'.[4] Mill focused on the individual, and its interactions with society. The primary concerns were with regards to a possible loss of individuality, diversity of opinion, and the truth itself. The emphasis on the interaction with society—thus not just with the government—was deliberate and had a Tocquevillian basis to it. 'The Tyranny of the Majority' leads to the majority's omnipotence and thus the aim becomes to please the

[1] Contrary to other commentators, Greenawalt has disambiguated marketplace of ideas and discovery of truth. K Greenawalt, *Speech, Crime, and the Uses of Language* (OUP 1989) 34.

[2] J Milton, *Areopagitica: Pour la liberté de la presse sans autorisation ni censure* [bilingual edition] (Aubier-Flammarion 1969) 140.

[3] ibid 216.

[4] JS Mill, *On Liberty and Other Essays* (J Gray ed, OUP 1992).

majority.[5] In essence, people have to be guarded not just against the will of the government or the magistrate, but also against their own will—which is more rigid[6]—consisting of the prevailing opinions and 'the tendency of society to impose, by other means than civil penalties, its own ideas and practices as rules of conduct on those who dissent from them […]'.[7] The idea of a noble search for truth through a clash of ideas in the marketplace of ideas for the greater good of society proved to be quite attractive for the judiciary on both sides of the Atlantic.[8]

It can be claimed that Schauer's interpretation of this argument that it pertains to an individual's state of being closer to 'certainty' rather than the 'truth' which emphasises the aim of approaching a preferable 'epistemic state' through 'epistemic advances' would be better fitting for the understanding of this approach.[9] In that, 'the argument from truth may easily be characterized as an argument from uncertainty'.[10] An individual may never be certain of the answers, but may be in a better 'epistemic state' due to the refutation of errors. Some opinions supported by facts and experience are more 'true' than others that are based on superstition, hate and prejudice. In view of the facts and experiences, it is more likely than not that earth is an oblate spheroid, and it is much more likely that Aryan Whites are not superior in intelligence and strength compared to other 'races'. Nevertheless, Redish's warning as to the abuse of institutions that enjoy coercive power is worth heeding where:

> […] any theory positing that the value of free speech is the search for truth creates a danger that someone will decide that he finally has attained knowledge of the truth. At that point, that individual (or society) may feel fully justified, as a matter of both morality and logic, in shutting of expression of any views that are contrary to this 'truth'.[11]

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[5] ibid 8; A de Tocqueville, *Democracy in America* (HC Mansfield and D Winthrop tr eds, University of Chicago Press 2000) 238-239.

[6] Mill (n 4) 18.

[7] ibid 9.

[8] *See Abrams v United States* 250 US 616 (1919) 630 (Holmes J dissenting) and *Gertz v Robert Welch Inc*. 418 US 323 (1974) 339 (note omitted). In Europe the ECtHR adopted a similar view. *Handyside v The United Kingdom*, (1976) Series A no 24, para 49.

[9] F Schauer, *Free Speech: A Philosophical Enquiry* (CUP 1982) 18 and 24-25.

[10] ibid 31.

[11] MH Redish, *Freedom of Expression: A Critical Analysis* (Michie 1984) 46.

Experiences and empirical data resulting from scientific studies may produce valuable results for anti-discriminatory measures; but the notions of discoverable truth and being closer to certainty become self-defeating in the search for truth in other subjects. For example, holocaust denial along with its trivialisation, minimisation and revisionism are criminally prosecuted through the use of 'memory laws' and hate-speech in certain jurisdictions such as France and Germany.[12] The EU also stepped into the scene with a framework decision, which puts forth that 'publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court' should be considered criminal offences, and thereby their perpetrators sanctioned.[13] Therefore, Redish's fears are justified.

Although it has its shortcomings, the theory of the discovery of truth and its ally the marketplace of ideas are useful in opening up different doors. The first use is pointed out by Redish, who has stated that this idea is important for the self-realisation of an individual. In that, the necessity to receive different opinions in reaching a life-affecting decision renders the marketplace essential even if the decisions themselves are irrational.[14] Moreover, the idea of diversity in Millian thought helps the cause of freedom of expression, because it offers more choices for society and the individual. Moving on from this, it can be asserted that the search for diversity provides important anchors for the purposes of this work. The underlying reason for this assertion is that, as will be argued in the following chapters, SGBs curb the diversity of ideas by restricting expressions of dissent in sports venues and beyond. In essence, as will be argued throughout this work, the SGBs are 'certain' of what sport should be like and claim that they have found the 'truth' about sport. Accordingly, they utilise their coercive power to the detriment of the views and individuals who might challenge these 'truths'.

[12] U Belavusau, 'Memory Laws and Freedom of Speech: Governance of History in European Law' in A Koltay (ed), *Comparative Perspectives on the Fundamental Freedom of Expression* (Kluwer 2015) 539.

[13] Council Framework Decision of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, OJ L328/55 [2008] art 1 (1) (c).

[14] Redish *Freedom of Expression* (n 11) 47.

2.2 Argument from Democracy

The argument from democracy focusses on the importance of political expressions in the democratic process. In doing that it limits the reasons and protection of expressions to their contribution towards achieving a healthy process. As a pioneer, Meiklejohn put democratic institutions and political expression at the centre of freedom of expression, which is intricately linked to the self-government of the people, a 'power'.[15] The protection of expressions is justified so long as 'the process of forming and expressing the will of the majority according to which our representatives must govern' is realised.[16] The crux of the matter is that, political expressions are the 'core' of freedom of expression.[17] Such primacy is based on the fear of the insulation of government through censorship, its bias towards certain views and the contention that curtailing political expressions results in more damage than it does to other types of speech.[18] Disapproval of policies may not be the reason for abridgment; however the limit of protection is damaging expressions and expressions unrelated to self-government.[19] In essence, the well-being of the deliberative process is at the heart of concerns.[20]

First of all, the argument's emanation from the (romantic) view of US History[21] and a specific interpretation of the US Constitution[22] leads to an exaggerated causality between the deliberative process in the governing of a political unit and political expressions. The idea of

[15] Meiklejohn later tweaked this approach so that the protection is expanded to other types of expressions. Other types of expressions, such as literature, art, education, discussion of public issues, philosophy and sciences are protected insofar as the 'voter derives the knowledge, intelligence, sensitivity to human values: the capacity for sane and objective judgment which, so far as possible, a ballot should express'. A Meiklejohn, *Free Speech and Its Relation to Self-Government* (Harper & Brothers 1948) 39-43 and 88-89; A Meiklejohn, 'The First Amendment is an Absolute' [1961] The Supreme Court Review 245, 255-257.

[16] LR BeVier, 'The First Amendment and Political Speech: An Inquiry into Substance and Limits of Principle' [1978] 30 Stanford Law Review 299, 309

[17] RH Bork, 'Neutral Principles and Some First Amendment Problems' [1971] 47:1 Indiana Law Journal 1, 29; CR Sunstein, 'Free Speech Now' [1992] 59 The University of Chicago Law Review 255, 304.

[18] Sunstein 'Free Speech Now' (n 17) 304-306.

[19] ibid 310; Meiklejohn, 'The First Amendment is an Absolute' (n 15) 258-260.

[20] JH Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980) 111-112.

[21] SH Shiffrin, *The First Amendment, Democracy, and Romance* (Harvard University Press 1990) 68.

[22] For example, Sunstein has based the argument from democracy on a 'Madisonian' understanding of the First Amendment that brings 'government by discussion' to the fore. *See generally* CR Sunstein, *Democracy and the Problem of Free Speech: with a new afterword* (Free Press 1995).

democracy does not have an all-encompassing legitimising factor. For example, 'epistemic democracy' argues that 'the aim of democracy is to track the truth' which is independent of the procedure.[23] Unlike 'deliberative democracy' it downplays the focus on procedure and introduces 'the quality of outcomes' as an important element of democracy.[24] Concordantly, on the one extreme 'group polarisation', which is defined as members of a deliberating group predictably move toward a more extreme point in the direction indicated by the members' predeliberation tendencies', may occur.[25] On the other extreme, the beliefs of the individuals might stop them from exchanging information and reason with others. In these cases, the focus on deliberative process is misleading, because it does not always produce intended results. The deliberation itself might skew and deform the process.

An ideal deliberation process (if indeed there is one, and if people can agree upon its characteristics) where every aspect of governmental policy is debated rigorously has so far not been presented. Even if policies are rigorously debated, the deliberation might not ensure a 'good' decision,[26] and even if the characteristics of an ideal deliberation process are designated, then the problem of the effects of interest groups appears. In reality, private interest groups can and could have an impact on the deliberation process through intense lobbying, campaign donations or the power over mediums of communication. As Cohen has argued, the perceived bias of the 'speakers' or conduits of an expression might move the individual to discount it,[27] in which case the expression would not foster democracy. This brush with reality warrants scepticism as to the viability of solely protecting political expressions. If freedom of expression is desirable so long as the deliberative process is rectified, then this consequentialist approach fails due to the fact that the utility of political expressions is doubtful.

[23] C List and RE Goodin, 'Epistemic Democracy: Generalizing the Condorcet Jury Theorem' [2001] 9:3 The Journal of Political Philosophy 277, 277 and 280 (citation omitted).

[24] C Holst and A Molander, 'Epistemic democracy and the role of experts' [2019] Contemporary Political Theory 1, 1-2 (online first version).

[25] CR Sunstein, 'Deliberative Trouble? Why Groups Go to Extremes' [2000] 110 The Yale Law Journal 71, 74 and 85-90. On the other hand, Habermas has stated that 'considered' opinions do not necessarily result in group polarisation. J Habermas, 'Political Communication in Media Society: Does Democracy Still Enjoy an Epistemic Dimension? The Impact of Normative Theory on Empirical Research' [2006] 16:4 Communication Theory 411, 414.

[26] M Fuerstein, 'Epistemic Democracy and the Social Character of Knowledge' [2008] 5:1 Episteme 74, 83-85.

[27] J Cohen, 'An Epistemic Conception of Democracy' [1986] 97:1 Ethics 26, 36.

More importantly, as Redish has indicated, the argument from democracy links freedom of expression only to democratic forms of government, which seems to ignore the fact that democracy is not the only type of government.[28] A literal reading of the argument from democracy would mean that in the wide gamut of regimes that have the purely utopian democratic ones at the one end and the purely dystopian autocratic ones on the other end, only the expressions that are relevant to certain regimes and societies that are closer to the democratic end would count. As will be argued in the next chapter, losing freedom of expression for being a citizen of or residing in the wrong side of the spectrum cannot be justified. What is more, freedom of expression can be used to attain the right (or power) to self-government in regimes that do not provide that.

Finally, the demarcation of the political and non-political creates problems as to the value of speech. As will be broached in a more in-depth manner in Section 5.3, there is an inherent difficulty in differentiating between political and non-political speech. The political might include profane and the profane might include political. It may even include commercial speech. The very narrow protection of expressions, as in the case of Bork's arguments,[29] leaves out an important part of human communication.[30] Moreover, when non-political expressions are given less or no protection from sanction, then the institution that does the categorisation is given a shortcut to restriction of 'undesired speech'.

In view of the above, if the only protected type of expression would be political expressions or the ones that (supposedly) help the political decision-making process of individuals, then this argument cannot deliver. This conclusion does not deny that the general availability of viewpoints or the cooperation of individuals in reaching a decision might be important for different conceptions of democracy.[31] Rather, it challenges the consequentialist view that freedom of expression is important solely for the well-being of the deliberative process.

[28] MH Redish, 'The Value of Free Speech' [1982] 130 University of Pennsylvania Law Review 591, 601-602.

[29] Bork (n 17) 20 and 27-28.

[30] It has to be indicated that not all proponents of the argument from democracy draw the limits of protection narrowly. BeVier's analysis of pragmatic concerns such as 'mixed utterances', which combine different types and subjects of expressions, leads to a broader protection. BeVier (n 16) 326-328.

[31] KK Ladha, 'The Condorcet Jury Theorem, Free Speech, and Correlated Votes' [1992] 36:3 American Journal of Political Science 617, 622-624 and 630-632; JF Müller, 'Epistemic democracy: beyond

Negative externalities of the focus on democracy are particularly exacerbated for sport. In line with the idea that sport should be politics-free, SGBs curtail political expressions for every stakeholder and spectator. This presents a paradoxical challenge for the argument from democracy. If political speech is at the core of freedom of expression, a private institution with coercive power must refrain from prohibiting political speech; nevertheless SGBs are able to restrict a type of expression, which is exactly what the argument from democracy sees untouchable. In that regard, this argument seems to be at odds with the restrictions in sport. In addition to this, the reliance on this argument would also be erroneous, as it does not expand to the citizens and residents of non-democratic regimes which take part in sport competitions. Consequently, a more inclusive and potent foundation for a defence of freedom of expression in sport should be introduced.

2.3 Suspicion of Government

Suspicion of government is a negative and overarching argument for freedom of expression. It is negative in the sense that it dwells on the 'evils of regulation', through which it differentiates from positive arguments focusing on the advantages of freedom of speech.[32] The argument takes its force from a sceptical look towards regulation and restriction[33] of expressions by the government. It reflects the scepticism that the government, in order to protect its own interests or that of private entities, might take certain measures that deprive the public of certain viewpoints.[34] These goals may be reached by the outright restriction of a certain subject or viewpoint regarding that subject, or by finding subtler means, including the designation of harm as a pretext for the restriction, in order to keep less popular ideas at bay.

It can be claimed that the negative effects of regulation and restriction of expressions have always been a concern. As touched upon above, Mill was aware of the dangers presented by the

knowledge exploitation' [2018] 175:5 Philosophical Studies 1267, 1270-1273; RE Goodin and K Spiekermann, *An Epistemic Theory of Democracy* (OUP 2018) 132-146. On the other hand, it is also claimed that erroneous facts are hard to unlearn. ibid 94.

[32] E Barendt, *Freedom of Speech* (2nd edn, OUP 2005) 21.

[33] The difference between two notions will be brought forth in Section 5.2.1.

[34] CR Sunstein, 'The Future of Free Speech' in LC Bollinger and GR Stone (eds), *Eternally Vigilant: Free Speech in the Modern Era* (The University of Chicago Press 2002) 306; Ely (n 20) 106-107.

implementation of the will of the government. But before that, Milton, right from the start, was sceptical of the suitability of the licensors as people of utmost integrity and infallibility. Do they possess these traits and can they be trusted?[35] In contemporary literature, the most forceful defence of suspicion of government comes from Schauer who posited that:

> [f]reedom of speech is based in large part on a distrust of the ability of government to make necessary distinctions, a distrust of governmental determinations of truth and falsity, an appreciation of the fallibility of political leaders, and a somewhat deeper distrust of governmental power in a more general sense.[36]

This way of approaching the question of governmental power makes this argument an overarching one. It is overarching because it can be used as a basis for each and every argument for freedom of expression. It does not claim to be *the* argument. Here, the target of suspicion is the entity which should ensure freedom of expression, since the same entity may stifle it by using its governmental power. In essence, suspicion catalyses the defence of the freedom of expression by critically examining the intentions of the institution that has regulatory, adjudicatory and coercive powers. These intentions are assumed to be better comprehended by comparing the institution's stance on similar viewpoints or subjects. Therefore, it is not, a 'parasitic'[37] argument.

These characteristics render suspicion of governance invaluable for any evaluation of freedom of expression. Nonetheless, a reservation should be put forth for the purposes of this work. The structures of SGBs result in the situation where the regulatory, adjudicatory and coercive powers also belong to non-governmental institutions. Accordingly, an approach which bears in mind the pluralistic nature of these powers would lead to a better result.

[35] Milton (n 2) 166.

[36] Schauer (n 9) 86.

[37] Barendt (n 32) 22.

2.4 Arguments from Autonomy and Self-Fulfilment

Arguments from autonomy and self-fulfilment take different aspects of human good as desired consequences, like the development of rational capacities and protection of human autonomy from the government. One such consequence is 'individual self-realisation'. The two aspects of self-realisation are the development of an individual's faculties and self-rule/self-governance.[38] Redish has presented self-realisation as the 'ultimate normative source'[39] served by 'all forms of purely communicative activity'.[40] It contains 'sub-values' in the shape of the 'checking function', the 'marketplace of ideas' and the 'political process'.[41] Similarly, in devising the 'Liberty Theory', Baker has selected two of Thomas Emerson's four common values protected by The First Amendment, namely individual self-fulfilment and participation in decision-making by all members of society.[42] In essence, speech in itself contributes to self-fulfilment.[43]

Despite later changing and rejecting some aspects of it,[44] and even distancing themselves from the idea of autonomy,[45] Scanlon's autonomy-based 'Millian Principle' is an important contribution to the argument. The theory deals with the limitations on the government's restriction of speech, rather than the rights of the individuals—which sets it apart from a rights-based defence of autonomy. The Millian Principle indicates that 'a legitimate government is one whose authority citizens can recognize while still regarding themselves as equal, autonomous, rational agents'.[46] Scanlon's autonomous agent compares competing reasons, creates beliefs and ultimately 'decides to do what he decides to do'. As an autonomous agent the processes are realised independently. This does not denote that the individual is immune from state restrictions, meaning that there are instances where the individual has to obey obligations set

[38] Redish *Freedom of Expression* (n 11) 11.

[39] ibid 36.

[40] ibid 4.

[41] Redish 'The Value of Free Speech' (n 28) 594.

[42] CE Baker, *Human Liberty and Freedom of Speech* (OUP 1989) 47.

[43] ibid 54.

[44] TM Scanlon, 'Freedom of Expression and Categories of Expression' [1979] 40 University of Pittsburgh Law Review 519, 530-534.

[45] *See generally* TM Scanlon, 'Comment on Baker's Autonomy and Free Speech' [2011] 27:2 Constitutional Commentary 319.

[46] T Scanlon, 'A Theory of Freedom of Expression' [1972] 1:2 Philosophy and Public Affairs 204, 214.

forth by the state. The legal restrictions as well as interventions which foster freedom of expression and the failure to intervene on the part of the state must be justified on several grounds that have to be compatible with the autonomy of individuals. One ground makes up the balancing of the value of expressions and other 'goods'. When balancing, the value of the expression at hand (variable according to the subject matter) is balanced against the good which is bound to be affected by the expression. For example, the expression through pamphlets goes against the cleanliness of the streets and weighs more which leads to an immunity from restriction. The second ground is as regards the equitable distribution of the means of communication, while the third ground focuses on the position of specific rights, such as political rights before a possible restriction.[47]

One of the weak points of the arguments from self-fulfilment and autonomy comes to light with the question which asks whether or not 'hate speech' contributes to these goals.[48] As will be analysed in Chapter 6, certain instances of hate speech should not be protected, even if the speaker's self-fulfilment is realised. Another important defect in these arguments is that the difference between this argument and other libertarian theories and moral arguments is not obvious. If the sole reason for the defence of freedom of expression is its contribution to autonomy and self-fulfilment, then theories of general liberty do a better job than theories that only deal with freedom of expression.[49] In the case of the argument from self-fulfilment, this criticism is apt in shedding light to the primary problem of the said theory, pointing out that the reason why expressions are protected, or rather better protected, is not answered. If the answer to this question is not presented in a convincing manner, freedom of expression is to be perceived as just another right within a list of rights and wants. The equalisation of rights and desires would devalue the importance of an expression, as it would become just another vessel for 'happiness'.[50]

The final concern is that the arguments from autonomy and self-fulfilment border on utilitarianism.[51] This situation paves the way for giving the weighing and balancing of rights

[47] ibid 215-217 and 223-224.

[48] N Wolfson, *Hate Speech, Sex Speech, Free Speech* (Praeger 1997) 29.

[49] Barendt (n 32) 13; Schauer (n 9) 52.

[50] Schauer (n 9) 49.

[51] Barendt (n 32) 13.

more importance than they are due. Larry Alexander's insights as to the question at hand are of value. Alexander has asserted that in cases where an expression has the potential to damage, the person expressing their ideas may be defended in the lines of autonomy and self-fulfilment. At the same time, the recipient's right not to suffer negative feelings and thoughts as a result of the said expression may also be defended. In this case, the consequences of the expression and thus the potential damage or level of offensiveness is to be taken into account. Accordingly, in order to decide which autonomy deserves more protection, an agency which balances and weighs competing sets of autonomies should be in place. Moreover, questions arise regarding whose autonomy and interests overrules the other and if the autonomy and interests would be the sole measures in judging the situation. The values and judgments of the agency would be omnipotent for the realisation of freedom of expression.[52]

Consequently, in tandem with the suspicion of government, one has to be sceptical of the impartiality of the agency that would do the weighing and balancing. The underlying reason for the scepticism is that such utilitarianism-inspired process would always have the risk of resulting in the loss of autonomy or the failure to realise the self-fulfilment of the individual. Therefore, these arguments would become the victims of the instruments that they have created. In addition, the unbalanced protection of expressions—either too narrow or too broad—takes its toll on the viability of these arguments. The only positive contribution of the argument from autonomy would be the defence of different ideas that have to be made available to the recipient; however the same options-based defence of freedom of expression would also be feasible in the approach that will be analysed in the next section. This situation brings about the need to reject these two arguments. More importantly, for the purposes of this work, these failings become clearer in the context of sport. Due to the fact that through their associative and disciplinary powers the SGBs themselves act as the agencies which undertake the weighing, balancing and valuing, the scepticism of the arguments analysed in this section increase incrementally. The downsides of these undertakings will be re-iterated and particularised in the coming chapters.

[52] L Alexander, *Is There a Right of Freedom of Expression?* (CUP 2005) 131.

2.5 Constructivist/Rights-Based Approach

One of the most helpful accounts of freedom of expression is the one introduced by David AJ Richards. In this approach, freedom of expression becomes an important tool in the interpretation of the US Constitution. By means of a Lockean understanding of social contract and a historical approach to the US Constitution, freedom of expression is rendered crucial for individuals. Richards has perceived freedom of conscience as the primary and inalienable right whose application and scope must be expanded to cover other rights.[53] Here, Dworkin's concept of 'background rights'[54] is utilised in positioning this freedom as a right that is capable of setting the stage for other rights and freedoms.[55] In essence, a rights-based theory of freedom of conscience is presented, and this theory is expanded to freedom of expression.[56] Since it will present one the staples of the defence of freedom of expression in sport, this section will provide more space for the explanation of Richards' account of freedom of expression compared to other arguments.

Richards, in order to be able to lay out a rights-based theory, has delved first into the matter of what a person is. In that step, following the Kantian model and a Rawlsian approach, the person is depicted as autonomous in the sense that the capacities of a person, ie autonomy (freedom), are the foundation of being a person. Autonomy implicitly appeals to the 'twin moral powers' of rationality and reasonableness, in that, persons are accepted to have the capacity 'to formulate and act on higher-order plans of action, which take as their self-critical object one's life and the way it is lived, changing or not changing one's life, as the case may be'. In essence, the autonomous person is capable of originating, expressing and revising claims with their own judgment, self-reflection and will. The autonomous person is rational and reasonable, because they have the sense of 'the good and the right', which are complemented by the desire to process beliefs through reason in an ever-evolving manner.[57]

[53] DAJ Richards, *Toleration and the Constitution* (OUP 1986) 61-62.

[54] Background rights 'are rights that hold in an abstract way against decisions taken by the community or the society as a whole […]'. R Dworkin, *Taking Rights Seriously: New Impression with a Reply to Critics* (Duckworth 2005) *xii*.

[55] Richards (n 53) 31 and 68-69.

[56] ibid 63 and 103.

[57] ibid 71-77.

One of the main points of Richards is that if a person's role in society is preassigned, then the person lacks autonomy as they have shed their moral powers. The same situation is witnessed 'when [persons] are defined solely by their functional utility of the person (for example, their role in some political or social hierarchy or religious theocracy)'. A person should be the end, not the means. The exercise of practical reason has to enjoy equal respect—which is essential for the expression and realisation of the moral powers as independent persons—. Epistemic certainty is rejected, and accordingly, so are 'natural hierarchies of order and submission'—revisability should prevail. The autonomy of the person is shaped by both coercion directed towards their will and a sense of self-direction, not authenticity. An absence of coercion and the presence of self-direction at the same time are the prerequisites of a free person. Any deficiencies in the realisation of the will or self-direction result in the person not being free. Preassigned roles in society and stultifying convention, with their obstruction of a person's power to originate and express claims, also lead to the loss of autonomy.[58]

Crucially, Richards has combined the characteristics of the autonomous person with the Dworkinian notion of 'equal concern and respect'[59] for individuals. In this rights-based interpretation of the autonomous person, the coverage is universal and anti-utilitarian. Rights are 'trumps'[60] that are available to everyone and these characteristics emphasise that persons, not pleasures, are equal. Universal equality of the persons is of the essence. Here, rights have a distributive role, which takes into consideration the moral standings and powers of individuals. The right to conscience is 'an inalienable human right' that is at the core of the notion of the autonomous persons and their moral powers. The background right to conscience is so central to the understanding of a person as an autonomous agent, '[i]f we have any rights, we must have this right […]', especially when the contractarian nature of the theory is taken into account.[61]

Richards has applied the central tenets of this theory first to religious toleration and then to freedom of expression. In general, on the freedom of expression part of the argument, the moral

[58] ibid 72 and 78-84.

[59] Dworkin (n 54) 198-201 and 272-278.

[60] ibid *xi*.

[61] Richards (n 53) 70 and 84-85.

powers of persons reflect through expressions, and conversely they are fed by expressions of others. Freedom of expression, as a right, is an elaboration of equal concern and respect for individuals. Therefore, freedom of expression and action of a person are protected against violations stemming from 'contempt for the autonomy of rational and reasonable conscience' and the partial judgements of the state that categorise expressions as valuable and valueless. In the latter case, Richards has contended that expressions critical of the state (usually) tend to be curtailed in view of their content. This is unacceptable because the principle of equal respect results in the equal protection of every type of expression regardless of their (supposed) content. Otherwise, the individual would not be able to originate, express, and revise claims. The expressions of the speaker are protected even in the cases where they are offensive or disturbing to the consciences of the audience. A lack of power on the part of the state to value an expression spills over to the ratification of the judgments of the audience, and thus, it cannot judge the value of an expression on behalf of the audience. If the expression inflicts damage on the conscience of the audience, this would be no reason for an intervention by the state, since the damage is collateral in view of the moral powers exercised. The solution to the damage is not intervention or prohibition, but the rebuttal of the expression through the use of one's moral powers.[62] Taking the exercise of a person's moral right as bearing and supporting it with the expansion of the freedom of conscience, the protection goes beyond political expressions and covers issues central to the independent exercise of freedom of expression.[63]

As was stated in the opening paragraph of this section, the approach as introduced by Richards will be accepted as one of the principal points for defending freedom of expression in sport. This move results in the acceptance of Dworkin's idea of a (moral) rights-based interpretation, which emphasises equal respect and concern for individuals along with their dignity. In that regard, the equality of speakers (whatever their viewpoints may be) along with the equality of the spectators and audiences wherever they may be or which country they are a citizen of, will be one of the mainstays of the defence of freedom of expression in sport. However, there will be departures from these theories due to their failure to explain and present a complete interpretation regarding specific situations, particularly in sport. The deviations from this approach will be presented along the way. Moreover, since the contractarian approach deals with the legitimacy of political power within a society, it may prove to be unsuitable for an

[62] ibid 167-172.

[63] ibid 177-178.

analysis of competitions that bring together competitors from countries with different regimes and accordingly with differing notions of legitimacy.

There is another caveat in the same vein to the designation of Richards' arguments as the primary defence in this work. The fact that this a theory of constitutional interpretation designed for the US Constitution renders it impossible to transpose it to a transnational setting without modifications. The arguments that have been presented in this section have to be moulded into an acceptable framework which takes into account the fact that within the context of global sport, jurisdictions represented by international SGBs or their member associations have different takes on rights, constitutions and their interpretations by institutions. Nevertheless, these obstacles are not insurmountable thanks to the idea of human rights. The contention that human rights are recognised as rights bestowed upon humans due to the simple fact that they are humans will pave the way for an exposition of the subject in the next chapter. Consequently, the characteristics of the autonomous person as well as the moral understanding of freedom of expression as introduced by Richards pave the way for a universalist approach which would be able to cover more individuals and societies.

2.6 Final Remarks

The overview of the arguments for freedom of expression can lead to two inferences. The first is that other than 'suspicion of government'—which is a negative argument—the speakers' right to freedom of expression, in essence, is based on their desire to make a change either in society or in their lives which should be seen as not dependent solely on the argument from self-realisation.[64] Whether with the intent to achieve self-realisation, to realise the two moral powers, to contribute to the marketplace of ideas or the democratic discourse, the speaker sends some kind of message to the outer world. The ability to make a change to their lives or society, and persuade others[65] is a crucial aspect of being a rational and reasonable individual having equal rights to their peers. Although it is based on the same moral arguments, this aspect of freedom

[64] For an example of the claims that have focused on the self-realisation aspect of expressing oneself *see* E Baker, 'Harm, Liberty, and Free Speech' [1997] 70 Southern California Law Review 979, 985.

[65] Shiffrin (n 21) 91.

of expression distinguishes it from the freedom of thought, which is concerned with the individual's inner world.[66]

The second important point is that a single argument or approach cannot be considered as the foundation for the protection of expressions. Since their scopes and coverage areas are limited (either self-imposed or due to insufficiency), they are not able to provide for an argument which would be applicable to all cases. If the fact that they all suffer from structural defects is also taken into account, the reliance on a sole argument without the necessary modifications for a given industry or subject would be to the detriment of freedom of expression. Moreover, the fact that private and especially transnational institutions have become regulators within their own areas of activity requires an approach that takes into account the nature of communication and the changing texture of societies. Therefore, as Schauer has posited,[67] overlapping justifications for freedom of expression could be utilised concurrently. However, it should be stated once more that for the purposes of this work, Richards' approach analysed in the previous section as well as Dworkin's idea of equal concern and respect for individuals will constitute the spearheads for the defence of freedom of expression in sport.

[66] SJ Heyman, 'Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression' [1998] 78:5 Boston University Law Review 1275, 1338.

[67] Schauer (n 9) 103-104.

Chapter 3 – Freedom of Expression as a Human Right

As was indicated in the previous chapter, David AJ Richards' approach presents the most suitable ground for a defence of freedom of expression in sport, and yet its grounding on social contract and the fact that it is based on the interpretation of the US Constitution could present problems in a transnational context.[1] The transnational effects of SGBs, the trans-border mobility of stakeholders and spectators, as well as the effects of trans-border broadcasts of sport competitions should steer in the direction towards a different type of defence of freedom of expression. In that regard, Teubner's assertion that a nation state-based constitutional critique of transnational institutions lacks sufficient basis due to the fact that they are not based on a specific national constitution, informs the analysis carried out in this chapter.[2] Therefore, in essence the egalitarian and moral powers-based defence presented by Richards will be supported through the analysis of transnational production and consumption processes in sport.

This chapter aims to act as bridge between the previous chapter, which introduced the arguments for freedom of expression, and the next chapter, which will apply the findings of preceding chapters. It will present certain sport industry-specific concerns that will become the foundations for a universal defence of human rights, however it will leave some of the justifications to later chapters. In view of this aim, it will strive to expand freedom of expression with the help of human rights discourse. It will review and in places take advantage of this discourse. In the process, the chapter will take account of the specificities of freedom of expression and the sport industry with its regulatory, adjudicatory and coercive powers. For the purposes of this work, the details of the human rights theories will not be presented. Nevertheless, they will shed light to the discussion at hand as certain points in these theories will be referred to where necessary either to refute a point or support another.

[1] It can be asserted that Richards' expansion of the Rawlsian social contract to the international stage is unconvincing. The more prominent problem with a social contractarian approach in the case of sport is that the relations between the governors and the governed are ambiguous. Moreover, Richards only focused on the relations between states which in effect, rules out relations between private legal and natural persons. *See generally* DAJ Richards, 'International Distributive Justice' [1982] 24 Nomos 275.

[2] G Teubner, 'The Project of Constitutional Sociology: Irritating Nation State Constitutionalism' [2013] 4:1 Transnational Legal Theory 44, 44-47.

3.1 Divisions in the Human Rights Discourse

3.1.1 Moral v. Political

While the concept of human rights has been around as an ideal since the latter part of the 18th century, it came to the forefront within the public discourse from the 1970s onwards. However, the philosophical discussion surrounding human rights was somehow late to arrive. Despite its formulations in international documents, one of the points of discussion is the nature of human rights. Two differing views on this subject can be witnessed: the 'orthodox' (or 'traditional') and the 'political' (or 'functional') conceptions of human rights. On the one hand, the proponents of the orthodox conception argue that humans *qua* humans have certain moral rights. On the other hand, the commentators following the political conception are of the opinion that human rights have certain functions in the modern international political 'practice'.[3] These functions may include 'setting standards of political legitimacy, serving as norms of international concern, and/or imposing limits on the exercise of national sovereignty'.[4]

A similar divide opens up regarding the grounds (justifications) of human rights, and this debate is linked to the nature of human rights.[5] According to Cruft and others, three grounds for human rights are salient in the literature: a) instrumental justifications, b) non-instrumental justifications, and, c) practice-based justifications. Instrumental justifications posit that human rights are useful in realising or furthering certain features of human life. The capacity to pursue the good life in according to one's plans (the agency approach), or the well-being and interests of humans (the argument from good life), or the protection of conditions for 'a minimally decent life' (the basic needs approach), could justify human rights. Non-instrumental justifications, on the other hand, point out that human rights are inherent due to the basic moral status of humans, and thus they should not be seen as vessels for the realisation or furthering of separate values. Finally, practice-based justifications, also called the 'political' conception of human rights, ground human rights to international human rights practice. Here the practice is

[3] R Cruft and others, 'The Philosophical Foundations of Human Rights: An Overview' in R Cruft and others (eds), *Philosophical Foundations of Human Rights* (OUP 2015) 1-7.

[4] A Etinson, 'Introduction' in A Etinson (ed), *Human Rights: Moral or Political* (OUP 2018) 1 (citations omitted).

[5] ibid 11.

analysed and interpreted with reference to the normative standards as set by the international community of peoples.[6]

In addition to this, the approaches just presented have different anchoring points, namely 'international legal human rights' and 'moral human rights'. Whilst acknowledging that international legal human rights are not the only instances in which the practice appears,[7] one could follow Buchanan who has argued that '[t]he system of international legal human rights is the core, or, one might also say, the heart of modern human rights practice'.[8] The main difference between moral human rights and international legal human rights is that the former's grounds, justifications and content can be decoupled from international human rights documents. So, although they could signal how the practice works, the consensus of states on a certain right or its formulation does not bind the moral analysis of rights.[9] The moral analysis of human rights can do away with international human rights law that is 'public, institutionalized, rule-governed practices for its own deliberate, self-conscious formation and revision over time'.[10] Accordingly, moral human rights' enforceability by the courts, due to the 'legal' part of the human right, is of no consequence. The duty to respect a moral human right of an individual is still there, but legal or institutional enforceability does not play a part in respect to this duty as moral rights inform 'an enlightened and sensitive conscience'.[11]

It can be asserted that some approaches to human rights are the results of certain reservations.[12] A short list of human rights can be read as the reflection of the consequences of having these

[6] Cruft and others (n 3) 11-23.

[7] J Tasioulas, 'Exiting the hall of mirrors: Morality and law in human rights' in T Campbell and K Bourne (eds), *Political and Legal Approaches to Human Rights* (Routledge 2018) 78-79.

[8] A Buchanan, *The Heart of Human Rights* (OUP 2013) 274.

[9] The opposite is also true. That is, the moral analysis of human rights might not aim to explain the practice based on international legal human rights. ibid 4-5.

[10] ibid 8.

[11] J Feinberg, *Rights, Justice, and the Bounds of Liberty: Essays in Social Philosophy* (Princeton University Press 2014) 187 and 194.

[12] It has to be noted that the adherents of the political approach also have concerns regarding the temporal scope of human rights. They contend that human rights cannot mean to protect rights of all humans since the dawn of humanity. As the present work deals with a specific period of human history, these concerns will not be addressed here. For the contours of the debate *see* SM Liao and A Etinson, 'Political and Naturalistic Conceptions of Human Rights: A False Polemic?' [2012] 9:3 Journal of Moral Philosophy 327, 333-334 and 336-343.

rights (eg international intervention), and also the aim to set a limit and differentiate human rights.[13] In the case of Rawls, the aims to be tolerant to non-liberal peoples and to escape the criticism of condoning parochial rights also triggers a move towards a limited set of rights.[14] Conversely, the orthodox approach aims to provide for a broad cover for the rights of individuals as per their dignity; but as in the case Tasioulas, it may introduce a 'threshold' based on interests in order to ease the effects of the rights 'proliferation'.[15] On another level, whereas Raz laments that the orthodox approach is too distant from human rights practice and moves closer to it;[16] proponents of the orthodox approach point out the 'glitches' thereof, such as the silence of the international community during the Rwandan Genocide.[17]

Similarly, the nature and justifications of human rights as well as their consequences steer commentators, especially in the case of the proponents of the political approach, to have a rather cautious stance. Too much of a good thing may devalue and weaken it, and accordingly the political approach holds the higher ground in that matter. Claiming a moral human right regarding every (supposedly) beneficial outcome or interest leads to absurd situations where citizens of Latin American countries claim a human right 'to watch their team play in their capital city'.[18] Moreover, the fact that international human rights documents are intricately linked to the practice is another advantage of the political approach over the orthodox one, in that, it has the potential to become concretised. After all, upon ratification, states recognise international human rights and these might become a part of their domestic legal system. Concordantly, either due to external pressure, which is a result of the consensus of the states, or

[13] J Rawls, *The Law of Peoples: With "The Idea of Public Reason Revisited"* (Harvard University Press 1999) 65 and 79-81; J Raz, 'Human Rights without Foundations' in S Besson and J Tasioulas (eds), *The Philosophy of International Law* (OUP 2010) 327-330; CR Beitz, *The Idea of Human Rights* (OUP 2009) 109 and 116-117. The point made here parallels the one made by Forst. R Forst, 'The Justification of Human Rights and the Basic Right to Justification: A Reflexive Approach' [2010] 120:4 Ethics 711, 728.

[14] Rawls *The Law of Peoples* (n 13) 59-65.

[15] 'The threshold requires an affirmative answer to the question: do the specified universal interests of human beings, all of them bearers of equal moral worth, generate in the case of each and every one of them duties to secure the object of the putative right?' J Tasioulas, 'On the Foundations of Human Rights' in R Cruft and others (eds), *Philosophical Foundations of Human Rights* (OUP 2015) 56-61.

[16] 'Some theories (I will say that they manifest the traditional approach) offer a way of understanding their nature which is so remote from the practice of human rights as to be irrelevant to it'. Raz (n 13) 323.

[17] J Waldron, 'A Critique of the Raz/Rawls Approach' in A Etinson (ed), *Human Rights: Moral or Political* (OUP 2018) 122.

[18] M Kumm, 'The Turn to Justification: On the Structure and Domain of Human Rights Practice' in A Etinson (ed), *Human Rights: Moral or Political* (OUP 2018) 240-241.

the internal legal pressure asserted as a result of making them a part of the domestic legal system, the practice might provide the high ground in the defence of rights.

Nevertheless, the orthodox approach will be the preferred tool for this work. To be more precise, rather than international legal human rights, the moral understanding of human rights will be the basis for the defence of freedom of expression. The underlying reasons for the designation of the orthodox approach are twofold. On the one hand, political approach is somewhat a double-edged sword; at least for the purposes of this work. On the other hand, the orthodox approach has its own advantages over the political one. The concerns regarding the nature of the practice and the advantages of the orthodox approach, as well as their specific incarnations within the context of sport will be analysed separately. Nonetheless, it should be maintained that the preference of the orthodox approach does not preclude a possible defence of freedom of expression in sport on the basis of the practice. The main argument of this chapter is that the orthodox approach constitutes a better defence in the context of sport.

Concerning the double-edged sword nature of the political approach in general, firstly, within international human rights documents, exceptions to these rights are presented alongside the rights themselves. For example, Article 19 of the International Covenant on Civil and Political Rights states that whereas '[e]veryone shall have the right to freedom of expression[…]'; the exercise of this right may be restricted due to, among others, public order and public morals.[19] It has to be asserted that an open-ended notion like public morals would create an efficient reason for not abiding by the human rights document. The expressions of dissenters would be the first casualty, because the 'public' part of the morals would be utilised to impose the will of the majority. Therefore, even though too much rhetoric on human rights weakens them, the exceptions in the international human rights documents create a more lasting damage. Furthermore, the deviations from a human right might not be in the international document in the first place. In concrete, the ECtHR applies the doctrine of 'margin of appreciation' even

[19] Paragraph 3 states that '[t]he exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals'.

though this doctrine does not find itself a place in the ECHR or its preparatory works.[20] Crucially, and relevant to the discussion at hand, the doctrine allows the contracting states to deviate from the ECHR if a measure is deemed to be 'necessary in a democratic society', directed at a 'pressing social need' and takes its power from 'public morals'.[21] Thus, the practice itself has the power to restrict freedom of expression in accordance with certain interests even where the source of the practice does not expressly forge it.

Related to the foregoing and notwithstanding the question if they are parasitic on the orthodox view or not,[22] international legal human rights are of egalitarian nature.[23] That is, status-wise all humans are equal and have equal dignity.[24] However, there is a specific freedom of expression-related problem when one relies solely on international legal human rights.[25] As will be argued in Section 5.3, exceptions to freedom of expression result in the valuation and categorisation of expressions. In creating an exception, the practice gives the government or the courts the authority to pass judgment as to the value of an expression. Lower value expressions, due to their unpopularity or content, are protected less or are not protected at all. Expressions which go against public morals would be of lower value, while the ones in line with them would be more valuable. It can be claimed that an individual whose expression is deemed to be of lower value cannot be considered as having equal status or equal dignity with another individual whose expression is not restricted and thus deemed more valuable. That is, from the point of view of the 'social-comparative' sense of dignity,[26] an individual has less dignity if the institution valuing the expression somehow deems an expression being against public morals. Consequently, although international human rights law may '[*assign*] *a uniform set of individual rights to all human beings*' consistent with the underlying concept of universally moral rights

[20] C van de Heyning, 'No Place Like Home: Discretionary space for the domestic protection of fundamental human rights' in P Popelier and others (eds), *Human Rights Protection in the European Legal Order: The Interaction between the European and the National Courts* (Intersentia 2011) 83.

[21] Y Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia 2002) 2, 7-8.

[22] Tasioulas 'Exiting the hall of mirrors' (n 7) 85-86.

[23] Buchanan has argued that international legal human rights are in several senses egalitarian. Buchanan, *The Heart of Human Rights* (n 8) 28-31; A Buchanan, 'The Egalitarianism of Human Rights' [2010] 120:4 Ethics 679, 683-684.

[24] Buchanan 'The Egalitarianism of Human Rights' (n 23) 685-691.

[25] It has to be added that Buchanan merely has urged philosophers to take into account this aspect of international legal human rights in reconstructing and criticising them.

[26] Buchanan 'The Egalitarianism of Human Rights' (n 23) 690-691.

possessed by all humans—which is its strong suit—[27] the law may also take them away through exceptions or categorisation. In that regard, the reliance on universal moral human rights becomes essential.

Finally, concerning the advantages of the orthodox approach in general, it can be asserted that, in the case of freedom of expression, its abstract nature allows one to cover a larger part of the world population. When the practice-based accounts of human rights are rejected and the orthodox approach is adopted it becomes easier to designate the two moral powers as the main defence for freedom of expression, especially in legal relationships stemming from private law. [28] More importantly, Richards' adoption of equal concern and respect for every person as a pillar of the freedom of expression creates an overlap between this theory and the orthodox human rights discourse.[29] Since reasonableness and rationality are perceived to reside in every person, it can be claimed that this manner of analysing freedom of expression can be extended beyond the borders of the nation state or constitutional law. In essence, every human-being is equal and has these moral powers. That the two moral powers become the supports of autonomy (freedom)[30] and the dignity of individuals is in line with the orthodox understanding of human rights. In essence, it is in the same genus as the argument pertaining that a human right is '*a right that we have simply in virtue of being human*';[31] or is a 'prima-facie' right that is obtained by only being a 'man' and a right that can only be overruled in special circumstances.[32] Such an

[27] Tasioulas 'Exiting the hall of mirrors' (n 7) 80-81 (emphasis present).

[28] On the contrary, Buchanan argues that the legal human right to freedom of expression is wider than its moral counterpart. However, that the 'practice' does not assign clear duties to non-state actors moves Buchanan to deem it as a limitation to the current international legal human rights system. Buchanan *The Heart of Human Rights* (n 8) 61-65 and 284.

[29] On the other hand, this does not mean that a political conception of justice cannot be established. While treating the universal human rights documents as the reflections of Rawls' idea of overlapping consensus, Donnelly has presented a theory on the basis of equal concern and respect for all humans. J Rawls, *Political Liberalism: Expanded Edition* (Columbia University Press 2005) 140-149; J Donnelly, *Universal Human Rights in Theory and Practice* (3rd edn, Cornell University Press 2013) 57-65.

[30] Richards has equated freedom and autonomy. Together they are the ends that the twin moral powers act as means of achieving them. This is in line with Kant's structuring of freedom/autonomy as: '"[i]f only rational beings can be an end in themselves, this is not because they have reason, but because they have freedom. Reason is merely a means". That is, through reason we grasp the rules that we need to follow in order fully to realize our freedom as autonomy, or "the property that a will has of being a law to itself"'. (Guyer referring to Kant's *Naturrecht Feyerabend* and *Groundwork for the Metaphysics of Morals* respectively). P Guyer, *Kant* (2nd edn, Routledge 2014) 204.

[31] J Griffin, *On Human Rights* (OUP 2008) 2 (emphasis present). Nevertheless, Griffin has disambiguated autonomy and liberty, therefore despite being in the same genus, moral approaches might differ in their groundings. ibid 149-151.

[32] G Vlastos, 'Justice and Equality' in J Waldron (ed), *Theories of Rights* (OUP 1984) 47.

understanding of human rights paves the way for tenable answers for concerns arising from the production and consumption patterns of sport. To be more precise, it should be stated that the advantages that the orthodox approach will bring, together with a universalist stance on human rights, will provide the framework for a defence of freedom of expression in sport. The next sub-section will lay down the foundations for the second leg of the defence.

3.1.2 Universalism and Cultural Relativism

The answers to the questions concerning the nature and grounds for human rights only solve part of the questions that are posed by the notion of human rights. Another important front in the human rights discourse is their global impacts. While, as in the case of the Rawlsian approach, the practices of peoples/cultures which are not wholly in line with the rest of the world might be given space to breathe at the expense of certain rights such as freedom of expression, [33] human rights based on moral ideals—more so than the practice-based approaches—carry the risk of standardising rights worldwide. This brings the discussion to the differing views between the 'cultural relativists' and the 'universalists'.

'Cultural relativism'—in this context—is clearly influenced and informed by anthropology, which analyses various cultures and their practices. In the words of Tilley, cultural relativism asserts that '[a]lthough for every culture some moral judgments are valid, no moral judgment is universally valid. Every moral judgment is culturally relative'.[34] The proponents of cultural relativism argue that the divergence of cultures in their moral judgements should act as wedges against the imposition of moral ideals on the basis of supposed cross-cultural standards. In that regard, relativism resists standardisation that is implemented through either international conventions or moral standards.[35] Accordingly, tolerance for practices that are specific to different cultures and the (human) rights understanding of these cultures are of the essence.[36] The adherents of this position have two interdependent reservations. The first reservation points

[33] Rawls (n 13) 65.

[34] JJ Tilley, 'Cultural Relativism' [2000] 22:2 Human Rights Quarterly 501, 505 (footnote omitted).

[35] On the other hand, it also utilises the rights discourse to achieve the 'right to culture' or the 'right to religious freedom'. JK Cowan and others, 'Introduction' in JK Cowan and others (eds), *Culture and Rights: Anthropological Perspectives* (CUP 2001) 8-11; M Mutua, *Human Rights: A Political and Cultural Critique* (University of Pennsylvania Press 2002) 94-111.

[36] DL Donoho, 'Relativism versus Universalism in Human Rights: The Search for Meaningful Standards' [1991] 27 Stanford Journal of International Law 345, 351-356.

out that the human rights rhetoric and its reflection in the shape of international human rights conventions are Western, and to be more precise liberal democrat.[37] The second reservation is that this rhetoric, with the help of conventions, is an instrument for moral and cultural imperialism.[38] The former reservation is especially seems forceful because Sharma has claimed that there are thirty-six senses in which human rights can be deemed Western.[39]

The 'universalists', on the other hand, assert that the nature and grounds for human rights are universal due to the fact that humans have these rights because they are human. Taking cultural practices into account would undermine the naturalistic roots of human rights. Moreover, universal human rights are an answer to the common needs and interests of all humans from every culture.[40] One of the favoured responses of the universalists to the cultural relativists is the paradox of cultural relativism. It can be maintained that Talbott's example of the Spanish conquistador's rebuttal of the relativist is an apt vessel in putting the response into context. In this example, the relativist criticises the universalist stance of the conquistador who declares that any native who does not convert to Catholicism shall be killed. The conquistador in turn replies that the relativist's call for tolerance is an imposition of a cultural norm in itself and further indicates that his own culture's take on tolerance is the forcible conversion of peoples. Thus, by relying on a cultural norm in the defence of tolerance, the relativist becomes a victim of the exact thing that is criticised.[41] Another point in the defence of universalism is that cultural relativism might be and is used as a shield for human rights abuses within a jurisdiction. Donnelly has presented an especially critical account of the playing of the culture card by 'largely westernized elites' against the calls for observing human rights from the outside, while at the same time homogenising the culture within their jurisdictions.[42] In the same sense, it is argued that 'a relativistic framework which ultimately allows each state to determine the

[37] Hoover referring to Rorty. J Hoover, *Reconstructing Human Rights: A Pragmatist and Pluralist Inquiry into Global Ethics* (OUP 2016) 7.

[38] Mutua (n 35) 15-38.

[39] However, Sharma has admitted that the thirty-six points may overlap. A Sharma, *Are Human Rights Western?: A Contribution to the Dialogue of Civilizations* (OUP 2006) 255 and 259.

[40] Donoho (n 36) 359.

[41] W Talbott, *Which Rights Should Be Universal?* (OUP 2005) 42-43.

[42] J Donnelly, 'Cultural Relativism and Universal Human Rights' [1984] 6:4 Human Rights Quarterly 400, 411-413; Donnelly *Universal Human Rights* (n 29) 110-111.

interpretive meaning and specific content of rights literally leaves the determination of the actual meaning of rights in the hands of the violators'.[43]

It can be claimed that there are sound arguments from both sides casting doubt into the possibility of cutting the Gordian knot. The relativists, just like the proponents of the political approach, are on point regarding the ambiguity of the content of human rights. The human rights 'inflation' and the catch-all nature of the rhetoric of human rights make one ask if indeed all human rights could be defended everywhere and on every occasion. One of the possible arguments supporting the doubt towards the 'everywhere' part would point to the derogations from international human rights documents. For example, the doctrine of margin of appreciation as applied by the ECtHR has a distinctly relativist flavour to it.[44] Likewise, regional and religion-inspired political documents like the Cairo Declaration on Human Rights in Islam (1990) can be seen as the chink in the armour of the universalists, inasmuch as the Declaration derogates from other international human rights documents regarding 'the human rights to life, to safety from bodily harm, to freedom of movement, to the fruit of one's labor, to various criminal proceedings, to freedom of expression, and to assume public office'. The reason for the derogations is that Islamic Sharia is designated as the foundation of the content of the Declaration itself. [45] Consequently, the practice is less than universal or universalist.

In view of the above, it can be asserted that a position which contends that every human right would be valid in every jurisdiction at all times would be untenable. Indeed, certain human rights have to be sculpted to fit the social and cultural realities of jurisdictions. Nevertheless, the forceful and sound criticisms directed against universalism should not dissuade one to abandon a universalist approach to freedom of expression. As will be argued later, the importance of freedom of expression in transnational and transcultural human communication renders it indispensable even when it does not exactly fit every culture. Moral powers of individuals are not culture-specific; they are inherent in every human in every culture. Moreover, an expression might inform other cultures of a political stance or of an idea that an individual or a group of individuals deem important to share with others. Therefore, in tandem with the adoption of the orthodox approach, the contention that freedom of expression can be grounded better in the

[43] Donoho (n 36) 380-381.

[44] Arai-Takahashi (n 21) 3.

[45] GY Kao, *Grounding Human Rights in a Pluralist World* (Georgetown University Press 2011) 32.

moral powers of individuals implicitly calls for a universalist defence of freedom of expression. This is relevant in sport because the participants, spectators and audiences of sport competitions, especially in mega-events and national competitions with global following, come from different cultures.

3.2 Universal Freedom of Expression in Sport

3.2.1 An Overview

Human rights are individualistic and they were state-centred until recently. They are individualistic—which is one of the reasons why they are seen as Western and as (neo) liberal constructs[46]—in the sense that they put the individual at the centre of concern.[47] They were state-centred because, at first, the perpetrators of human rights abuses were thought to only be the state and concordantly remedies for these abuses were sought from them. Nevertheless, with the increase of transnational commerce and the number of cross-border supply chains corporations have become perpetrators of human rights abuses. [48] Accordingly, the transformation of global (legal) relationships have created a discussion on the 'horizontal' and 'third-party-effects' of human rights. While there are arguments against it,[49] it should be argued that that the state was the first addressee of human rights should not mean that transnational private law persons shed their responsibilities born out of their activities. On the contrary, the changing nature of relationships in a globalised world should result in the conclusion that transnational private law persons are also the addressees of human rights duties.[50] This is the starting point for the introduction of the 'United Nations Guiding Principles on Business and

[46] T Miller, 'A Distorted Playing Field: Neoliberalism and Sport through the Lens of Economic Citizenship' in DL Andrews and ML Silk (eds), *Sport and Neoliberalism: Politics, Consumption, and Culture* (Temple University Press 2012) 33-34.

[47] R Panikkar, 'Is the Notion of Human Rights a Western Concept?' [1982] 30:120 Diogenes 75, 82-83; but *see* Wellman who has argued that group rights can only derive from international law. C Wellman, *The Moral Dimensions of Human Rights* (OUP 2010) 66-69. For arguments against group rights *see* Donnelly *Universal Human Rights* (n 29) 49-51.

[48] *See generally* SR Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' [2001] 111:3 Yale Law Journal 443.

[49] Beitz (n 13) 109 and 122-125. It has to be added that Beitz leaves the door open for a revision of the arguments in case the practice evolves into a practice that covers non-state agents.

[50] G Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (OUP 2012) 11-12.

Human Rights',[51] which bring forth certain voluntary humans rights responsibilities for corporations.

This renders the SGBs possible subjects of the human rights discourse, and for the purposes of this work, the discourse on freedom of expression. The rest of the chapter will aim to provide an approach to human rights that takes into account the characteristics of sport, while at the same time expanding the human rights protection to horizontal relationships in a universalist manner.[52] It has to be asserted upfront that, as Waldron has suggested, 'there are all sorts of rights, with all sorts of foundations: free speech has one sort of foundation; humane treatment for detainees has a different foundation; the right to education yet another; and so on'. In addition to this, for the adherents of 'foundational pluralism' there may not be a sole foundation for a given human right.[53] Complementary to these contentions, justification for freedom of expression in sport should be 'sphere specific', in that, the characteristics, the sphere of activities and the capacities of sport should result in a differentiation from possible justifications of this right in other industries or spheres.[54] Consequently, as put forth in the Introduction the arguments made here cover only freedom of expression in the context of the sport industry. Therefore, they do not preclude from designating a different nature, justification or aim for freedom of expression in other industries.

3.2.2 The Position of Sport Governing Bodies

SGBs had already engaged in certain humanitarian causes,[55] and they took into account of human rights abuses in their shunning of the South African Apartheid regime.[56] Nonetheless,

[51] 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (HR/PUB/11/04, January 2012) <https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf> accessed 20 August 2019.

[52] Teubner *Constitutional Fragments* (n 50) 134-135 and 140-142. It has to be stated that Teubner created a different approach against the effects of transnational regimes on human rights due to the contention that the validity of fundamental rights cannot be left to the 'outcome of the philosophical controversy between universalists and relativists'. ibid 125 and 142-149.

[53] J Waldron, 'Is Dignity the Foundation of Human Rights?' in Cruft and others (eds), *Philosophical Foundations of Human Rights* (OUP 2015) 120 (footnote omitted).

[54] T Campbell, 'Moral Dimensions of Human Rights' in T Campbell and S Miller (eds), *Human Rights and the Moral Responsibilities of Corporate and Public Sector Organisations* (Kluwer 2005) 15.

[55] R Giulianotti and R Robertson, *Globalization & Football* (Sage 2009) 37.

[56] P Donnelly, 'Sport and Human Rights' [2008] 11:4 Sport in Society 381, 386-387.

their concern for human rights violations that eventuate from the production processes of sport is something more recent. Due to the abuses in the run-up to mega-events, and especially the effects of the '*kafala*' system in Qatar, the host of the 2022 FIFA Would Cup, the SGBs received criticism regarding their bidding processes and choice of hosts. In the current shape of things, the IOC, FIFA and UEFA have all integrated human rights to their respective bidding processes;[57] the effects of which were witnessed in the 2026 FIFA World Cup and the 2024 UEFA European Football Championship bidding processes.[58] FIFA has gone a step further in its commitment to human rights by adding an article to its statutes stating that 'FIFA is committed to respecting all internationally recognised human rights and shall strive to promote the protection of these rights'.[59]

FIFA again has led the way regarding human rights in sport by commissioning a report on business and human rights to John Ruggie;[60] and accordingly by adopting the 'FIFA's Human Rights Policy'.[61] This move is striking since Ruggie, as the 'Secretary General's Special Representative for Business and Human Rights', also developed the United Nations Guiding Principles on Business and Human Rights. The policy is an important step for the protection of human rights in FIFA-organised competitions as it declares that 'FIFA is committed to respecting human rights in accordance with the UN Guiding Principles on Business and Human Rights'.[62] In like manner, the IOC has added a reference to the UN Guiding Principles in its

[57] D Heerdt, 'Tapping the potential of human rights provisions in mega-sporting events' bidding and hosting agreements' [2018] 17:3-4 The International Sports Law Journal 170, 170-171.

[58] 2026 FIFA World Cup Bid Evaluation Report, 105-109 <https://resources.fifa.com/image/upload/bid-evaluation-report-2026-fifa-world-cuptm.pdf?cloudid=ir3g14juxglqbbteevvf> accessed 20 August 2019; 'The bid of the [Turkish Football Federation] meets the overall political, social responsibility and sustainability criteria. The lack of an action plan in the area of human rights is a matter of concern'. UEFA, EURO 2024 Evaluation Report, 31 <https://www.uefa.com/MultimediaFiles/Download/OfficialDocument/competitions/General/02/57/28/19/2572819_DOWNLOAD.pdf> accessed 20 August 2019.

[59] FIFA Statutes 2019 Edition, art 3 <https://resources.fifa.com/image/upload/fifa-statutes-5-august-2019-en.pdf?cloudid=ggyamhxxv8jrdfbekrrm> accessed 20 August 2019.

[60] JG Ruggie, '"For the Game. For the World". FIFA and Human Rights' (April 2016) Corporate Responsibility Initiative Report No 68 <https://www.hks.harvard.edu/sites/default/files/Ruggie_humanrightsFIFA_reportApril2016.pdf> accessed 20 August 2019.

[61] FIFA, FIFA's Human Rights Policy (2017) <https://resources.fifa.com/mm/document/affederation/footballgovernance/02/89/33/12/fifashumanrightspolicy_neutral.pdf> accessed 20 August 2019.

[62] ibid 5.

Host City Contract.[63] The common point for the IOC, FIFA and UEFA is that they all have accepted the International Bill of Human Rights, consisting of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, along with eight core International Labour Organization conventions. The acceptance comes in the form of a reference in Guiding Principle 12 of the UN Guiding Principles.[64] Therefore, at the minimum, these SGBs have accepted to be bound by international legal human rights.

While these are remarkable developments, there should be scepticism towards the intentions of the SGBs, because in addition to the ambiguity of the content of the recognised human rights[65] and the limits of their protection or monitoring by the SGBs it can be claimed that one of the fundamental concerns should be the restriction of expressions. In particular, if the SGBs undertake to abide by the international documents on human rights, then they should also abide by the human right to freedom of expression that finds its place in these documents. This work argues that in sport, expressions are met with different reactions depending on the content and viewpoint of the expression, as well as the context in which the expression is shared. Concordantly, from the point of view of freedom of expression this work deems the human rights commitments of the international SGBs insufficient.

Another point is that the human rights commitments could be limited tournament-wise. In concrete, the human rights documents that UEFA have adopted would not have any effect in the UEFA Champions League matches because the SGB has adopted them only in its European Football Championship bidding processes—not in the context of the UEFA Champions League. For example, although Turkey's prospects of organising the 2024 UEFA European Football Championship were seriously damaged by the UEFA Bid Evaluation Report which included negative remarks concerning a lack of human rights action plan, UEFA handed the right to organise the 2020 UEFA Champions League Final to Istanbul. In essence, due to the voluntary nature of the UN Guiding Principles on Business and Human Rights, the scope of protection

[63] IOC, Host City Contract Principles: Games of the XXXIII Olympiad in 2024, art 13.2 (b) <https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/Documents/Host-City-Elections/XXXIII-Olympiad-2024/Host-City-Contract-2024-Principles.pdf> accessed 20 August 2019.

[64] UN Guiding Principles (n 51) 13-14.

[65] T Grell, 'The International Olympic Committee and human rights reforms: game changer or mere window dressing?' [2018] 17:3-4 The International Sports Law Journal 160, 165-166.

could be limited according to the interests of the SGBs. More importantly, the principles stem from the idea that transnational private bodies could and can violate international legal human rights in their capacity as enterprises conducting their business in a state. In that regard, the liability of SGBs from human rights violations might arise insofar as they have revenue-generating activities—such as sponsorship and broadcasting contracts—with respect to the competitions they organise, and this dimension of the human rights discourse informs the effects of SGBs on human rights.[66] However, as will be argued shortly, the SGBs should be held accountable, not only as enterprises—which should be analysed separately but resides beyond the scope of this work—, but also as regulators, adjudicators and institutions having coercive power over stakeholders and other persons.[67] The fact that the bases of these activities are distinct should lead to a particular analysis of the human right to freedom of expression within the context of sport.

3.2.3 The Roots of Concerns

Above, it was argued that the human rights discourse has its roots in certain concerns. These concerns inform arguments as to the possible limits to the scope of human rights. In like manner, the arguments in this work have their roots in certain concerns that can be grouped as: the global outreach of sports events, the regulatory, adjudicatory and coercive powers of the SGBs, and the relationship between the state and SGBs. This sub-section will point out to these set of specific concerns, and will strive to justify an orthodox and universalist approach to freedom of expression in sport.

[66] F Kirschner, 'Breakthrough or much ado about nothing? FIFA's new bidding process in the light of best practice examples of human rights assessments under UNGP Framework' [2019] The International Sports Law Journal 1, 2 and 5 (online first version).

[67] One could argue that Ruggie's point that the liability of FIFA covers 'all situations where harm to human rights can be linked directly to what the enterprise does or produces' would cover coercive power. In that regard, the 'production' aspect of the obligation would include the SGBs' production of the events as enterprises, whereas the 'doing' aspect would cover the regulatory, adjudicatory and coercive powers of the SGBs. Nevertheless, whilst Ruggie mentions the regulatory power of FIFA and its possible impact on human rights, the report does not have a clear framework as to why and how such risks might develop. In addition to this, the analyses of 'events-related sources of risk' and 'systemic sources of risk' are not wide enough to fully comprise other threats such as freedom of expression. Ruggie (n 60) 13, 16 and 20-27.

3.2.3.1 Global Entertainment and the Role of Borders

The production and consumption of sport are global, and these aspects become the departure points for the analyses made in this sub-section. On the one hand, within the production process of sport, athletes from different nations and teams take part in national and international competitions. As a reflection of globalisation, the mobility of teams and sportspersons—not to mention, capital—across borders is one of the fundamental characteristics of sport. On the spectators' side of things a similar picture can be presented. Closely linked to the consumption of sport, sport tourism is an integral part of the sport industry. Spectators get together for both national and international competitions. Especially for mega-events and important national or international competitions, spectators travel around the world to watch their favourite teams and athletes. Therefore, spectatorship, too, is global.

Such mobility brings together teams, athletes and spectators from a wide gamut of regimes, democratic and non-democratic.[68] In a similar manner, mega-events take place in both democratic and non-democratic regimes where athletes and travelling spectators have to reside temporarily. Since 2008, states with poor (contemporary) democracy records have often organised mega-events. Russia and China have organised two Olympic Games and a FIFA World Cup between them, along with another Olympic Games on the horizon. This should result in the pointlessness of relying solely on the human rights protections embraced by states, because, as witnessed in the 2014 Winter Olympic Games in Sochi, there may be differences in the tolerance levels between the stakeholders that travel to a mega-event and the host. In concrete, in the run-up to the Olympic Games, 'anti-propaganda' laws were enacted by the Russian Federation in order to curb 'propaganda of non-traditional sexual relations and attitudes' through administrative fines against 'informative' acts where any show of sympathy for LGBT+ rights were perceived as an infraction.[69] In a sense, the state itself, through the utilisation of 'culture' and 'public morals', brought down the threshold for the rights protection of everyone involved. Countering the consequences of such practices, it has to be asserted that athletes and spectators cannot be left at the mercy of the intolerant. In order to be able to cover more

[68] One can add autonomous regions such as Macau, Hong Kong and Faroe Islands, or British Overseas Territories such as Gibraltar and British Virgin Islands to the equation.

[69] V Postlethwaite, 'Sochi 2014 Winter Olympics and the controversy of the Russian Propaganda Laws: is the IOC buckling under the pressure of its own incoherence in thought?' [2014] 14:3-4 The International Sports Law Journal 264, 269-270.

individuals, the defence of freedom of expression should be grounded on a universalistic approach, taking into consideration the equality of individuals as well as their inherent moral powers. The expansion of coverage in line with the production and consumption processes is vital for a tenable approach to freedom of expression.

Continuing with the universalistic and orthodox defence of the human right to freedom of expression of athletes and spectators, it should be noted that every regime has its dissenters and they might want to make themselves heard. The dissenters that risk criminal charges for expressing their discontent with the state they live in—or the state they are in—must be given the chance to express themselves in accordance with the said moral powers. In addition to this, diasporas of competing nations attend sports events. Their dissent from afar offers a legitimate reason for the recognition of the right to express their discontent against the states they do not (or cannot) live in. Concerning the latter two cases of dissent, individuals do not lose their right to freedom of expression when they have links to non-democratic regimes, either as a part of the diaspora or as residents living in a non-democratic state. They still have to be treated with equal concern and respect.[70] The idea that the personality of a human is eroded if they are stopped from expressing what they believe in, in particular about how they are governed, is apt in explaining what is at stake.[71] Accordingly, the morality and the culture of the society or government that they are linked to should not be reason to act as constraints to their moral powers.

From the viewpoint of global audiences, within the bigger picture, it can be witnessed that thanks to technological advances, local discourses become globalised,[72] and global discourses become localised.[73] The result of the interpenetration of the local and global is that an expression about local politics can be disseminated globally. In the same sense, the global discourse is fed to the local. What is happening globally informs the local; therefore globalisation is 'a vehicle for transforming the inner grammar of cultural and political

[70] R Dworkin, 'Foreword' in J Weinstein and I Hare (eds), *Extreme Speech and Democracy* (OUP 2009) *ix*.

[71] R Dworkin, *Taking Rights Seriously: New Impression with a Reply to Critics* (Duckworth 2005) 201.

[72] S Sassen, 'Globalization or denationalization?' [2003] 10:1 Review of International Political Economy 1, 4 and 10-12.

[73] D Levy and N Sznaider, *Human Rights and Memory* (Penn State University Press 2010) 32.

identities'.[74] Expressions, as sounds and images are spread through various means that are introduced by technological advances, and these resonate both locally and globally. Concordantly, restrictions on expressions informing the global audience would mean that there might be perfect repression of information by the state or its allies that have an interest in the restrictions.[75] Such repression skews the global communication processes and stop individuals from acquiring information concerning certain subject, facts or viewpoints. More importantly, as Zick has argued, freedom of expression is not isolated from other rights but it also informs others of the violations of rights such as the right to life or the right to due process.[76] Finally, sharing information is crucial for inducing solidarity and having a 'critical moral scrutiny' towards the practices of states and societies, and these cannot be limited to the borders of the nation state—they overleap borders and distances.[77] The final two points can be supported by the global condemnation of the murder of the Saudi journalist Jamal Khashoggi. In this case, in a world of increased connectivity where the idea of 'public' has evolved into something that is not strictly territorial,[78] the violation of the rights to life and due process, along with the freedom from torture became a global concern. Here, it was freedom of expression and its ability to impart information that mobilised people from different countries.

If the points made in the previous paragraph are transposed to the matter of global audiences in sport, it can be noticed that the picture is similar to the one just presented. Global coverage of sports events allows the dissemination of sounds and images of sports events globally, in that, depending on the competition, the audience may include the better part of the world population. Global consumption of sport, by means of global broadcasts, results in the creation of links between different societies and cultures. International competitions that are produced globally are consumed globally; therefore the global informs the local. Similarly, national competitions such as the NBA, the English Premier League and the Spanish La Liga are broadcast globally—the local is introduced to the global. The said consumption patterns and the interpenetration of

[74] ibid 8.

[75] R McCorquodale and R Fairbrother, 'Globalization and Human Rights' [1999] 21:3 Human Rights Quarterly 735, 758-762.

[76] T Zick, *The Dynamic Free Speech Clause: Free Speech and Its Relation to Other Constitutional Rights* (OUP 2018) 37-70.

[77] A Sen, 'Elements of a Theory of Human Rights' [2004] 32:4 Philosophy and Public Affairs 315, 354-355; Sassen (n 72) 10-13.

[78] JA Scholte, 'Reconstructing Contemporary Democracy' [2008] 15:1 Indiana Journal of Global Legal Studies 305, 313-317 and 330.

the local and global should move one to perceive expressions within the context of sport as important outlets of information.

These points need to be concretised. With a view to realising this, it can be maintained that an expression in a globally consumed event has the power to inform a part of the citizens of a given country. On the other hand, an expression pertaining to local politics made in a globally consumed event can become a part of the global discourse. In like manner, expressions conveyed during a sport event would not only be able to inform people, but also they might become the starting points for solidarity between various parts of globalised society. For example, an expression on local politics can inform a specific society that is suffering from the same ills the expression targets: it can induce solidarity. In addition to this, it can inform other societies of the situation, whatever the consequences of such informing may be. In these circumstances, 'cosmopolitanism' in the form of global concern for risks and threats presupposes a universalist outlook of freedom of expression as a human right,[79] because only on this condition can the moral powers breach man-made boundaries of nation states. Otherwise, the same man-made boundaries would marginalise certain parts of the world in terms of receiving and imparting expressions. The same approach presupposes that world is not divided into cultures by means of neatly-drawn boundaries. Global social interaction and interdependence as exacerbated by globalisation rule out such a strictly communitarian and cultural relativist approach.[80] Finally, the global dissemination of sports events paves the way for the exposure of expressions by audiences in cultures and regimes which do not allow expressions on a certain viewpoint or subject. As an example, the Kurdistan flag at the UEFA Super Cup Final match between FC Barcelona and Sevilla FC in 2015 is relevant to this point. In this case, while the rest of world watched the match highlights without censorship, the state television in Turkey blurred the flag in its highlights.[81]

[79] U Beck and N Sznaider, 'Unpacking cosmopolitanism for the social sciences: a research agenda' [2010] 61:s1 The British Journal of Sociology 381, 391-393 and 399.

[80] J Waldron, 'Minority Cultures and the Cosmopolitan Alternative' [1992] 25:3-4 University of Michigan Journal of Law Reform 751, 772-781.

[81] Sözcü Newspaper Website, 'TRT'den o bayrağa sansür geldi!' [The TRT has censored that flag!] (13 August 2015) <https://skor.sozcu.com.tr/2015/08/13/trtden-o-bayraga-sansur-geldi-434979/> accessed 20 August 2019.

Bearing in mind all the points made regarding the specific concern of global entertainment and the role of borders in the defence of human right to freedom of expression a summary can be made. If one defers to the relativist and political approaches and let the SGBs, the culture or the regime block an expression just because it is not to their liking or because it is against the culture or politics of a given country would mean that not everyone is equal in their position as recipients. This would result in the implicit acceptance that there are those fortunate enough to receive non-conforming expressions because they were born in or they reside in a more tolerant state or culture and that there are those who were born in or residing in other, less open or tolerant cultures or states. The egalitarian nature of human rights would be corroded. Equality does not and should not decrease or increase in relation to borders. This stance could be summed up in this way: 'the accident of birth into a particular social group or is not an ethically relevant circumstance and thus has no bearing individual's intrinsic human worth and her or his entitlement to be treated a human being'.[82]

Against the points made as to the consequences of global entertainment, it can be objected that international legal human rights might achieve the same results as a moral understanding due to the former's universalistic tendencies and ratification by the states themselves. However, as will be argued below, the close proximity of the 'practice' and sport renders the reliance on the practice dangerous. Crucially, as was indicated above, international human rights conventions, by providing exceptions to freedom of expression in these documents, carve out unrestricted areas for states. As in the case of the 'anti-propaganda' laws of the Russian Federation, it was the public morals—which from the viewpoint of international legal documents might serve as legitimate grounds—that restricted the moral powers. Consequently, the universalism of international human rights documents are self-limiting, and thus moral human rights based on the equal concern and respect for all involved would be a better choice in the defence of freedom of expression in sport.

3.2.3.2 The Effects of Sport Governing Bodies

One of the concerns for freedom of expression in sport is that SGBs have regulatory, adjudicatory and coercive powers. The concern emerges from the argument that while the

[82] EM Zechenter, 'In the Name of Culture: Cultural Relativism and the Abuse of the Individual' [1997] 53:3 Journal of Anthropological Research 319, 320 (citations omitted).

(semi-)autonomous jurisdictions of the SGBs are seen as complementary to those of the states;[83] in the case of freedom of expression, the complementarity has its limits. The global, or more precisely, transnational production processes in sport set these limits.

The nation state is far from dead and buried,[84] and (normative) pluralism is the order of the day, particularly in sport.[85] The heart of the matter is that concerning the production and consumption of sport, as well as the positive and negative externalities of these processes, the SGBs and states might have overlapping regulatory, adjudicatory and coercive powers that might clash or collaborate with each other or adapt to the situation.[86] Accordingly, whilst the state draws up a sport policy,[87] and accordingly draws up laws and implements them in line with 'legal centralism',[88] international SGBs and joint ventures, with the help of freedom of contract and the presence of property rights,[89] thrive in a legal landscape where regulatory and coercive powers are in the hands of private institutions. Although there is no doubt that the SGBs are not situated 'outside of the nation-state',[90] in line with and supported by the notion of autonomy, their capacity to regulate, adjudicate and enforce their regulations and internal policies allow them to have a direct impact on the way which the stakeholders' and other persons' behaviours are framed.

The sanctioning of FC Barcelona and FC Schalke 04 by UEFA due to the unfurling of *Estelada* flags and ACAB (All Cops Are Bastards) banners respectively in the stands are apt in depicting the effects of SGBs, and the presence of overlapping powers of the SGBs and the states. In these

[83] *See* text to notes 33 to 39 in Section 1.2.2.

[84] RD Lipschutz and C Fogel, '"Regulation for the rest of us?" Global civil society and the privatization of transnational regulation' in RB Hall and TJ Biersteker (eds), *The Emergence of Private Authority in Global Governance* (CUP 2002) 118; G-P Calliess and P Zumbansen, *Rough Consensus and Running Code* (Hart 2010) 19-20.

[85] For an analyses of the convergence of the fundamental concepts of transnational legal pluralism and '*lex sportiva*' *see* A Duval, '*Lex Sportiva*: A Playground for Transnational Law' [2013] 19:6 European Law Journal 822.

[86] PS Berman, 'Global Legal Pluralism' [2007] 80 Southern California Review 1155, 1158-1159.

[87] The EU, as a supranational political and legal regime, also draws up and implements a sport policy.

[88] J Griffiths, 'What is Legal Pluralism?' [1986] 18:24 The Journal of Legal Pluralism and Unofficial Law 1, 8.

[89] J-P Robé, 'Multinational Enterprises: The Constitution of a Pluralistic Legal Order' in G Teubner (ed) *Global Law Without a State* (Ashgate 1997) 57.

[90] Calliess and Zumbansen (n 84) 185-186.

cases, the expressions were judged to be illegal by UEFA due to their political nature, even though they were deemed legal by public authorities in Spain and Germany. Crucially, the illegality of the expressions was based on Swiss Law.[91] UEFA's argument before a CAS panel indicating that '[p]ursuant to Article 154 of the Swiss Act concerning International Private Law, the UEFA regulations cannot be overridden by the national laws as this would lead to unequal treatment among clubs from different countries'[92], supports the reasoning of the FC Barcelona and FC Schalke 04 decisions, along with their interpretation. More importantly, in another case a CAS panel has asserted that since only the Swiss Law is applicable to UEFA, the morality of a regulation cannot be evaluated by taking account of the public law of the country where the sanctioned person resides in or is bound by. Foreign 'public order' is not applicable.[93] Consequently, Duval's suggestion that 'the CAS can be best described as a legal alchemist' that brings together the rules of the SGB and Swiss Law fits the matter at hand.[94] The alchemy provides the necessary grounds for the associational activities of SGBs. During these associational activities, the rules of the SGB may be given primacy over Swiss Law, as was accepted by the CAS.[95] The clearest example to this is the FIFA Statutes which indicate that '[t]he provisions of the CAS Code of Sports-related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law'.[96]

There are important consequences of these decisions and awards. First, UEFA's regulatory power allowing it to pass regulations that restrict political expressions, its adjudicatory power

[91] UEFA Appeals Body decision of 21 June 2016, *FC Barcelona.* Reported in UEFA, 'Case Law: Control, Ethics and Disciplinary Body & Appeals Body' (January 2016 - June 2016) 187 and 189-190 <https://www.uefa.com/MultimediaFiles/Download/OfficialDocument/uefaorg/UEFACompDisCases/02/40/14/21/2401421_DOWNLOAD.pdf> accessed 20 August 2019; UEFA CEDB decision of 23 March 2017, *Schalke 04*. Reported in UEFA, 'Case Law: Control, Ethics and Disciplinary Body & Appeals Body' (January - June 2017) 73 and 75 <https://www.uefa.com/MultimediaFiles/Download/OfficialDocument/uefaorg/UEFACompDisCases/02/51/76/81/2517681_DOWNLOAD.pdf> accessed 20 August 2019.

[92] CAS 2012/A/2702 *Györi ETO v UEFA*, para 91.

[93] TAS 2002/A/423 *PSV Eindhoven / Union des Associations Européennes de Football (UEFA)*, paras 33-38.

[94] Whilst the CAS may also apply national law and EU law, it does so only rarely. A Duval, 'What *Lex Sportiva* Tells You About Transnational Law' (TMC Asser Institute June 2019) 22-23 <https://poseidon01.ssrn.com/delivery.php?ID=991004073021021076091002076103082091096025095076029067119003115024068083005002003072121042119015047112061082124071112000071011119066064011050071074017100118025008099046054032120005084117094028092111030074119102089006071088080103007084028016093066098127&EXT=pdf> accessed 20 August 2019.

[95] CAS 2017/A/5003 *Jérôme Valcke v FIFA*, paras 146-150.

[96] FIFA Statutes 2019 Edition (n 59) art 57 (2).

paving the way to decide on the case, and finally its coercive power enabling it to both enforce the decision and threaten its stakeholders regarding their future conduct create a situation where a private institution outweighed the state legal regime. From a Teubnerian perspective, with the help of alchemy, UEFA recast a conflict of norms—between municipal law and the UEFA regulations—in a way that would enable it to vault-over the municipal law.[97] In this way, the norms of an association, which is normally at the 'periphery', dislodged the municipal law and moved to the 'centre',[98] affecting everyone concerned. Second, UEFA sets the standard of tolerance. In essence, whilst UEFA has posited the desire to avert 'the unequal treatment among clubs from different countries' as a justification for the implementation of Swiss Law-based interpretations, it falls into the same trap. In parallel to the concerns presented in the previous sub-section regarding the effects of cultural-relativism on tolerance levels, it can be asserted that UEFA's alleged concern for equality brings the tolerance level 'down' rather than 'up'. The race to the bottom was made beyond auspices the municipal law and the constitutional law, and it was made possible by utilising the regulatory, adjudicatory and coercive powers of the SGB. Consequently, this is one of the chief reasons why a suspicion of the effectiveness of state-adopted human rights is present. In cases like FC Barcelona and FC Schalke 04, the rights as protected by the states can be overridden by a foreign private institution.

If equal concern and respect for all humans, as supported by the notion of moral powers, becomes the ground for a defence of freedom of expression in sport, then the rights of the speakers in Spain and Germany—let alone recipients all over the world—would not be easily overridden by a transnational private law person. That is, references to Swiss Law in the statutes of the SGBs would not become the basis for the negation of moral powers of persons who are not the citizens of Switzerland.[99] The importance of the cause and effect relationship between the powers of the SGBs and the restructuring of freedom of expression will be restated and reemphasised in Section 4.3, where it will be argued that such power results in the suspicion toward the intentions and activities of the SGBs.

[97] Teubner *Constitutional Fragments* (n 50) 153-154.

[98] A Fischer-Lescano and G Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' [2004] 25 Michigan Journal of International Law 999, 1012-1014.

[99] The foregoing is not a lament for the overriding of the constitutional law of states. Rather, it aims to put into context the impact of SGBs on freedom of expression in different jurisdictions, because, after all, arguing for a universal moral human right would in itself lead to the overriding of national legal orders in certain cases.

3.2.3.3 Sport Governing Bodies and the State

The final concern results from the assertion—which was introduced in Section 1.2.1 and will be analysed in an in-depth manner in Section 4.5—that in sport, SGBs and states are allies. Generally, while municipal law and EU law may have an effect on the way sports events are produced and consumed; in the case of freedom of expression states tend to overlook violations on the part of the international SGBs. Moreover, the policies of national SGBs tend to be in line with the state they reside in. This presents challenges for both the cultural-relativist and political accounts of human rights. In view of these challenges, the points made in this sub-section, just like the ones before it, give support for an orthodox and universalist approach to freedom of expression in sport. This sub-section develops the notion of collaboration between the state and sport within the confines of this chapter, but leaves the theorising of such collaboration, along with its specific instances pertaining to freedom of expression, to following chapters.

Starting from the challenges presented to cultural relativist approaches, it should be reminded that one of the criticisms towards this account of human rights is that it provides the human rights violators with the necessary tools to defend their actions. When the state (as a violator) is focused on, it can be claimed that in sport a universalist take on freedom of expression based on the moral powers of individuals would be able to break the hegemony of positivism which is defended by the perpetrators of human rights violations themselves. The starting point of the argument is, once again, the 'anti-propaganda' laws against the LGBT+ community and its allies that were enacted by the Russian Federation in the run-up to the 2014 Winter Olympics in Sochi. Here, it has to be pointed out that the IOC did not condemn the Russian Federation for its laws or its refusal to set up a 'Pride House' which had become a fixture at the Olympic Games. The official reasoning behind the passivity of the IOC was its (alleged) 'political neutrality'.[100] So, it has to be asserted that the IOC and the Russian Federation collaborated effectively in silencing a certain viewpoint and imposing the state's and society's views of 'the good life'. The silencing was made possible by adopting cultural relativism and the rhetoric of neutrality.

[100] Postlethwaite (n 69) 270.

In view of the actions taken by the Russian Federation and the actions not taken by the IOC, the question should be, will cultural relativism prevail and the inequality of human-beings created at the hands of the state be confirmed? Or will the universalist stance prevail and equal concern and respect for humans be satisfied? On the one hand, the cultural relativist positions would give mega-events hosts the weapons they need, as in the case of the Russian Federation. It would act as both as a supporter and enabler of the state policy causing inequality between individuals with 'normal' sexual preferences and the ones with 'abnormal' appetites. In another sense, cultural relativism would strengthen the collaboration between the state and SGBs. On the other hand, a universalist, egalitarian and moral powers-based approach to freedom of expression in sport would present a way in stopping regimes and cultures that ignore equal concern and respect for persons from trying to find shelter in cultural relativism. It would challenge excuses resulting from the idea of 'political neutrality', and thus this option would weaken the collaboration between the states and SGBs. It would force the SGBs to take action on the grounds that cultural relativism must not cause status inegalitarianism that is imposed by a certain culture or state upon other cultures and states or individuals who are part of them.

A second contentious aspect of the collaboration between the states and SGBs presents similar reservations, this time about the 'practice' that the political approach adopts. In general, the practice attributes certain positive qualities to sport, and this is the exact reason for the suspicion toward the practice. The practice argues that there is a human right to sport.[101] More importantly, international community sees sport, as the former Secretary-General of the United Nations Kofi Annan has argued, as something that has the power to 'bring people together, no matter what their origin, background, religious beliefs or economic status'.[102] It has to be asserted that caution must be shown when adopting or staying too close to international practice which—arguably without the necessary prudence or taking into account the evidence to the contrary—perceives sport as 'an important enabler of sustainable development' and a contributor to peace,

[101] IOC, Olympic Charter 2019 Edition, Fundamental Principles of Olympism, art 4 <https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/General/EN-Olympic-Charter.pdf> accessed 20 August 2019; UNESCO International Charter of Physical Education, Physical Activity and Sport, art 1.1 <http://www.unesco.org/education/pdf/SPORT_E.PDF> accessed 20 August 2019.

[102] United Nations Press Release (SG/SM/9579) 'Universal Language of Sport Brings People Together, Teaches Teamwork, Tolerance, Secretary-General Says at Launch of International Year' (05 November 2004) <https://www.un.org/press/en/2004/sgsm9579.doc.htm> accessed 20 August 2019. A similar approach was adopted by Ban Ki-moon, Annan's successor. Ruggie (n 60) 20.

tolerance, respect and empowerment of women.[103] Similarly, states that create the practice itself attribute 'social function'[104] to sport, putting it beyond criticism or, at least as in the case of the EU, carve exceptions within legal framework.[105]

Another way of putting the matter is that states, which are the primary bearers of human rights duties, make clear their partiality towards sport. The danger for human rights becomes apparent in this instance when it is made clear that the practice is predominantly created by the same states through the adoption of international legal documents. This leads to an important conclusion: the practice cannot be the sole foundation of the defence of a human right to freedom of expression in sport because the adoption of a defence which relies solely on the practice would allow the states to shed their duties in respect to human rights violations in sport. The underlying reason to this contention is that since states are of the opinion that sport has supposedly important positive social externalities, they would justify the overlooking of human rights violations connected to sport. In a similar sense, the question of whether or not the practice itself is a vessel for the defence of the status quo[106] becomes relevant. With the help of a practice which looks favourably upon sport, the states would benefit from the curbing of the human rights claims; and especially for the purposes of this work the restriction of freedom of expression.

The final point about the alliance between the state and SGBs is independent of the downsides of cultural relativism and the practice, because it concerns constitutional law. It can be asserted that constitutional law, as applied by state courts, might fail to protect human rights on the ground that, on balance, the advantages of sport will outweigh the advantages of freedom of expression. There are at least two ways to achieve this. The first way, in tandem with the assertions made in the previous two paragraphs, would be to tolerate the curbing of fundamental rights because of the 'specialness' of sport. Nonetheless, in this instance it would not be the

[103] United Nations, 'Transforming our world: the 2030 Agenda for Sustainable Development' (Resolution 70/1, 22 September 2015) art 37 <https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E> accessed 20 August 2019.

[104] European Council, 'Declaration on the Specific Characteristics of Sport and its Social Function in Europe, of which Account Should be Taken in Implementing Common Policies' (2000) Annex IV <http://www.europarl.europa.eu/summits/nice2_en.htm> accessed 20 August 2019.

[105] K Pijetlovic, 'EU sports law: a uniform algorithm for regulatory rules' [2017] 17:1-2 The International Sports Law Journal 86, 93-95.

[106] But *see* Beitz (n 13) 105-106.

international practice—which is predominantly drawn up by the states—but the states themselves that pave the occasion for the curbing of the rights of individuals because of such specialness. It can be claimed this was what moved the German Federal Supreme Court's decision in the Pechstein saga. Here, the court deferred to the rhetoric of the specialness of sport and the importance of autonomy as an association. Worse, the court did not even perceive the SGB and the athlete challenging the decision of the former within separate camps. Due to an allegedly shared objective, the interests of the athlete were subsumed by the SGB.[107] In essence, the sportsperson stopped being an autonomous individual due to their association with the SGB. The second way to ensure the outweighing of interests of the individuals is that the state might overlook violations of freedom of expressions in relation to sports events, especially for mega-events. The violations might be overlooked in order to fully maximise the (perceived) benefits of the event. Since states and national and international SGBs are allies, the state would defer to the interests of the SGBs in certain ways and in certain situations, because political logic dictates so. This part of the argument will be particularised and expanded in Section 4.7.2.

3.3 A Possible Objection

At this point, a possible objection against the contextualisation of the matter as provided in this work should be presented. The objection would go like this. For the purposes of this work, the reliance on universals and the inherent moral powers in the defence of freedom of expression in sport leads to a contradiction. The contradiction appears when one argues for a universal freedom of expression in sport and then criticises the universalistic tendencies of SGBs that preside over a sport industry where rules, experiences and practices are standardised, universalised and westernised.[108] The objection would add that a universalist take on freedom of expression in sport would create the same consequences that the neo-liberal structuring of sport create, because there is neither structural nor ideological difference between 'the universalistic conception in the idea of Olympism as "respect for fundamental universal principles"'[109] and a universalistic conception of freedom of expression. Therefore, a universalist take on the subject

[107] Bundesgerichtshof [BGH], Az. KZR 6/15, *Pechstein v International Skating Union* [2016] as referred by B Schwab, 'Celebrate Humanity': Reconciling Sport and Human Rights Through Athlete Activism' [2018] 28:2 Journal of Legal Aspects of Sport 170, 183-184.

[108] G Hayes and J Karamichas, 'Introduction: Sports Mega-Events, Sustainable Development and Civil Societies' in G Hayes and J Karamichas (eds), *Olympic Games, Mega-Events and Civil Societies: Globalization, Environment, Resistance* (Palgrave Macmillan 2012) 6.

[109] M McNamee, 'Olympism, Eurocentricity, and Transcultural Virtues' [2006] 32:2 Journal of the Philosophy of Sport 174, 178.

would only serve the powerful. Accordingly, the universality of freedom of expression would only—whilst helping the neo-liberal economic logic as well as the expansionist tendencies of West-driven sport—exacerbate the 'arrogance' of universalism.[110]

These are strong and legitimate points, and yet they are not irrefutable. Starting from the last, it can be claimed that while the sustaining of power may be a fixture within human rights and its practice, it may also be used to challenge power.[111] This work aims for the latter. As will be witnessed in the following chapters, in view of the inherent suspicion of the regulations and practices of SGBs—which in themselves hold monopolistic power over the most important sport competitions worldwide—along with the lip-service on the part of the states; the defence of freedom of expression as one of the cornerstones of the human rights discourse is far from power-sustaining. On the contrary, the aim is to create a morals-supported obstacle with a view to hindering such power.[112] This obstacle is contended to be a means of curbing the effects of restrictions of human rights within the context of sport—restrictions that are fortified by the alliance between the state and sport, as well as the impacts of the market on both. The role of articulate consistency in trying to level the playing ground is an important step for achieving this. The argument for equality in the treatment of viewpoints and persons sets the tone, rejecting the branding of certain viewpoints as 'undesirable' just because they challenge the state, the market and the SGBs. The work essentially tries to overcome the 'indifference' that might be produced through the overlooking of human rights violations in other cultures.[113] That equal concern and respect for every person regardless of their cultural or legal links and origins is at the core of this work means that the contextualisation of freedom of expression in this work does not aim to serve any type of hegemony.

Second, although it has to be kept in mind that sport has contributed to Western colonialism and cultural standardisation, and also that the SGBs have taken the mantle regarding the imposition

[110] M-B Dembour, 'Following the movement of a pendulum: between universalism and relativism' in JK Cowan and others (eds), *Culture and Rights: Anthropological Perspectives* (CUP 2001) 56-58.

[111] P Gilabert, 'Reflections on Human Rights and Power' in A Etinson (ed), *Human Rights: Moral or Political?* (OUP 2018) 378, 384-385 and 394-395.

[112] Teubner *Constitutional Fragments* (n 50) 133-134.

[113] Dembour (n 110) 58-59.

of standardised conduct,[114] the picture is actually more subtle than that. As has been argued in this chapter and as Giulianotti has shown in the context of sport, cultural relativism and anti-Westernisation may be used by oppressive regimes.[115] Moreover, in countries such as South Korea which, in the case of the 2002 FIFA World Cup, 'implemented image construction programmes to "raise [the] standards to match that of an advanced nation"',[116] the desire to 'civilise' may come from 'non-Western' cultures/states.

In any case, there is no secret agenda in the aim to organise a tenable defence for freedom of expression. The goal is not to 'civilise' non-Westerners. That would be mixing universalism and ethnocentrism.[117] On the contrary, this work only tries to come up with tenable moral grounds against the encroachment of freedom of expression by SGBs, in that, the primary target of this work is the international SGBs which are usually based in the Northern hemisphere and are bound by 'Western' laws. Since, the SGBs have been the prime-movers of the rules, regulations, and in mega-events laws of the state, that restrict morally and legally sound expressions, the work targets the international SGBs and their national counterparts that successfully utilise sport-related rhetoric. The work, concordantly, targets economic and political logic that serve SGBs, the state and the market. In that sense, as will be witnessed in the next chapter, it does not condone the standardisation/homogenisation of cultural practices or the consumption attitudes of individuals, rather it criticises approaches which would lead to the neglect of the moral powers of individuals residing or having links to cultures/states that restrict their freedom of expression. If there is any standardisation, it is the standardisation of the geographical and industry-wise scope of the inherent moral powers of human beings. Moreover, the work maintains that freedom of expression as based on the moral powers of individuals should be deemed universal. That is only an assertion, not a ploy to render cultures and states that do not take such a view as 'uncivilised' and 'backwards'. Simply put, the work aims to make use of the positive aspects of globalisation, such as increased global political awareness connected to technological advances, while on the other hand it rejects globalisation's negative aspects such as mass consumption and political opportunism, both of which both instrumentalise sport.

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[114] R Giulianotti, 'Human Rights, Globalization and Sentimental Education: The Case of Sport' [2004] 7:3 Sport in Society 355, 358 and 362.

[115] ibid 363-364.

[116] Broudehoux referring to Choi. A-M Broudehoux, 'Civilizing Beijing: Social Beautification, Civility and Citizenship at the 2008 Olympics' in G Hayes and J Karamichas (eds), *Olympic Games, Mega-Events and Civil Societies: Globalization, Environment, Resistance* (Palgrave Macmillan 2012) 49.

[117] Tilley (n 34) 527 and 540-541.

In addition to these, it has to be warned that deferring to cultural relativism in the case of freedom of expression in sport, and thus denying certain dissenters such freedoms in cases where SGBs deem fit overlooks two important points. First, harking back to the above-presented argument that cultures are not neatly-drawn social phenomena, achieving distinction through physical and non-physical boundaries, it should be maintained that 'culture' within a given nation state is not homogenous either. As put forth by Merry, culture is far from integrated, consensual and homogenous. It is 'historically produced, globally interconnected, internally contested, and marked with ambiguous boundaries of identity and practice'.[118] Also, culture is not static.[119] Second, 'non-Western' states, their supporters and their dissidents, too, enjoy the benefits of the 'Western' freedom of expression. As will be exemplified in the coming chapters, in the cases of the booing of a minute's silence for the victims of the Paris attacks and the booing of the national anthem of the People's Republic of China,[120] 'non-Western' spectators, namely the ones in Turkey and Hong Kong respectively, fully mobilised their moral powers to conduct 'counter-speech'.[121] Moreover, the source and the target of the expression did not matter. In Turkey, in essence, the Westerners were booed; whilst in Hong Kong, geographically speaking, their neighbour, ie a non-Western state, was booed. The fact that *Stade de France* witnessed the booing of the French National Anthem by Algerians supporters—many of whom were also French citizens—in a friendly match between France and Algeria further complicates the drawing of the line between Western and non-Western, and for that matter, the line between 'different' cultures.[122] This supports the contention that thanks to globalisation, culture is mobile and that it might move beyond the nation state through migration and mass media.[123] In essence, with the effects of migration, the 'culture' embedded in itself the 'Western' human right to freedom of expression. That freedom of expression was utilised to a great effect by the Algerians creates strong doubts as to the ability to implement a territory-based demarcation of culture and freedom of expression. More importantly, the selective adoption of

[118] SE Merry, 'Changing rights, changing culture' in JK Cowan and others (eds), *Culture and Rights: Anthropological Perspectives* (CUP 2001) 32 and 41.

[119] Zechenter (n 82) 332-334; Donnelly *Universal Human Rights* (n 29) 109.

[120] *See* Section 5.3.2.

[121] HM Wasserman, 'Symbolic Counter-Speech' [2004] 12:2 William & Mary Bill of Rights Journal 367, 390-391.

[122] T Bar-On and L Escobedo, 'FIFA seen from a postcolonial perspective' [2019] 20:1 Soccer & Society 39, 39-40.

[123] Merry (n 118) 42.

'Western' attitudes when the interests align but their rejection when they do not would give weight to Donnelly's reservations in the excess reliance on cultural relativism.

3.4 Final Remarks

This chapter has served as a bridge between the arguments for freedom of expression and the defence of freedom of expression in sport. Yet, in order to be able to have a clearer account of the subjects, the analyses regarding the relationship between the states and SGBs, the weighing of interests as well as the impact of the powers of the SGBs has been left to the next chapter. This chapter continued on from where the previous chapter left-off and it expanded the constitutional right to freedom of expression to a global level in the sport industry. It is argued that the groundings for freedom of expression on equal concern and respect for all humans, allows a defence to rely on highest-order moral powers which are accepted as inherent to all humans regardless of the culture or state they are a part of. Moreover, this approach eases the hardships of a defence that is founded on the democratic processes in a country. Freedom of expression, as Zick has argued, is linked to the enjoyment of other rights, because it helps to disseminate information and ideas on any human or constitutional right that may be violated. Therefore, a structure which covers individuals who are a citizen of, or residing in, both democratic and non-democratic regimes is of the essence. The global nature of the sport industry and its followers render this essential. Finally, this approach acts as a shield against the coercive power of the SGBs over their stakeholders. When this approach radiates to all jurisdictions, including the ones created by transnational private persons, it becomes an important tool for both the speakers who wish to express themselves and the recipients who receive the expression. Consequently, the 'disruptive' nature of human rights[124] should be complemented by their being limits to the sovereignty of states as well as limits to the activities of the SGBs.

[124] Hoover (n 37) 1.

Chapter 4 – Arguments for Freedom of Expression in Sport

The arguments for freedom of expression and human rights in the previous two chapters have presented helpful tools, and these tools will clear the way for a defence of freedom of expression in sport. First, the groundwork for the contentions of this chapter and later chapters will be laid. After that, a defence of freedom of expression in sport will be presented. In the process, the practices and regulations of the SGBs will be focused on through the looking glass of the arguments and approaches put forth in the previous two chapters. Correspondingly, the said practices and regulations will be criticised from an egalitarian perspective. Finally, the position of the spectators within sports facilities and the audiences following sports events on their devices will be looked into. It must be said that the arguments for freedom of expression in sport will be faithful to the sphere-specific approach signalled in the previous chapter.

4.1 Some Ground Rules

Although it is a frequently-appealed notion, the content of freedom of expression in sport might not be understood clearly in the first instance. The contents of the term 'expression' remain unclear unless one delves deeper into its meaning, and the question 'whose freedom of expression?' remains unanswered. Beyond that, the position of sport within society and its particularities are not apparent at first. These three points of ambiguity betoken the limits to the scope of the work at hand. The answers to these points shall also help to set its tone.

The discussion among commentators regarding what an expression is, and accordingly which types of communications are included in freedom of expression, results in different takes on the subject. For example, one view sees no difference between 'speech' and 'expression' and thus uses them interchangeably.[1] The question is whether or not an expression should be accepted as an expression only when it is communicated through conventional modes such as with written words and spoken words or whether 'actions' conveying messages should also be accepted as expressions. Does burning a flag[2] or showing an image have the same expressive status before the law? When the word 'speech' is taken literally, they do not include speech in its

[1] E Barendt, *Freedom of Speech* (2nd edn, OUP 2005) 75.

[2] *Texas v Johnson* 491 US 397 (1989).

conventional sense and they do not use words to get the message across. Nonetheless, it is maintained that in both cases the actions of individuals should be accepted as speech because they convey a message in reference to an understanding of the context or the law itself.[3] The crux of the matter is that, the message should have a communicative impact on the recipients. In sport, since athletes are mostly not able to 'speak' to the spectators or the audience, they 'act' in a certain way. In that regard, taking a knee during the national anthem or booing someone should be considered as expressions.

The second question is 'whose freedom of expression will be analysed?' One way of answering the question is protecting only the speaker or the potential audience. However, this manner of approaching the matter is deficient in several accounts. It has to be asserted that since individuals not only impart but also receive information;[4] both the speakers' and the recipients' positions have to be made subject. Focusing too much on the speaker would result in losing sight of the recipients. Furthermore, the possibility of depriving the recipients of a chance to hear, see and read a message should be reason enough for giving some thought on this question. The individual as a recipient has the moral requirement to have enough and relevant information in order to make choices that would realise their moral powers. In addition to these, the notion of equal concern and respect commands that freedom of expression would be relevant to a person both as a speaker and a recipient. This freedom is shaped by the freedom to choose an audience, and as a part of the audience, shaped by the freedom to choose a speaker.[5] The messages received might or might not have an effect on the outcome of the choices the individual makes. Yet, they provide more options for them to choose, and as long as they are morally acceptable they entrench the autonomy of individuals. Therefore—as signalled in the discussion regarding concern for global audiences—since communication is acknowledged as a two-way phenomenon, for the purposes of this work both sides of the communication will be discussed.

Finally, the position of sport within society has to be located. It is not contentious that sport, with its power to mobilise masses through rhetoric, is a force to be reckoned with. As indicated

[3] RM Cover, 'The Supreme Court, 1982 Term - Foreword: Nomos and Narrative' [1983] 97 Harvard Law Review 4, 8.

[4] GP Magarian, *Managed Speech: The Roberts Court's First Amendment* (OUP 2017) 71.

[5] DAJ Richards, *Toleration and the Constitution* (OUP 1986) 170-171.

in the previous chapter, sport is also perceived to be a phenomenon with a 'social function'. Nevertheless, it would be an error not to critically analyse these contentions. As postulated by the EU, sport, and especially professional sport and sporting activities enjoying sponsorships, are economic activities.[6] Sport is a 'product'[7] which comes into being through sports events created by the cooperation of competitors[8] in a competition with pre-set rules. Sport, as a product, is thus marketable and consumable. It is interdependent with the market, and accordingly affected by the market, and vice versa. With these characteristics in mind sport should be categorised as a business within the experience sector/industry.[9] This stance will inform the arguments presented in this work.

4.2 Of Values and Aims

In 1997, 'Think of football's interests before your own. Think how your actions may affect the image of the game' commanded FIFA in its bundle of credos.[10] Credos, essentially, depict the values of an organisation, so the one just presented reflects the importance of the values and interests of an SGB perfectly: primarily the values and interests of the SGB dictate the way sport is produced. It can be maintained that in sport, the oft-utilised notions 'unsportsmanlike conduct', 'misconduct', 'the spirit of good sportsmanship',[11] 'bringing the game into disrepute' and 'abusing sport's popularity'[12] have been the primary grounds and tools for restricting

[6] Case C-519/04 *David Meca-Medina and Igor Majcen v Commission of the European Communities* [2006] ECR I-6991, paras 22-28; Joined Cases C-51/96 & C-191/97 *Deliege v Ligue de Judo* [2000] ECR 1-2549, paras 46-53.

[7] T Peeters and S Szymanski, 'Financial fair play in European football' [2014] 29:78 Economic Policy 343, 347.

[8] RD Blair, *Sports Economics* (CUP 2012) 47.

[9] S Söderman, *Football and Management: Comparisons between Sport and Enterprise* (Palgrave Macmillan 2013) 13-17.

[10] FIFA Website, 'A Credo to Live and Play by' (26 August 1997) <https://www.fifa.com/news/y=1997/m=8/news=credo-live-and-play-72003.html> accessed 20 August 2019.

[11] CJ Kaufman, 'Unsportsmanlike Conduct: 15-yard Penalty and Loss of Free Speech in Public University Sports Stadiums' [2009] 57 Kansas Law Review 1235, 1238 (footnote 22).

[12] 'The Control and Disciplinary Body takes this opportunity to recall, that it cannot allow football matches organised by UEFA to become forums for people who want to abuse the game's popularity to publicise their political or religious opinions.' UEFA CEDB decision of 23 February 2017, *Legia Warszawa*. Reported in UEFA, 'Case Law: Control, Ethics and Disciplinary Body & Appeals Body' (January - June 2017) 25-26 <https://www.uefa.com/MultimediaFiles/Download/OfficialDocument/uefaorg/UEFACompDisCases/02/51/76/81/2517681_DOWNLOAD.pdf> accessed 20 August 2019.

freedom of expression.[13] These tools ensure that the nature, meaning and purposes of sport are produced and interpreted by the SGBs. In essence, they create and protect the image of the game.[14] The opaqueness of the terms notwithstanding,[15] in general, they allow the restriction of freedom of expression throughout the production and consumption of the game. The reliance on the complex rules and regulations and the coercive power of the SGBs are the adhesives in that regard.

The aims to protect the production and the image of the game, along with the efficiency of the bureaucratic and coercive powers of the SGBs have an important reflection in the case of footballer Hope Solo. Having called the opponents a 'bunch of cowards' following the team's elimination at the hands of Sweden at Rio 2014 Olympic Games, the US Women's National Team goalkeeper was banned from the National Team.[16] The morals of this case and similar cases are that the 'good moral character' of a person is perceived as something to be strived for, on the penalty of a disciplinary charge.[17] The good moral character of an athlete, intricately linked to the ideals of sportspersonship, is coerced by the SGB. The Olympic Charter's provision stating that the National Olympic Committees should select Olympians 'not only on the sports performance of an athlete, but also on his ability to serve as an example to the sporting youth of his country'[18] confirms this view. Similarly, the fact that the failure, refusal or neglect of the NBA players' conduct to standards of 'good citizenship' is a just cause for the

[13] Also *see* text to notes 41 to 43 in Section 6.2.

[14] CAS 2010/A/2119 *International Federation of Body Building and Fitness (IFBB) v International World Games Association (IWGA)*, paras 25-29.

[15] But *see* CAS 16/009 *Russian Weightlifting Federation (RWF) v International Weightlifting Federation (IWF)*, para 7.13, '[t]he Applicant submits that the information on which the IWF based its Appealed Decision is not sufficient to bring the sport of weightlifting into disrepute. The Panel is unable to agree that the term "disrepute" is ambiguous. It refers to loss of reputation or dishonour'; CAS 2011/A/2525 *Harry Wiltshire v International Triathlon Union (ITU)*, para 40, '"*[u]nsportsmanlike conduct*" describes an offense which is not necessarily a breach of a specific rule of play, but violates the sport's generally accepted rules of sportsmanship and/or participant conduct' (emphases present).

[16] The Guardian Website, 'Hope Solo suspended for 'sum total of actions', says USA coach Jill Ellis' (7 September 2016) <https://www.theguardian.com/football/2016/sep/06/hope-solo-suspended-usa-coach-jill-ellis> accessed 20 August 2019.

[17] JSE Lee and JK McFarlin, 'Sports Scandals from the Top-Down: Comparative Analysis of Management, Owner, and Athletic Discipline in the NFL & NBA' [2016] 23 Jeffrey S. Moorad Sports Law Journal 69, 82 and 90-91.

[18] IOC, Olympic Charter 2019 Edition, Bye-law to Rules 27 and 28, art 2.1 <https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/General/EN-Olympic-Charter.pdf> accessed 20 August 2019.

termination of their contract exemplifies the situation perfectly.[19] Likewise, according to the MLS Collective Bargaining Agreement, on-field misconducts along with off-field misconducts that are 'detrimental to the reputation and public image of the MLS, the Team and/or the game of soccer' may result in the termination of the Standard Player Agreement.[20] In essence, whilst care should be taken in perceiving the values of the SGBs as monolithic, uniformly interpreted and implemented phenomena—even within the same governance hierarchy[21]—, it can be suggested that the higher-order values of the SGB become the starting points and the primary justifications for the strict control over the athletes. It has to be added that this argument can be extended to their impact on the two moral powers of the spectators. These points support Cotterrell who has suggested that transnational regulations 'relate to the interests, experiences, allegiances and values associated with transnational networks of community […]'.[22]

The counter-argument for the contentions just presented would point out that SGBs are mostly founded on private law principles. The support for the counter-argument would come from freedom of association. This freedom is inherently linked to upholding certain aims and values, which are usually found in the SGBs' founding texts. Concordantly, the emphasis would be on the SGBs' 'freedom not to associate' with expressions of others as regards certain issues, along with the 'right to choose to send one message but not the other'[23] concerning certain viewpoints. According to Fiss, institutions are not just recipients or forums for the dissemination of expressions, but also speakers. Besides, they enjoy their autonomy not through the autonomy of the individuals who manage them or work for them; rather they have separate cumulative autonomies.[24]

[19] NBA Collective Bargaining Agreement of 19 January 2017, Exhibit A 'NBA Uniform Player Contract', art 16 <https://ak-static.cms.nba.com/wp-content/uploads/sites/4/2017/10/2017-NBA-Collective-Bargaining-Agreement.pdf> accessed 20 August 2019.

[20] MLS Collective Bargaining Agreement of 1 February 2015, sections 20.1 and 20.2 <https://s3.amazonaws.com/mlspa/Collective-Bargaining-Agreement-February-1-2015.pdf?mtime=20180213190926> accessed 20 August 2019.

[21] The caution results from the sanctioning of a German bobsledder by the German Bobsleigh, Luge, and Skeleton Federation. The sanction was due to the bobsledder's renting his high-technology bobsleigh to a Russian competitor who went on to win the Gold medal at the Olympic Games. While the sanction was later rescinded by the national federation, the case shows that an act which might be deemed to honour the values of Olympism could become the basis of disciplinary action at another level. M McNamee, 'Whither Olympism?' [2014] 8:1 Sport, Ethics and Philosophy 1, 1-2.

[22] R Cotterrell, 'Transnational Communities and the Concept of Law' [2008] 21:1 Ratio Juris 1, 5.

[23] *Boy Scouts of America v Dale* 530 US 640 (2000).

[24] OM Fiss, 'Free Speech and Social Structure' [1986] 71 Iowa Law Review 1405, 1410-1411.

Supported by Fiss' sound assertions, the counter-argument would go on to argue that the autonomy from outside interference and the freedom to express and associate as the SGB deems fit is crucial in the sport industry. Securing a place in the market, and, if possible, expanding it are important goals of the SGB. Accordingly, the SGBs and their events have turned into 'brands'[25] that act as a 'guarantee' to consumers, and something to be associated with.[26] As businesses, the SGBs strive to generate as much income as possible through their brands. In line with these, 'brand image', which is defined as 'perceptions about a brand as reflected by the brand associations held in consumer memory',[27] help communicate the messages that the SGBs allow or approve.[28] In essence, the brands are the voice of the SGBs, and accordingly, any association or expression not approved by it may be seen as interference with the communications strategy of the SGBs. The danger is that appearing in the same sentence with an incident that society would shun or would call scandalous has far reaching consequences, including the loss of sponsors.[29] Hence,—through the use of coercive power—the desire to 'separate' the SGB and the individuals whose expressions might be to the detriment of the former.[30] The counter-argument would further emphasise that the SGBs should develop a strategy where they have an active role in the protection of the brand images of both the SGBs

[25] '[A] brand is a symbol of something that makes us recognize the product or service (names, symbols, for example) and of the associations that we get when we come in contact with the product or service' (citation omitted). Söderman (n 9) 185. A supporting definition indicates that a brand is 'a deeply established and distinctive picture of a product or a service in the mind of the customer and other peer groups' (citation omitted). T Ströbel and H Woratschek, 'Brand equity models in the spotlight of sport business' in S Söderman and H Dolles (eds), *Handbook of Research on Sport and Business* (Edward Elgar 2013) 496.

[26] Söderman (n 9) 16. Moreover the idea of sponsorship is based on the idea that the sponsors 'associate' with the sponsees with a view to be 'rubbed off' on the positive qualities that the SGB evoke. This effect is defined as 'association benefits'. JA Davis and JZ Hilbert, *Sports Marketing: Creating Long Term Value* (Edward Elgar 2013) 127 and 199.

[27] KL Keller, 'Conceptualizing, Measuring, and Managing Customer-Based Brand Equity' [1993] 57:1 Journal of Marketing 1, 3.

[28] The brand and image of the SGBs and their competitions are so important; World Taekwondo Federation whose acronym was 'WTF' has rebranded itself to World Taekwondo in 2017, because in the words of the President, 'the acronym of our federation has developed negative connotations unrelated to our organization'. WTF is the acronym for 'What the Fuck?!' in the internet jargon. World Taekwondo Federation Website, 'WTF Rebrands to World Taekwondo' (23 June 2017) <http://www.worldtaekwondo.org/wtf-rebrands-to-world-taekwondo/> accessed 20 August 2019.

[29] Lee and McFarlin (n 17) 93 and 102.

[30] JC Smith and D Keeven, 'Creating Separation From the On-Field Product: Roger Goodell's Image Repair Discourse During the Ray Rice Domestic Violence Case' [2019] 7:3 Communication and Sport 292, 294-296 and 301-302.

and the sponsors,[31] and thus they must heed the preferences of consumers and the market. 'Economic logic' as introduced in Section 1.2.1 has to apply. This situation results in the SGBs being vigilant about who or which viewpoint they seem to be approving. For an SGB, allowing one viewpoint within its jurisdiction may be perceived as an approval of the viewpoint.[32] After all, the Court of Justice of the European Union confirmed, in view of Article 16 of the Charter of Fundamental Rights of the European Union concerning 'freedom to conduct business',[33] that 'the desire to display, in relations with both public and private sector customers, a policy of political, philosophical or religious neutrality must be considered legitimate'.[34]

It can be claimed that there are flaws with this set of counter-arguments. First, since it is maintained that the two moral powers of reasonableness and rationality are the foundations of the freedom of expression of individuals, the fact that sport is organised mostly by private law bodies do not stop them from being applicable in the relationship between the SGBs and the athletes—or the spectators. In line with the orthodox and universalist understanding of human rights adopted in the previous chapter, it has to be asserted that moral powers do not become defunct in relationships founded on private law, or for that matter, on business or association. The social aspect of moral human rights precludes a conclusion which only takes account of the social relationships of the individual with the state; rather this aspect allows the moral powers to be relevant in private social relationships.[35]

Second, one has to acknowledge that in the face of the ultra-commercialisation of sport, economic logic prevails. The SGBs indeed have to protect their brands to be able to market them to consumers. As businesses, the SGBs' desire to be vigilant as to with whom they are associating with is understandable and tenable. The 'separation' of stakeholders and the SGBs through the use of the latter's coercive power indeed constitutes one of the pillars of freedom of association. On the other hand, the criticisms directed against the practices of the SGBs in this

[31] C Jeanrenaud, 'Sponsorship' in W Andreff and S Szymanski (eds), *Handbook on the Economics of Sport* (Edward Elgar 2006) 49.

[32] TB Wolff and A Koppelman, 'Expressive Association and the Ideal of the University in the Solomon Agreement Litigation' [2008] 25:2 Social Philosophy and Policy 92, 106-107.

[33] 'The freedom to conduct a business in accordance with Union law and national laws and practices is recognised'. Charter of Fundamental Rights of the European Union (2012/C 326/02).

[34] Case C157/15 *Achbita v G4S Secure Solutions NV* [2017] CJEU paras 37 and 38.

[35] C Wellman, *The Moral Dimensions of Human Rights* (OUP 2010) 26-27.

work stem not from the selection of their aims, values or their desire to protect their business interests. Rather the criticisms arise from the SGBs' failure to employ the notion of 'articulate consistency' and their continuing reliance on the rhetoric of 'politics-free' sport. As will be asserted in the coming sections and chapters, under the guise of political neutrality, the SGBs treat viewpoints unequally, serving only economic and political logic. The SGBs, of course, have to designate certain aims and values according to economic logic, but these should not present reasons for departing from the principle of equal concern and respect for individuals who express 'undesired' opinions and facts. More importantly, they do not have hide behind a veil of political neutrality in forwarding their agenda.

Another line of criticism to the positing of the freedom not to associate as a defence for the discrimination of viewpoints would point to the SGBs' transnational nature, the number of persons affected by their values, the consequences of the choosing of values, and finally their monopolistic positions within the sport industry. Most international SGBs present themselves as just another association having its headquarters in Switzerland. Governments, too, use this as an excuse for circumventing municipal law.[36] Yet, with the help of globalisation, their rules and regulations affect everyone who take part, attend or tune in to a sport competition. The monopolistic structure of sport, the almost-closed circuit arbitration and the coercive power of the state ensure their observance. Furthermore, the position of the SGBs as monopolies run counter to the arguments that the workforce tends to gravitate toward workplaces and corporations that are more in line with their values, or similarly, the consumers tend to choose corporations that embrace similar values.[37] National SGBs are usually the sole bodies for the organisation of a certain sport in a given country. Joint ventures such as the NBA and the NFL, too, act like cartels within their respective fields of businesses. In like manner, international SGBs that are protected by the hierarchical structure of sport hinder the athletes from moving to another organisation.[38] Thus, they cannot 'easily switch to a more tolerant employer'.[39] Most importantly, the athletes cannot find another mega-event to compete in or the spectators and

[36] AM Louw, *Ambush Marketing and Mega-Event Monopoly: How Laws Are Abused to Protect Commercial Rights to Major Sporting Events* (TMC Asser Press 2012) 56-57.

[37] RJ Colombo, *The First Amendment and the Business Corporation* (OUP 2015) 68-70.

[38] However, the European Commission has opened the gates for rival events provided that they satisfy the 'protection of the integrity of the sport, the protection of health and safety and the organisation and proper conduct of competitive sport'. Case AT.40208 *International Skating Union* [2018] reported online, paras 219-267.

[39] E Volokh, 'Deterring Speech: When Is It "McCarthyism"? - When Is It Proper?' [2005] 93 California Law Review 1413, 1440.

audiences cannot tune-in to an equivalent one, because other than the ones organised by the SGBs there are none, at least for the time being. Consequently, if the values of sport and the right to associate are seen as the guardians of SGBs' fields of business, the deprivation of the stakeholders' and the spectators' right to express themselves would be justified outright, without having regard to its consequences on the diversity of ideas and opinions, or more importantly for the purposes of this work, on the moral powers of speakers and recipients.

Finally, SGBs sometimes border on arbitrary in their use of coercive power. One clear example supporting this assertion is the AS Roma owner Jim Pallotta's sanctioning with a € 19.000 fine and a three-month ban.[40] Following AS Roma's defeat by Liverpool in the 2017/2018 Champions League semi-finals, Pallotta had commented that 'Liverpool are a great team, congratulations going forward, but if they don't get VAR [Video assistant referee] in the Champions League stuff like this is an absolute joke'.[41] The fining and banning of Pallotta is in line with the assertion that referees are beyond reproach and that any strongly worded proposal by stakeholders will be sanctioned. Nevertheless, there is a twist to this story: UEFA decided to introduce the use of VAR in the knockout stages of Champions League of the 2018/2019 Season.[42] This example shows that in their bid to protect their aims and values, the SGBs may act arbitrarily, curbing the freedom of expression of stakeholders despite the fact that the expressions may be beneficial to sport. Worse, the punished viewpoint might be adopted by the institution that punished it in the first place.

4.3 Suspicion of Governance

In order to embark on a healthy analysis of freedom of expression in sport, it has to be asserted that while '[h]istorically the great battles for free expression have been fought against government';[43] government is not the sole source of danger. In view of this, 'an ethic of

[40] BBC Website, 'Roma owner James Pallotta gets three-month Uefa match ban' (20 July 2018) <https://www.bbc.com/sport/football/44897802> accessed 20 August 2019.

[41] Sky Sports Website, 'Roma president charged by UEFA for comments following Champions League defeat to Liverpool' (04 May 2018) <https://www.skysports.com/football/news/11861/11358086/roma-president-charged-by-uefa-for-comments-following-champions-league-defeat-to-liverpool> accessed 20 August 2019.

[42] UEFA Website, 'UEFA briefs UEFA Champions League clubs on VAR' (4 February 2019) <https://www.uefa.com/insideuefa/news/newsid=2590378.html> accessed 20 August 2019.

[43] B Russell (ed), *Freedom, Rights and Pornography: A Collection of Papers by Fred R. Berger* (Kluwer 1991) 22-23.

distrust and critique of all institutions, not least of government' reflects more aptly the current trend in the prevalence of non-public coercive power.[44] Whilst in Chapter 2, the structure of the coercive power of the SGBs was touched upon; Chapter 4 raised the question of this power's global effects and its effects on human rights. This section takes the mantle from the arguments made in the said chapters and transposes them to a specific notion pertaining to freedom of expression, namely suspicion of government.

The effects of normative orders created by the SGBs and their outweighing of the state-made legal order were depicted in the previous chapter. The sanctions against FC Schalke 04 and FC Barcelona were clear cases where the collision of normative orders in a normatively plural environment resulted in the restraining of behaviour at the hands of a private legal person. In the process, the SGB overrode municipal law by simply passing a regulation and enforcing it. In addition to this, it can be argued that the norms that are laid down by the SGBs, the contracts between the SGBs and stakeholders and the ones between the SGBs and the spectators have effects on the third parties.[45] This is the case despite the view arguing that '[t]he major regulatory concern addressed by private law regimes is the protection of third parties from the harmful effects of private transactions'.[46]

In line with these, the SGBs' regulatory and coercive powers over its stakeholders, as well as the spectators they provide tickets with restrict certain expressions. In turn, their being unable to 'speak' affects the freedom of expression of other stakeholders, spectators and audiences, as recipients. Furthermore, with the help of contracts, international SGBs may also have direct impact on the laws of the state.[47] Legislations as imposed by international SGBs have become legal transplants. In line with the idea of best-practice, previous experiences from mega-events shape new mega-event legislations. More importantly, 'these enforced transplants are becoming

[44] V Blasi, 'Free Speech and Good Character: From Milton to Brandeis to the Present' in LC Bollinger and GR Stone (eds), *Eternally Vigilant: Free Speech in the Modern Era* (The University of Chicago Press 2002) 90.

[45] G-P Calliess and P Zumbansen, *Rough Consensus and Running Code* (Hart 2010) 206-207.

[46] R Wai, 'Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization' [2002] 40 Columbia Journal of Transnational Law 209, 233-236 and 263.

[47] *See generally* JT Wendt and PC Young, 'Protecting spectator rights: reflections on the General Law of the Cup' [2014] 14:3-4 The International Sports Law Journal 179.

accepted norms without any real parliamentary interrogation' since they are aimed at appeasing the international SGB.[48]

This outlook confirms the argument that just as the municipal law reflects the power structures within national boundaries, transnational norms reflect the 'distribution of power in transnational communal networks'.[49] Therefore a challenge is presented for analyses which solely take account of the government. Here, it is of no consequence whether the power to organise events are delegated from the state[50]—as in the case of France[51]—, or not,—as in the case of arguments on the status of the FA and the Jockey Club,[52] the US National Olympic Committee (USOC) and the National Collegiate Athletic Association (NCAA).[53] Rather, the effective, efficient and interest-focused regulative, adjudicative and coercive powers—that are the reflections of the aims and values of the SGBs—are valid reasons of the suspicion toward them. These powers affect the way stakeholders and spectators behave. Moreover, they act as indirect sieves as to the services and information audiences receive. Therefore, powers which the SGBs hold, along with the interests and values that the coercive power aims to protect result in suspicion towards the intentions of the SGBs.

Consequently, the regulation of behaviour through private regulation and concordantly the interpretation of such regulation through private adjudication moves the matter to a discourse on governance. This way of depicting the landscape leads to the restatement of the negative and overarching argument of 'suspicion of government' as 'suspicion of governance'.[54] In short, due

[48] M James and G Osborn, 'The Olympics, transnational law and legal transplants: the International Olympic Committee, ambush marketing and ticket touting' [2016] 36:1 Legal Studies 93, 94 and 100-101 (footnote omitted).

[49] R Cotterrell, 'What is Transnational Law?' [2012] 37:2 Law & Social Inquiry 500, 515-516.

[50] A Geeraert, *The EU in International Sports Governance: A Principal-Agent Perspective on EU Control of FIFA and UEFA* (Palgrave Macmillan 2016) 78.

[51] B van Rompuy, 'The Role of EU Competition Law in Tackling Abuse of Regulatory Power by Sports Associations' [2015] 22:2 Maastricht Journal of European and Comparative Law 179, 188-189; S Szymanski and SF Ross, 'Governance and Vertical Integration in Team Sports' [2007] 25:4 Contemporary Economic Policy 616, 619.

[52] A Clapham, *Human Rights Obligations of Non-State Actors* (OUP 2006) 471-472; D McArdle, 'Judicial Review, "Public Authorities" and Disciplinary Powers of Sports Organisations' [1999] 30 Cambrian Law Review 31, 36-39.

[53] GE Metzger, 'Privatization as Delegation' [2003] 103 Columbia Law Review 1367, 1413 and 1423.

[54] According to Ciacchi, 'governance may be understood as decision and policy making within a group of persons or within an institution, or within a system of institutions. It is, so to say, governing with or

to the fact that the institutions that have the coercive power to affect the behaviour of everyone involved, a suspicion of governance is an apt way of reflecting the change in power structures. It is this suspicion—which was introduced as one of the primary concerns moving the work towards moral human rights—that will pave the way for a critical examination of the SGBs rules and practices relating to freedom of expression.

4.4 A Brief Overview of Politics and Sport

Sport is situated within the grander scheme of regional, national and global networks, and thus political and social challenges at these levels affect it.[55] Moreover, just as sport is a construct which is omnipresent in the everyday lives of stakeholders and followers,[56] it should be accepted that the same stakeholders and followers bring the outer world into sport. In view of this, it can be claimed that even if individuals are stopped from expressing themselves as per the restrictions, sport cannot be politically insulated from the outer world. Consequently, as indicated in Section 1.2.1, the depiction of sport as a phenomenon that is completely autonomous is a 'myth'.

The fallacy of trying to achieve 'physical insulation' from the outer world was pointed out in the case of the UEFA U21 European Championships Qualifier match between Turkey and Sweden that was played in 2013. The match was played on the backdrop of Gezi Protests that erupted following the policies of President Recep Tayyip Erdoğan. Ironically, the Recep Tayyip Erdoğan Stadium, which is located near the epicentre of the protests that took place, was the venue selected for the match. On the 23rd minute, the play was stopped by the referee due to the pepper spray deployed by the Turkish police against a political rally protesting the death of one of the protesters.[57] Therefore, a sport activity was disrupted due to the physical externalities created by political action. Physical insulation of sport was thus impossible.

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without a government, policy making with or without politics'. AC Ciacchi, 'European Fundamental Rights, Private Law, and Judicial Governance' in H-W Micklitz (ed), *Constitutionalization of European Private Law* (OUP 2014) 124 (citations omitted).

[55] D Chatziefstathiou and IP Henry, *Discourses of Olympism: From Sorbonne 1894 to London 2012* (Palgrave Macmillan 2012) 248-249.

[56] D Rowe, *Sport, Culture and the Media: The Unruly Trinity* (2nd edn, Open University Press 2004) 1-4.

[57] Milliyet Newspaper Website, 'Milli maça 'biber gazı' molası' [Time-out due to 'pepper spray' at the national team match] (10 September 2013) <http://www.milliyet.com.tr/milli-maca--biber-gazi--molasi---1761723-skorerhaber/> accessed 20 August 2019.

On the 'non-physical' side of things, the interdependence of sport and the state becomes more pronounced. As Pérez has indicated, the state utilises sport for the purposes of their foreign and domestic policies.[58] The policies include short and long-term agenda.[59] In particular, mega-events organised under the auspices of international SGBs are the showcases and exercises of the state and civil society at national and international levels.[60] In stark contrast to the myth of 'politics-free sport', sport and politics are so intertwined, Jedlicka has presented international SGBs as 'the fulcrum on which the relationship between "sport and politics" rests'.[61] In another sense, sport is an important medium in the production and reproduction of the sense of national identity.[62] The rituals exercised in international competitions are crucial in this sense.[63] Sport helps create an 'imagined community' (in reference to the term coined by Benedict Anderson) in the shape of the nation, and it also assists the nation state in creating narratives about the nation. The narratives are specially-crafted, as they depict 'nations and their place in the world'.[64] As a consequence of the foregoing, '[t]hose who object to the so-called politicizing of the Olympics are often the individuals and organizations that have the most to lose from protests and boycotts'.[65]

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[58] The third leg of politics is sport is presented as the internal politics of sport. JL Pérez, *The Challenge of Modern Sport to Ethics: From Doping to Cyborgs* (Lexington Books 2013) 90ff. Also *see* R Parrish, *Sports Law and Policy in the European Union* (Manchester University Press 2003) 13; Rowe *Sport, Culture and the Media* (n 56) 91.

[59] G Hayes and J Karamichas, 'Conclusion. Sports Mega-Events: Disputed Places, Systemic Contradictions and Critical Moments' in G Hayes and J Karamichas (eds), *Olympic Games, Mega-Events and Civil Societies: Globalization, Environment, Resistance* (Palgrave Macmillan 2012) 249-250.

[60] Horne referring to Roche. J Horne, 'The Four 'Cs' of Sports Mega-Events: Capitalism, Connections, Citizenship and Contradictions' in G Hayes and J Karamichas (eds), *Olympic Games, Mega-Events and Civil Societies: Globalization, Environment, Resistance* (Palgrave Macmillan 2012) 42.

[61] SR Jedlicka, 'Sport governance as global governance: theoretical perspectives on sport in the international system' [2018] 10:2 International Journal of Sport Policy and Politics 287, 290.

[62] R Giulianotti and GPT Finn, 'Old visions, old issues: New horizons, new openings? Change, continuity and other contradictions in world football' [1999] 2:3 Sport in Society 256, 257; M Mutz and M Gerke, 'Major Sporting Events and National Identification: The Moderating Effect of Emotional Involvement and the Role of the Media' [2018] 6:5 Communication & Sport 605, 606.

[63] It has to be added that in the context of mega-events, the notions unity and harmony, along with nationalist rhetoric could be utilised to pacify and tame the citizens of the host country in general, and this process could start long before the mega-event starts. A-M Broudehoux, 'Civilizing Beijing: Social Beautification, Civility and Citizenship at the 2008 Olympics' in G Hayes and J Karamichas (eds), *Olympic Games, Mega-Events and Civil Societies: Globalization, Environment, Resistance* (Palgrave Macmillan 2012) 54-55.

[64] J Gleaves and M Llewellyn, 'Ethics, Nationalism, and the Imagined Community: The Case Against Inter-National Sport' [2014] 41:1 Journal of the Philosophy of Sport 1, 5-9.

[65] HL Lenskyj, 'Sochi 2014 Olympics: Accommodation and Resistance' in J Dart and S Wagg (eds), *Sport, Protest and Globalisation: Stopping Play* (Palgrave Macmillan 2016) 313.

The general outlook just presented is reflected in expressions in sport. As Tännsjö has asserted, politics shows its face in the use of abstract symbols, such as the team itself, flags and national anthems along with chants, which serve the fiction of oneness of the nation, to the detriment of the individual.[66] Moreover, in addition to the flags; sports events and their insignia too have the function 'to link individuals to a community and generate a feeling of a common identity'.[67] Accordingly, a political expression in the form of a lap of honour donning the flag of the state, which the athlete is a citizen of after winning an international championship, is now 'innocuous and widely accepted'.[68] The same goes for national anthems, since their being sung before and during the match is allowed, and certain decorum is expected of all persons within the sports venue. The merger of symbols, which has been coined as 'patriotic symbolism' by Wasserman,[69] is an important part of ceremonies, and in particular medal ceremonies. In addition to this, communication within the sports venues can be realised through chanting.[70]

Consequently, generally, symbols of the states or the expressions that glorify them, which are in essence political expressions, are allowed. Yet, political expressions are restricted by SGBs. At first, this may seem confusing but when it is asserted that the restrictions on political expressions are far from 'viewpoint-neutral',[71] the picture becomes less blurry. That is, in practice, non-conforming expressions of stakeholders and spectators are restricted, while the conforming ones are not. Consequently, the practices of the SGBs are argued to lack articulate consistency, which calls for the consistent treatment of cases having the same facts and features. This tentative conclusion will pave the way for the next section, which argues that the SGBs go beyond the restriction/approval dichotomy and themselves promote certain political idea(l)s.

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[66] T Tännsjö, 'Is Our Admiration of Sports Heroes Fascistoid?' in WJ Morgan (ed), *Ethics in Sport* (Human Kinetics 2007) 431.

[67] A Lenger and F Schumacher, 'The Social Functions of Sport: A Theoretical Approach to the Interplay of Emerging Powers, National Identity, and Global Sport Events' [2015] 6:2 Journal of Globalization Studies 41, 45.

[68] K Gelber, 'Political Culture, Flag Use and Freedom of Speech' [2012] 60 Political Studies 163, 165.

[69] HM Wasserman, 'Symbolic Counter-Speech' [2004] 12:2 William & Mary Bill of Rights Journal 367, 392.

[70] HM Wasserman, 'Fans, Free Expression, and the Wide World of Sports' [2006] 67 University of Pittsburgh Law Review 525, 528.

[71] The US doctrine posits that '[g]overnment cannot regulate speech on the basis of viewpoint; that is, it may not single out for approval or disapproval a particular point of view'. CR Sunstein, 'Words, Conduct, Caste' [1993] 60:3-4 The University of Chicago Law Review 795, 796.

4.5 Sport Governing Body as Collaborator

4.5.1 The Setting

Although globalisation and transnational institutions cast doubt on the powers and position of the nation state, in the case of sport it is still an important but, at first sight, paradoxical actor. On the one hand, in a world dominated by mega-events, the nation state is an important factor in the development of the globalised commercialisation of sport. This 'raise[s] the question of cultural standardization, or rather the projection of a Western, liberal model of social relations on local host cultures'[72] along with the rhetoric of locals becoming 'citizens of the world' through the production and consumption of global products.[73] On the other hand, the nation state, identity politics and sport, especially high-performance international competitions, are intricately linked to each other. Single victories and long-term successes have the power to generate national pride.[74] Moreover, the nation state is never truly neutralised because it utilises the 'contest' aspect of sport to its advantage.[75] Nationhood and political unity are consolidated through national teams, which are seen as means of releasing tensions.[76] More importantly, in order to protect its interests, the nation state may introduce restrictions to the process of production in sport industry.[77] The situation can be summed up as follows: Whilst the production and consumption processes of sport go hand in hand with globalisation, the state, depending on the circumstances, might intervene or support these processes as long as its interests are of concern. Political logic within the triumvirate of sport, the state and the market has the potential to prevail.

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[72] G Hayes and J Karamichas, 'Introduction: Sports Mega-Events, Sustainable Development and Civil Societies' in G Hayes and J Karamichas (eds), *Olympic Games, Mega-Events and Civil Societies: Globalization, Environment, Resistance* (Palgrave Macmillan 2012) 6.

[73] D Whitson and J Horne, 'Underestimated costs and overestimated benefits? Comparing the outcomes of sports mega-events in Canada and Japan' in J Horne and W Manzenreiter (eds) *Sports Mega Events: Social Scientific Analyses of a Global Phenomenon* (Blackwell 2006) 83-84.

[74] HE Meier and M Mutz, 'Political regimes and sport-related national pride: a cross-national analysis' [2018] 10:3 International Journal of Sport Policy and Politics 525, 526-527 and 534.

[75] D Rowe, 'Sport and the Repudiation of the Global' [2003] 38:3 International Review for the Sociology of Sport 281, 286

[76] European Commission, 'The European Model of Sport. Brussels: Consultation Paper of DGX of the European Commission' (1999) 5 <http://www.bso.or.at/fileadmin/Inhalte/Dokumente/Internationales/EU_European_Model_Sport.pdf> accessed 20 August 2019.

[77] Rowe 'Sport and the Repudiation of the Global' (n 75) 286.

In addition to its role as the consolidator of domestic policy and unity, sport occupies a crucial role in international relations and the foreign policies of states. Milza's arguments as referred by Polo, maintaining that sport is a part of and is a reflection of the international stage, a means of foreign policy, and a signifier of public feeling,[78] are supported by the practices of the state and SGBs. Especially during international competitions, athletes and/or teams compete for their countries, which are deemed to be sovereign and 'recognised by the international community'.[79] For example, the Republic of China (Taiwan) competes under the name Chinese Taipei for political reasons. Moreover, because they are not recognised by the international community *de facto* countries cannot take part in the Olympic Games or other competitions organised by monopolistic international SGBs.[80] Finally, sport reflects public feeling which may include antagonising certain current and historical adversaries, or showing their desire or support to a particular aspect of foreign policy, as in the parallel between Turkey's prolonged EU candidacy and Turkish supporters' chants showing their frustration with it.[81] Consequently, and for the purposes of this work crucially, the pressure exerted by 'political logic' to sport is conspicuous.

4.5.2 The Practices of International Sport Governing Bodies

4.5.2.1 A Tale of Two Teams

With respect to international SGBs' role in the global governance of sport, Giulianotti and Robertson's assertion that 'international governance has functioned in part to maintain the political identity and differentiation of nation states and associations' is relevant to the subject at hand.[82] It can be maintained that this assertion is confirmed by the practices of the international SGBs regarding freedom of expression where partiality is the main theme. The said partiality is the result of a lack of articulate consistency on the part of the SGBs. In essence, certain

[78] J-F Polo, 'Istanbul's Olympic Challenge: A Passport for Europe?' in G Hayes and J Karamichas (eds), *Olympic Games, Mega-Events and Civil Societies: Globalization, Environment, Resistance* (Palgrave Macmillan 2012) 69.

[79] FIFA Statutes 2019 Edition, Definitions 'Country' <https://resources.fifa.com/image/upload/fifa-statutes-5-august-2019-en.pdf?cloudid=ggyamhxxv8jrdfbekrrm> accessed 20 August 2019.

[80] Tournaments organised by the Confederation of Independent Football Associations (ConIFA) are notable exceptions. Yet, these exceptions derive from the fact the confederation comprises football associations of *de facto* countries, and regions that cannot be represented in competitions organised by FIFA and UEFA. Therefore, the exceptions do not break the link between being recognised as a country and being able compete against other recognised countries.

[81] Polo (n 78) 82.

[82] R Giulianotti and R Robertson, 'Mapping the global football field: a sociological model of transnational forces within the world game' [2012] 63:2 The British Journal of Sociology 216, 227.

'political' expressions are restricted due to their content, even though similar 'political' expressions are approved as a result of their conformity. In the view of this general assertion, the comparison of the sanctioning of FC Barcelona due to its supporters' political expressions and the approval of the political expression of İstanbul Başakşehir supporters by UEFA will be illuminating.

One of the high-profile incidents of sanctioning a club on the grounds of their supporters' expressions is the case of FC Barcelona, which was touched upon in the previous chapter while analysing the impact of the SGBs' regulations and practices on the municipal law. In the said case, UEFA fined FC Barcelona € 100.000 for their supporters' chanting '*independencia*' (independence) and waving *Estelada* flags during a home match in the UEFA Champions League. UEFA Appeals Body perceived (and the club admitted it in a similar case previously) that *Estelada* flags have political connotations as a symbol of the Catalonian independence movement. The chants were heard at minutes 17:14 of both halves, and the expression was interpreted by UEFA as having connotations to the date Catalonia 'lost its independence to Spain'.[83]

The UEFA Appeals Body focused on the context in which the chants were heard and the flags were waved, and thus decided that the context in which the actions of the spectators took place confirmed the political dimensions of both.[84] Concerning the cases at hand, it can be claimed that UEFA took sides under the guise of being neutral. The approval of expressions which utilise symbols of nation states recognised in the international stage, and conversely, the banning of expressions which are symbols of the parties in tension with them point to partiality on the part UEFA. In a situation where there is tension between Spanish and Catalan flags,[85] UEFA, in effect, weighed in on the side of the Spanish state. With the help of UEFA, the status

[83] This is a historical error since Catalonia has not been an independent state since the Principality of Catalonia in the Medieval and Early Modern Eras. UEFA Appeals Body decision of 21 June 2016, *FC Barcelona.* Reported in UEFA, 'Case Law: Control, Ethics and Disciplinary Body & Appeals Body' (January 2016 - June 2016) 182 <https://www.uefa.com/MultimediaFiles/Download/OfficialDocument/uefaorg/UEFACompDisCases/02/40/14/21/2401421_DOWNLOAD.pdf> accessed 20 August 2019.

[84] ibid 186-189.

[85] S Whigham and others, '"Més Que Un Joc?": Sport and Contemporary Political Nationalism in Scotland and Catalonia' [2019] 43:3 Journal of Sport and Social Issues 219, 233.

of Catalonia as a 'submerged nation'[86] is crystallised, because the political awareness and agenda-creating aspect of the nationalistic expressions became the primary reasons for restriction. The idea of politics-free sport was utilised to the extent that a more conformist strand of nationalism, namely the nationalism of the nation state was chosen over the nationalism of the submerged nation. In view of these, it has to be maintained that if there is to be articulate consistency, all flags of the same society, country and whatever political or social levels present in a certain area, ie all the expressions of similar content and means, have to be allowed. Consequently, politics-free sport should be judged as no more than a ploy to silence dissenting voices directed at the political status quo, and as a reflection of the policies of 'recognised' nation states.

The restriction of expressions depicts only part of the story. The importance of the maintenance of the political status quo may also be exemplified through the 'approval' of expressions by international SGBs. In that regard, UEFA's stance following the clearly political expressions of the supporters of the Turkish Super League team İstanbul Başakşehir Futbol Kulübü at its UEFA Champions League Qualifier match against Club Brugge in the 2017/2018 Season is an apt example. In the 90th minute of the match, the supporters of the home team unfurled a banner covering half of the stand. The banner bore the word '*Başkomutan*' (commander-in-chief) and the photo of President Recep Tayyip Erdoğan who attended the match.[87] There were no reports of a fine against the club.

It can be objected that this case is in line with the exercise of the moral powers of spectators who feel united with their community by embracing their leader.[88] It can also be added that the title commander-in-chief is granted to the President by the Constitution of the Republic of Turkey,[89] and thus, the expressions could be perceived as perfectly legal. Finally, the fact that UEFA established a test of some sort for the determination of the political nature of an expression that indicates 'the relationship between the potential message and the football match

[86] ibid 221 and 223-224.

[87] Sabah Newspaper Website, 'Cumhurbaşkanı Erdoğan, Başakşehir-C. Brugge Maçını İzlemeye Geldi' [President Erdoğan Attended the Başakşehir-C. Brugge Match] (02 August 2017) <https://www.sabah.com.tr/spor/futbol/2017/08/03/cumhurbaskani-erdogan-basaksehir-c-brugge-macini-izlemeye-geldi> accessed 20 August 2019.

[88] J Raz, *The Morality of Freedom* (Oxford Scholarship Online 2003[1988]) 34.

[89] Constitution of the Republic of Turkey, art 117 (Official English version) <https://global.tbmm.gov.tr/docs/constitution_en.pdf> accessed 20 August 2019.

and how the said potential message can be understood not only by the home and away supporters at the stadium, but also by the objective viewers on television'[90] may be emphasised, concluding that the away fans and the objective viewers following the match on television would not consider it a political expression.

Nevertheless, there are strong counter-arguments for these objections. Firstly, the contentions of the UEFA Ethics and Disciplinary Inspector in the FC Barcelona case where it was established that the '['*independencia*'] chants have no relation to football whatsoever and are therefore not fit for a sports event' and instead they constituted an 'abuse of football matches for political purposes by [the FC Barcelona] supporters' have to be mentioned.[91] In the same lines, it can be asserted that Erdoğan's position as the commander-in-chief of the armed forces of Turkey has nothing to do with football, and that the message in question is not fit for a sport event since it evokes war (if indeed war and sport can be separated, which deserves a separate discussion). The evoking of war is especially important due to the *coup d'etat* attempt against Erdoğan the year before by the armed forces of Turkey and the cross-border military operations in Syria at the time. Secondly, as depicted in Section 3.2.3.2, in the FC Barcelona and FC Schalke 04 cases UEFA had already restricted expressions that were deemed as legal by the domestic courts of Spain and Germany respectively. In addition, *Estelada* is officially recognised by the Parliament of Catalonia. Therefore, if articulate consistency is to be realised, the legality of the status of Erdoğan as commander-in-chief, and accordingly the expressions reminding this should have no effect whatsoever on the practices of UEFA. If the legality of expressions is to be the determining factor, then articulate consistency demands that the *Estelada* flags and the '*Başkomutan*' banner be treated in an equal manner. They are both the expressions of spectators, they are both political expressions and they were both communicated in the same competition, the UEFA Champions League. Finally, concerning the alleged importance of the perception of viewers with respect to an expression, it has to be asserted that the perceptions of the viewers in Turkey cannot be rendered homogenous. The reason is that the viewers in Turkey might have voted against Erdoğan's presidency and his proposal for constitutional amendments the same year. Concordantly, the opposition might rightly perceive the banner as politically charged. Therefore, the banner represented the exact thing UEFA says it endeavours to keep out of football, ie the use of football matches for political purposes. Under UEFA's logic, since 'the

[90] UEFA Appeals Body *FC Barcelona* (n 83) 188.

[91] ibid 182.

objective viewers on television' would have perceived the banner as political, the club should have been fined, just like FC Barcelona.

The cases of FC Barcelona and Başakşehir lead to the same conclusion. The steps UEFA has taken in restricting certain political expressions but at the same time allowing others amount to a defence of the political status quo. The only difference between the two cases is that whereas UEFA took an action by charging Barcelona in order to defend the political status quo; it defended the political status quo in Turkey through inaction (if indeed the absence of any report on the subject points out to an absence of disciplinary charges against Başakşehir). By doing that, UEFA left hanging the accurate contention in the FC Barcelona decision that in judging an expression the contexts of the expressions have to be taken into account.[92] The only positive aspect of these cases is that the approval of the '*Başkomutan*' banner in the Başakşehir case shows respect for the moral powers of the speakers and recipients. Nevertheless, this point would not change the claim that UEFA did not show equal concern and respect for FC Barcelona supporters, relegating them to 'abusive' elements in football just for the reason that their expressions were non-conforming.

4.5.2.2 Conforming and Non-Conforming Symbolisms

As indicated in the previous section, patriotic symbolism provides an important element of sport ritualism, which in its turn helps the cause of the nation state. It can be claimed that the Olympic Games are the apex of the rituals and ceremonies that are embroidered with patriotic symbolism. The IOC lays down the proponents of victory ceremonies that include the hoisting of the flags of the medal winners and playing the national anthem of the gold medallist. Therefore, stakeholders, spectators and audiences are compelled to experience the exaltation of national values through symbolic expressions. In this sense, it should be asserted that compelled speech goes against the idea that forcing a point of view, orthodoxy or a ritual should be prohibited.[93] If it is accepted that such expressions are the incarnations of the values of the majority, then, as

[92] ibid 187.

[93] The clearest example of this position is laid down by the US Supreme Court which stated that '[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us' (footnote omitted). *West Virginia State Board of Education v Barnette* 319 US 624 (1943) 642.

Wasserman has indicated, the tolerance of the individuals' 'symbolic counter-speech', which convey dissent against the expressions and the values that compelled expressions represent, comes to the forefront.[94]

It has to be noted that symbolic counter-speech at a victory ceremony is the source of the IOC Charter Rule prohibiting political expressions.[95] In concrete, African-American sprinters Tommie Smith and John Carlos' raising their fists and refusing to face the flag during the medals ceremony in the 1968 Mexico Summer Olympic Games 'to protest the unjust treatment of Blacks and people from low-income backgrounds in the U.S.' led to the prohibition itself.[96] The Olympic Charter at the time included the obligation to face the flags during the national anthem, but an eligibility rule stipulating the observation of 'the traditional Olympic spirit and ethics' led the IOC to *sua sponte* ban the sprinters for life from the Olympic Games.[97] As Wasserman has pointed out, the duo were banned due to their drowning out of the 'symbolic speech' consisting of the flag and the national anthem through their symbolic counter-speech, which is their right in the face of the symbolic speech.[98]

The point that gives support to the argument in this section is that at the same Olympic Games, Věra Čáslavská, a Czechoslovakian gymnast, turned their head down and away from the Soviet Union flag as a protest to the Soviet invasion of Czechoslovakia. Čáslavská's not facing the flag—a gesture that took place just days after the Black Power Salute—did not result in a disciplinary action and was seen as 'as a heroic individual resistance' by the US society. Therefore, the IOC, headed by Avery Brundage, an American who believed in sport's role as a catalyst of social progress but was against the mingling of politics and sport,[99] became the spearhead in the sanctioning of the protesters who 'threatened the ideological links between

[94] Wasserman 'Symbolic Counter-Speech' (n 69) 428-431.

[95] 'No kind of demonstration or political, religious or racial propaganda is permitted in any Olympic sites, venues or other areas'. Olympic Charter 2019 Edition (n 18) Rule 50.2.

[96] JN Cooper and others, 'Race and resistance: A typology of African American sport activism' [2019] 54:2 International Review for the Sociology of Sport 151, 159.

[97] JAR Nafziger, *International Sports Law* (Transnational Publishers 1988) 97-98.

[98] Wasserman 'Symbolic Counter-Speech' (n 69) 398.

[99] S Henderson, *Sidelined: How American Sports Challenged the Black Freedom Struggle* (University Press of Kentucky 2013) 48 and 95.

sport and ideas about the United States as a meritocratic liberal democracy',[100] but condoned a protest against the US's adversary through inaction. Unsurprisingly, more than 50 years-on, the official history of the IOC sees Čáslavská as an 'unbowed' and 'unbroken' 'folk hero';[101] whilst lamenting that in the case of Smith and Carlos 'the brilliance of all three athletes was overshadowed by the protest on the podium […]'.[102] This 'history' informs that Smith and Carlos did not take part in subsequent Olympic Games without mentioning the reasons why.

It can be claimed that while the values of sport restricted the ability of the athletes to express themselves about injustices in the US, the same restrictive values approved of the anti-communist expression, which was compatible with how the better part of the West felt at the time. The action and inaction of the IOC in these cases respectively reflected the public feeling and the international stage. In another sense, the differing stances against similar protests made just a few days apart, gives support to Henderson's contention that the silencing of the black athletes was a consequence of the US Cold-War policy that considered international sport competitions as means of furthering this.[103] It has to be added that the restrictions shaped by the values of sport created inequality and injustice—the same inequality and injustice that Smith and Carlos protested in the first place. Consequently, articulate consistency was again lacking in the cases of Smith, Carlos and Čáslavská, because the contents, perpetrators and targets of the expressions resulted in the expressions being treated differently at the hands of the same SGB. The fact that these expressions were made during different Victory Ceremonies at the same Olympic Games renders the situation even bleaker for a defence of freedom of expression in sport. The partiality of institutions that decide on the 'legality' of expressions within their jurisdictions and the pragmatic use of the rhetoric of politics-free sport even though the reality is far from it, is disconcerting.

[100] T Rorke and A Copeland, 'Athletic Disobedience: Providing a Context for Analysis of Colin Kaepernick's Protest' [2017] 10 Fair Play. Revista de Filosofía, Ética y Derecho del Deporte 84, 90-91.

[101] The IOC Website, Věra Čáslavská profile <https://www.olympic.org/vera-caslavska> accessed 20 August 2019.

[102] The IOC Website, '200M Medallists Smith and Carlos Stage Podium Protest' (10 September 2013) <https://www.olympic.org/news/200m-medallists-smith-and-carlos-stage-podium-protest> accessed 20 August 2019.

[103] Henderson (n 99) 95-96.

Finally, on the hate speech side of things, while they have anti-discrimination regulations that become the basis of strict scrutiny regarding the origins and meanings of an expression,[104] SGBs might become accomplices to discriminatory practices of host nations as witnessed in the case of the Sochi 2014 Winter Olympics. In concrete, the 'anti-propaganda laws' in the Russian Federation prohibiting any expression regarding LGBT+ rights, which was mentioned in the previous chapter, had a chilling effect on the athletes, who were only able to protest and show solidarity in the qualifying stages.[105] In addition to this, an Italian transgender rights activist was detained by the police because they attended an ice hockey match in a rainbow skirt.[106] The crucial point in the question at hand is the fact that the ECtHR judged the 'anti-propaganda' laws to be in violation of articles 10 and 14 of the ECHR.[107] Thus, the IOC, which aims to override municipal laws when its interests are at stake, went along with national laws of a discriminatory nature to the detriment of freedom of expression of both athletes and spectators. The IOC willingly became an accomplice to practices that ignore the idea of equal concern and respect for individuals, along with their moral powers. Here, the notion of political neutrality was utilised to the fullest as evinced by the IOC President's comment on the matter indicating that 'in order to fulfil our role to make sure that in the Olympic Games and for the participants the Charter is respected, we have to be strictly politically neutral'.[108] It can be asserted that the IOC chose to go along with the unequal practices of the Russian Federation, so that the autocrats who had promised and later supplied billions of dollars[109] were safe within the sterile environment they had created.

[104] For example, Uruguayan footballer Luis Suárez's use of the word 'negro' generated a lengthy account of the origins of the expression. *The FA v Luis Suarez* Decision of the FA Regulatory Commission, paras 162-176.

[105] J Ekberg and M Strange, 'What happened to the protests? The surprising lack of visible dissent *during* the Sochi Winter Olympics' [2017] 20:4 Sport in Society 532, 542.

[106] V Postlethwaite, 'Sochi 2014 Winter Olympics and the controversy of the Russian Propaganda Laws: is the IOC buckling under the pressure of its own incoherence in thought?' [2014] 14:3-4 The International Sports Law Journal 264, 271.

[107] *Bayev and Others v Russia,* App Nos. 67667/09, 44092/12 and 56717/12 (ECHR, 13 November 2017).

[108] Postlethwaite (n 106) 270.

[109] 'In nominal terms, the whole project became about 4.5 times more expensive than planned ($55.0 vs. $12.3 billion). The costs for venues escalated particularly strongly, with a nominal 585 percent cost overrun (337 percent in real terms after controlling for inflation)'. M Müller, 'After Sochi 2014: costs and impacts of Russia's Olympic Games' [2014] 55:6 Eurasian Geography and Economics 628, 635.

4.5.3 The Domestic Sport Governing Bodies' Front

Domestic SGBs, too, play the 'politics-free sport' card effectively. Whilst ritualistic patriotic symbolism is put to good use, non-conforming expressions tend to be seen as political expressions, and thus castigated and restricted. Patriotic symbolism may include the playing of the national anthem and facing the flag, whose *leitmotif* is that their introduction coincides with times of adversity for the country. For example, in the US, the MLB introduced the singing of the 'Star Spangled Banner' before games during World War I and responded to the 9/11 attacks with the playing of 'God Bless America' during the seventh-inning stretch.[110] Likewise, it is reported that the singing of the 'Star Spangled Banner' in the NBA has its roots in World War II.[111] Most US teams adopted this approach before the end of World War II, however the NFL national anthem policy became stricter in 2009.[112] Similarly, the practice of singing the national anthem before football matches in Turkey dates back to the 1990s, which was a time of increased attacks by the Kurdistan Workers' Party (PKK).[113] The crucial common ground of these practices that force individuals to bear with patriotic/militaristic symbolism is that during dire straits for society,[114] unorthodox and non-conforming ideas are tolerated less and patriotic symbolism increases. In those times, sport becomes a vessel for intolerance.[115] The implementers of the policies tend to become overzealous, and therefore, not being present during the airing of the song 'God Bless America' might result in missing the match.[116] Moreover, the SGBs or the entities that make up the SGB could implement sport-specific measures so that the speakers do not tarnish the image of the game.

[110] Wasserman 'Fans, Free Expression, and the Wide World of Sports' (n 70) 559-560.

[111] CJ McKinny, 'Professional Sports Leagues and the First Amendment: A Closed Marketplace' [2003] 13 Marquette Sports Law Review 223, 243.

[112] M Edelman, 'Standing to Kneel: Analyzing NFL Players' Freedom to Protest during the Playing of the U.S. National Anthem' [2018] 86 Fordham Law Review Online 1, 3-5. It has to be added that the 'Game Operations Manual' which is the basis of the ritual is not publicly available.

[113] D Irak and J-F Polo, 'Turkey' in J-M de Waele and others (eds), *The Palgrave International Handbook of Football and Politics* (Palgrave Macmillan 2018) 668.

[114] Magraw has argued that these practices coincide with growing nationalism, populism and protectionism. K Magraw, 'Separation of sport and State: military salutations at US Major League Soccer events' [2019] The International Sports Law Journal 1, 5 (online first version).

[115] Wasserman 'Symbolic Counter-Speech' (n 69) 402-428.

[116] N DeSiato, 'Silencing the Crowd: Regulating Free Speech in Professional Sports Facilities' [2010] 20:2 Marquette Sports Law Review 411, 411.

It has to be asserted that the case of Colin Kaepernick, an NFL player of African-American origin, who first remained seated and then kneeled during the singing of the National Anthem before matches as a protest against police brutality directed against African-Americans would be the ideal example for the discussion at hand.[117] In this case, the alternating expressions produced no disciplinary charges, as there was no rule prohibiting such conduct.[118] What is more, other stakeholders joined the protest in the following season. Nevertheless, Kaepernick became a free agent and no team added the player to its roster despite solid statistics.[119] Consequently, it can be argued that the SGB itself did not restrict the symbolic counter-speech, and yet the owners comprising it disciplined the player by not signing him. Moreover, what Kaepernick experienced can be traced to the intolerance of a society divided sharply with respect to its stance against civil and human rights violations during a dire period.

Likewise, in Turkey, the period in which an unorthodox expression is conveyed may directly affect the manner that it is dealt with. In a relatively calm period for Turkish politics, footballer Özgür Nasuh received a two-match suspension from the Turkish Football Federation for unsporting behaviour due their not facing the Turkish flag during the playing of the national anthem before a domestic match.[120] On the other hand, periods where fundamental rights of the individuals are curbed, and to be precise after the Turkish Armed Forces started an operation in the south-eastern part of Turkey, the magnanimous stance of the Turkish Football Federation changed.

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[117] It has to be noted that a previous symbolic counter-speech against the national anthem was executed by African-American NBA player Mahmoud Abdul-Rauf. The player's non-attendance to the pre-match ceremony resulted in a suspension without pay which lasted one match. The expression stemmed from the player's invocation of teachings of Koran, and thus should be analysed from the religion leg of freedom of conscience and employment law. This being the case, the compelled speech and the sanction can be seen as an intervention to the moral powers of the player. KB Koenig, 'Mahmoud Abdul-Rauf's Suspension for Refusing to Stand for the National Anthem: A "Free Throw" for the NBA and Denver Nuggets, or a "Slam Dunk" Violation of Abdul-Rauf's Title VII Rights?' [1998] 76:1 Washington University Law Quarterly 377, 383-384.

[118] In its statement the NFL indicated that "[p]layers are encouraged but not required to stand during the playing of the national anthem". S Wyche, 'Colin Kaepernick explains why he sat during national anthem' (*NFL Website*, 27 August 2016) <http://www.nfl.com/news/story/0ap3000000691077/article/colin-kaepernick-explains-why-he-sat-during-national-anthem> accessed 20 August 2019.

[119] To add insult to wound, Miami Dolphins signed a white player out of retirement despite the fact that Kaepernick had better statistics. LR McNeal, 'From Hoodies to Kneeling during the National Anthem: The Colin Kaepernick Effect and Its Implications for K-12 Sports' [2017] 78 Louisiana Law Review 145, 160 (footnote 66).

[120] Turkish Football Federation Board of Appeals Decision 2009/650 E 2009/621 K of 17 November 2009.

In concrete, Deniz Naki, a Kurdish footballer, was first suspended for twelve matches for 'ideological propaganda'. Naki had posted on their social media account after a win stating '[w]e dedicate this victory as a gift to those who have lost their lives and those wounded in the repression in our land which has lasted for more than 50 days'.[121] The dedication came in the midst of the Turkish Armed Forces' operations in the south-eastern provinces of Turkey. Later, following the Turkish Armed Forces' incursion into Syria in order to fight against the Kurdish militants (People's Protection Units-YPG), through social media, Naki called for people to join in a rally in the German city of Cologne. The footballer was fined € 58.000 and was banned for three years—meaning an automatic life-time ban—on the grounds of 'separatist and ideological propaganda'.[122] Consequently, in challenging times, national SGBs may take strict measures to maintain the dominant viewpoint in their jurisdiction. At the same time, they feed this viewpoint through rituals and, as in the case of the Turkish Football Federation President's support for President Erdoğan in the lead up to the referendum that was referred to above, they also show overt support for the political status quo.[123]

Finally, it can be claimed that Azerbaijan's sponsoring of Spanish club Atlético de Madrid is an intriguing example in depicting both national and international SGBs' condoning of political expressions when they are presented in the guise of commercial speech. Azerbaijan became the main shirt sponsor of the club in the 2012/2013 Season[124] along with other spaces where the advertisements would be visible. During the sponsorship, the content of the sponsor area of the shirts and other spaces changed in line with the projects Azerbaijan undertook. The club officially announced that the project's aim was to 'promote the image of Azerbaijan'.[125] It can be claimed that the success of the team in both national and European competitions indeed

[121] The Guardian Website, 'Turkish player handed 12-match ban for 'ideological propaganda' on Facebook' (5 February 2016) <https://www.theguardian.com/football/2016/feb/05/turkish-player-12-match-ban-ideological-propaganda> accessed 20 August 2019.

[122] Deutsche Welle Website, 'Turkey bans Deniz Naki from professional football' (30 January 2018) <http://www.dw.com/en/turkey-bans-deniz-naki-from-professional-football/a-42370473> accessed 20 August 2019.

[123] Turkish Football Federation Website, '2. Futbol Zirvesi Sona Erdi' [The 2nd Football Summit has ended] (20 March 2017) <http://www.tff.org/default.aspx?pageID=285&ftxtID=26793> accessed 20 August 2019.

[124] Atlético de Madrid Website, 'El Atlético renueva su acuerdo con Azerbaijan' [Atlético renews its agreement with Azerbaijan] (1 March 2014) <https://www.atleticodemadrid.com/noticias/el-atletico-renueva-su-acuerdo-con-azerbaijan> accessed 20 August 2019.

[125] Atlético de Madrid Website, 'Azerbaijan: Official Atletico Sponsor - Much more than a sponsorship' (13 November 2013) <http://en.atleticodemadrid.com/noticias/much-more-than-a-sponsorship> accessed 20 August 2019.

promoted the image of a country which is infamous for its poor democracy record and widespread corruption.[126] In essence, La Liga and UEFA both condoned political expressions sponsored by Azerbaijan by approving shirts and advertisements bearing the name and slogan of the country. Therefore, although a country with a low rank in democracy can manage to create a brand, communicate with the public, and create visibility through commercial speech, an expression against the ruling elite of this country within a stadium would be deemed political and thereby sanctioned.

4.5.4 Summary

In view of the aforementioned examples, it has to be asserted that sport is not neutral as it has close links to the public feeling, the political status quo and the policies on both national and international levels. In sport, common identity is produced, reproduced and presented by institutions that are protected and supported by the nation state. In exchange, national and international SGBs, by means of regulations that aim for the sustenance of alleged neutrality of sport and its components, neutralise expressions that would tarnish this process. Moreover, the nation state is encouraged to polish and market itself as a brand. Yet, at the hands of the SGBs dissenting voices against the nation state and their brands are silenced in line with the national and international policies of the states. By sanctioning dissenting expressions despite fostering nationalistic tendencies of sport and its followers, the SGBs assist the states in their domestic and foreign policies. The assistance comes at a steep price. Moral powers and dignity of individuals as speakers and recipients, in particular those of the dissenters, are eroded through coercive power. In essence, a difference in status is created between speakers who conform to the dominant viewpoints of the status quo and those who do not. In creating a difference between the expressions as well as the individuals who speak in line with their moral powers, the SGB move away from the idea of articulate consistency. That is, they do not treat like cases alike, despite the contents of the expressions and the intentions of the speakers are the same. More importantly, as in the cases of Tommie Smith, John Carlos, Colin Kaepernick and Deniz Naki, the dissenting voices are removed from the production process of sport indefinitely.

[126] JS Krzyzaniak, 'The soft power strategy of soccer sponsorships' [2018] 19:4 Soccer & Society 498, 505.

4.6 Preassigned Roles

4.6.1 Overview

It can be maintained that, the SGB's production and interpretation of the nature of the game lead to an assignment of roles regarding stakeholders and spectators alike. In the current shape of things, athletes are mostly aimed to be positioned within society as depoliticised role models who must keep out of politics and as a result avoid activism. On the other hand, the spectators, as consumers, are expected to refrain from engaging in non-conforming political expressions while in and around the sports venues. Therefore an analysis of the role of athletes (with the possibility to extend it to other stakeholders) and spectators/audiences should be made. In this respect, the focus will be on Richards' arguments regarding the preassigned role of a person and its negative impact on personal judgment, self-reflection and will.[127] The crucial point is that the depoliticisation of sport has a detrimental effect on the ideal of equal concern and respect for individuals.

4.6.2 The Athlete: 'Additive Identity'

On the athletes' side of things, the regulations laid down by SGBs position the athlete as a depoliticised individual. In most cases, they cannot make political statements within sports facilities, and outside them, they are expected to make them responsibly.[128] The main question is with regards to the way they lose their ability to express their will.

If it is accepted that athletes should not lose their freedom of expression when creating a contractual relationship with an SGB or entering a sports venue, then the regulations prohibiting them from conveying political messages in sports venues would run contrary to that. On the one hand, for international competitions that include delegations from different countries, the loss of

[127] Richards *Toleration and the Constitution* (n 5) 71-84.

[128] In order not to take a casuistic turn, expressions that are conveyed near sports venues but in extraordinary situations such as at an after-party or two-days before a competition starts are not elaborated. For the after-party example *see* CAS 2014/A/3519 *Arnaud Di Benedetto v Fédération Internationale de Touch (FIT)* & CAS 2014/A/3520 *Bastien Cotte-Barrot v FIT*; for the second example *see* CAS 2016/A/4558 *Mitchell Whitmore v International Skating Union (ISU)*.

the right to freedom of expression inside the sports venue, during the event[129] or in the case of the IOC on social media during the Olympic Games[130] is almost absolute. On the other hand, in the context of club competitions athletes have employment contracts, and the sports venue is among their workplaces.

Concerning the employment relationship between the clubs (or the teams and joint ventures as in the case of collective bargaining agreements, or as in some cases the national teams) and the athletes, the employment contract's impact on freedom of expression differs from jurisdiction to jurisdiction. For example, while in the US, the athletes, unless the entity they are part of is a public entity, are left out of the scope of First Amendment Protection as they have collective bargaining agreements and contracts with private persons and the observation of this freedom is subject to their being present in the said documents or the violation of federal and state statutes.[131] On the European side of the Atlantic, the ECtHR has indicated that Article 10 may be invoked in the employment contracts with private institutions.[132] Nonetheless, in any case, due to the moral foundations of freedom of expression defended in this work and following Dworkin's contentions on the waiver of the right to speak via employment contracts signed with government agencies, one could claim that the right to speak should not be a part of a bargain between SGBs and the athletes, because it hampers the dissemination and receiving of information and stops the athletes from being in equal standing with their peers.[133]

[129] Before 2014 Sochi Winter Olympics, the President of the IOC indicated that the athletes were free to make political statements at the press conferences but not while competing or during victory ceremonies. On the other hand, FIFA has a stricter approach. F Faut, 'The Prohibition of political statements by athletes and its consistency with Article 10 of the European Convention on Human Rights: speech is silver, silence is gold?' [2014] 14:3-4 The International Sports Law Journal 253, 254; FIFA, 2018 FIFA World Cup Russia Regulations, art 24 (1) and 48 (1) <https://resources.fifa.com/image/upload/2018-fifa-world-cup-russiatm-regulations-2843519.pdf?cloudid=ejmfg94ac7hypl9zmsys> accessed 20 August 2019.

[130] IOC Social and Digital Media Guidelines for persons accredited to the XXIII Olympic Winter Games PyeongChang 2018, art 1 (b) <https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/Games/Winter-Games/Games-PyeongChang-2018-Winter-Olympic-Games/IOC-Social-and-Digital-Media-Guidelines/PyeongChang-2018-Social-Media-Guidelines-eng.pdf> accessed 20 August 2019.

[131] B Bramhall, 'An Employment Stance on Taking a Knee' [2017] 27:2 Journal of Legal Aspects of Sport 109, 111-115; L Kurlantzick, 'John Rocker and Employee Discipline for Speech' [2001] 11 Marquette Sports Law Review 185, 187-193; T Zick, 'Managing Dissent' [2018] 95 Washington University Law Review 1423, 1450-1451.

[132] Barendt referring to *Fuentes Bobo v Spain*, (2001) 31 EHRR 50. Barendt (n 1) 488.

[133] R Dworkin, *A Matter of Principle* (OUP 1986) 393-397.

Society, too, assigns athletes the role of depoliticised individuals. Those who wish to go beyond the preassigned role consider it necessary to declare that they are 'more than an athlete', as in the case of LeBron James, when they are reminded of their role by commanding them to 'shut up and dribble'.[134] In an age when social media allow people to directly engage with athletes, society's impact on the way the athletes present themselves becomes even more important. For example, when Scottish tennis player Andy Murray took sides in the 2014 Scottish independence referendum with a tweet, the public was quick to condemn the athlete with negative and abusive comments. These resulted in Murray expressing regret for supporting Scottish independence and promising to refrain from making political comments in the future. Other athletes who also took sides in the referendum met with equally abrasive comments.[135]

As heroes/entertainers, the fact that athletes are shown affection by the public not because of their political stances but because of their ability to entertain, renders them vulnerable to backlashes due to their expressions. The underlying reason is that the economic logic-driven commodification of athletes starts not in the athletes' political stance, but their sporting prowess. Accordingly, in its capacity as an aggregate of consumers, the public wields great power over how the producers and the product should be. That is, if sport competitions are not produced by likable entities and individuals then these competitions' brand images—along with that of the entertainers—may suffer, leading to a decrease in the perception and engagement of the consumers.[136] In essence, it is not in the SGBs' interests to associate with 'unlikable' producers, because economic logic demands so.

Leaving aside the question as to the instrumentalisation of their colour in the designation of a position within a given society,[137] another way of legitimising the one-dimensional athlete is the notion of 'role model'. It can be claimed that society's expectations from an athlete to act as a role model—and not cross the red-lines that come with it—limits their choices in the utilisation of their moral powers unless the said role is voluntarily accepted or introduced by the athlete in

[134] D Cole, 'LeBron James: 'I am more than an athlete'' (*CNN Website*, 17 February 2018) <https://edition.cnn.com/2018/02/17/politics/lebron-james-laura-ingraham-kevin-durant/index.html> accessed 20 August 2019.

[135] Whigham and others (n 85) 227-229.

[136] SH Schmidt and others, 'An Experimental Examination of Activist Type and Effort on Brand Image and Purchase Intentions' [2018] 27 Sport Marketing Quarterly 31, 33-34 and 38-39; Volokh (n 39) 1423-1426.

[137] C King, *Offside Racism: Playing the White Man* (Berg 2004) 116-117.

the first place.[138] The limits are drawn widely to include both the on-field activity and the personal lives of athletes, because the role of the individual as an athlete spills over to their lives' other aspects.[139] In the case of political expressions and activism, it has to be emphasised that diametrically opposite beliefs such as 'the athlete ought not be political' and 'the athlete ought to be political'[140] lead to the same result where outside forces other than the athlete cast a role for the athlete, compelling certain kind of behaviour. To be precise, while the former compels the athlete not to express themselves, the latter compels them to do so. Either way, due to their preassigned role in the eyes of the society, the moral powers of athletes are overruled.[141]

Consequently, the athletes are put in an unequal position when compared to non-athletes, and at the hands of the SGBs they lose their right to be treated with equal concern and respect, because they are assigned the role of depoliticised entertainer. The SGBs' prohibitions and the perceptions of society have negative implications on the athletes' two moral powers. In that, they are preassigned a role due to their occupation, a role that is incompatible with the idea of expressing and revising claims with its own judgment, self-reflection and will. In the same manner, their dignity is compromised due to 'popular opinion',[142] which assigns certain members a role that brings about fewer rights than the persons on the other strata of society.[143]

It can be claimed that, following Zirin, the pressure is a continuation of previous practices that lead people to command Muhammad Ali to 'shut up and box'.[144] The depoliticisation of the athlete helps to ensure the maintenance of hegemony and the role of sport as 'a cultural

[138] E Spurgin, 'Hey, How did I become a Role Model? Privacy and the Extent of Role-Model Obligations' [2012] 29:2 Journal of Applied Philosophy 118, 121-124.

[139] R Feezell, 'Celebrated Athletes, Moral Exemplars, and Lusory Objects' [2005] 32:1 Journal of the Philosophy of Sport 20, 31-32.

[140] SE Klein, 'An Argument against Athletes as Political Role Models' [2017] 10 Fair Play. Revista de Filosofía, Ética y Derecho del Deporte 25, 28-35.

[141] Rorke and Copeland reach a similar conclusion via an existentialist take on the subject. Rorke and Copeland (n 100) 104.

[142] R Dworkin, *Taking Rights Seriously: New Impression with a Reply to Critics* (Duckworth 2005) 126-130.

[143] Kaufman and Wolff indicate that the athletes who participated in their interviews and are 'politically aware' tend to feel that 'the notion of being an apolitical athlete is insulting and degrading'. P Kaufman and EA Wolff, 'Playing and Protesting: Sport as a Vehicle for Social Change' [2010] 34:2 Journal of Sport and Social Issues 154, 166-167.

[144] D Zirin, 'Serena Williams Is Today's Muhammad Ali' (*The Nation Magazine Website*, 14 July 2015) <https://www.thenation.com/article/serena-williams-is-todays-muhammad-ali/> accessed 20 August 2019.

ideological outpost' by neutralising one of the potential (and powerful) spearheads of counter-hegemonic activity.[145] This situation calls for the confirmation of Dworkin who has stated, '[political equality] supposes that the weaker members of a political community are entitled to the same concern and respect of their government as the more powerful members have secured for themselves […]'.[146] Yet, the depoliticisation of the athletes maintains SGBs' hegemony and their claim to infallibility. Here, a paradoxical situation appears where the 'heightened influence on the conduct of others'[147] granted to the role model is neutralised and used against the athlete/role model when the question of politics arises. Moreover, as broached earlier, the policies of SGBs, which are in line with the domestic and foreign policies of the states along with the status quo in the international stage, are rendered immune from this type of challenge.

4.6.3 The Spectator: 'Multiplicative Identity'

It can be claimed that the moral powers of spectators as speakers and their role in modern sport have a multi-layered relationship. By entering the venue (or the moment they enter a contractual relationship to buy a ticket), the spectators shed their right to expression.[148] From then on, they are bound by the SGBs' regulations and ticket terms and conditions[149] prohibiting them from communicating certain political expressions. In concrete, the 'PyeongChang 2018 Winter Olympics Ticket Terms and Conditions' prohibited the possession of 'banners, printouts, ropes, protest banners, clothing, etc. with phrases and paintings that express racial, religious, political, commercial or other propaganda that violate the Olympic Charter, public order, and common public sensibilities'.[150] Similarly, although the supporters are allowed to possess '[n]ational

[145] Cooper and others (n 96) 160 and 173-174.

[146] Dworkin *Taking Rights Seriously* (n 142) 198-199.

[147] Feezell (n 139) 21-22.

[148] FIFA Stadium Safety and Security Regulations 2013 Edition, art 60 <https://resources.fifa.com/image/upload/-515398.pdf?cloudid=xycg4m3h1r1zudk7rnkb> accessed 20 August 2019.

[149] B van Rompuy and T Margoni, 'Sports organizers rights in the European Union' (EAC/18/2012, 2014) 27 <http://ec.europa.eu/sport/news/2014/docs/study-sor2014-final-report-gc-compatible_en.pdf> accessed 20 August 2019.

[150] IOC, PyeongChang 2018 Terms & Conditions of Ticket Purchase, Possession and Use, 'Spectator Policy' 2.1.7 <https://library.olympic.org/Default/doc/SYRACUSE/171868/pyeongchang-2018-terms-conditions-of-ticket-purchase-possession-and-use-the-pyeongchang-organising-c?_lg=en-GB> accessed 20 August 2019. A similar approach is present in the UEFA EURO 2020 General Public Ticketing Terms and Conditions article 9.2 which provides that '[i]t shall be strictly forbidden inside the Stadium to express, to disseminate of any insulting, racist, xenophobic, sexist (relating to either men or women), religious, political or other illegal/prohibited messages, particularly discriminatory propaganda messages or being in possession of such material.

flags of the registered countries for the [Olympic] Games',[151] national flags of countries that are not registered to the Olympic Games cannot be unfurled. Here, the difference between the coercive power against the stakeholders and spectators is that unlike the position of the stakeholders, the coercive power of SGB does not amount to banning or fining. The coercive power in this case is the refusal to provide services to the individual. Furthermore, state's coercive power is felt through the threat of 'arrest and/or prosecution by the relevant authorities' in the cases where the spectators violate the terms and conditions.[152] Thus, not all viewpoints are equal.

From the vantage point of the spectators, sport is spectatorial and this characteristic has links to commercialism, commodification and controlled behaviour.[153] Accordingly, it can be asserted that the SGBs desire 'tame and obedient'[154] consumers/citizens within sports venues. The consumers are tame and obedient rather than 'passive', because they are allowed to cheer their favourite teams or athletes. At the end of day, emotions have a positive effect on the consumption of sport and on national identification through sport.[155] Accordingly, in UEFA's view, '[s]pectators are expected to encourage their teams by singing and shouting and to create a positive atmosphere in the spirit of fair play'. They also should applaud the opposition, create choreographies, sing supportive songs despite disappointing score, and give a standing ovation to the opponent.[156] Yet, these must be done with a view to reproducing the political coin of the realm, and the requirements of the market[157]—under the guidance of political and economic logic. Finally, as obedient spectators they are expected 'to turn on the perpetrators [of racist conducts] and to help to combat racism by helping the Police and the association identify the perpetrators, so they can be banned'. Disobedience results in not being able attend the matches

<https://www.uefa.com/MultimediaFiles/Download/competitions/Ticketing/02/58/34/40/2583440_DOWNLOAD.pdf> accessed 20 August 2019.

[151] PyeongChang 2018 Terms & Conditions of Ticket (n 150) 'Spectator Policy' 2.1.7.

[152] ibid 2.1.

[153] J Horne, *Sport in Consumer Culture* (Palgrave Macmillan 2006) 42.

[154] Broudehoux (n 63) 46.

[155] *See generally* Mutz and Gerke (n 62).

[156] UEFA Fair Play Regulations 2015 Edition, art 10 <https://www.uefa.com/MultimediaFiles/Download/uefaorg/Respect/02/24/29/20/2242920_DOWNLOAD.pdf> accessed 20 August 2019.

[157] M Guschwan, 'Stadium as Public Sphere' [2014] 17:7 Sport in Society 884, 896.

organised under the auspices of certain SGBs.[158] Consequently, economic and political logic dictate the terms for not only the SGBs and the athletes, but also the spectators to whom the game—as a product—is intended for. One cannot escape either type of logic in the production and consumption of sport.

As a result, in parallel to the contentions regarding athletes, it should be claimed that the desire to cater solely to tame consumers as well as the desire to tame consumers are against the moral powers of the spectators. The spectators—and by analogy the audiences that follow sports events from their devices—have to be seen as persons whose sole aim in attending sports competitions is not the consumption of entertainment 'together' and as 'one' or as 'one world' with 'one dream'.[159] The 'commercial consumption qua mass spectatorship as a normalized mode of participation', which is inherently linked to the branding of events, symbols and the SGBs[160] should not be guides for behavioural control. Closely related to this, economic and political logic should not become vessels for overriding the moral powers of everyone involved. While it is understandable that the SGBs would like to 'not associate' with expressions that might be to the detriment of its brand, and thus would like to defend its financial interests, the fact that they lack articulate consistency taints their practices. Moreover, even if there was articulate consistency and that all political expressions were restricted, this would not have changed the fact that the maintaining of the status quo is to the advantage of the nation state and the transnational networks of power.

4.7 Weighing Interests

Since the positions of SGBs, the market and the state, the relationship between them, as well as the preassigned position the athletes and the spectators are put into context, it is the ideal time to analyse one of their cumulative consequences. The SGBs have certain interests which have intricate links with their aims and values, and in essence, their autonomies. The importance of

[158] CAS 2013/A/3094 *Hungarian Football Federation v Fédération Internationale de Football Association (FIFA)* Reported in CAS Bulletin 2014/2, 100-103.

[159] The slogan for the 2008 Beijing Olympic Games was 'One World, One Dream' while Turkey's and Germany's 2024 UEFA European Football Championship bid slogans were 'Share Together' and 'United by Football. In the Heart of Europe' respectively. Finally, the slogan for the 2024 Paris Olympic Games is 'Made for Sharing'.

[160] M Heine, 'Olympic Commodification and Civic Spaces at the 2010 Winter Olympic Games: A Political Topology of Contestation' [2018] 35:9 The International Journal of the History of Sport 898, 900-901.

interests becomes tangible in cases where an expression is uttered or conducted in a sport setting. When stakeholders and spectators express themselves on a restricted subject, in a restricted manner or if the content of the expression is seen as an infringement to the SGBs rules and regulations, there would be a clash of interests. The interests clashing are that of the SGBs and the legal or natural person that is the target of the disciplinary process.

4.7.1 Sport Governing Bodies

Due to the claim that autonomy is linked to interests, there should be a further claim that interests have designated values. Put this way, this situation and the weighing that follows seem highly abstract. The picture that depicts the weighing of interests becomes even blurrier when arguments emphasising the harm caused by the expression, the interests of the parties and the costs and benefits of the expression are taken into account.[161] In order to concretise these points Lindholm's argument would be useful. Lindholm has asserted that when sanctions for political expression by an athlete is made a subject '[t]he circumstances in the individual case and the relative weight of the interests of the athlete and the sport governing body must be considered and balanced against each other'.[162] As will be argued in the next two chapters, the context and content of the expression, in certain cases, should lead to a restriction or sanction. Nonetheless, the weighing and balancing part is untenable, because probable or actual damages dealt by an expression would always pave the way for the SGBs interests to outweigh that of the stakeholders, spectators and audiences—both in their positions as speakers and listeners.

The basis of the assertion just made is that since the SGBs make up the main components of the production of sport competitions due to their bringing together of competitors and teams, any damage to the brand of the competition or that of the SGB would have a detrimental effect on all those who compete in and invest in the competition. Therefore, the interests of the SGBs, since they are thought to represent the interests of the stakeholders—as in the Pechstein case which was presented in the previous chapter—would always outweigh the interests of the individual or the few. Furthermore, as indicated in Section 2.4 in the analysis of the arguments

[161] J Rubenfeld, 'The First Amendment's Purpose' [2001] 53 Stanford Law Review 767, 778 ff. For a reply to Rubenfeld and a defence of the cost-benefit analysis with the help of pragmatism *see* R Posner, 'Pragmatism Versus Purposivism in First Amendment Analysis' [2002] 54 Stanford Law Review 737, 737-745.

[162] J Lindholm, 'From Carlos to Kaepernick and beyond: athletes' right to freedom of expression' [2017] 17:1-2 The International Sports Law Journal 1, 2.

from autonomy and self-fulfilment, the competent agency doing the valuing and weighing is the decider, because there has to be an institution that should designate the interests and their values. However, the fact that SGBs themselves adjudicate on the expressions of stakeholders and spectators within their jurisdictions skews the process to their advantage. In essence, the agency whose interests are at stake does the weighing and balancing. The underlying reason for this aversion—which is informed by the suspicion of governance—is that the brand of the SGB or the competition tends to be designated as a vital interest of utmost value by the deciding agency.

In the cases of the NBA, MLB, NFL and NHL, commissioners use their broad discretion with a view to safeguarding the 'best interests' of the joint ventures.[163] For example, the NBA Commissioner has the power to suspend and/or fine players if they make a statement with 'an effect prejudicial or detrimental to the best interests of basketball or of the [NBA] or of a Member'.[164] In the case of other SGBs the full force of the agency doing the weighing and balancing is felt. The CAS supports this claim by its deference to freedom of association. In a case regarding the suspension of an Olympic athlete due to the material used in their bid to become a member of the IOC Athlete's Commission, the CAS put forth that:

> This Panel submits that such self-restraint is especially warranted in the situation at hand, where the freedom of an association to organize itself, setting the procedures for the election of its bodies and monitoring the observance of the rules adopted for that purpose, is at stake. The rules established by an association under Swiss law with respect to its organization pursue an interest of the association, which prevails over the individual interest of a member.[165]

Fortifying the interests of the SGBs, the CAS is of the opinion that when the regulations of the SGB are worded so, broadly drawn-up regulations which aim to protect their interests would be

[163] McKinny (n 111) 234-236.

[164] NBA Constitution and By-Laws 2018 Edition, art 35 (d) <https://ak-static.cms.nba.com/wp-content/uploads/sites/4/2018/10/NBA-Constitution-By-Laws-October-2018.pdf> accessed 20 August 2019.

[165] CAS 2012/A/2913 *Mu-yen Chu & Chinese Taipei Olympic Committee v International Olympic Committee (IOC)*, para 114 (citation omitted).

able to protect even remote ones.[166] Worse, fundamental rights may be discriminated against provided that the norms enabling them 'are necessary, reasonable and proportionate for the purposes of establishing a level playing field […]'.[167] At this point, it has to be reminded that the interests of the SGBs are backed by their adjudicative powers over the stakeholders' behaviour, where unless a procedural error takes place or the decision is deemed to be unfair[168] decisions of the competent bodies of the SGB are immune from state authority. Furthermore, from the CAS's point of view, only 'evidently and grossly disproportionate' decisions of SGBs would be unlawful.[169]

4.7.2 The State

Another aspect of the weighing concerns the interests of the individuals and the state. In addition to the benefits of sport to the state in general—of which the arguments presented in this sub-section may be applied by analogy—, in this instance the perceived positive effects of mega-events come to the forefront. In concrete, the bidders for mega-events are motivated primarily by economic factors, which are usually based on overly optimistic and biased data.[170] Simply put, the bids are defended on the grounds that the economic benefits will surpass the expenditures, which in most cases, is fallacious.[171] On the more abstract side, mega-events are supported by states due to their being a source of 'soft power'[172] and a way to improve and restore the states' or the cities' brand images.[173] They also have a role in 'put[ting] the country (or city) on the map'.[174] Tangible and intangible positive—if any—residues of the mega-events

[166] CAS 2016/A/4558 *Mitchell Whitmore* (n 128) para 62.

[167] CAS 2014/A/3759 *Dutee Chand v Athletics Federation of India (AFI) & The International Association of Athletics Federations (IAAF)*, paras 443 and 450.

[168] *See* Section 1.2.2.

[169] CAS 2012/A/2913 *Mu-yen Chu* (n 165) para 113.

[170] J Horne, 'The Four 'Knowns' of Sports Mega-Events' [2007] 26:1 Leisure Studies 81, 85-88.

[171] Müller (n 109) 635-637.

[172] A term coined by Nye; it is utilised to get others to desire the outcome one desires through not threat and coercion, but shaping others' preferences through inducement and attraction. JS Nye, *Soft Power: The Means to Success in World Politics* (Public Affairs 2004) 5-6.

[173] J Grix and B Houlihan, 'Sports Mega-Events as Part of a Nation's Soft Power Strategy: The Cases of Germany (2006) and the UK (2012)' [2014] 16 The British Journal of Politics and International Relations 572, 578-581; E Avraham, 'Hosting Events as a Tool for Restoring Destination Image' [2014] 8:1 International Journal of Event Management Research 61, 61-66.

[174] VA Matheson and RA Baade, 'Mega-Sporting Events in Developing Nations: Playing the Way to Prosperity?' [2004] 72:5 The South African Journal of Economics 1085, 1085.

are hailed as their 'legacy'.[175] In a sense, the opportunity to organise such an event is seen as a peaceful way of flexing the muscles of developed and developing states. More importantly, in the process of bidding and hosting them, mega-events may be perceived as a 'national goal',[176] and worse, those against them may be deemed 'either unpatriotic, naysayers, or prisoners of unacceptable ideologies'.[177] The 2016 European Football Championship in France was even instrumentalised as a political message directed at the terrorist threat in the wake of the 2015 terrorist attacks, showing that 'France remained France'.[178] Consequently, the states undertake projects and investments in order to ensure the achievement of pre-set tangible and intangible goals.

Furthermore, when the sports-loving populace, whose 'personal preferences' point out to their enjoyment of the games or 'external preferences', which prefer the enjoyment of others, or a combination of the two are taken into account, the sport and soft power policies of the state will prevail over the rights of individuals. As in Dworkin's example of citizens' preference of swimming pool to theatre, the preferences of citizens who wish to watch their favourite athletes, or feel proud of the mega-event organisation and sporting achievements of their nation would be reason enough to outweigh the autonomy of individuals.[179] It can be claimed that one's getting pleasure from watching sport, or feeling proud of their country and nation or their country soft-power, organisational and economic abilities or sporting achievements are not reasons enough to overrule the autonomies of the persons who do not harbour these feelings. Furthermore, following Richards, it should be pointed out that equal concern and respect for autonomous individuals is not based on their lower order ends such as desires, feelings or pleasure, but on their higher order moral powers.[180] So, a claim to equality on the basis of utilitarian weighing of desires and preferences is bound to fail. Consequently, state policies setting out 'collective goals' (or 'national goals' as in the case of Turkey) stifle the principles establishing the individuals'

[175] A Tomlinson, 'Olympic legacies: recurrent rhetoric and harsh realities' [2014] 9:2 Contemporary Social Science 137, 137-142; Horne 'The Four 'Knowns' of Sports Mega-Events' (n 170) 86.

[176] EURO 2016 Bid Evaluation Report 'Turkey' 8 <https://www.uefa.com/MultimediaFiles/Download/MediaRelease/uefaorg/MediaReleases/01/48/83/27/1488327_DOWNLOAD.pdf> accessed 20 August 2019.

[177] HH Hiller, 'Assessing the Impact of Mega-Events: A Linkage Model' [1998] 1:1 Current Issues in Tourism 47, 48.

[178] V Divišová, 'Euro 2016 and its security legacy for football supporters: a conceptual blurring of hooligans and terrorists?' [2019] 20:5 Soccer & Society 757, 761.

[179] Dworkin *Taking Rights Seriously* (n 142) 234-238.

[180] DAJ Richards, 'Rights and Autonomy' [1981] 92:1 Ethics 3, 16-17.

right to express themselves. The trade-off realised in order to reach the collective goal supported by the external preferences of the populace is one-sided and to the detriment of freedom of expression of the individuals.[181]

When the interests of the individual and the mega-event organiser, the state or society are weighed against each other in the context of freedom of expression, a crudely utilitarian balancing of interests and autonomies would always favour the latter. The reason is that the benefits the mega-events will bring are assumed to be more important than the rights of the individuals whose expressions might hurt the interests of the state and society. The rights (as human rights or constitutional rights) of an individual simply cannot survive the balancing against the rights of many.[182] Accordingly, the interests of the many will be protected by the constitutional law of the state, overruling the human right to freedom of expression at the domestic level. Hence the adoption of a moral powers and equality-based account of freedom of expression that radiates to all jurisdictions, private or public.

4.7.3 Summary

In view of all these, in the clash of the interests of stakeholders, citizens and the SGBs the balancing of autonomies within the context of freedom of expression in sport would result in the individuals and the dissenters being on the losing side and the status quo on the winning side.[183] While Tasioulas contends that a non-utilitarian approach to interests in the context of human rights could be realised,[184] in sport the weighing of interests is unmistakably utilitarian. The tangible and intangible (perceived) positive externalities of sport competitions—including but not limited to the (supposed) social function of sport—rule out a just weighing. Economic logic pertaining to the opening up of new markets for the SGBs and their sponsors and the generation of income for them through mega-events are too tempting. That in the past decade the primary set of mega-event organisers came from emerging markets such as Brazil, China, Russia and South Africa,[185] as well as South Korea, supports this point. On the political logic side, the soft

[181] Dworkin *Taking Rights Seriously* (n 142) 90-93.

[182] Russell (n 43) 68.

[183] E Baker, *Human Liberty and Freedom of Speech* (OUP 1989) 130-131.

[184] J Tasioulas, 'Towards a Philosophy of Human Rights' [2012] 65 Current Legal Problems 1, 7-10.

[185] It is not surprising that except for India, these countries coincide with the BRICS countries. J Boykoff, 'Celebration Capitalism and the Sochi 2014 Winter Olympics' [2013] 22 Olympika 39, 50.

power to be attained and the sense of 'unity' to be injected to the population are important prime movers in the defence of mega-events. Therefore, the weighing of interests would always favour the state and SGBs, to the detriment of the moral powers of individuals as well as the equal concern and respect due to them. However, it has to be asserted that some kind of balancing can to be made if the rights' value for human liberty is taken into account,[186] if it is not made on purely utilitarian grounds,[187] and if the balancing is made between the individuals' rights.[188]

One might argue that the only way to undermine the position of the SGBs that is entrenched by their interests is the understanding of public order in the states that they reside in, or where the event takes place.[189] The courts might provide for a better-balanced confrontation between the dissenters on the one side and the state and SGBs on the other. For example, regarding the effects of the public policy doctrine, Nafziger contends that the athletes' human rights may be considered outside of the immunity due to a possible deviation from the Swiss public policy principles.[190] In support of this contention, it can be noted that, as depicted in Section 1.2.2, in the *Matuzalem* case the mobilisation and implementation of the notion of public order by the Swiss Federal Tribunal overruled the practices of FIFA. In addition to these, the CAS itself has underlined the importance of public policy in view of the rules and regulations of the SGBs.[191] However, the downside of triggering the idea of public order is that international SGBs might threaten the state with relocating to more accommodating countries,[192] in concrete to countries where the public policy doctrine is more in line with the policy of the SGB. Furthermore, the

[186] SJ Heyman, 'Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression' [1998] 78:5 Boston University Law Review 1275, 1353.

[187] 'For example, it could be argued that it is morally justified to break a promise to meet someone for lunch on the basis that one has to take his child to the doctor. But it is not justified to break the promise on the basis that the aggregated happiness of the promisor and others (for example, that of his child and his child's friends whom the promisor decides to takes to the park instead of keeping his promise) exceeds the unhappiness caused to the promisee by the breach'. G Letsas, 'Rescuing Proportionality' in R Cruft and others (eds), *Philosophical Foundations of Human Rights* (OUP 2015) 325. Also *see* Richards *Toleration and the Constitution* (n 5) 201-202.

[188] Dworkin *Taking Rights Seriously* (n 142) 199.

[189] BBC Website, 'Rio 2016: Brazil judge allows political protest at Olympics' (9 August 2016) <http://www.bbc.com/news/world-latin-america-37023425> accessed 20 August 2019.

[190] JAR Nafziger, 'Lex Sportiva' in RCR Siekmann and J Soek (eds), *Lex Sportiva: What is Sports Law* (TMC Asser Press 2012) 56.

[191] CAS 98/200 *AEK Athens and SK Slavia Prague v/ Union of European Football Associations (UEFA),* para 156.

[192] A Geeraert and others, 'A rationalist perspective on the autonomy of international sport governing bodies: towards a pragmatic autonomy in the steering of sports' [2015] 7:4 International Journal of Sport Policy and Politics 473, 475; Wai (n 46) 254-255.

notion of public order is notoriously ambiguous and its understanding differs from jurisdiction to jurisdiction.[193] The ambiguity would result in sacrificing the idea of articulate consistency to different interpretations of the notion in different jurisdictions. This is especially important and dangerous because public order that might be mobilised for the protection of rights might also be utilised to quash them by a totalitarian understanding of it.

4.8 Captive Audiences

So far, apart from the remark in the final paragraph of the Section 4.6.3 indicating that the arguments against the preassigned role of spectators would apply to audiences by analogy, freedom of expression of the speakers has been the primary focus. Nevertheless, the recipients' position in the conveying of an expression also has to be taken into account. In this context, the assertion '[n]o one has a right to impose even "good" ideas on an unwilling recipient'[194] would reflect the essence of the situation, as the listeners do not have to be open to communication at all times or at least to some ideas at certain times. While, as Wasserman has pointed out, it is limited in scope,[195] the US doctrine of the 'captive audience' will be set as a stepping stone towards creating a framework for the subject at hand since it will provide valuable theoretical basis in the analysis of the position of the recipients of expressions.

The key to the idea of the captive audience is that the recipients cannot ignore a certain message, image or sound[196] due to the characteristics of the forum in which the communication is

[193] The Swiss Federal Tribunal has summarised its position as, '[a]n award is incompatible with public policy if it disregards the essential and widely recognized values which, according to the prevailing view in Switzerland, should constitute the basis of any legal order (ATF 132 III 389, at 2.2.3). An award is contrary to substantive public policy when it is in breach of fundamental principles of substantive law to such an extent that it can no longer be reconciled with the decisive legal order and value system: these principles include, in particular, contractual fidelity, respect for the rules of good faith, prohibition of abuse of law, prohibition of discriminatory or confiscatory measures, and protection of persons lacking civil capacity. As the adverb "in particular" stresses, unambiguously, that the list of examples drawn up by the Federal Tribunal to describe the content of substantive public policy is not exhaustive, despite its constant presence in the case law relating to Art. 190 (2) (e) PILA'. Swiss Federal Tribunal, *X v International Federation of Association Football, 4A_260/2017 20* (English translation of the judgment). Reported in CAS Bulletin 2/2018, 156.

[194] *Rowan v Post Office Dept.* 397 US 728 (1970) 738.

[195] HM Wasserman, 'Cheers, Profanity, and Free Speech' [2005] 31:2 Journal of College and University Law 377, 378-380.

[196] *Lehman v City of Shaker Heights* 418 US 298 (1974) 307.

received.[197] If the recipients are able to avert their eyes,[198] to answer in the negative to a solicitation for donation, [199] or in any way avoid the receipt of the communication, they are not captive. However, if they are unable to avoid an expression then they are captive. The flexibility of the doctrine derives from the fact that it is implemented not just in public spaces, such as airports, buses and fairgrounds, but also in private spaces like the home.

4.8.1 Stakeholders, Spectators and Audiences as Captive Audiences?

One way to approach the subject at hand is to claim that the logic behind the doctrine of captive audience can be applied to sport. First, spectators are captive in a sports venue. Their bodies have to be in a position that would allow them to follow the play through their senses. They are captive in the sense that leaving the premises would result in missing the play or the outcome, or both. Second, athletes and other persons whose functions require them to remain in the venue are captive. They have to stay at places where the SGB commands them to be. The fact that they are in the field of play is of special importance, as the failure to be present or stay there would result in forfeiture if the absence is not sanctioned by the referee or the SGB itself. Finally, the audience following the event on their devices may be deemed captive in certain circumstances. The audience is unable to turn off the volume of its device if profane or discriminatory expressions are present—if it is not censored by the broadcaster[200]—or change the channel for a moment if there is an ongoing event outside play time. The characteristics of sport and the media utilised to follow the event make it difficult to ignore communication in some cases. In the case of chanting, turning off the sound of the radio would defeat the whole purpose of the radio. In the same lines, blacking out the television while political events or actions of a discriminatory or violent nature are unfolding in a live event would amount to the same thing. Moreover, continuous communications, such as a flag or banner on the stands, are inescapable, as they would appear in the frame whenever the play focuses on that area. Last, but not least,

[197] Supreme Court formulated this situation as 'so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it' (citation omitted). *Erznoznik v City of Jacksonville* 422 US 205 (1975) 212 (referring to *Redrup v New York* 386 (1967) 767 and 769.

[198] *Cohen v California* 403 US 15 (1971) 21.

[199] *Heffron v Soc'y for Krishna Consciousness* 452 US 640 (1981) 663 (footnote 2 of Brennan J., Marshall J. and Stevens J., concurring in part and dissenting in part).

[200] In Turkey, the broadcaster also lowers the volume of certain microphones and the broadcast if profane chants can be heard. Bein Sports Turkey Website, 'Fenerliler Misafirimiz Olsun' [Let Fenerbahçe Supporters Be Our Guests] <http://tr.beinsports.com/haber/fenerliler-misafirimiz-olsun> accessed 20 August 2019.

expressive allegiance of fans to teams and athletes[201] results in a situation where the fan is not able to avert what is going on. It is suggested that the bond between the fan and the team is at times greater than the bond between them and the religion, family and friends, which in turn makes consumer mobility lower.[202] It is also suggested that the strength of the bond creates 'a low cross elasticity in demand, which means that one form of sport product cannot easily be replaced by another'[203]which is acknowledged by the European Commission.[204] Consequently, a fan watching the event on a device cannot simply switch the channel and thus cannot bar the communication.[205]

4.8.2 Arguments against Captive Audiences in Sport

It can be maintained that the foregoing arguments might justify the ban on political expressions due to the fact that they may be directed to 'unwilling recipients'. Indeed, spectators, athletes and other persons performing a function in the venue and the audience following the event on their devices have the right not to be communicated unless they want to receive them. Nonetheless, the fact that spectators and audiences are captive does not automatically provide a reason for prohibiting political and personal expressions. SGBs already hold them captive.

There are various points arguing that the unwilling recipient thesis does not hold in respect to political expressions. Firstly, from the point of view of captive audiences themselves, as argued previously, stakeholders, spectators and audiences are exposed to 'symbolic speech' consisting

[201] B Gerrard, 'Competitive Balance and the Sports Rights Market: What Are the Real Issues' in C Jeanrenaud and S Késenne (eds), *The Economics of Sport and Media* (Edward Elgar 2006) 29.

[202] ibid; R Simmons, 'The demand for spectator sports' in W Andreff and S Szymanski (eds), *Handbook on the Economics of Sport* (Edward Elgar 2006) 79.

[203] ACT Smith and B Stewart, 'The special features of sport: a critical revisit' in S Söderman and H Dolles (eds), *Handbook of Research on Sport and Business* (Edward Elgar 2013) 530.

[204] 'When the major sporting event A is broadcast simultaneously with another major sporting event B, event A achieves (on average) the same audience as it does when event B is not available. For instance, there is evidence that the elasticity of demand in the UK for the Wimbledon finals with respect to the World Cup Football is very small, and probably zero. World Cup Football viewers do not appear to watch Wimbledon Finals, even when the world cup is not available'. Commission Decision 2000/400/EC, *Eurovision* (Case IV/32.150) [2000] OJ L 151/8, para 41 (footnote 11).

[205] This situation has led Chief Justice Burger to state that '[i]n this case, the mailer's right to communicate is circumscribed only by an affirmative act of the addressee giving notice that he wishes no further mailings from that mailer. To hold less would tend to license a form of trespass, and would make hardly more sense than to say that a radio or television viewer may not twist the dial to cut off an offensive or boring communication, and thus bar its entering his home'. *Rowan v Post Office Dept* (n 194) 737.

of expressions consolidating the nation state and its policies. As in the cases of the US Soccer Association, the NBA and NFL, stakeholders are coerced to show respect to the symbolic speech. In general, athletes, captive in their workplaces, are compelled to 'behave' under threat of sanction. Secondly, commercial speech in the form of announcements, advertising boards and other spaces allocated to the sponsor of the event, the club or the athlete are also expressions forced upon everyone involved.[206] The allocation of advertising time during the broadcast is also a way of bombarding the audience with commercial speech. Thus, if being captive to political expressions is something to be averted, then the same aversion should apply to the overwhelming effects of commercial speech during sports events. Thirdly, in normal circumstances, noise is an important factor for captive audiences. Yet, sport spectators and stakeholders alike are captive to crowd noises reaching 142 decibels[207] or instruments such as vuvuzela. Except in the case of sports like golf, these noises tend to be seen as an integral element of the atmosphere.[208]

Fourthly, if the question of captive audience is analysed solely from the exposition to (restricted) political or discriminatory remarks, then the analysis would be deficient, due to the fact that, as argued in the first and second points, they are already exposed to various types of unwarranted expressions. However, in effect, the restrictions are not viewpoint-neutral,[209] and as has been indicated throughout the work, the practices of the SGBs concerning freedom of expression lack articulate consistency. The selective interpretation in sport is that commercial expressions and the SGB-endorsed expressions have the advantage of being forced upon a captive audience while other political expressions and personal ones cannot. Beyond that, it can be argued that spectators and audiences shed their 'reasonable expectation of privacy' when

[206] An exception is the Olympic Games where within the venues advertising boards and equipment of athletes cannot contain any commercial expressions except the manufacturer of the item.

[207] Guinness World Records Website, 'Loudest crowd roar at a sports stadium' <http://www.guinnessworldrecords.com/world-records/loudest-crowd-roar-at-a-sports-stadium> accessed 20 August 2019.

[208] In the case of vuvuzelas, while FIFA condoned their use in the 2010 World Cup in South Africa, some SGBs banned them. S Kotlarsky, 'What's All the Noise About: Did the New York Yankees Violate Fans' First Amendment Rights by Banning Vuvuzelas in Yankee Stadium?' [2013] 20:1 Jeffrey S. Moorad Sports Law Journal 35, 35-36.

[209] The same kind of inequality can be witnessed in the jurisprudence of the US Supreme Court. Whereas an unsolicited 'erotically arousing or sexually provocative' mail sent to a home's mailbox was the catalyst in the court's protection of the privacy of the individual; the recipients of pro-nuclear views of the electric company in the monthly bill inserts mailed to their homes were not qualified as captive audience 'since customers may escape exposure to objectionable material simply by throwing the bill insert into a wastebasket'. *Rowan v Post Office Dept* (n 194); *Consolidated Edison Co. v Public Svc. Comm'n* 447 US 530 (1980) 542.

they enter the venue (in its wider sense) or tune in to a sport competition;[210] they become open for communication.

Finally, even though, as Lefever has concluded, the interests of the consumers and the citizens are different,[211] their status cannot be disambiguated as 'viewer as consumer' and 'viewer as citizen'. In the same sense, contrary to what Sunstein has argued, neither can the sovereignties of individuals can be distinguished as 'consumer sovereignty' and 'political sovereignty'.[212] This situation is especially clear when the viewer is tuned in to sports events which are both political and commercialised, and the case of Azerbaijan's sponsoring of Atlético de Madrid makes the disambiguation even harder. Sport strives to maintain the status quo and create a shared identity while trying to sell goods and services through the utilisation of emotions. Patriotic symbols are used to sell goods and services while the nation states open up or secure new mediums that corporations can then exploit.[213] The proposed compartmentalisation of the role of the audience does not apply to sports events, and thus sport audiences can be held captive by the speakers.

Consequently, stakeholders, spectators and audiences before their devices are captive in the context of sports events, and this situation may lead one to conclude that they should not be exposed to expressions on the part of the same stakeholders and spectators. Nevertheless, this conclusion would be deficient in the sense that individuals, whose right not to communicate is of concern, are already exposed to various expressions in the form of symbolic speech and commercial speech. The only difference with the two types of exposure is that in the former, the SGB does not allow unapproved expressions, while in the latter the expressions are approved and more importantly they are inured by the same captive audiences. Therefore, they do not have absolute protection from expressions that they are unwilling to hear; and accordingly non-conforming and dissenting expressions should be allowed regardless of whether the audience is captive or not.

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[210] GR Stone, 'Fora Americana: Speech in Public Places' [1974] The Supreme Court Review 233, 263-264 and 267.

[211] K Lefever, *New Media and Sport: International Legal Aspects* (TMC Asser Press 2012) 77-80.

[212] CR Sunstein, 'The Future of Free Speech' in LC Bollinger and GR Stone (eds), *Eternally Vigilant: Free Speech in the Modern Era* (The University of Chicago Press 2002) 293-294.

[213] For the South African experience before and during the 2010 FIFA World Cup *see generally* Louw (n 36).

4.9 Final Remarks

It can be maintained that the source of the regulations and practices of SGBs, in essence, curb the stakeholders' and citizens' moral powers both as speakers and recipients. The disregard for the moral powers of individuals along with the preassigning of roles to them is aggravated due to the partiality of SGBs. In brief, they are selective in their prohibition of expressions, which corrodes the equality between the speakers of conforming expressions and the ones that express non-conforming ideas and opinions. More worrisome is that the partiality derives from the inherent characteristics of sport which de-politicise the individual, but at the same time constantly reproduce, remind and entrench national identity, as well as national and foreign policies. As can be noticed in the analysis of the contradictory practices of SGBs, through the use of rules and regulations along with the consent of states, international SGBs act as a censor with regards to expressions that challenge the status quo. Therefore, in line with notion of the suspicion of governance, the utilitarian and self-preserving practices of the SGBs should be viewed sceptically, and their intentions should be analysed in a case-by-case basis.

Chapter 5 – The Limits of Protection

Arguments for freedom of expression are just one side of the coin, the other side being the arguments for its limits. In this chapter, moving on from the contention that an absolutist approach which objects to limitations to freedom of expression is untenable, arguments for limiting freedom of expression will be reviewed. Finally, the valuation and categorisation of expressions that provide the groundwork for leaving certain expression out of the scope of protection will be analysed. In the analysis of these subjects, their reflections on sport will be presented.

5.1 Absolutism

Absolutism is a product of a formalist and literalist reading of the First Amendment. According to this perspective, the government cannot restrict freedom of expression, because the government shall make 'no law' restricting it. The coverage of absolutism can be extended beyond the First Amendment,[1] but it can be claimed that in any jurisdiction an absolutist approach creates more problems than it solves. First, absurdities may arise if individuals are given *carte blanche*. As Berger has exemplified in a humorous manner, some kind of 'regulation' of expression which 'den[ies] someone the right to march into President Reagan's operating room when he was shot to deliver a polemic against the President's budget cuts' is a necessity.[2] Similarly, even Meiklejohn sees conforming to the necessities of the community as a requisite for political speech and agrees that citizens do not have an 'unlimited right to talk'.[3] Second, an absolutist approach does not explain the question of the interplay between expressions and laws on anti-trust, along with laws prohibiting perjury, fraud and copyright infringements.[4] Finally, ignoring the moral dimension of expressions would result in unwanted consequences where expressions are protected at the expense of the well-being of the individual, especially in face-to-face expressions.

[1] Article 10 (2) of the ECHR already foresees instances where freedom of expression may be curtailed. Therefore, absolutism is rejected at the outset.

[2] B Russell (ed), *Freedom, Rights and Pornography: A Collection of Papers by Fred R. Berger* (Kluwer 1991) 10.

[3] A Meiklejohn, 'The First Amendment is an Absolute' [1961] The Supreme Court Review 245, 261.

[4] SH Shiffrin, 'The Dark Side of the First Amendment' [2014] 61 UCLA Law Review 1480, 1483-1484.

In the case of sport, it has already been seen that absolutism is rejected outright by SGBs. Not being able to express certain viewpoints in sports venues and places linked to mega-events is the norm. That is, as reflections of a lack of articulate consistency, expressions not supporting the status quo are restricted by the SGBs or expiated by society, even though the ones supporting it are approved. It can be claimed that the criticisms directed to absolutism in general can be applied within the context of sport. This being the case, as will be noticed later in this chapter and the next chapter concerning hate speech, specificities arising from the production of sport competitions and the regulations governing the behaviour of athletes and spectators pave the way for particularities in the limiting of expressions. Judging from the above, an absolutist approach is both untenable and impractical.

5.2 Restricting Freedom of Expression

5.2.1 Restriction or Regulation?

Since absolutism is rejected by the commentators and SGBs, a step towards an analysis as to when, why and how freedom of expression may be curtailed has to be carried out. Before undertaking that project, a distinction should be made between 'regulation' and 'restriction'. It can be maintained that whereas the 'regulation' of expressions creates an orderly manner of discussion through the implementation of rules, the 'restriction' of expressions renders certain expressions out of the scope of protection of freedom of expression.[5]

As Berger has argued, the regulation of expressions is consistent with freedom of expression, and even fosters its goals.[6] In that sense, Barendt has gone one step further by saying that 'the regulation, and on occasion even the prohibition, of speech may be justified to protect the free speech rights of others'.[7] For example, regulating persons' 'having the floor', and accordingly getting their message across without fear of being interrupted are in the interest of both the

[5] J Rawls, *A Theory of Justice: Revised Edition* (Harvard University Press 1999) 178; J Rawls, *Political Liberalism: Expanded Edition* (Columbia University Press 2005) 295-296.

[6] Russell (n 2) 11.

[7] E Barendt, *Freedom of Speech* (2nd edn, OUP 2005) 49.

speaker and the recipients. However, expression must not be restricted through overregulation or abuse.[8]

The ideal example from sport—although it concerns commercial speech—would be UEFA's regulation and restriction of expressions on shirts. UEFA 'restricts' the advertising of tobacco, strong alcoholic beverages as well as slogans of political, religious or racial nature, or other expressions that may offend common decency, but 'regulates' commercial speech by allowing shirt sponsors that are not included in the said categories and limits the size of the sponsor advertising surface on the shirt.[9] They both give rise to coercive power since failure to comply with either restriction or regulation of commercial speech would result in a disciplinary charge against the club. However, whilst restriction renders certain expressions sanctionable *per se*; regulation allows the expression provided that certain conditions are met.

5.2.2 The Harm in Speech

With regards to the restriction of expressions, 'harm' and 'interest' are two of the staple words in the debate on limits of protection. Since Section 4.7 has already provided an in-depth argument against the utilitarian weighing of interests, this aspect of the discussion will not be further elaborated here. There, it was suggested that a purely utilitarian weighing of interests of the stakeholders and spectators against that of the SGBs and the nation states would always result in the former being restricted, in that, the interests of the SGBs and nation states in organising and competing in tournaments would override the interests of the one or the few.

Moving on to the 'harm' aspect of a call for restrictions, it should be pointed out that it has been one of the most important points of the discussion. The literature, including Mill[10] and Raz, has been aware that the presence or potential of harm due to an expression would be reason enough for rendering the speaker liable. It can be asserted that there are two aspects to harm: physical harm and psychological harm.

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[8] Meiklejohn (1961) (n 3) 252 and 257; DAJ Richards, *Toleration and the Constitution* (OUP 1986) 173.

[9] UEFA Equipment Regulations 2018 Edition, arts 5, 27 and 28 <https://www.uefa.com/MultimediaFiles/Download/Tech/uefaorg/General/02/56/52/75/2565275_DOWNLOAD.pdf> accessed 20 August 2019.

[10] JS Mill, *On Liberty and Other Essays* (J Gray ed, OUP 1992) 14 and 104.

Concerning the former, expressions that might cause irrevocable harm to the bodily integrity of persons,[11] animals or the environment should be restricted *per se*. Killing or maiming a person, destroying a building, burning a forest or damaging a unique item (eg an art piece or a religious relic) might have a communicative impact on the recipients, and yet they cause irrevocable physical harm on the 'means' or 'targets' of these expressions. As a result, they should be restricted. Likewise, the use of bodily fluids against another person in face-to-face situations warrants restriction, because these expressions corrode the moral powers of the targets. In view of these, in the case of sport, spitting, using flares, destroying equipment at sports facilities or throwing a rabbit onto the pitch and causing its death[12] should not be protected. The underlying reason is that these expressions 'directly' cause physical harm to the means and sometimes targets of the expression.

The case of RB Leipzig player Timo Werner's substitution in a Champions League match against Beşiktaş is an apt example showing how expression can cause 'direct' and 'physical' harm to the target. In the said match, noise created by Beşiktaş fans through whistling and chants created circulatory problems for Werner and led to their substitution on the 32th minute of the match.[13] There were no reports of Beşiktaş being charged for the conduct of their supporters even though their expressions physically harmed a player on the field. However, it has to be asserted that since a footballer, the prime stakeholder in football, was harmed, Beşiktaş should have been sanctioned. UEFA, in its position as the organiser and the overarching association, should have protected its stakeholder from direct physical harm.

On the psychological harm side of things, the problem with the focus on harm and offense the expression might create is that the lowest common denominator among the recipients becomes the determinant in restricting expressions. In this approach, the rest of the recipients become

[11] SJ Heyman, 'Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression' [1998] 78:5 Boston University Law Review 1275, 1317-1320.

[12] Hürriyet Spor Website, 'Tribünde tavşan vahşeti' [Violence against a rabbit in the stands] (04 January 2011) <http://www.hurriyet.com.tr/tribunde-tavsan-vahseti-16677627> accessed 20 August 2019 (reporting that supporters of Akhisar Belediyespor threw a rabbit on to the pitch during the match against Tavşanlı Belediyespor, causing its death. '*Tavşanlı*' means 'the place with rabbits' in Turkish).

[13] The Guardian Website, 'RB Leipzig's Werner 'feeling better' after Besiktas substitution due to crowd noise' (27 September 2017) <https://www.theguardian.com/football/2017/sep/27/rb-leipzig-timo-werner-besiktas-crowd-noise> accessed 20 August 2019.

slaves to the viewpoint of the least tolerant or the most susceptible to critical speech.[14] 'Sensibility harms', which include '[harms] that cannot be defined independently of the hearer's attitude', renders the speakers liable. This situation results in the bringing of the bar for harm even lower.[15] Here, Raz's aim to limit the coercion of a person—thus invading their autonomy—with a view to protecting 'the greater autonomy of others or even that person himself in the future'[16] does not solve the problem, but rather fosters it. It re-introduces the weighing of interests and autonomies of persons, which has been rejected by the work at hand.

In the context of sport, grounding restrictions on the likely psychological harm and offense to recipients leads to a 'heckler's veto' where expressions are suppressed due a perceived possibility of violent reaction.[17] Further, in the Olympic Games expressions by spectators which might violate 'common public sensibilities'[18] are restricted. When taken together with the idea of heckler's veto, this situation creates a murky climate where the fear that someone somewhere might be offended would stop spectators from expressing themselves. The elusiveness of the term 'common public sensibilities'—just like the ambiguity of the term 'public morals'—lays a further layer of uncertainty, due to the fact that the question 'whose sensibilities?' is nowhere to be answered. International competitions include participants and spectators from around the world. The participants and spectators are members of different cultures, and followers of different 'comprehensive doctrines'[19] that are quite possibly at odds with each other. More importantly, the events are broadcast worldwide. Accordingly, reliance on the idea of harm should not justify wholesale restriction of personal, religious and political expressions because the standard would then be the least tolerant person, culture or state. Exactly which culture or comprehensive doctrine will be made the standard for tolerance of expressions is a paradoxical question. It can be asserted that this situation deserves bias towards being more tolerant. An example to the setting the tolerance bar lower in accordance with the least tolerant society may be the fallout after cartoons depicting (the Prophet) Mohamed that were published by a Danish newspaper in 2005. Following public disorder in Muslim countries and death threats which led

[14] HM Wasserman, 'Cheers, Profanity, and Free Speech' [2005] 31:2 Journal of College and University Law 377, 382.

[15] Note (anonymous), 'A Communitarian Defense of Group Libel Laws' [1988] 101:3 Harvard Law Review 682, 687-691.

[16] J Raz, *The Morality of Freedom* (Oxford Scholarship Online 2003[1988]) 412-419.

[17] RG Wright, 'The Heckler's Veto Today' [2017] 68:1 Case Western Reserve Law Review 159, 161.

[18] *See* Section 4.6.3 note 150.

[19] Rawls *Political Liberalism* (n 5) 36-40 and 58-63.

to the Danish Foreign Ministry to implore its nationals to leave Indonesia; harsh measures were taken against students who published the cartoons in college magazines. The European Trade Commissioner even urged media outlets to refrain from publishing images which may offend Muslims.[20] It can be witnessed that in this case the less tolerant group guided the stance of other groups. The same logic should not apply in sport. The lower level of tolerance in a society should not dictate others in terms of freedom of expression. In essence, cultural relativism should not be used as a sword against the more tolerant societies.

On the national level, the Turkish Super League match between Trabzonspor and Beşiktaş of the 05th of March 2018, which was played against the backdrop of the Turkish Armed Forces' cross-border operation into Syria against the YPG, would be an apt vessel in depicting the reservations as regards the use of harm and sensibility harms. In that match, in line with the patriotic stance on the part of the Turkish sport industry, child mascots escorting the players onto the field wore uniforms of the Turkish Armed Forces, and gave military salutes during the minute's silence performed in memory of Turkish soldiers who had died in the operation. In the meantime, the fans in the stands concertedly shouted 'The martyrs won't die, the Land won't be divided'.[21]

Hypothetically speaking, in the midst of an electric situation generated by the residents of a province known for its violence and hatred towards any perceived threat against 'the land, the nation and the national identity',[22] a footballer's or a spectator's 'V for Victory'—a sign identified with Kurdish militants—would have caused an upheaval in the stadium (and beyond). The underlying reason of this assertion is that the expression was made before a 'hostile audience'. Though the sign is not unlawful and certainly does not incite people sympathetic to the PKK or YPG's cause to join their ranks, one could argue that it might have produced 'harm'. The spectators and the audience before their devices would be 'angry' or 'sad'. Consequently,

[20] I Cram, 'The Danish Cartoons, Offensive Expression, and Democratic Legitimacy' in J Weinstein and I Hare (eds), *Extreme Speech and Democracy* (OUP 2009) 311-312.

[21] Milliyet Newspaper Website, 'Trabzonspor-Beşiktaş Maçından Notlar' [Notes from the Trabzonspor-Beşiktaş Match] (05 March 2018) <http://www.milliyet.com.tr/trabzonspor-besiktas-macindan-notlar-trabzon-yerelhaber-2637513/> accessed 20 August 2019.

[22] G Bakırezer and Y Demirer, 'Giriş: Trabzon'u anlamak' [Introduction: Understanding Trabzon] in G Bakırezer and Y Demirer (eds), *Trabzon'u Anlamak* [Understanding Trabzon] (İletişim 2009) 12.

the persons and commentators who focus on the appearance of harm would restrict or sanction the 'V for Victory' sign that was made in this context.

This being the case, Schauer is correct in pointing out that 'we want to protect speech not because it causes no harm, but *despite* the harm it may cause'.[23] In respect to the case at hand the US Supreme Court's *Tinker*[24] decision provides important insights into the position of dissident views within society. In this case, the Court emphasised that 'undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression', and the acts of authorities in 'an urgent wish to avoid the controversy', are untenable.[25] In that regard, as Richards has argued, toleration and freedom of conscience should be wide enough to cover not just persons with a certain type of belief, but every person even if their views are intolerant to the point where there is a danger of imminent action.[26] The two moral powers of individuals and the idea of equal concern and respect bring about the protection of expressions that are uncontroversially false and antipode to the conscience of the majority. The fact that the majority or the state may label an expression as seditious or libellous to a certain group of people makes the protection of dissent indispensable.[27] Consequently, while a realistic warning indicating that speakers in such situations should be more careful, it has to be asserted that expressions before hostile audiences should be protected.

On another level, disrespect or offense should not be the grounds for restricting expressions. A clear example of this attitude can be witnessed in the case of 'UEFA mafia' chants by Crvena Zvezda supporters. In fining the club, among other infringements, the UEFA CEDB indicated that by chanting 'UEFA mafia', 'the club's supporters surpasses ['sic'] the limits between criticism ['sic']. It is offensive and disrespectful'.[28] In essence, the UEFA has argued that a legal

[23] F Schauer, 'Must Speech be Special?' [1983] 78:5 Northwestern University Law Review 1284, 1295 (emphasis present).

[24] *Tinker v Des Moines Independent Community School District* 393 US 503 (1969).

[25] ibid 508 and 510.

[26] Richards (n 8) 96-97.

[27] ibid 192.

[28] UEFA CEDB decision of 16 November 2017, *FK Crvena Zvezda*. Reported in UEFA, 'Case Law: Control, Ethics and Disciplinary Body, Appeals Body, CFCB Adjudicatory Chamber' (July - December 2017) 102 <https://www.uefa.com/MultimediaFiles/Download/OfficialDocument/uefaorg/UEFACompDisCases/02/54/65/16/2546516_DOWNLOAD.pdf> accessed 20 August 2019.

person has feelings, which led to the sanctioning of the club. Similarly, in the case of Kaepernick, presumed disrespect to the flag, the US Army and the National Anthem, along with the military personnel and veterans, was at the forefront in the criticism of taking a knee during the singing of the National Anthem. The adjectives 'inappropriate', 'disrespectful' and 'unpatriotic' were also mobilised by the supporters of the status quo against Kaepernick who performed a silent form dissent which did not disrupt the game, the national anthem or the ceremony.[29] Interestingly, the military personnel who were said to be disrespected by the protest showed support for Kaepernick after the player changed the protest from not standing during the National Anthem to taking a knee and also made it clear that the protest was not against US military servicemen and servicewomen.[30]

It can be maintained that these two examples show the instrumentalisation of ambiguous and highly subjective notions such as offensiveness and disrespect, which are utilised by both SGBs and society with a view to curbing expressions. Moreover, the supposed feelings of persons (legal or natural) are brought forth as the bases of suppression. This situation is not surprising, since after all, one of the justifications for supressing anti-slavery speech in the Antebellum US was the protection of the feelings of the slaveholders.[31] More problematic is the utilisation of the supposed disrespect towards third parties, who in fact may support the expressions or detest the way a speaker is treated due to the expression conveyed. In the case of spectators, the limits of criticism—if indeed it is empirically distinguishable—are brought so low that spectators are put into a precarious position. If they speak against the institution that organises the competition, the chances are that the institution will be 'offended' and that the same institution will fine their club. Consequently, the supposed 'respect' that is given to institutions such as SGBs and the military, acts as a weapon against the dissenters.

[29] T Zick, 'Managing Dissent' [2018] 95 Washington University Law Review 1423, 1450-1451.

[30] L Trimbur, 'Taking a Knee, Making a Stand: Social Justice, Trump America, and the Politics of Sport' [2019] 71:2 Quest 252, 255-256.

[31] MK Curtis, *Free Speech, "The People's Darling Privilege": Struggles for Freedom of Expression in American History* (Duke University Press 2000) 384.

5.2.3 Arguments for Restriction

The above-presented arguments do not result in the conclusion that all expressions should be under protection. In addition to the arguments presented above regarding the restrictions due to physical harm on the means and targets of expressions, there should be limits to freedom of expression in certain circumstances. First, face-to-face expressions that are 'directed toward individuals with the intention of violating their rights' should not be protected.[32] This caveat will be discussed in a more in-depth manner in the next chapter as a part of the aim to create a coherent framework on hate speech restrictions.[33] Further, certain 'contexts' should pave the way for repercussions where restrictions on expressions meddling with the moral powers of recipients and their deliberative processes, such as fraud and intimidation are justified.[34] Likewise, libel and defamation should not be protected.[35] Moreover, expressions resulting in physical and mental coercion[36] may be restricted and sanctioned.

In sport, in addition to the general limits just presented, the adoption of a slightly tweaked approach to the one as put forth by Richards would be helpful. In that regard the 'clear and present danger test'[37] would take into account the context of the expression, the imminence of harm and the possibility of a rebuttal of the expression.[38] Starting from the point where one should diverge from Richards' account, it can be maintained that while rebuttal in certain circumstances might be feasible in general, in sport the rebuttal—immediate or not—of an expression might not be possible, even though that would be in line with the parties' autonomy and moral powers. In reality, the perpetrator might not be identifiable by the athlete due to the

[32] Heyman (n 11) 1340. A similar definition is presented by Sadurski who has argued that personally abusive insults made face-to-face should target a specific person who cannot avoid the expression. W Sadurski, *Freedom of Speech and Its Limits* (Kluwer 1999) 113.

[33] *See* Section 6.1.2.1.

[34] Richards (n 8) 172.

[35] Rawls *Political Liberalism* (n 5) 336.

[36] E Baker, *Human Liberty and Freedom of Speech* (OUP 1989) 56-61.

[37] Introduced in *Schenck v United States* (249 US 47 [1919]), it requires that the harm due to an expression is highly probable and imminent. The danger of harm must be great. RA Posner, 'The Speech Market and the Legacy of *Schenck*' in LC Bollinger and GR Stone (eds), *Eternally Vigilant: Free Speech in the Modern Era* (The University of Chicago Press 2002) 122-123.

[38] Richards (n 8) 181-185. Rawls has posited that while followers of intolerant points of view cannot complain if they are not tolerated, they can only suppressed if there are considerable risks to equal liberty and the institutions of society. Rawls *A Theory of Justice* (n 5) 190-194.

size of the stadium. Moreover, a reaction to expressions in the form of a rebuttal by an athlete is in most cases sanctionable by SGBs. The exact opposite is possible where the spectators might not be able to properly rebut the expression of an athlete except through jeers and gestures, as the 'strict liability' rule which allows the clubs and member associations to be punished stops them from expressing themselves in this manner. [39]

Moving on from these, it can be claimed that immediate and direct threats to the security of the state, and persons living, residing or visiting it, are reason enough to restrict expressions. The logic behind the restriction is that they 'immediately' and 'directly' cause unlawful, violent actions.[40] 'Imminence' rules out 'chronologically remote harms' as the grounds for restricting expressions, because the institution with the coercive power would be able to intervene before any harm is realised.[41] Correspondingly, it has to be asserted that the context of speech is of the essence because the violent reactions appear against certain backdrops. These contexts are the cumulative reflection of social, historical, sociological and, for the purposes of this work, sporting determinants. Different contexts generate different consequences both individually, and—if the recipients are numerous—collectively.

For example, a friendly competition between the national teams of Argentina and Nigeria is different from a FIFA World Cup Finals match between Germany and England (or the UK in some competitions like the Olympic Games). On the one hand, the former's context lacks both animosity between the states and peoples, and a grand goal to win a competition. On the other hand, historical tensions on and off the field between the latter's participants would bring about a different set of variables. The previous chapter touched upon the role of sport in creating narratives for the nation.[42] Accordingly, a match between Germany and England is likely to be

[39] *See* CAS 2013/A/3047 *FC Zenit St. Petersburg v Russian Football Union (RFU)*, paras 96-103; also *see* CAS 2014/A/3578 where a panel dealt with FIFA regulations stipulating liability of the host association. CAS 2014/A/3578 *Koninklijke Nederlandse Voetbalbond (KNVB) v Fédération Internationale de Football Association (FIFA)*, paras 39-44.

[40] But *see* Altman's formulation of restrictions based on the idea that expression may indirectly contribute to violence and unlawful actions. '[S]peech should be protected, regardless of the viewpoint it advocates, unless the speech is a) intended and likely to bring about imminent lawless conduct, or b) reasonably expected to contribute substantially to widespread violence'. A Altman, 'Freedom of Expression and Human Rights Law: The Case of Holocaust Denial' in I Maitra and MK McGowan (eds), *Speech and Harm: Controversies Over Free Speech* (OUP 2012) 44.

[41] E Zamir and B Medina, *Law, Economics, and Morality* (OUP 2010) 196-199.

[42] *See* text to note 64 in Section 4.4.

fuelled by narratives about past confrontations both on and off the field. It has the potential to become an instrument to both remember and to forget.[43] Hence, the complex relationship between the past and the present requires strict scrutiny. Each case should be strictly scrutinised, and the scope of protection should be wide enough to ensure the upholding of the moral powers of everyone involved. If it does not pose an immediate danger of violent repercussions, and 'if violence and disorder may be prevented by other means, such as reasonably employing police powers to control the audience and maintain order'[44] the expressions should not become the grounds of sanctions.

In line with the importance that is granted to the context, a sport-specific caveat for the threat-based restrictions should be presented, in that, in the scrutiny of a case, the degree of security and safety measures should also be considered. The underlying reason is that while mega-events and matches played as part of higher-tier or continent-wide competitions may enjoy sufficient security and safety, the same cannot be said of lower-tier competitions and competitions of disciplines which do not receive sufficient funding. In these cases, Schauer's concern regarding speaker security may be justified,[45] because a lack of funding or prudence may result in the 'offending' speaker being harmed. The same concern can be extended to spectators. In certain cases crowd trouble may flare up due to an expression, without giving the security officers enough time to intervene. Consequently, the characteristics of the competition and the sports venue have to be considered in deciding whether an expression is restricted or not.

5.2.4 The Impact on Play

As a final consideration, the impact of the expressions on the flow of play should be touched upon. It is argued throughout this work that political expressions of stakeholders and spectators have to be protected. But the one element that has not been discussed is the limits of protection as demarcated on their effects on play.

[43] C Young, 'Two World Wars and One World Cup: Humour, Trauma and the Asymmetric Relationship in Anglo-German Football' [2007] 27:1 Sport in History 1, 5-19.

[44] Zamir and Medina (n 41) 223.

[45] F Schauer, 'The Hostile Audience Revisited' (Knight First Amendment Institute 2017) <https://knightcolumbia.org/sites/default/files/content/Schauer_Hostile_Audience.pdf> accessed 20 August 2019.

It can be asserted that in the case of spectators, only expressions that do not interrupt the play should be protected. In addition to this, expressions which block the view of fellow spectators[46] and the cameras of the broadcasters or the SGBs[47] should be sanctioned. Here, the use of the word 'play' is of utmost importance since it leaves out pre-match activities, breaks and post-match activities, and as can be noticed, late start or re-start of play are not perceived as reason enough to sanction expressions. Unlike SGBs' reasons for sanctioning delays,[48] concern for the flow of play does not arise from a commercial agenda pertaining to economic logic; rather the autonomy and moral powers of stakeholders, spectators and audiences are to be protected. Finally, even in the cases of golf and tennis, annoying or offending the spectators should not be basis for sanctions.[49]

A possible counterargument to this claim would point out that a political expression is more important than the audience's entertainment. While a thought-provoking assertion in its own sense, this would lead to a valuation of different ways of life. In addition to this, it would amount to perceiving the ways of life of individuals who are interested in politics as more important than the ones who would rather not see their favourite pastime disrupted. Stakeholders and athletes in particular perform activities that encompass an important part of their lives. In the case of professional sport, it is their livelihood and years of hard labour. An important competition becomes the apex of an athlete's career. It can mean going through

[46] Wasserman, 'Cheers, Profanity, and Free Speech' (n 14) 388-389.

[47] In a Portuguese league match between Boavista and CD Aves, a flag blocked the view of the Video Assistant Referee (VAR) camera, rendering the system useless in a controversial incident. The Guardian Website, 'VAR and the giant flag: how a match in Portugal became the scene of farce' (7 February 2018) <https://www.theguardian.com/football/2018/feb/07/video-assistant-referee-var-aves-boavista-giant-flag-goal-offside> accessed 20 August 2019.

[48] In sanctioning Manchester United due to their being late in coming out to the pitch that resulted in a late kick-off, the UEFA CEDB indicated that 'it needs to be taken into account that every delay of the kick-off times might lead to serious consequences for the relationship of UEFA and its commercial partners. In addition, respect needs to be paid to the nature of the competition of the UEFA Europa League is one of UEFA's flagship club competitions. In this view, any behaviour tending to tarnish the image of this major competition cannot be accepted and must therefore be punished accordingly'. UEFA CEDB decision of 07 June 2017, *Manchester United*. Reported in UEFA, 'Case Law: Control, Ethics and Disciplinary Body & Appeals Body' (January - June 2017) 91 <https://www.uefa.com/MultimediaFiles/Download/OfficialDocument/uefaorg/UEFACompDisCases/02/51/76/81/2517681_DOWNLOAD.pdf> accessed 20 August 2019.

[49] In a case before the House of Lords, the appellant was charged because of their 'insulting' expressions annoying the spectators and making them angry. They were anti-apartheid expressions in a Wimbledon match which led to the play's interruption, hence the annoyance and anger. The expressions were not found to be insulting within the scope of the section 5 of the Public Order Act 1936, but the annoyance and anger of the spectators were looked upon sympathetically. *Brutus v Cozens* HL [1973] AC 854.

months of 'hell'.[50] The interruption or postponement of that activity would be to the detriment of the equal concern and respect given to every person involved, along with their autonomy. Similarly, utterances that might distract athletes on the field in sports such as golf and tennis[51] would be left out of the scope of protection.

In line with the foregoing assertions, pitch invasions with the purpose of getting a political message across would not be tolerated if they disrupt the flow of play. The band Pussy Riot's pitch invasion in the FIFA 2018 World Cup Final in Russia[52] is important in depicting both the problem at hand and the argument that conduct can count as expression. A pitch invasion, just like other conduct that is done with a view to conveying a certain message and having an impact on the recipient, should be accepted as an expression. Even if the person has no knowledge regarding the background of the expression, the conduct would make a recipient derive a meaning from it. Accordingly, it would be tempting to allow pitch invasions in a mega-event played under the auspices of a regime that is known for its disrespect of human rights and in particular freedom of expression. Therefore, the argument would conclude that the conduct which is also a political expression directed against an authoritarian regime could be protected. However, this argument would beg the questions which regimes are 'clean enough' so that prohibiting such an act would be in line of what has been argued throughout this work, and which natural or legal person decides on the cleanliness of a regime. It can be claimed that both questions point out to the impossibility of such a distinction between regimes and their human rights records, even if some regimes are known for their lack of respect for human rights.

When focusing on expressions by athletes, it can be asserted that expressions relating to public discourse and governance of sport should be protected even if they interrupt or diverge from the normal flow of play. After all, as the most important stakeholders in sport, the athletes that produce the game, should have the ultimate say in the flow of play. They are the ones that invest

[50] Dart reporting a response from rowers whose race was cancelled due to protest. The race was the famous annual boat race between the University of Cambridge and the University of Oxford. J Dart, ''Messing About on the River.' Trenton Oldfield and the Possibilities of Sports Protest' in J Dart and S Wagg (eds), *Sport, Protest and Globalisation: Stopping Play* (Palgrave Macmillan 2016) 296-297.

[51] HM Wasserman, 'Fans, Free Expression, and the Wide World of Sports' [2006] 67 University of Pittsburgh Law Review 525, 534.

[52] The Guardian Website, 'Pussy Riot claim responsibility for World Cup final pitch invasion' (15 July 2018) <https://www.theguardian.com/world/2018/jul/15/pussy-riot-claim-responsibility-world-cup-final-pitch-invasion> accessed 20 August 2019.

countless hours to train mentally and physically, moreover as was argued in the previous chapter they cannot be preassigned a role that would render them unequal. Therefore, their view on a certain subject that is conveyed through the use of sport deserves protection. Under this view, for example, footballer's protests of one minute's inaction after the kick-off against unpaid wages[53] or two minutes' silence 'in memory of the hundreds of children who continue to lose their lives every day in the Aegean due to the brutal indifference of the EU and Turkey'[54] are justified. It has to be added that the athlete's expressions before and after the play's start along with the breaks should in any case be protected, thus Los Angeles Clippers players' pre-match protest against racist remarks of the team owner should be deemed as stakeholders'[55] legitimate use of the perfect platform for getting the message across.

5.3 Valuation and Categorisation of Expressions

5.3.1 The Foundations and Their Critique

Valuation and categorisation of expressions are important for the purposes of this work due to the fact that they can act as shortcuts to restriction. One strand of the debate on the subject contends that some expressions have lower value than the others. Commentators in this camp such as Sunstein have argued that since the core of protected expressions are political expressions and expressions that are concerned with the behaviour of public officials, they have higher value than other types of expressions.[56] This results in some expressions enjoying less or no protection. Expressions of the highest order are the ones having social importance or the ones assuming a role in the democratic process. However, obscenity, profanity and commercial speech are types of expressions that are not considered to be in this category.

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[53] Milliyet Newspaper Website,'Manisasporlu futbolculardan 1 dakikalık protesto' [A minute's protest by Manisaspor players] (1 April 2018) <http://www.milliyet.com.tr/manisasporlu-futbolculardan-1---2638849-skorerhaber/> accessed 20 August 2019.

[54] The Guardian Website, 'Greek match delayed as players stage sit-down protest over migrant deaths' (30 January 2016) <https://www.theguardian.com/football/2016/jan/30/greek-match-delayed-players-sit-down-protest-migrant-deaths> accessed 20 August 2019.

[55] A Markazi, 'Clippers stage silent protest' (*ESPN Website*, 28 April 2014) <http://www.espn.com/nba/story/_/id/10848577/los-angeles-clippers-stage-silent-protest-donald-sterling-hide-team-logo> accessed 20 August 2019.

[56] CS Sunstein, 'Free Speech Now' [1992] 59 The University of Chicago Law Review 255, 301 and 308; CR Sunstein, *Democracy and the Problem of Free Speech: with a new afterword* (Free Press 1995) 121-165.

The question posed by the commentators in this camp is: does profanity help to attain the truth, foster democracy and serve the common good? Based on this question, courts judge whether an expression is valuable enough to be protected, where timing of the expression may gain importance. *Roth v. United States* represents a good example depicting such limitations. Here, it was pointed out that 'the slightest redeeming social importance' would enjoy protection 'unless excludable because they encroach upon the limited area of more important interests'.[57] The emphasis on the social importance was nothing new, yet it did not answer for whom the expression must be redeeming.[58] In essence, expressions of lower value are protected less, and are subjected to balancing of interests, as they do not '[further] the historical, political, and philosophical purposes […]' of freedom of expression.[59]

The literature has produced serious challenges to these arguments in the form of criticism regarding the position of the state as a judge for valuing[60] and categorising expressions.[61] It can be asserted that the principal problem with valuation and categorisation is the inherent difficulty in determining whether an expression is political or not. Even if the context of the expression is well laid-out, amalgamations of various expression types would render the mission nigh on impossible. As in the case of the movie *The Raspberry Reich*,[62] even the political and the pornographic may be combined. The movie can be seen as shuttling between gay pornography, a political statement and a feminist outburst. Since it is a movie, it is hard to isolate a certain scene and decide on the value or category of the work, and any attempt to do so may pave the way for censorship.

It has to be noted that, in certain cases, the category of expression may be easier to distinguish. As Schauer has asserted, the judge or the recipient has an easier job in distinguishing commercial speech from political expressions.[63] On the other hand, the use of the term 'in

[57] *Roth v United States* 354 US 476 (1957) 484.

[58] S Ingber, 'The Marketplace of Ideas: A Legitimizing Myth' [1984] Duke Law Journal 1, 22.

[59] GR Stone, 'Content Regulation and the First Amendment' [1983] 25:2 William and Mary Law Review 189, 194-195.

[60] MH Redish, *Freedom of Expression: A Critical Analysis* (Michie 1984) 69.

[61] P Chevigny, *More Speech: Dialogue Rights and Modern Liberty* (Temple University Press 1988) 108.

[62] *The Raspberry Reich*, dir. Bruce LaBruce, Germany/Canada, Jürgen Brüning Filmproduktion, 2004.

[63] It has to be noted that Schauer sees categories as 'sub-categories', due to the argument that the main category consists of expressions the First Amendment covers. Also, for Schauer the creation of sub-

certain cases' added in the sentence before is deliberate. The source of such reservation is due to the case of Azerbaijan's sponsorship of Atlético de Madrid mentioned in the previous chapter. The goal to achieve soft power, which is inherently political, and the use of commercial means of attaining it blurs the distinction between the political and the commercial. The presence of the advertisements on the shirt and other marketable spaces depicts a situation where it becomes harder to delineate the border between the commercial and political sides of an expression.[64]

From another point of view, terms (or jargon) used in judgments regarding categorisation are not unambiguous enough to become standards. Even if the terms were clear enough, the changing standards would render them useless.[65] On the other hand, the opposite where the categories determined by the court might become frozen in time is even more dangerous. In concrete, in *United States v. Stevens*, the US Supreme Court rejected the idea of balancing, but stated that the judiciary had no power to add new categories to unprotected expressions that are historically and traditionally unprotected.[66] Then, depending on the decision maker,[67] the categories may have a tendency to be entrenched so that technological and societal novelties are of no consequence whatsoever in the judging of the value of an expression. The categories invented by the decision makers become dogmatic.

The US Supreme Court's findings shed light into another problem of categorising. When the protection is limited to a certain category, the stance of the institution deciding on categorisation and valuation in borderline cases becomes too important. Accordingly, the valuation and categorisation of expressions cannot be entrusted upon one institution, because it may tend to

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categories is subject to a principled definition and application, along with a strong link to the theoretical foundations of the First Amendment. F Schauer, 'Categories and the First Amendment: A Play in Three Acts' [1981] 34 Vanderbilt Law Review 265, 290-296.

[64] L Alexander, *Is There a Right of Freedom of Expression?* (CUP 2005) 138-140.

[65] SH Shiffrin, *The First Amendment, Democracy, and Romance* (Princeton University Press 1990) 30.

[66] *United States v Stevens* 559 US 460 (2010) 470-472.

[67] The reason behind the caveat is the ECtHR's progressive interpretation technique named 'Evolutive Interpretation' which takes into account technical and societal changes when interpreting rights protection. *See generally* K Dzehtsiarou, 'European Consensus and the Evolutive Interpretation of the European Convention on Human Rights' [2011] 12:10 German Law Review 1730.

categorise expressions to the detriment of freedom of expression.[68] Arguably the most important criticism to valuation comes from Lakier who has stated that:

> By granting less or no protection to low-value speech, the doctrine of low-value speech allows the government to do what it is not supposed to be able to do: that is, to remove ideas it dislikes from public circulation in the marketplace and potentially (though less easily) repress the speech of those who criticize it.[69]

Governments' intervention to the discourse within society because it deems some of its constituents of lesser value, from a certain point of view, might be to the detriment of the legitimacy of that regime. In that regard, the government 'must preserve all ideas' *civic* equality, irrespective of intellectual inequality'.[70] The moral powers of the speakers and recipients as well as the idea of equal concern and respect require it to be so.[71] Furthermore, value is subjective; meaning the individuals with different tastes and backgrounds would value expressions—whether pertaining to politics, art, literature or even science—differently. The audience, collectively or individually, judge an expression by their own parameters. The claim that a great deal of expressions in the age of the Internet is of 'little value' or 'worthless'[72] falls into the same trap with the elite's disdain for some expressions. The supposedly low value expressions on the Internet may turn out to be high value for some segments of the society. As witnessed in the Brexit Referendum and the United States presidential election of 2016, posts on social media, blogs and forums have an effect on the electorate even if the opposition deems them of low value.

In addition to the foregoing, whilst categorising expressions, because of an inherent need to balance, a calculation as to the costs of allowing an expression has to be made. The calculation of the costs of allowing an expression against the cost of restricting an expression—which is the

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[68] F Schauer, *Free Speech: A Philosophical Enquiry* (CUP 1982) 144; DA Strauss, 'Persuasion, Autonomy, and Freedom of Expression' [1991] 91 Columbia Law Review 334, 342.

[69] G Lakier, 'The Invention of Low-Value Speech' [2015] 128:1 Harvard Law Review 2166, 2172 (footnote omitted).

[70] E Heinze, *Hate Speech and Democratic Citizenship* (OUP 2016) 104 (emphasis present).

[71] *See* Section 2.5.

[72] D van Mill, *Free Speech and the State: An Unprincipled Approach* (Palgrave Macmillan 2017) 3.

point of origin for balancing and weighing—along with the determination of probable societal value weakens the equal concern and respect due to individuals. As Dworkin has suggested, restrictions on expressions require stronger reasons, and extra costs on the society would be justified unless right and dignity of another person along with equality are at stake.[73] Nonetheless, when the rights, along with the dignity and equality of persons, are brought forth certain face-to-face expressions are excluded from protection. The guiding logic of the exclusion is that in these cases the cost of the expression is borne only by the person(s) the expressions are directed at.[74]

5.3.2 The Situation in Sport

The drawbacks arising from the utilisation of valuation and categorisation by an institution with coercive power is apparent in the case of sport. The difficulty in distinguishing political and non-political expressions as well as the problems pertaining to definitions persists in sport, albeit in different forms. Profanity is inherently 'wrong' due to the prevailing idea of fair play. Respect for the opponents, other stakeholders and values, is perceived as one of the foundations of sport.

This being the case, exactly what is political is not clear. For example, a CAS panel has contended that, although the conduct was related purely to the internal strife between factions of a private body, '[t]he taking of legal advice, the institution of legal proceedings, and vigorous electioneering' is political speech.[75] Similarly, in the case of the prohibition of messages underneath football shirts, exactly what is political personal, or discriminatory cannot be analysed in a clear-cut manner, even though the IFAB has tried to introduce interpretations as to what political means.[76] Contrary to what IFAB has argued, the 'personal' cannot be clearly defined, neither can the 'political', therefore a list of what political is should be perceived as

[73] R Dworkin, *Taking Rights Seriously: New Impression with a Reply to Critics* (Duckworth 2005) 199-203.

[74] CR Lawrence, 'If He Hollers Let Him Go: Regulating Racist Speech on Campus' [1990] Duke Law Journal 431, 472-473.

[75] CAS 2011/A/2452 *Paul King v International Boxing Association (AIBA)*, para 32.

[76] IFAB Laws of the Game 2019/20, 61 <http://static-3eb8.kxcdn.com/documents/793/103202_200519_LotG_201920_EN_SinglePage.pdf> accessed 20 August 2019.

self-defeating. A personal message might be politically-charged[77] and a political expression is a personal statement. In addition to these, the fact that profanity may be combined with other words with a view to creating political expressions creates more problems.[78] The sanctioning of Borussia Dortmund due to its supporters' unfurling a banner reading 'Fuck UEFA - MAFIA' is a good example in demonstrating the indivisibility of expressions.[79] Here, the addition of a 'profane' word to an accusation should be interpreted as driving home a message with aggro, because the recipients would not be sexually aroused or try to have sexual intercourse with a legal person. Moreover, the banner was categorised as political so that it would seem to have no relation to football despite overwhelming evidence to the contrary. These problems stem from the idea of categorisation and valuation itself.

The same situation can be witnessed in Faut's examples of restricted expressions at the Olympic Games. Faut has reported that Olympians commemorating events such as the death of a team member, the death of the brother of a team member and the protesters that were killed in the Maidan protests were all deemed inappropriate due to their political connotations.[80] It has to be asserted that these practices confirm the fear that categories are liable to be abused. Here, the IOC, and in the second case the Norwegian Olympic Committee, kept the notion of political expression excessively wide and thus categorised these expressions as political. One might ask what part of commemorating a loved one might be political unless the person's life or death has political overtones. The commemoration of the protesters who were killed in the Maidan Square in Kyiv is clearly political, as the reasons for the protests and killings were of political nature. Even in this case, the commemoration of persons on account of care for human life, dignity and equality should have been reason enough for their approval.

Another question concerning valuation and categorisation in sport reflects the points made regarding the movie *The Raspberry Reich*, in that, the meaning of an expression made within

[77] Baker (n 36) 26.

[78] The same is also true for discriminatory expression, which will be analysed in the next chapter.

[79] UEFA CEDB decision of 23 February 2017, *Borussia Dortmund*. Reported in UEFA, 'Case Law: Control, Ethics and Disciplinary Body & Appeals Body' (January - June 2017) 27-33. <https://www.uefa.com/MultimediaFiles/Download/OfficialDocument/uefaorg/UEFACompDisCases/02/51/76/81/2517681_DOWNLOAD.pdf> accessed 20 August 2019.

[80] F Faut, 'The Prohibition of political statements by athletes and its consistency with Article 10 of the European Convention on Human Rights: speech is silver, silence is gold?' [2014] 14:3-4 The International Sports Law Journal 253, 253.

the context of sport might not be self-evident. In some cases, an expression fuses personal, political and even religious aspects so strongly that the interpretation of the said expression requires a deeper understanding of the context. One such expression was witnessed in football. Due to a bombing in Ankara where scores of leftists calling for peace were killed, a minute's silence was observed before the EURO 2016 Qualifier match between Turkey and Iceland that was played in Konya. Turkish fans jeered and whistled during the silence and shouted '*Allahu Akbar*' near its end.[81]

When wringed away from its context, the acts of the supporters of Turkey might be interpreted as unsporting behaviour. Nevertheless, when the facts that the bombing was blamed on ISIS, that Konya is a city perceived as one of the strongholds of conservativism and nationalism where almost 90 % of the votes were cast in favour of parties defending these values is taken into account, the interpretation might differ. This is the point where the stance of the institution doing the interpretation, in this case UEFA, comes to the fore. How does UEFA, which has the power to adjudicate a possible infringement of its rules and values, interpret the situation? One interpretation would vindicate the shouts as religious expressions of supporters living in a religious city, or as the incarnations of the unrest of spectators due to their being compelled to express themselves by being silent. Another interpretation might focus on the fact that the minute's silence resulting from the death of leftists did not call for the assertion 'God is greater', and thus, the Turkish Football Federation should be sanctioned in line with UEFA's regulations and jurisprudence stating that political and religious messages not fitting a sports events are prohibited. The fact that booing recurred during minute's silence in memory of the victims of the Paris attacks in 2015, this time before the friendly match between Turkey and Greece,[82] shows that the question of interpreting expressions is not a temporary one and that the SGBs acting as adjudicatory bodies have to take a definite and consistent stance on the categorisation and interpretation of expressions—if they have to do so—. In the cases at hand, there were no

[81] I Tharoor, 'Watch: Turkish soccer fans boo minute of silence for Ankara terror victims' (*The Washington Post Website*, 13 October 2015) <https://www.washingtonpost.com/news/worldviews/wp/2015/10/13/watch-turkish-soccer-fans-boo-minute-of-silence-for-ankara-terror-victims/?utm_term=.8e1914d5ac52> accessed 20 August 2019; Cumhuriyet Newspaper Website, 'Konya'daki saygı duruşunda tekbir sesleri' [Shouts of Takbir during minute's silence in Konya] (2015) <http://www.cumhuriyet.com.tr/haber/futbol/387423/Konya_daki_saygi_durusunda_tekbir_sesleri.html> accessed 20 August 2019.

[82] Reuters Website, 'Turkey fans boo minute's silence for Paris victims' (2015) <https://www.reuters.com/article/us-soccer-friendly-turkey/turkey-fans-boo-minutes-silence-for-paris-victims-idUSKCN0T62LY20151117> accessed 20 August 2019.

reports indicating that the Turkish Football Federation was charged for any misconduct on the part of its supporters, despite the fact that they were of a political nature.

In line with the idea of articulate consistency, it can be maintained that the foregoing examples give rise to a puzzling situation. On the one hand, commemoration of the deaths of a team member and the brother of a team member are prohibited; and on the other hand expressions that might be deemed to denigrate human dignity and equal respect are approved. Looking through the same lens, it can further be argued that while the former cases involved the moral powers of all concerned, along with the equal respect for human dignity; the booing of a minute's silence went against the exact thing UEFA tries to prevent from happening, psychological harm and offense to others, and in this case persons who had lost their lives in terrorist attacks. The situation also lays bare a perverse logic to categorisation. Whereas the purely personal losses of a team member and the brother of a team member were brought into the category of political, and thus restricted; the booing of a minute's silence in remembrance of political terrorist attacks became purely personal, and thus approved. Furthermore, the articulate consistency that is strived for in this work is even more damaged when the SGBs fine the booing of a national anthem,[83] yet decide not to do so in the case of booing a minute's silence due to political terrorist attacks. It can be concluded that the SGBs find patriotic symbolism more important than the lives lost.

Finally, although specific instances of categorisation pertaining to hate speech in sport will be broached in Section 6.4.1, a brief overview of the risks involved in categorisation should be given here. In general, the categorisation made at the hands of the SGBs creates bright lines which mark the political and the discriminatory. A recent amendment to the FIFA Disciplinary Code would be the ideal norm to support this assertion. In getting closer to the wording of the FIFA Statutes,[84] the 2019 edition of the Code has expanded the scope of 'discrimination' to the extent that expressions targeting 'the dignity or integrity of a country' and 'a political opinion'

[83] The Hong Kong Football Association was fined twice and warned thrice about further conduct by FIFA following its supporters' booing of the Chinese National Anthem in three separate occasions during their 2018 FIFA World Cup Qualifiers campaign. FIFA Website, 'Disciplinary Overview – 2018 FIFA World Cup Russia Qualifiers' (07 November 2017) <http://resources.fifa.com/mm/document/tournament/competition/02/91/90/53/fifa_disciplinaryoverview_2018fwcqualifiers_7november2017_neutral.pdf> accessed 20 August 2019.

[84] FIFA Statutes 2019 Edition, art 4 <https://resources.fifa.com/image/upload/fifa-statutes-5-august-2019-en.pdf?cloudid=ggyamhxxv8jrdfbekrrm> accessed 20 August 2019.

could become the bases for sanctions.[85] A debate on the possibility of a state or legal person having dignity notwithstanding, it can be asserted that the addition of the words 'country' and 'political opinion' to the Code, which were not present in its previous edition [86] but have been present in the FIFA Statutes with different formulations, equates political with discriminatory. Here, with a sleight of hand, what is naturally political is automatically rendered discriminatory. In the present work, it was argued that suspicion of governance offers sometimes direct, but sometimes equally subtle dissenting expressions against states. In the case at hand, the said subtlety in dissenting expressions is aimed to be extinguished through categorisation.

An important consequence of this way of categorisation is that it allows the SGBs to impose harsher sanctions. Due to the gravity of the offence as well as the desire show the market and society that they 'deal' with discrimination, the regulations of the SGBs usually contain harsher sanctions when compared with the ones imposed upon persons who are judged to have made political expressions. For example, the 2019 Edition of the FIFA Disciplinary Code sets the sanction for the first offence as 'a suspension lasting at least ten matches or a specific period' for natural persons; whilst the associations and clubs could be faced with 'the forfeiting of a match, expulsion from a competition or relegation to a lower division […]' if there is a case of recidivism or if the facts of the case require so.[87] Therefore, the fear of the consequences of the categorisation of an expression, which in normal circumstances would be seen as political, as discriminatory would stop individuals from expressing themselves—the stakes are too high. Disputable terms such as 'the dignity and integrity of a country' provide too great a power in interpreting a given dissenting expression against a state, and the term 'political opinion' expands the scope immensely. Consequently, yet again, subtlety suffers, and the defence of the state and status quo is consolidated.

Consequently, it can be claimed that,—consistent with assertions that sport itself is political, and that SGBs conduct their businesses in line with domestic policies and the power struggles within the international stage—one aspect of these arguments is that the categorisation and valuing of expressions are to the detriment of dissenters against the status quo. Therefore, the

[85] FIFA Disciplinary Code 2019 Edition, art 13 (1) <https://resources.fifa.com/image/upload/fifa-disciplinary-code-2019-edition.pdf?cloudid=i8zsik8xws0pyl8uay9i> accessed 20 August 2019.

[86] FIFA Disciplinary Code 2017 Edition, art 58 <https://resources.fifa.com/image/upload/fifa-disciplinary-code-500275.pdf?cloudid=koyeb3cvhxnwy9yz4aa6> accessed 20 August 2019.

[87] FIFA Disciplinary Code 2019 Edition (n 85) art 13.

suspicion of governance—in this case the SGBs—in the form of an inherent distrust of categorisation is justified, because it forcibly and arbitrarily removes certain 'undesired' ideas from the scene. The decision makers create and manipulate categories of expressions, value them and accordingly create stronger shields for their interests. The way out, as argued above, would be to allow all expressions without categorising and valuing them; however, limits should be set regarding certain expressions, which will be the subject of the next chapter.

5.4 Final Remarks

Freedom of expression cannot, and should not, be limitless. Expressions resulting in direct physical harm to the means and targets should be restricted. Moreover, concerning psychological harm, in certain cases where harm is imminent and there is no other recourse to stop the harm from happening, freedom of expression may be restricted. The restrictions should not be justified on the basis of the psychological harm they present, but rather they should be done so on the basis of the moral powers of the target. In that regard, face-to-face expressions directed at a certain person in order to violate their rights or will, resulting in a violent reaction should be restricted. Expressions leading to coercion, fraud, libel and defamation should also be restricted as they infringe upon the moral powers of the individuals. Likewise, security and safety concerns which would take the imminence of danger, along with the context of a given competition should be considered in the restriction of an expression. Further, spectators' expressions that are to the detriment to the flow of play should be restricted.

Regarding the categorisation and valuation of expressions, it is rejected that, in most cases, there are clear-cut categories of expressions. As a reflection of their inherent problems prevalent in the bigger picture, the valuation and categorisation present further problems in the context of sport. In essence, SGBs deem certain expressions political even if they have a strictly personal tone. This way of interpreting expressions is to the detriment of freedom of expression of everyone involved. This is a point that will be revisited in the categorisation of political expressions as hate speech.

Chapter 6 – Hate Speech

While criticisms against the categorisation of expressions have been laid down in the previous chapter, 'hate speech'[1] is analysed here separately. Despite its non-neutral connotations,[2] for the purposes of this work hate speech shall denote an umbrella term for expressions that consist of incitement to hatred, group libel, group epithets, discriminatory harassment, negative stereotyping, stigmatisation and other types of othering.[3] However, the analyses and arguments presented hereof does not alter the assertion that certain expressions are inseparable either from the context they are made in, or from the words or symbols used in conveying the message; because a racial, class or gender-based expression may or may not include profanity or amount to religious or political expressions.[4] The underlying reason for creating a separate chapter for hate speech is that international and national SGBs have distinct provisions with grave consequences. This chapter will first focus on the restriction of hate speech in general. Following this, the position of hate speech in sport will be analysed. Finally, the focus will shift to the SGBs' view of history and its interplay with hate speech.

[1] 'Discriminatory', 'biased' and 'derogatory' speech are also utilised depending on the commentator and the institution regulating the expression.

[2] A Brown, 'What is Hate Speech? Part 2: Family Resemblances' [2017] 36 Law and Philosophy 561, 574-575.

[3] It has to be noted that Brown has warned against the grouping together of expressions as hate speech law, and has identified ten clusters of hate speech on national, sub-national and international levels. Nevertheless, sports rules and regulations indeed group together such expressions and they are mostly transnational in nature. Moreover, time and space would not allow a clustered approach to the subject at hand, which, in any case, will turn for a more casuistic approach later in the chapter. Therefore, the umbrella term hate speech will be utilised for the purposes of this work. A Brown, *Hate Speech Law: A Philosophical Examination* (Routledge 2015) 19-41.

[4] The words used in the sentence 'Go back to your harem, you fucking towelhead hag' present an insurmountable challenge for the analysers who wish to divide and rule. The sentence includes sexism, racism, profanity, ageism and religious discrimination. The same goes for defamation and especially 'group libel', hate speech through the linking of negative connotation with a certain group as in the case of 'You, Paki, are a stinking fat gay retard'. The sentence links not only attributes a condition on a certain group, but also stigmatises persons with lesser capabilities and non-heterosexuals while using a pejorative.

6.1 The Jousting Over Hate Speech

6.1.1 The Two Sides

As in every subject regarding freedom of expression, there are staunch defenders of and those who oppose hate speech restrictions. On the one side, commentators arguing for the restriction of hate speech focus on the harm—physical and psychological—the targets suffer because of hate speech. The dignity and equality, along with the self-worth of individuals are also presented as values to be protected.[5] Moreover, power dynamics within society are thought be calcified through hate speech, and thus they should be unprotected. Hate speech can cause subordination.[6] Likewise, hate speech has the power to 'constitute' subordination and to silence powerless members of society.[7] Face-to-face expressions result in both physical and psychological distress, and have debilitating and subordinating effects on the recipient, which stops them from rebutting what is depicted as a 'pre-emptive strike'.[8] Personal attacks and isolated events are the signposts of a greater, society-wide problem. Another branch of this discussion contends that these expressions have the potential to lead to violence.[9] Finally, it is argued that hate speech should be restricted due to fear of the destruction of democracy.[10]

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[5] R Delgado, 'Words That Wound: A Tort Action for Racial Insults, Epithets and Name-Calling' [1982] 17 Harvard Civil Rights-Civil Liberties Law Review 133, 143-146. Different from the Kantian sense of dignity, Waldron posits that dignity is the social standing of a person, and that it is the basis of their recognition as equals in a society. J Waldron, *The Harm in Hate Speech* (Harvard University Press 2012) 59-60.

[6] *See generally* MJ Matsuda, 'Public Response to Racist Speech: Considering the Victim's Story' [1989] 87 Michigan Law Review 2320.

[7] I Maitra, 'Subordinating Speech' in I Maitra and MK McGowan (eds), *Speech and Harm: Controversies Over Free Speech* (OUP 2012) 95-102; R Langton, 'Beyond Belief: Pragmatics in Hate Speech and Pornography' in I Maitra and MK McGowan (eds), *Speech and Harm: Controversies Over Free Speech* (OUP 2012) 74-77 and 83-85. They both draw upon Langton's analysis of JL Austin's differentiation of speech acts. *See generally* R Langton, 'Speech Acts and Unspeakable Acts' [1993] 22:4 Philosophy & Public Affairs 293.

[8] CR Lawrence, 'If He Hollers Let Him Go: Regulating Racist Speech on Campus' [1990] Duke Law Journal 431, 452-453 and 462-466.

[9] For the presentation of the problem and its criticism *see* K Greenawalt, *Fighting Words: Individuals, Communities, and Liberties of Speech* (Princeton University Press 1995) 50-53.

[10] One reflection of this line of thought can be seen in the jurisprudence of the ECtHR where some values might be 'offensive' to national constitutional order or values protected by the ECHR itself. Communism, fascism, racism and anti-Semitism are presented to be such values, whose presence results in more deference to the states. Moreover, when the state's interference is based on the fight against abuse of the ECHR values, then the scrutiny by ECtHR may be relaxed. Y Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia 2002) 112-115.

The opposite camp presents its reasons for protecting hate speech in certain circumstances. An important argument puts forth that restricting speech due to possible injury would surrender the interpretation of expressions to judges who will tend to rule against the minorities that are endeavoured to be protected in the first place. Further, the idea of 'group defamation' is untenable, because expressions against groups are of public concern.[11] Another argument states that restriction of hate speech might not be able to produce desired results, as there is no empirical evidence proving the efficiency of the restrictions.[12] Beyond that, hate speech restrictions might even lead to the opposite effect and exacerbate racism.[13] Heinze has expanded this line of criticism to the argument based on the perceived harms to the dignity of individuals and the argument that hate speech breeds violence.[14] In that regard, the injury one suffers might just be a part of rhetoric. The emotional value might be used as an aggravator. More problematically, the arguments against hate speech expressed face-to-face are extrapolated—without clear empirical evidence—to hate speech within 'public discourse'.[15] The two instances of hate speech, namely in face-to-face confrontations and within public discourse, are inherently different and accordingly should be confronted differently. Finally, the prohibition of hate speech is important for democracy where political legitimacy requires every individual to have a 'voice'. Dworkin, as well as Richards, posit that taking away the voice of citizens brings about suspicions as to political legitimacy.[16] In the words of Rawls, 'to restrict or suppress free political speech, including subversive advocacy, always implies at least a partial suspension of democracy'.[17]

[11] N Strossen, 'Regulating Racist Speech on Campus: A Modest Proposal?' [1990] Duke Law Journal 484, 515-517.

[12] ibid 554.

[13] ibid 555-561; CE Baker, 'Autonomy and Hate Speech' in J Weinstein and I Hare (eds), *Extreme Speech and Democracy* (OUP 2009) 149-155.

[14] E Heinze, *Hate Speech and Democratic Citizenship* (OUP 2016) 75-76 and 127-128.

[15] ibid 126. Post defines public discourse as the 'encompassing the communicative processes necessary for the formation of public opinion, whether or not that opinion is directed toward specific government personnel, decisions, or policies'. RC Post, 'Racist Speech, Democracy, and the First Amendment' [1991] 32 William and Mary Law Review 267, 288.

[16] R Dworkin, 'Foreword' in J Weinstein and I Hare (eds), *Extreme Speech and Democracy* (OUP 2009) *vii-viii*; DAJ Richards, *Free Speech and the Politics of Identity* (OUP 1999) 126-137.

[17] J Rawls, *Political Liberalism: Expanded Edition* (Columbia University Press 2005) 354.

6.1.2 Disambiguating Contexts

Given the arguments of the defenders and opponents of hate speech laws, and the contentions made in the previous chapter, it can be asserted that a distinction should be made between face-to-face expressions conveyed to specific persons—'targeted vilification'—[18]and expressions conveyed to unspecified persons or groups of persons.[19] In this way, arguments that would be justified in face-to-face expressions, but would remain unjustified in non-face-to-face situations would still hold and the trap of extrapolation of arguments would be averted.

6.1.2.1 Face-to-face Expressions

With regards to expressions that are made face-to-face, it has to be asserted that hate speech laws restricting expressions conveyed in order to provoke a fight or hurt an individual without provocation or without relevant context should be admissible. In addition to these, restrictions on expressions that threaten, defraud, and in general violate the personal security of the target,[20] as well as 'fighting words' that do not 'open a discussion, invite counter-arguments, advocate a view or to convince one's audience',[21] should be admissible. The underlying reason is that the said restrictions would help protect the autonomies of persons that are targeted. They were targeted due to their supposed otherness or because the speaker solely intended to provoke a fight or negatively affect the autonomy of the target. Even if the speakers' autonomy and moral powers might deserve protection, unprovoked expressions that lead to hierarchies between people without reference to public discourse require the protection of the target. Moreover, even if the face-to-face message were within public discourse, a lack of relevant context as to the message would render it outside the scope of protection. Consequently, in the defence of hate speech restrictions, the context of the expression, the positions of the speaker and the recipients as well as the expression's relevance to the public discourse should be taken into account.

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[18] Greenawalt (n 9) 63-64.

[19] J Weinstein, 'Extreme Speech, Public Order, and Democracy: Lessons from *The Masses*' in J Weinstein and I Hare (eds), *Extreme Speech and Democracy* (OUP 2009) 35-38.

[20] SJ Heyman, 'Hate Speech, Public Discourse, and the First Amendment' in J Weinstein and I Hare (eds), *Extreme Speech and Democracy* (OUP 2009) 161 and 165-166; SJ Heyman, 'Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression' [1998] 78:5 Boston University Law Review 1275, 1340.

[21] W Sadurski, *Freedom of Speech and Its Limits* (Kluwer 1999) 114.

The foregoing may be clarified by comparing two hypothetical scenarios. In the first example, suppose there is a rally by the supporters of anti-immigration policies. At the same time and place there is a pro-immigration rally by the immigrants and their allies. If a supporter of anti-immigration policies (somehow) comes face to face with an immigrant who is attending the counter-rally and tells them, 'You are going back to Africa!' the expression should deserve protection. The expression is within public discourse. Further to that, by joining the counter-rally the target opened themselves up to public discourse.[22] In this example, there is no differentiation between criminal and tort law. The target should not be able to seek public prosecution against the speaker or claim personal damages through private litigation.

On the contrary, if an immigrant is targeted with the same words while they are commuting to work, then there is no context for the expression, and thus it should not be protected. Even though the expression is within public discourse, the target is not open to discussion. There is no pretext for the expression. The nerve of the matter is, in face-to-face situations, the threat is 'in flesh' and tangible. Besides, the autonomy and dignity of the person are directly called into question when the expression is against a certain person and conveyed before the eyes of the public.[23] Depending on the target, the quality and quantity of the speakers talking back may cease to be a viable option. Hence, the target may be helpless. The target's two moral powers, which are likely to have suffered a setback due to the aggression, should trump that of the speaker, because the motivation of speaker lacks context and is not aimed at persuading the target towards their own point of view,[24] or as pointed out above, to open up a discussion. It has to be added that, the use of 'fighting words' in face-to-face situations should render it out of the public discourse *per se*, so under no circumstances the expression 'Nigger, you are going back to Africa!' should not be protected. As Waldron has pointed out, the political protester can always use a non-fighting word when going face-to-face with a person of opposite view.[25]

[22] However, for Delgado face-to-face racial insults are not political expressions as their sole purpose is injuring the victim. Delgado (n 5) 174-175.

[23] DFB Tucker, *Law Liberalism and Free Speech* (Rowman & Allanheld 1985) 139.

[24] Strauss, in view of their 'Persuasion Principle' would not protect wounding expressions that are made face-to-face with little or no audience. DA Strauss, 'Persuasion, Autonomy, and Freedom of Expression' [1991] 91 Columbia Law Review 334, 343.

[25] Waldron (n 5) 182-183.

6.1.2.2 Non-face-to-face Expressions

Non-face-to-face hate speech within the public discourse of democracies is another issue and it brings about different takes and results. If, as Dworkin, and to a less dramatic extent, Richards have maintained, political legitimacy depends on the equal concern and respect shown to individuals, then hate speech laws regulating public discourse might corrode that legitimacy in the sense that it would be both wrong to enforce such laws, and that the person bound by these laws might not have the moral obligation to obey them.[26] There are two separate but related questions in this matter. The first is the autonomy and the moral powers of the speakers, and the second is those of the recipients.

Firstly, it can be asserted that as equals within a society, individuals conveying messages that might be offensive to a certain section of the same or another society have to be shown equal concern and respect, because the speakers deem it worthy to express themselves in questions concerning society. Failing to observe the equality between speakers due to real or perceived psychological harms their expressions might cause would be contrary to the basic tenets of freedom of expression. Accordingly, as was argued in the previous chapter, societies and groups with lower level of tolerance would set the threshold for the restrictions. In this way, in the case of democracies, silenced individuals are left out of the 'communicative processes necessary to instil a sense of self-determination' which is its essence.[27] A part of society loses its 'voice', and thus they remain equal only in its formal sense.[28]

In the matter at hand, the question is not, as Bleich has put it, 'Just how much freedom *should* we give to racists?'[29] Rather the question should be how could a democratic society tolerate

[26] It can be claimed that the limiting of the political legitimacy to hate speech laws pertaining to public discourse results from two reservations about this line of argument. First, as Waldron has asserted, the political legitimacy argument is liable to spread to all restrictions on freedom of expression, because the limits of the applicability of this argument are not precise. Second, if all hate speech laws are contended to corrode political legitimacy, then all laws restricting face-to-face expressions also have the potential to result in such corrosion, which is untenable. ibid 181-186.

[27] Post 'Racist Speech, Democracy, and the First Amendment' (n 15) 281-284 and 304.

[28] Rawls (n 17) 361.

[29] E Bleich, *The Freedom to Be Racist?: How the United States and Europe Struggle to Preserve Freedom and Combat Racism* (OUP 2011) 5 (emphasis present).

expressions, even those that might shock or disturb, and in general abhor? Heinze's criticism of Bleich for setting out the problem in this manner cannot be overstated. 'Giving' freedom creates classes of persons where the higher ones, within a bureaucratic process, distribute rights to individuals in the lower echelons. In the process, the moves taken to erase hate speech and discriminatory expressions create their own system of discriminations, rendering some discussions 'dangerous' and 'harmful'.[30] Here, there is no supposition that all ideas and expression can guide public discourse equally, but rather it is supposed that individuals qua civic participants are equally worthy, and this leads to the impossibility of determining the value of expressions. It can be claimed that hate speech restrictions go against these fundamental points, in that, they designate some expressions as wounding to some sections of society, deeming them of lesser value.[31] In restricting hate speech, and in effect removing certain expressions from public discourse, the government makes valuations about the worth of ideas. In tandem with this, the defence of hate speech laws, such as 'group libel' and 'group defamation', would give the agency that judges the case the authority to categorise the expression as libellous and defaming. Therefore, the rejection of categorisation and valuation of expressions in the previous chapter should inform the way hate speech is analysed. Furthermore, the government creates the exact same societal dynamics it is trying to avert. To be more precise, it grades individuals according to the value of the expressions that they convey. Notwithstanding, a lack of evidence regarding the level of psychological harm (if it is possible to measure it), the fact that society is protected from some type of expressions is the exact reason why suspicion of government is justified.

On the recipients side of things, it can be argued that restrictions on hate speech reflect the distrust of society due to a fear of its being unreasonable, irresponsible[32] and having a tendency to be persuaded to 'dangerous or offensive convictions'.[33] This poses a severe risk to the moral powers of the recipients, because in such cases, an agency decides, in a paternalistic manner, that certain expressions might lead to 'undesirable' judgments on the part of the recipients. Led by their moral powers, the recipients themselves have to be the ones cutting through rival

[30] Heinze *Hate Speech and Democratic Citizenship* (n 14) 108-109.

[31] Richards (n 16) 134; S Gellman, 'Sticks and Stones Can Put You in Jail, but Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws' [1991] 39 UCLA Law Review 333, 382.

[32] CE Baker, 'Harm, Liberty, and Free Speech' [1997] 70 Southern California Law Review 979, 991; GR Stone, 'Content-Neutral Restrictions' [1987] 54 University of Chicago Law Review 46, 56-57.

[33] R Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (OUP 1996) 200-201.

accounts and reach a judgment. The 'moral independence' of the individuals in realising this process is pivotal for the moral understanding of freedom of expression. [34] Accordingly, the fear that an expression would move someone to act in a certain way severs the logical link between the speaker and the person who commits the act. In this case, the possibility of being influenced by an expression thus justifies restriction even where there is not an act or a 'clear and present danger' of its occurrence.

Likewise, in the case of expressions having connotation to the past and particularly past failures in democratic systems, along with the animosity and intolerance shown towards minorities—as in the cases of Austria and Germany—are presented as reason enough for restricting hate speech. [35] In that regard, the American South, South Africa and Europe, among others, may have suffered from the negative effects of totalitarian regimes and atrocities in the past, but transposing these experiences to the present and quite possibly to the future, and identifying expressions as the culprit for the horrors that had befallen on the victims of violence amounts to a sceptical stance against democracy, and in general, society. In the past one hundred years, there have been crimes against groups that were the targets of othering, and certain expressions may have been the triggers. The means of mass communication under the command of the government and its abetters are likely to become tools for propaganda. This situation causes a not unfounded feeling of reservation for the effects of expressions on groups and the introduction of desires into the equation. Nonetheless, comparing cases of the creation of sexual fetishes in an individual through conditioning, and provocations by the Nazi mouthpiece *Der Stürmer* against the Jews in the 1930s and 1940s may be a step too far.[36]

In that sense, focusing too much on the situation-altering effects of expressions is counter-productive. In the analysis of actions of persons, both as a group and individually, their background as well as the political and social climate in which they took place have an immense effect on the way individuals behave. The historical Christian aversion against the Jews[37] along with their blaming the Jews for the German Empire's defeat in World War I, which started right after the armistice, should also have taken their toll on the population, breeding animosity

[34] Richards (n 16) 27 and 242-243.

[35] Bleich (n 29) 140.

[36] Langton 'Beyond Belief' (n 7) 73 and 81-86.

[37] Richards (n 16) 47.

towards the Jews. Moreover, as Heinze has pointed out, from a socio-political point of view there is a world of difference between the Weimar Republic and modern democracies.[38] Popular examples for showing the effects of expressions that veer around the Weimar Republic, the break-up of Yugoslavia and the genocide in Rwanda do not represent the background to the tensions in these societies, which date back centuries. Overstating the clearly undesirable consequences and the expressions that were disseminated before them leads to the loss of sight of the bigger picture consisting of complex sociological, psychological, social epistemological and economic determinants. By doing that, states and commentators who support hate speech laws become prone to tides of fear for the health of the democracy along with the interests of the minorities.

Here a necessary statement has to be made: the arguments presented against hate speech laws in this section in no way run counter to the commitment to anti-discrimination laws. While implementing policies that would give birth to a sense of equal standing between different identities is desirable, this should not give *carte blanche* to the government in taking an active part through restrictions on expressions that might hurt individuals with certain identities. As Rubenfeld has put it succinctly, '[d]iscrimination is prohibitable on the ground that blacks, women, and so on, are entitled as a matter of justice to the same treatment as whites, men, and so on. It is not prohibitable on the ground that discrimination expresses offensive and harmful attitudes or messages'.[39] This way of putting it renders it in line with the case made for equal concern and respect for all humans.

6.2 The View from Sport

From this section on, the position of hate speech within sport will be analysed by bearing in mind the particularities of the sport industry. When tackling the question of hate speech, international SGBs such as FIFA and UEFA perceive human dignity as something to be protected, as confirmed by the CAS.[40] Concerning the much-discussed notion of harm, as a

[38] Heinze has called the extrapolation of data regarding non-longstanding, instable, and impoverished democracies to longstanding, stable and prosperous ones 'the Weimar fallacy'. Heinze *Hate Speech and Democratic Citizenship* (n 14) 129-132.

[39] J Rubenfeld, 'The First Amendment's Purpose' [2001] 53 Stanford Law Review 767, 811 and 815-816.

[40] CAS 2013/A/3324 *GNK Dinamo v UEFA* & CAS 2013/A/3369 *GNK Dinamo v UEFA*, para 9.12; CAS 2015/A/3874 *Football Association of Albania (FAA) v Union des Associations Européennes de Football (UEFA) & Football Association of Serbia (FAS),* para 172.

reflection of economic logic, SGBs are more interested in the perceived 'harm to the sport',[41] harm to the organiser[42] and harm to the reputation of the competition.[43] As has been argued, harm-based contentions for the restriction of non-face-to-face hate speech should be rejected, and it can be maintained that a similar framework to the one presented just above may be developed for sport.

6.2.1 Overview

The arguments for hate speech in sport are complex and do not offer a one-size-fits-all formula, but at the end of the day the notion 'expression' is itself complex.[44] Nonetheless, the examples above regarding anti-immigration expressions can set the framework for the analysis. In essence, the context of the expression and the willingness of the speaker to persuade others are important points of reference. In addition to these, the ability of the recipient to rebut hate speech is of the essence. Before going for more in-depth arguments regarding hate speech in sport in the following sections, a brief overview should be given.

First, athletes' face-to-face hate speech directed at other stakeholders in and around the sports venue might result in disciplinary sanctions if the expression is out of context, meaning the expression is not used as a rebuttal or is a part of an ongoing discussion in which everyone involved had opened themselves up to the discourse at hand. Likewise, unwarranted face-to-face hate speech in and around the sports venue towards specific spectators, and other persons such as members of the media and the stewards should also be restricted in certain cases. Depending on the circumstances, the athletes' expressions towards a group of spectators could be restricted. On the other hand, messages within public discourse and against groups should not be restricted when disseminated through traditional or social media.

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[41] CAS 2014/A/3562 *Josip Simunic v Fédération Internationale de Football Association (FIFA)* para 114.

[42] UEFA Appeals Body decision of 26 June 2013, *Zenit St. Petersburg*. Reported in UEFA, 'Case Law: Control and Disciplinary Body & Appeals Body' (January 2013 - June 2013) 125 <https://www.uefa.com/MultimediaFiles/Download/uefaorg/UEFACompDisCases/01/99/00/41/1990041_DOWNLOAD.pdf> accessed 20 August 2019.

[43] UEFA Appeals Body decision of 3 February 2015, *Legia Warszawa*. Reported in UEFA, 'Case Law: Control, Ethics and Disciplinary Body & Appeals Body' (January 2015 - June 2015) 97 <https://www.uefa.com/MultimediaFiles/Download/OfficialDocument/uefaorg/UEFACompDisCases/02/27/53/44/2275344_DOWNLOAD.pdf> accessed 20 August 2019.

[44] Heinze *Hate Speech and Democratic Citizenship* (n 14) 4.

It can be claimed that the contentious part of the spectator's side concerns expressions by a group of supporters in a sports venue.[45] On the one hand, unwarranted hate speech directed at a stakeholder, whether it was conveyed as a part of public discourse or not, are to be bases for disciplinary action against the team, club or member association they are linked to, and in some cases the host association. On the other hand, expressions that are not directed against a specific stakeholder as well as expressions made within public discourse or made with the aim of rebutting hate speech should be protected in certain cases.

Nevertheless, one point that arises due the particularities of the sport 'production' process has to be clarified. In the context of sport, an attack against hate speech restrictions that is grounded solely on their domestic political legitimacy—following Dworkin and Richards—might turn out to be deficient in certain cases. In concrete, it should be asserted that international competitions, national competitions that are broadcast outside the territory of the country they are played, and the presence of non-citizens in national competitions (both as stakeholders and as spectators) take away the bite of the legitimacy objection.

The ideal example for this point is Anelka's '*quenelle*' gesture, which will be analysed later in Section 6.4.1. When observed in a more abstract manner, the '*quenelle*' incident pertains to a French footballer's message about French politics in an English Premier League match that was broadcast worldwide. Here, the French footballer was sanctioned by an institution based in England. In other words, Anelka was sanctioned by an institution that had no links to either the French political system or the instruments that ensure its legitimacy. Under these circumstances, could the sanction that was imposed by a private English institution affect the legitimacy of French governmental institutions or their laws? Of course, the answer should be a resounding 'no'. First, the impact of private institutions on democratic legitimacy should be questioned. Suspicion of governance provides a tool to redirect suspicion as to the intentions of the institutions that have coercive power. Yet, altogether different kinds of reasoning and conclusions would appear if such suspicion evolves into a challenge for the legitimacy of the democratic processes of sovereign states, especially in transnational settings grounded on mostly private relationships. Second, nation states evolve under the influence of globalisation,

[45] Discontinuous individual expressions would be within the jurisdiction of anti-sport violence laws.

and so do citizenship,[46] democracy,[47] and sovereign power. If hate speech restrictions are to be criticised by putting political legitimacy to the forefront, then the global effects of dissemination of expressions have to be borne in mind.

The natural step forward from these two interrelated points would be the suggestion that an idea of political legitimacy solely based on the analysis of the nation state would be trying to swim against the current. Therefore, the political legitimacy objection against hate speech restriction—if it is to be adopted in the global discourse in the first place—has to be sharpened for international cases, especially in sport. The analysis should make sense of the particularities of the production and consumption of sport as well as the prevalent economic and political logic. Consequently, for the purposes of this work, despite political legitimacy being the stepping stone in the attack on hate speech restrictions in the previous sub-section, in the case of sport, the political legitimacy argument cannot be transposed without alterations. To be more precise, in transnational sport, equal concern and respect for individuals from diverse cultures have to be retained, while political legitimacy arguments should be dropped.

Similarly, the French politics part of the assertion treads on a possible challenge in the shape of the question 'what discourse?' Here, it has to be pointed out that Post's composition of the idea of public discourse is inherently linked to argument from democracy. According to Post, this situation gives rise to the fact that a person is deemed autonomous within public discourse, but may lose this position when they are outside it because 'this autonomy is political, rather than ethical'.[48] It can be asserted that this challenge in the context of sport can be overcome by inverting and tweaking the composition, in that, the public discourse would be moral, rather than political. In that manner, the scope of the public discourse would be extended to include not just 'political speech' but also subjects regarding the globalised society in general. In this way, the universality of freedom of expression would be realised. Moreover, although it is not within the scope of this work, the moral nature of public discourse would allow less-hindered criticism of SGBs by the stakeholders and spectators. Consequently, in line with the moral defence of freedom of expression as a human right, the transnational nature of sport keeps one

[46] S Sassen, 'The State and Globalization' [2003] 5:2 interventions 241, 245-246.

[47] JA Scholte, 'Reconstructing Contemporary Democracy' [2008] 15:1 Indiana Journal of Global Legal Studies 305, 313-323.

[48] R Post, 'Participatory Democracy and Free Speech' [2011] 97:3 Virgina Law Review 477, 483.

from anchoring public discourse to just one nation state or society. Such a move would also stop restrictive practices such as the curbing of criticisms against Qatar—due to its poor human rights record—through the playing of the racism card.[49]

6.2.2 Expanding the Scope of Hate Speech

Before moving on to a more in-depth analysis of the contentions discussed at the start of this section, there is an obstacle that has to be cleared. The obstacle in the debate on hate speech is with regards to the subject matter of expressions. Racist and sexist expressions (as the institutions judging them have perceived them) are restricted by the defenders of hate speech laws. Nevertheless, such restrictions leave important aspects of discrimination like homophobia, transphobia, ageism, or physical and mental capabilities out of the scope. Here, Heinze's cautious and moderate contentions that extend hate speech bans to protect all vulnerable individuals or groups should be followed.[50] That is, in sport every type of expression that 'others' an individual due their supposed distinctness should be restricted if they pass a rigorous case-by-case scrutiny, because equal concern and respect for all 'others' requires such an expansion of scope. A bright-line test for the designation as to who would be protected is bound to fail, because as Brown has demonstrated characteristics, identities and statuses that are to be protected hugely vary.[51] Equal concern and respect for individuals should stop one from introducing such tests unless clear and empirical evidence that would clear away doubts is produced.

It has to be asserted that one of the few SGB practices concerning freedom of expression that is in parallel with what this work argues is the expansion of the scope of hate speech restrictions. In concrete, UEFA, in addition to the ones pertaining to the religion and gender of the target, perceives expressions as to the sexual orientation, ethnic origin, of persons, discriminatory.[52]

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[49] G Farred, 'The World Cup, the security state, and the colonized 'Other'' in R Gruneau and J Horne (eds), *Mega-Events and Globalization: Capital and spectacle in a changing world order* (Routledge 2016) 158.

[50] E Heinze, 'Cumulative Jurisprudence and Hate Speech: Sexual Orientation and Analogies to Disability, Age, and Obesity' in J Weinstein and I Hare (eds), *Extreme Speech and Democracy* (OUP 2009) 274-282.

[51] A Brown, 'The "Who?" Question in the Hate Speech Debate: Part 1: Consistency, Practical, and Formal Approaches' [2016] 29:2 Canadian Journal of Law & Jurisprudence 275, 276-282.

[52] UEFA Disciplinary Regulations 2019 Edition, art 14 (1) <https://www.uefa.com/MultimediaFiles/Download/Regulations/uefaorg/UEFACompDisCases/02/60/83/56/2608356_DOWNLOAD.pdf > accessed 20 August 2019.

The FIFA Disciplinary Code goes several steps further by adding 'political opinion, wealth, birth or any other status' within the scope of restrictions.[53] There are at least two examples of this approach. The first example is FIFA's treatment of the Mexican chant '*eeeeeh Puto*!' The chant literally means 'eeeeeh Faggot!', but Rodriguez has asserted that in the case of Argentinean fans '[p]uto is a symbolic gesture of subordination and control, used to reify the in-group', and it comprises of nuances as to the meaning of the word depending on the listener.[54] Opting for the former interpretation, FIFA sanctioned the Mexican Football Federation in accordance with its 'discrimination' provision but the CAS changed the fine to a warning as it deemed the chant as 'improper conduct'.[55]

Second, the UEFA case law contains incidents where expressions denigrating sexual orientation of persons are sanctioned.[56] It also includes similar expressions of athletes against other stakeholders;[57] and equating individuals and groups with certain 'others' or vilifying them, as in the case of calling a Serbian team's supporters '*cigani*' which means gypsy in Serbian.[58] Consequently, the practices of FIFA and UEFA regarding the expansion of the scope of hate speech, up to a certain point, are mostly adequate and appropriate. On the other hand, as the strategic use of the words 'up to a certain point' indicates, the picture is not free of contradictions. In Section 5.3., the concerns that come with the categorisation of political

[53] FIFA Disciplinary Code 2019 Edition, art 13 (1) <https://resources.fifa.com/image/upload/fifa-disciplinary-code-2019-edition.pdf?cloudid=i8zsik8xws0pyl8uay9i> accessed 20 August 2019.

[54] NS Rodriguez, '#FIFAputos: A Twitter Textual Analysis Over ''Puto'' at the 2014 World Cup' [2017] 5:6 Communication & Sport 712, 716 and 719-722.

[55] CAS Media Release (16 November 2017) 'The Court of Arbitration for Sport (CAS) Cancels Two Fines Imposed on the Mexican Football Federation and Imposes Warnings in Their Place' <http://www.tas-cas.org/fileadmin/user_upload/Media_Release__English__4780_4788.pdf> accessed 20 August 2019.

[56] UEFA CEDB decision of 07 July 2017, *Crvena Zvezda*. Reported in UEFA, 'Case Law: Control, Ethics and Disciplinary Body, Appeals Body, CFCB Adjudicatory Chamber' (July - December 2017) 8 <https://www.uefa.com/MultimediaFiles/Download/OfficialDocument/uefaorg/UEFACompDisCases/02/54/65/16/2546516_DOWNLOAD.pdf> accessed 20 August 2019.

[57] Due to calling the assistant referee a 'Fucking Faggot'. UEFA CEDB decision of 19 May 2016, *The Football Association of Wales*. Reported in UEFA, 'Case Law: Control, Ethics and Disciplinary Body & Appeals Body' (January 2016 - June 2016) 65-69 <https://www.uefa.com/MultimediaFiles/Download/OfficialDocument/uefaorg/UEFACompDisCases/02/40/14/21/2401421_DOWNLOAD.pdf> accessed 20 August 2019.

[58] UEFA CEDB decision of 22 August 2013, *Budapest Honvéd*. Reported in UEFA, 'Case Law: Control and Disciplinary Body & Appeals Body' (July 2013 - December 2013) 6-10 <https://www.uefa.com/MultimediaFiles/Download/uefaorg/UEFACompDisCases/02/04/83/54/2048354_DOWNLOAD.pdf> accessed 20 August 2019.

expressions as hate speech by FIFA were touched upon. In the penultimate section of this chapter, similar examples and concerns will build upon that premise.

6.2.3 Hate Speech on the Part of Athletes

After setting the scope of hate speech, it is time to particularise the points introduced in the Overview above. Regarding hate speech on the part of athletes, it can be maintained that restrictions should be in place in certain cases. A justified question against this assertion would ask why the restriction on hate speech is given a green light in this case, while restrictions on hate speech in general are condemned. The answers to that question lie in the oft-referred conceptions of equal respect and moral powers as well as the particularities of the sport industry.

Moving on to the specifics of hate speech restrictions, it can be argued that the framework set out above is relevant to the questions at hand. In general, the disambiguation of face-to-face expressions and expressions conveyed to the public in general can be utilised in the case of sport, with sport-specific alterations. As was argued above, face-to-face hate speech might have negative effects on the autonomy of persons. Creating an 'other' in flesh and blood implies that the target does not deserve equal concern and respect as a person. This goes contrary to the assertion that individuals cannot have pre-assigned roles in society and in sport. The disruption of the equality between individuals should be addressed bearing in mind the context of the expression. Here, it should be stated that the target's ability to avoid an expression is of importance. If the target has no chance of avoiding the expression,[59] then they have to bear with it. Particularly, in sport avoiding a face-to-face expression in the field and around it is almost impossible. More importantly, the movements of the athletes and other stakeholders are regulated by the rules and regulations of the SGB. They cannot simply leave a certain area, either the field of play or the area surrounding it. Furthermore, as a reflection of the general question of the viability of counter-speech,[60] in some cases counter-speech in face-to-face hate speech may not be viable option in sport. The lack of viability also stems from the way that rules and regulations of the SGBs function. In concrete, due to the rules of the game and the principle of fair play, a stakeholder—and for the purposes of this work an athlete—cannot react to an expression in a way they deem fit. The person in charge has the capacity to adjudicate on

[59] *See* note 32 in Section 5.2.3.

[60] Brown *Hate Speech Law* (n 3) 258-259.

what happens in the field of play and the area around it. Therefore, the rebuttal of an expression or a counter-expression by the target may not be possible for the fact that the person in charge of the field of play is seen as the only person who has the duty to keep things in order. Counter-speech or a reaction could be perceived as a challenge to the powers of the person in charge or in general the notion of fair play, and might result in the sanctioning of the athlete by the person in charge of the field of play and the disciplinary bodies.

It can be suggested that laying down the problem in this way points out to the SGB's condemnation of athletes to the role of 'Stoic' athletes through what Stephens and Feezell call 'simple Stoicism'. As distinct from its namesake that has its roots in ancient philosophy, simple Stoicism, in the context of sport, perceives the athlete as devoid of emotions, unwavering in the face of adversity and stiff in general.[61] Simple Stoicism ignores the fact that the athlete is a moral agent. To counter this situation, as moral agents with their own autonomies that are supported by the two moral powers, athletes have to have the means of personally reacting to (man-made) adversities created by other moral agents. However, as argued in the previous paragraph, in sport, athletes are stopped from avoiding an expression, and the ideal means of reacting is taken away from the athlete through rules and regulations.

These points lead to the argument that the SGBs which inhibit the athletes should be the ones protecting them, as they, from a moral psychological point of view, take away the athletes' means of responding to hate speech. Therefore, since they are unable to avoid or respond to targeted discriminatory expressions—which is in itself a moral problem—the SGBs that inhibit the athlete (and stakeholders in general) should have the duty of protecting the autonomies of its constituents while showing equal concern and respect for each and every one of them.[62] As has been argued at Section 4.2, as a part of their associative activities, SGBs set out rules with a view to maintaining order and protecting their brands. Accordingly, it can be claimed the associative activities of SGBs could be put to good use. These activities should not be one-sided, meaning that the SGBs should not be concerned only with the well-being of their brand image. As associations and joint ventures, they have to uphold the wellbeing of their direct and indirect

[61] WO Stephens and R Feezell, 'The Ideal of the Stoic Sportsman' [2004] 31:2 Journal of the Philosophy of Sport 196, 196-200.

[62] This reasoning is akin to Alexy's justification and limiting of 'protective rights' against third parties. The underlying reason for both is that having coercive power obliges the same bodies to protect their agents. R Alexy, *A Theory of Constitutional Rights* (Julian Rivers tr, OUP 2002) 307.

members, along with the athletes who 'produce' the game. This is the *ratio operandi* of associations. Therefore, the SGBs should protect athletes from unwarranted hate speech made by other stakeholders in and around the sports venues.

The FA's sanctions against John Terry[63] and Luis Suárez[64] are relevant for the subject at hand. In these cases, the footballers were sanctioned due to their face-to-face targeting of black footballers. The targets were subjected to words highlighting their skin colour. There was dialogue between the speakers and the targets in both cases, but since the incidents happened in the field of play rebuttal was impossible. Neither Terry nor Suárez were disciplined by the referee, but both were sanctioned after subsequent FA investigations. Consequently, in view of the arguments of this sub-section, the sanctions against the players should be deemed as justified, because the FA intervened in the situation and upheld the moral powers of footballers whose means of avoiding the expression and rebutting it were limited. More importantly, the targets of hate speech did not accept the abuse and moved on. This point is of the essence as this was the course suggested by former FIFA president Sepp Blatter who supported his argument with the idea of fair play and the inherent characteristics of the 'game'.[65] As has been argued in this work, equal concern for respect due to the athletes cannot be nullified by the rules of the game or the values designated by a private organisation. The alleged 'characteristics of the game' should not insulate sport from the outer world. On the contrary, rules and values should be shaped so that the moral powers of the stakeholders are efficaciously protected just as they should be protected beyond the confines of sport.

With respect to athletes' expressions towards spectators in and around sports venues, a case-by-case scrutiny of the circumstances has to be conducted. Although the following arguments could not provide for an all-encompassing account of hate speech due to infinite possibilities as to the interaction between stakeholders, along with the contexts in which they take place, a rough account will be given. First of all, being face-to-face and the context of the expression are both of concern. In line with the general principles set forth above, an athlete's discriminatory expressions against an identifiable spectator or group of spectators should present grounds for disciplinary charges, provided that the expression on the part of the athlete is unwarranted.

[63] *The FA v John George Terry* Decision of the FA Regulatory Commission.

[64] *The FA v Luis Suarez* Decision of the FA Regulatory Commission.

[65] B Carrington, 'Introduction: sport matters' [2012] 35:6 Ethnic and Racial Studies 961, 962.

Similar to the athletes, spectators do not shed their moral powers and rights at the turnstiles. An important aspect of the respect and concern shown to the spectators is that spectators cannot be reduced to the role of consumers.

The more contentious part of the discussion involves athletes' expressions in sports venues against a large group of supporters, eg a certain part of the stands or all of the stands, or no one in particular. As was argued before, the spectators' sentimental investments may be disproportionate to the competition at stake. Both the spectators and the media further accentuate competitions between athletes and teams from nations that are historical or contemporary rivals. In view of this, the mood within the sports venue may become even more prone to the perceived or real negative effects of the expressions by the athletes, who are in the spotlight, and actually, by the persons the spectators have come to watch. Therefore, in cases where a clear and present danger might manifest itself, hate speech should not be protected; otherwise it should be protected. In this regard, the safety and security concerns presented in Section 5.2.3 are relevant. There, it was argued that in the lower tiers of sport, the safety and security of all who are concerned might be less than ideal. Therefore, it was indicated that in certain cases, the creation of restrictions might be the best way to proceed. Yet, in any case, the judgment as to danger should be made in an objective manner. The decision-maker has to rely on admissible facts, not suppositions. Consequently, the suspicion of governance still prevails, but there still should be room for an objective evaluation of facts of any given case.

Sports venues are not the only mediums where athletes can express themselves. Traditional and social media have become important outlets in the dissemination of expressions. Regarding athletes' expressions directed against certain groups of the public in general, the position arguing that their sanctioning may be of societal interest is untenable in various regards. Athletes cannot be deemed solely as de-politicised entertainers. Accordingly, the athletes' expressions before the media, on social media, or on the street are no different from those of a non-athlete. They have the right to freedom of expression even if their expression might 'hurt' a certain group. SGBs' or society's pre-assignment of a role to athletes is not reason enough to curb their moral powers and autonomy, and thus registering to conduct sporting activities as a part of association or joint venture should not damage them. Hate speech on the part of the athletes directed against the public in general through traditional and social media should not be

the basis of disciplinary sanctions, due to the inherent political nature of such expressions within public discourse.

Regarding the liability of athletes due to their social media posts, the sanction against the then-Liverpool FC player Mario Balotelli is an apt example. The player was banned by the FA for one match and was fined £25,000 for re-posting an image on Instagram which read 'Don't be racist! Jump like a black man and grab coins like a Jew'.[66] This case is illuminating in two respects. First, it is an example of the SGBs' vigilance in applying hate speech restrictions, including the ones resulting from social media posts.[67] Second, it depicts the paradox of discriminatory expression by members of negatively discriminated groups towards members of other groups experiencing the same problem, where a black footballer, who is a member of a group suffering from racism, and in fact had suffered from racist expressions,[68] shared stereotyped tweets. In parallel with the contentions regarding the athletes' discriminatory expressions against a group of individuals and the ones made beyond the immediate vicinity of sports venues, this kind of expression should have been protected. It is not relevant whether the sanction against the footballer was light or not, as the important aspect of the whole deal is the chilling effect on the athletes.

Balotelli and similar cases may be straightforward to judge and discuss. But expressions that might be deemed by the speaker or football community as 'banter' or 'just fun' can be seen as 'hard cases'. For example, French footballer Antoine Griezmann posted a picture taken before a party painted in black and wearing a Harlem Globetrotters jersey. Following strong reactions likening the picture to 'dressing up in blackface', the footballer apologised and deleted the

[66] *The FA v Mario Balotelli* Decision of the FA Regulatory Commission.

[67] In the season which the incident took place, the number of cases rising from social media activity of the stakeholders increased by 77%. The IOC is also aware of the importance of the social media. The 2018 PyeongChang Olympics version of the IOC Social and Digital Media Guidelines clearly draw the lines for posting by stating that '[p]ostings must not be made for the purposes of demonstration or any form of political, religious or racial propaganda. They must be dignified and not be discriminatory, offensive, hateful or defamatory'. The FA, 'Tackling Discrimination' 19 <http://www.thefa.com/-/media/files/pdf/respect/the-fa-reporting-statistics.ashx> accessed 20 August 2019; IOC Social and Digital Media Guidelines for persons accredited to the XXIII Olympic Winter Games PyeongChang 2018, s 1 (b) <https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/Games/Winter-Games/Games-PyeongChang-2018-Winter-Olympic-Games/IOC-Social-and-Digital-Media-Guidelines/PyeongChang-2018-Social-Media-Guidelines-eng.pdf> accessed 20 August 2019.

[68] M Doidge, ''If you jump up and down, Balotelli dies': Racism and player abuse in Italian football' [2015] 50:3 International Review for the Sociology of Sport 249, 257.

tweet.[69] This case should give rise to the following questions: is Balotelli's case so much different than that of Griezmann's, and accordingly, should Griezmann have been charged for the image? The answer to both questions is 'no'. Both footballers were raised in and reside in Western democracies, and both expressed themselves through stereotyping certain groups, depicting them as greedy, and confirming the myth of the masculine black male (athlete). Both expressions were disseminated through social media, and both were part of the public discourse directed against the public in general. Consequently, similar cases were treated differently by SGBs without presenting sufficient reasons for doing so.[70] This situation shows the challenges presented by the futility of drawing limits as to athletes' expressions (and expressions in general), and their treatment by SGBs.

In addition to the foregoing, one has to bear in mind the fact that athletes may engage in non-sport related activities to express themselves. A notable example is former NBA player Allen Iverson's hip-hop single. Under the alias 'Jewelz', Iverson was planning to release a hip- hop album to fulfil their childhood dream. The release of the first single from the album was met with shock and horror because the song (supposedly) contained misogynistic, homophobic and violent lyrics. The NBA Commissioner demanded 'less offensive lyrics', and eventually the album was not released. Iverson was not charged for their 'conduct'.[71] Correspondingly, it should be maintained that an athlete's expressions that made beyond the immediate vicinity of sports venues and that do not target other stakeholders should be of no concern for the SGBs.

[69] The Guardian Website, 'Antoine Griezmann apologises for painting himself black at party' (18 December 2017) <https://www.theguardian.com/football/2017/dec/18/antoine-griezmann-aplogises-painting-himself-black> accessed 20 August 2019.

[70] One may object that the FA—in Balotelli's case—, and Real Federación Española de Fútbol (RFEF)—in Griezmann's case—are separate entities with differing policies. The reply to that would emphasise that if the aim of sanctioning athletes is 'sending a message', then both SGBs preside over jurisdictions with rising xenophobia, and thus in both cases the sanction would indeed 'send a message'. Most importantly, in the case of discrimination in football regulating different jurisdictions is not an issue, due to the fact that UEFA and FIFA's statutes include the goal to prohibit discrimination, and thus, they may intervene if their goals are not observed by member associations or their members. FIFA Disciplinary Code 2019 Edition (n 53) art 27 (6); UEFA Disciplinary Regulations 2019 Edition (n 52) art 29 (4).

[71] CJ McKinny, 'Professional Sports Leagues and the First Amendment: A Closed Marketplace' [2003] 13 Marquette Sports Law Review 223, 223-224; PL Cunningham, '"Please Don't Fine Me Again!!!!!": Black Athletic Defiance in the NBA and NFL' [2009] 33:1 Journal of Sport & Social Issues 39, 43.

6.2.4 Hate Speech on the Part of Spectators

In the case of spectators' discriminatory remarks against stakeholders, and especially the athletes in and around sports venues, it is possible to extend the arguments presented above regarding the athletes' expressions against fellow stakeholders to the question at hand. Generally, SGBs should lend a hand in protecting its stakeholders, especially the athletes, against hate speech by the spectators. Such intervention means that the athletes' sole aim is not to entertain at all costs, to the detriment of their moral powers and their status as moral equals.

The keys in this respect, as argued above, are the rules and regulations of SGBs that stop the athletes from taking certain actions or expressing themselves. The athletes' interaction with spectators is curbed, and thus they are not given the chance to rebut the expressions immediately. An example of inhibition is seen with Ghanaian footballer Sulley Muntari's sending-off—later rescinded by the Italian Football Federation (FIGC)—because of his protests against racial abuse. Having received a card for informing the referee in a protesting manner of the racial abuse by rival supporters, Muntari received a second yellow card for walking off the pitch.[72] The laws of the game require footballers to act within certain parameters, and any deviation from these may result in sanctions. A counter-example to this argument can be presented through the then-Barcelona player Dani Alves' peeling and eating of a banana, which was thrown towards the footballer during a match.[73] Nevertheless, it can be claimed that while there is a rebuttal of a discriminatory expression in this incident, there is no direct interaction with the perpetrator. The footballer engaged in counter-speech, but the expression is limited to an ironic use of the expression itself. Any confrontational expression, including against the ones using the banana, would have resulted in a sanction for the footballer. Moreover, Alves did not break the rules of the game by eating the banana.

Moving past this objection, it has to be maintained that the protection should cover not only overt and clear instances of hate speech such as monkey noises, 'jungle chants' and stereotyping

[72] The Guardian Website, 'Sulley Muntari ban rescinded after red card for walking off over racial abuse' (5 May 2017) <https://www.theguardian.com/football/2017/may/05/sulley-muntari-ban-rescinded-pescara-racial-abuse> accessed 20 August 2019.

[73] BBC Website, 'Dani Alves: Barcelona defender eats banana after it lands on pitch' (28 April 2014) <http://www.bbc.com/sport/football/27183851> accessed 20 August 2019.

through words and actions, but also veiled dehumanisation such as 'sexual dehumanisation' that reduces individuals to their perceived or apparent sexuality.[74] Such an incident took place in the Premier League where Manchester United fans chanted about their team's Belgian/Congolese footballer Romelu Lukaku's supposedly 'abnormally big' penis size. The FA did not charge the club, and 'Kick It Out', an organisation working for equality and inclusion, drew attention to the issue.[75] The chants calcify the stereotypes about the black male, and dehumanise him sexually because of the supposition that he is 'well-endowed'. The player is unable to react during the match, but can only appeal to the fans for putting an end to such chants.

As can be noticed, in the foregoing arguments regarding the position of the athletes, potential psychological harm to them has not been made an issue. Moreover, it can be claimed that the possibility of a violent response by the athlete is of no consequence. The underlying reason is that there is not enough evidence about the negative impacts of hate speech on the stakeholders. What makes it even more difficult is the fact that stakeholders who are the targets of hate speech react differently. For example, whereas Muntari left the pitch and Cameroonian footballer Samuel Eto'o threatened to leave the pitch,[76] Dani Alves ate the banana. In view of these, upholding the moral powers of the athlete and equality are more appropriate for the issue at hand. Attempting to justify restrictions on hate speech in sport through the instrumentalisation of harm would be counter-productive. Simply put, not all stakeholders may feel or react the same way. Consequently, unwarranted hate speech against stakeholders by the spectators should not be protected.

On the other hand, a group of spectators' hate speech that is not directed against a specific athlete or spectator[77] may also be made a subject of analysis. These expressions could be directed against legal persons such as clubs, certain groups including the opponents, or as in the case of Mexican chant '*eeeeeeh Puto*!' sometimes to no one in particular.[78] In line with the

[74] Richards (n 16) 58.

[75] BBC Website, 'Manchester United: Romelu Lukaku chant is 'racist' - Kick It Out' (19 September 2017) <http://www.bbc.com/sport/football/41317495> accessed 20 August 2019.

[76] BBC Website, 'Eto'o makes anti-racism protest' (26 February 2006) <http://news.bbc.co.uk/sport1/hi/football/europe/4751876.stm> accessed 20 August 2019.

[77] Individual face-to-face expressions between the spectators unrelated to public discourse should result in charges by the state rather than disciplinary actions by SGBs.

[78] CAS Media Release (n 55).

defence of moral powers and autonomies of the spectators, even when they are directed against certain groups of people, hate speech should be protected. Here, following Wasserman who has grouped all 'oral, symbolic, or written on signs, banners, clothing, and body parts' as 'cheering speech', such expressions by the spectators should be deemed a part of public discourse.[79] At the end of the day, a group of people chanting on a subject of their choosing would surely pertain to public discourse, which is, as argued above, of moral nature. The same logic should apply to banners in the stands. Nevertheless, a reservation should be brought forth with respect to expressions that are not directed against a person or a group. That is, a distinction should be made according to the facts of the case. For example, in the case of '*eeeeeeh Puto*!', if there is an openly non-heterosexual stakeholder or spectator is in or around the sports venue, then the expression could be interpreted as being directed towards a specific individual. Therefore, it should be restricted. Finally, safety and security within the sports venue and the disproportionate sentimental investment on the part of the spectators should also be borne in mind. Consequently, a case-by-case approach taking into account the context, the actors and the setting of the expression would produce valuable results.

6.3 Possible Objections to Allowing Hate Speech in Sport

It can be claimed that arguments for allowing hate speech within and around sports venues in certain cases could meet serious objections by those who call for total restriction of hate speech. In the case of sport, those who argue that politics and discrimination have no place in it would join them. In that regard, there might be at least two objections.

6.3.1 Two Objections

The first objection would follow Waldron in asserting that an aspect of discriminatory expressions is the inherent message that the 'other' is not welcome.[80] When 50,000 fans chant 'I'd rather be a Paki than a Turk'[81] against Turkish fans watching an international football match in the away stand, the mood would be less than friendly. The chant drips of a mix of racism and

[79] HM Wasserman, 'Fans, Free Expression, and the Wide World of Sports' [2006] 67 University of Pittsburgh Law Review 525, 528-529.

[80] Waldron (n 5) 2, 95-96 and 166-167.

[81] P Barclay, 'Blurred line between bile and banter' (*The Telegraph Website*, 28 November 2004) <https://www.telegraph.co.uk/sport/football/teams/england/2392033/Blurred-line-between-bile-and-banter.html> accessed 20 August 2019.

Islamophobia through the choosing of 'the lesser of two evils', so it should be sanctioned. The same argument could be transposed into other forms of discrimination, such as homophobia, transphobia, and ageism. If the 'other' is not welcome within a certain field of sport, they might have to start following another sport, or give up watching sport altogether. The argument would rightly drive home that the forcible disenfranchisement of a certain part of the public becomes even more acute when the near-monopolistic position of SGBs and the Olympics in particular is taken into account. Since a similar competition would not attract the talent, support, and attention needed to hold a competition; the spectator or the audience might not be able to find another sport event of the same calibre. The case of the IOC would be of particularly importance as it is protected by the Nairobi Treaty on the Protection of the Olympic Symbol, and the monopoly position entitled to National Olympic Committees through laws. The fact that the IOC is able to stop any rivals that use the term Olympics[82] would be enough to dissuade creation of rivals. In essence, the objection would defend that the fact that a person cannot simply change the sport they are interested in would be reason enough to restrict certain expressions that might alienate a certain audience.

The second objection would assert that laws aiming to fight discrimination—racism in particular—on national and transnational levels is of concern to SGBs. On the transnational level, the EU introduced combating racism as an '[EU] Treaty-mandated objective'.[83] This objective is endeavoured to be achieved through criminal law with a framework decision whose principles and certain articles were directly transposed to national laws.[84] Furthermore, each state—if they opt to do so—enact their separate hate speech laws in order to tackle the issue.[85] States may even go on to prescribe criminal or administrative penalties against racist behaviour in sport.[86] Also, as indicated in Section 3.2.2, SGBs have started to adopt the documents of international human rights law. Bearing these facts in mind, the objection would underline that

[82] The strong protection of the Olympic trademark in Section 110 of the Amateur Sports Act of 1978 brought about a court injunction against the use of the word Olympic in the 'Gay Olympic Games'. *San Francisco Arts & Athletics, Inc. v United States Olympic Committee* 483 US 522 (1987); Nairobi Treaty on the Protection of the Olympic Symbol.

[83] M Bell, *Racism and Equality in the European Union* (OUP 2008) 177.

[84] Council Framework Decision of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, OJ L328/55 [2008], arts 1, 3 and 10.

[85] P Godzisz and D Pudzianowska, 'Do Some Identities Deserve More Protection Than Others? The Case of Anti-LGB Hate Crime Laws in Poland' in J Schweppe and MA Walters (eds), *The Globalization of Hate: Internationalizing Hate Crime?* (OUP 2016) 174.

[86] Football (Offences) Act 1991 s 3 (as revised by Football (Offences and Disorder) Act 1999 s 9).

the prohibition of incitement to discrimination in the Article 20(2) of the International Covenant on Civil and Political Rights[87] would serve as a foundation for hate speech restrictions by SGBs. In essence, the argument would focus on the effects of international law on the SGBs' stance on hate speech.

6.3.2 The Counter-arguments

These two objections are indeed strong and thought-provoking. However, they do not carry enough weight to overhaul the contentions set forth in this chapter. The following provide point-by-point counter-arguments for the above-mentioned objections.

6.3.2.1 Feeling Unwelcome

Concerning the first objection, it can be maintained that it is about expressions which include groups of persons, either as speakers or recipients. Therefore, face-to-face expressions and the considerations that they bring with them would not apply. In that regard, three counter-arguments that set its sights on the group-related hate speech may be presented.

Firstly, the nature of the expression, which is dependent on the context, is important. As was asserted above, if the expression is not conveyed in order to disrupt the moral powers of the target, if it is not made out of context and if it is within the public discourse—with the exception of spectators' expressions within sports venues targeting a specific athlete—, then discriminatory expressions should not be the grounds of sanctions by the SGBs. If the basis for restrictions is the recipients' unease in receiving an expression, then it has to be suggested that any expression might make someone (whether as a stakeholder, a spectator or a part of the audience) feel unwelcome. More importantly, either as a political expression backed by the nation state or as an expression reflecting dissent against it, political expressions might convey the message that others are not welcome. Anti-racist expressions by the stakeholders, such as wearing shirts with the message '*Kein Fussball den Faschisten*' (No Football for Fascists), too,

[87] 'Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'.

make the targets of these expressions unwelcome.[88] The targets become the 'other' in another sense. Moreover, the word fascist can be deemed a 'fighting word'. Therefore, in certain contexts, discriminatory expressions should be protected on the same grounds that other expressions are protected.

The second counter-argument has intimate links to the first one, in that, it concerns the feelings of persons who are posited as the 'other'. As can be remembered, the basis for very narrow grounds for restriction was provided to be the moral powers of individuals, along with the equal concern and respect for them, not the psychological harm an expression may cause.[89] The corollary of this contention is that—contrary to the reasoning of some of their supporters[90]—hate speech restrictions do not protect the feelings of individuals.[91] Due to the contention that they are not neutral,[92] feelings, and accordingly being offended or hurt,[93] are not in the equation for the purposes of the discussion at hand. The points that were made in the discussion regarding the different reactions by Samuel Eto'o, Daniel Alves and Sulley Muntari to discriminatory expressions are topical in that regard. Not every person feels or reacts the same way to similar expressions. Differing thresholds or reasons for being offended or hurt create a situation in which it becomes harder to anticipate whether an expression is offensive or not in a given case. Therefore harm and feelings of the targets should not be made the basis of sanctions.

The third counter-argument would target the claims concerning the near-monopolistic position of SGBs within the sport industry, and the possible hardships on the part of those involved in

[88] J Lindholm, 'From Carlos to Kaepernick and beyond: athletes' right to freedom of expression' [2017] 17:1-2 The International Sports Law Journal 1, 1; AS Website, 'St. Pauli to wear anti-fascist shirt for Holocaust Remembrance Day' (11 February 2016) <https://en.as.com/en/2016/02/11/football/1455188378_710778.html> accessed 20 August 2019.

[89] *See* Section 5.2.2.

[90] Lawrence (n 8) 452-453 and 462-466; R Delgado and J Stefancic, *Must We Defend Nazis: Hate Speech, Pornography, and the New First Amendment* (New York University Press 1997) 8.

[91] The upshot of this contention is that hate speech does not necessarily derive from feeling of hate on the part of the speaker. A Brown, 'What is Hate Speech? Part 1: The Myth of Hate' [2017] 36 Law and Philosophy 419, 450-455; Waldron (n 5) 34-35.

[92] Z Triger, 'Discriminating Speech: The *Heterophilia* of the Freedom of Speech Doctrine' [2013] 19 Cardozo Journal of Law and Gender 349, 371.

[93] On the other hand, Langton is of the opposite opinion; arguing that '[h]ate speech is about *hate* […]. It involves the feelings of speaker, and of hearer. It expresses a speaker's emotions and attitudes, so vividly indeed that it may seem that this is *all* it does. Besides expressing feelings, hate speech *provokes* feelings' (emphases present) (footnotes omitted). R Langton, 'The Authority of Hate Speech' in J Gardner and others (eds), *Oxford Studies in Philosophy of Law Volume 3* (OUP 2018) 137-138.

following another sport. Here, an analogy can be made with the effects and possible consequences of political expressions. When compared to consequences of the expression 'America: Love it or leave it', an expression that causes an individual to stop following a certain sport would be less important. The former presents a more rash, nationalistic and uniformist view of society. It is about an individual's place within the society and the country they live in. Consequently, it has a potentially more marginalising effect on the target. Uprooting one's life and moving to another country are undoubtedly much harder for an individual to set in motion and accomplish than to change their team or favourite sport. Thus, if outside the sports venue, political expressions are protected even when they marginalise certain groups of people, then they the same expressions should be protected in and around them. There is no 'right to follow sport'.

6.3.2.2 The Effect of International Law

The situation becomes even more complicated when a response is given to the objection pointing to national and transnational laws regarding hate speech. At present, hate speech laws and their sport-specific incarnations seem to have an effect on the way SGBs position themselves. Discriminatory expressions are, in certain cases, restricted both by the law of the land and SGBs. Moreover, governments may even designate SGBs as the spearheads in tackling discrimination.[94] However, as in the case of symbols and expressions with connotations to Nazi Germany and Neo-Nazi groups, whilst they are prohibited by SGBs and Germany, there are no Europe-wide restrictions. Likewise, whereas in Hungary the use of the five-pointed red star is prohibited with certain exceptions[95] and the Soviet Union flag was deemed illicit by UEFA;[96] FIFA allowed '*ushanka*'s—a type of fur hat with ear flaps—with Soviet badges on them. These hats were worn by spectators at the 2018 World Cup Finals in the Russian Federation. In

[94] House of Commons Culture, Media and Sport Committee, 'Racism in Football - Second Report of Session 2012–13 - Volume I: Report, together with formal minutes, oral and written evidence' (11 September 2012) 8-9 <https://publications.parliament.uk/pa/cm201213/cmselect/cmcumeds/89/89.pdf> accessed 20 August 2019.

[95] M Bán, 'Memory Wars of Commercial Worth – The Legal Status of the Red Star in Hungary' (*Verfassungsblog: On Constitutional Matters*, 11 January 2018) <https://verfassungsblog.de/memory-wars-of-commercial-worth-the-legal-status-of-the-red-star-in-hungary/> accessed 20 August 2019.

[96] UEFA Appeals Body Decision of 12 May 2016, *The Football Association of Serbia*. Reported in UEFA, 'Case Law: Control, Ethics and Disciplinary Body & Appeals Body' (January 2016 - June 2016) (n 57) 113.

addition, SGBs even allow clubs such as CSKA Moskva, Slavia Praha and Crvena Zvezda Beograd whose club crests contain five-pointed stars.[97]

Having a coherent framework becomes even harder when considering that a CAS panel was of the opinion that if the regulations of the SGB are not clear, the Swiss criminal law's interpretation of racial discrimination should be adhered to.[98] Therefore, it is the national practice that would decide such a case, not the international practice. Just as the SGBs take into consideration Swiss laws and their implementation in certain cases, and just as the international SGBs that reside in Switzerland ignore the municipal law of other countries, they do not have any obligation to follow international law. In any case, as was argued in Section 3.2.2 the SGBs adherence to international human rights documents and international law is restricted to certain documents, and as in the case of UEFA, certain competitions.

Finally, in regards to the protection of the 'other' such as the LGBT+ community against hate crimes there is no uniformity in Europe.[99] The protection of the 'other' is far from uniform, because international legal documents do not have the same effect on every jurisdiction. Just as the moral justifications of human rights should be decoupled from international legal human rights that are supported by international human rights documents, arguments for restrictions of hate speech should be decoupled from international legal human rights. Consequently, it has to be asserted that in sport blanket hate speech restrictions that take international law as bearing are untenable.

6.4 Unacceptable and Acceptable Histories

As has been argued throughout this work, in their restriction of freedom of expression, SGBs lack 'articulate consistency'. Another subject giving rise to contradictory implementations by the SGBs is their view of history. It can be claimed that certain expressions derive their meanings from history; yet at the same time they may also have political or discriminatory

[97] Moreover, ECtHR found that a Hungarian politician's use of the five-pointed red star was legitimate. *Vajnai v Hungary* ECHR 2008-IV 173.

[98] CAS 2013/A/3324 & CAS 2013/A/3369 *GNK Dinamo v UEFA* (n 40) para 9.8.

[99] Godzisz and Pudzianowska (n 85) 174.

connotations when regarded from a certain point of view. This sub-section will analyse the intricacies of interpreting the historical and the contemporary, as well as the political and the discriminatory. The arguments made against categorisation of expressions will play an important part in the analysis of the 'unacceptable'.

6.4.1 Unacceptable Histories

It can be claimed that symbols and expressions with connotations to World War II bring about closer scrutiny by certain SGBs.[100] In addition to a Swastika ban, 'SS' symbols, runes with connotations to the 'SS', combinations of numbers such as 18 ('AH' denotes Adolf Hitler as they are the first and eight letters in the alphabet)[101] and 88 ('HH' denotes '*Heil Hitler*' as it is the eight letter in the alphabet)[102] are subject to sanctioning. The list is not exclusive. Contemporary culture, which has links to history, may also present itself as grounds for sanctions. In the sanctioning of French footballer Nicolas Anelka by the FA due to '*quenelle'* gesture following a goal in an English Premier League match, the reasoned decision referred to the gesture's creator's links with Holocaust denial. '*Quenelle*', that was created and popularised by French comedian Dieudonné M'bala M'bala ('Dieudonné'), is an 'inverted Nazi salute' with ambiguous meanings ranging from 'up yours' to anti-Semitism to anti-establishment. Whilst trying to find the real meaning of the gesture and Anelka's motivation, the decision analysed anti-Semitic connotations of the gesture and its creator's links with Holocaust denial.[103]

The banning and fining of Anelka can be read as the creation of an association between Holocaust denial and anti-Semitism that had already been established against Robert Faurisson,[104] an academic known for their denial of the Holocaust.[105] In *Anelka,* relying on one

[100] One exception is, as indicated in the previous section, FIFA's stance against certain uses of the symbols of the Soviet Union that might evoke the Red Army and the World War II.

[101] UEFA CEDB decision of 13 February 2014, *CSKA Moskva*. Reported in UEFA, 'Case Law: Control and Disciplinary Body & Appeals Body' (January 2014 - June 2014) 20-21 <https://www.uefa.com/MultimediaFiles/Download/OfficialDocument/uefaorg/UEFACompDisCases/02/12/48/82/2124882_DOWNLOAD.pdf> accessed 20 August 2019.

[102] UEFA Appeals Body decision of 29 August 2013, *Juventus*. Reported in UEFA, 'Case Law: Control and Disciplinary Body & Appeals Body' (July 2013 - December 2013) (n 58) 56-57.

[103] *The FA v Nicolas Anelka* Decision of the FA Regulatory Commission, paras 47-58. For a similar analysis *see* J Ervine, 'Nicolas Anelka and the *Quenelle* Gesture: A Study of the Complexities of Protest in Contemporary Football' [2017] 34:3-4 The International Journal of the History of Sport 236, 241-242.

[104] E Heinze, 'Viewpoint Absolutism and Hate Speech' [2006] 69:4 The Modern Law Review 543, 551.

of the expert opinions in the case, Holocaust denial was perceived as anti-Semitic.[106] Therefore, considering the expressions' impact on the French audience, the decision of the FA signalled its concern with the consequences of the expression. That there was an ongoing debate in the French society at the time the gesture was made did not make things any easier for Anelka.[107] Here, despite the complex nature of the gesture, it was deemed to be solely of an anti-Semitic connotation. Moreover, Holocaust denial is linked to an a priori hatred of Jews, which is in itself problematic.[108] It can be concluded that the weight of history is brought upon an athlete who might have just made a point against (what the athlete believed was)[109] the establishment.

Another example is former Croatian footballer Josip Šimunić's suspension from the 2014 World Cup Finals in Brazil. Following the Croatian National Team's qualification for that World Cup Finals, the footballer obtained a megaphone and interacted with Croatian supporters in the stadium. The footballer:

> [w]hile making 'rising arm movements' with his left hand, […] first pronounced, at least two times, the words '*u boj, u boj*' ('to the battle'), replied by the spectators in the stadium with the words '*za narod svoj*' ('for your people' or 'for your nation') and then repeatedly, i.e. four times, the words '*za dom*' ('for the homeland'), replied by the spectators at each occasion with the word '*spremni*' ('we are ready').[110]

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[105] Faurisson's receiving of a mock award—whilst wearing a yellow-star bearing the word 'Jew' on striped pyjamas reminiscent of garments worn by Jewish deportees—from Dieudonné at one of the latter's shows, resulted in a fine for Dieudonné. *The FA v Nicolas Anelka* (n 103) paras 33 and 39.

[106] Similarly, in view of the anti-Semitic and negationist messages, the ECtHR judged that Dieudonné is not able to enjoy the protection of Article 10. In agreeing with the national court, the ECtHR ruled that 'during the offending scene the performance could no longer be seen as entertainment but had taken on the appearance of a political meeting'. ECtHR (10 November 2015) Press Release 'European Convention on Human Rights does not protect negationist and anti-Semitic performances' <http://hudoc.echr.coe.int/app/conversion/pdf?library=ECHR&id=003-5219244-6470067&filename=Decision%20M%27Bala%20M%27Bala%20v.%20France%20-%20ECHR%20does%20not%20protect%20negationist%20and%20anti-Semitic%20performances.pdf> accessed 20 August 2019.

[107] Ervine (n 103) 243-244.

[108] Brown 'What is Hate Speech? Part 1' (n 91) 456-457.

[109] Ervine (n 103) 244-246.

[110] CAS 2014/A/3562 *Josip Simunic* (n 41) para 5.

The CAS Panel, following FIFA, found that the expressions and the arm movements of the supporters had connections to the *Ustaše*, Croatian Allies of the Nazi Germany.[111] It was indicated that expressions associated with the *Ustaše* regime would indeed offend the dignity of certain groups and individuals,[112] and resultantly, CAS confirmed the decision of the Appeal Committee of FIFA regarding the suspension of 10 official matches, which practically ruled the footballer out of the World Cup Finals.

As was indicated above, possible harm to SGBs' interests comes to the forefront in deciding the outcome. In this case, FIFA aimed to exercise its 'freedom not to associate' to the fullest and in this way strived to protect the brand image and goodwill of itself and the World Cup. It can further be claimed that, *Anelka* and *Simunic* highlight a common problem with the viewpoint of SGBs, in that, they negate the fact that these are political expressions. Categorisation allowed the SGBs to freely deem an expression that is predominantly political as discriminatory. A related decision to this specific concern is the sanctioning of the Russian club Zenit St. Petersburg. Here, UEFA's reasons for sanctioning the club due to the unfurling of a banner reading 'Ratko Mladic - Hero of Serbia' the day after Mladić was found guilty of 10 of 11 charges against them, *inter alia* genocide, by the International Criminal Tribunal for the former Yugoslavia provides food for thought. In this case, the contentions of the club that the banner was of political nature and not a discriminatory one were challenged by UEFA, stating that:

> […] discriminatory and/or racist banners can have an additional political dimension, which does not necessarily mean that such additional circumstance would make such banners only political. Such reverse conclusion is illogic ['sic'] and cannot be upheld by the CEDB.[113]

It can be maintained that this case presents evidence for the argument regarding categorisation at the hands of decision maker, which was broached in Section 5.3.2. In the case at hand, the expression regarding Ratko Mladić—without adequate grounds for doing so—was deemed to be

[111] ibid paras 60-93.

[112] ibid para 72.

[113] UEFA CEDB decision of 07 December 2017, *Zenit St. Petersburg*. Reported in UEFA, 'Case Law: Control, Ethics and Disciplinary Body, Appeals Body, CFCB Adjudicatory Chamber' (July - December 2017) (n 56) 112.

only discriminatory rather than political, as if the situation can be untangled by simple categorisation of the expression. The political aspect of the expression was downplayed so as to re-categorise it with a view to implementing harsher sanctions for the club. UEFA's stance may be viewed as an effort to distance itself from anything that may have discriminatory overtones. In that regard, expressions on phenomena having connotations to a discriminatory background are automatically deemed discriminatory without having regard to other possible dimensions or, for the purposes of this work, the moral nature of the public discourse.

6.4.2 Acceptable Histories

Moving on from this set of specific problems with categorisation and its impacts, it can be claimed that while SGBs keep historical traumas like World War II, which FIFA deems 'a horrifying remembrance, for those who have lived through that troubling time, a dark episode in our history that nobody should be proud of, much less so mention or even promote',[114] at arm's length, it cannot be denied that certain dark chapters of history are the bases of chants, national symbols and sports club names. Notwithstanding the prevalence of the contention that political expressions should be protected in the context of sport, chequered practices of SGBs concerning the question at hand have to be analysed.

With regards to chants, the 'Dambusters March' sung by England supporters would be an apt example.[115] The Dambusters March is the theme for the movie 'The Dam Busters'[116] that depicts Royal Air Force's 'Operation Chastise' in World War II targeting dams in the Ruhr Valley, the industrial region of Nazi Germany. England fans have sung the march, in particular on occasions where Germany has been the opponent or the host nation. The dilemma at hand is whether to sanction the FA for its fans' chants or not. It can be argued that SGBs that thoroughly scrutinise historical contexts of expressions should take into account that the operation was part of World War II and resulted in the death of around 1.000 Germans and foreign prisoners. Therefore, since it has connotations to 'a dark episode in our history nobody

[114] CAS 2014/A/3562 *Josip Simunic* (n 41) para 112.

[115] C Davies, 'World Cup fans urged to sharpen their wit and give Dambusters a miss in Germany' (*The Telegraph Website*, 20 April 2006) <https://www.telegraph.co.uk/news/uknews/1516175/World-Cup-fans-urged-to-sharpen-their-wit-and-give-Dambusters-a-miss-in-Germany.html> accessed 20 August 2019.

[116] *The Dam Busters*, dir. Michael Anderson, United Kingdom, Associated British Picture Corporation, 1955.

should be proud of', SGBs that sanction their stakeholders for their World War II-linked expression should treat expressions of the same mould—such as the 'Ten German Bombers' song depicting the exploits of the Royal Air Force during World War II sung by England supporters[117]—in a similar manner. In essence, if, contrary to the moral powers of all those involved, expressions regarding past conflicts are to be sanctioned, then expressions pertaining to the winners have to be treated in the same manner the ones pertaining to the losers, in this case the Axis.

The same incoherent stance can also be witnessed in the case of FIFA where it allowed '*ushanka*'s with Soviet Union badges on them within stadiums, but restricted the use of 'poppies' by the British 'home nations'. Whereas the former's presence in the 2018 FIFA World Cup Finals is a hark back to the Red Army in World War II; the latter is the symbol in remembrance of the Armistice Day that brought an end to World War I and also those who have died on behalf of their country. The facts that IFAB and FIFA later changed their strict stance as to the commemoration of 'significant national and international events' and have agreed to allow them on certain occasions including concerning the Armistice Day[118] do not ward off the criticisms. In fact, they render the link between history, state and sport unbroken. At the end of the day, significant national and international events are anchored in the nation state. As can be witnessed in the case of the Armistice Day, the use of history is not controversial in the eyes of society and politicians.[119] Moreover, even the German National Football agreed to wear poppies on their shirts. So, in line with articulate consistency and the contention that some histories are unacceptable for the SGBs, the question posed regarding this subject should be: would the Unification of Germany in the latter half of the 19th Century be commemorated, even though it is an event of significance for the world history?

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[117] The Telegraph Website, 'England fans criticised for vocal chorus of "10 German bombers" during match in Dortmund' (23 March 2017) <https://www.telegraph.co.uk/football/2017/03/22/england-fans-criticised-vocal-chorus-10-german-bombers-match/> accessed 20 August 2019.

[118] K Magraw, 'Separation of sport and State: military salutations at US Major League Soccer events' [2019] The International Sports Law Journal 1, 9-11 (online first version); FIFA Website, 'Several member associations sanctioned for incidents during FIFA World Cup qualifiers and friendlies' (19 December 2016) <https://www.fifa.com/governance/news/y=2016/m=12/news=several-member-associations-sanctioned-for-incidents-during-fifa-world-2861299.html> accessed 20 August 2019; BBC Website, 'FIFA fines England, Scotland, Wales & Northern Ireland over poppies' (19 December 2016) <https://www.bbc.com/sport/football/38368144> accessed 20 August 2019.

[119] Magraw has reported that the then-British Prime Minister Teresa May supported the use of poppies in sports events. ibid 10.

Team names too may have historical roots, as witnessed in the case of Osmanlıspor Futbol Kulübü, which can be roughly translated as 'Ottoman Football Club'. The team's name was Büyükşehir Belediye Ankaraspor (Greater Municipality of Ankara Sports Club), but, as a reflection of the Ottoman Empire nostalgia sweeping across the Turkish cultural landscape, it was later changed to its current form. Due to its success in the 2015/2016 Season, the club qualified for the UEFA Europa League for the 2016/2017 Season. The controversial point of the club's participation in the competition is that the Ottoman Empire perpetrated mass deportation and killings of Armenians. Even if the problematique of whether these actions amounted to genocide or not should be sidestepped for the purposes of this work, these actions bring about question marks regarding the name of the club. In that respect, it has to be noted that UEFA referred to the indictment of Ratko Mladić as a means of confirming an entity's guilt in perpetrating crimes against humanity. Under this rationale the fact that the Ottoman Empire itself charged, tried and in some cases even executed Ottoman officials who had organised and carried out the killings[120] should have been reason enough to bar the club from a Europe-wide competition. The ambivalent practices of football governance in this issue become more evident when the CAS Panel's opinion that the '*Ustaše*' 'demonstrably was responsible for the atrocities of various ethnic groups, chiefly Serbs, Jews and Roma, as well as for the murder of many members of the political opposition' is taken into account.[121] If expressions with connotations to atrocities against certain people are judged to be reason enough to sanction a club, then it should also be the ground for the removal of the club from a Europe-wide competition due to its connotations to atrocities against Armenians.

It can be asserted that the key to understanding the dissimilar implementations of regulations by SGBs is through focusing on the reasons why certain expressions are restricted in the first place. As pointed out in the case of Šimunić the underlying reason for 'zero tolerance' against discriminatory expression is the aversion to associate with them. A possible association between such expression and the SGB or its competitions would damage the brands of both itself and its competitions. The last thing the television networks, the sponsors and the SGBs want are to alienate consumers. The judgments as to the perceived dangers are founded on the fear that the expression might cause harm to sport. Symbols and expressions with connotations to certain historical regimes, and in particular the Nazi War Machine, are perceived as evil to be purged

[120] J Balint, 'The Ottoman State Special Military Tribunal for the Genocide of the Armenians: 'Doing Government Business'' in KJ Heller and G Simpson (eds), *The Hidden Histories of War Crimes Trials* (OUP 2013) 85-97.

[121] CAS 2014/A/3562 *Josip Simunic* (n 41) paras 62 and 72.

from the sports venues despite the fact that they are part of the history of the state(s) they belong to. It can be argued that the roots for the calls for hate speech prohibitions, namely to protect the minorities and the preservation of democracy,[122] is relevant with regards to the fears of SGBs. That is, in the context of sport, minorities must be welcome, and expressions historically linked to atrocities must be prohibited to preserve democracy and ease the minds of minorities that were the victims of brutal regimes. Consequently, similar to the fear of 'the rise of fascism and racism in Europe',[123] fears of their rise in sports venues are strived to be curbed through restriction. Furthermore, just like the European countries' stance in the case of Holocaust denial laws, SGBs are eager—maybe too eager—to demonstrate the 'abhorrence of anything linked to Nazism'.[124]

The same cannot be said when other historical symbols and expressions become a part of the culture of a state, are not feared, and even in some cases internalised by society. As seen in the examples of the Dambusters March and the Ottoman Football Club, were approved by the SGBs despite the fact that they have connotations to armed conflict, brutality, atrocity and a general lack of respect for human life. Following Stone, it can be asserted that the practices of SGBs are based on 'content-based' rules 'designed to restrict speech because of its "communicative impact"—that is, "because of a fear of how people will react to what the speaker is saying"'.[125] In essence, the public feeling, which is contended to set the tone for the practices of SGBs, comes to the forefront. Domestically and on the international stage these expressions are not feared. Bombing raids, at least for Europeans, are things of the past, and thus, they have provided fertile grounds for bestsellers or box-office successes. Likewise, the chances are high that the Ottoman Empire, with lands stretching from Hungary to Iran, will not reappear. Moreover, the fact that the Ottomanisation of Turkey is perpetrated by the party ruling Turkey since 2002, and thus is a part of the domestic status quo, renders Osmanlı Spor Kulübü immune to sanctions by SGBs. Consequently, these expressions are tolerated due to a lack of fear. To be more precise, as Kalven put forth, 'tolerance depends not on principle but on *indifference*'.[126]

[122] Heinze *Hate Speech and Democratic Citizenship* (n 14) 130.

[123] Bleich (n 29) 48.

[124] ibid 51.

[125] Stone (n 32) 56.

[126] H Kalven, *A Worthy Tradition: Freedom of Speech in America* (Jamie Kalven ed, Harper & Row 1988) 6 (emphasis added).

6.5 Final Remarks

A contentious subject within the broader contexts of society and democracy, hate speech presents similar difficulties in sport. Generally, hate speech laws create 'others' while trying to fight othering, in that, they ignore the worth of the individuals expressing themselves. In the context of sport, SGBs claim that expressions regarding a group of persons or past traumas are deemed to lead to more severe consequences than political expressions. In the process, they tend to ignore the fact that they are in essence political expressions, and accordingly opt to implement stricter punishments due to their 'discriminatory' nature. On the other hand, SGBs are erratic in their practices. Instead of educating the stakeholders and spectators on this subject, SGBs prefer to castigate them. Moreover, unbalanced practices on the part of SGBs make one question the sincerity of the fight against discrimination. Nevertheless, the arguments against most of the SGBs' practices should not pave the way for a complete freedom of hate speech. Hate speech in face-to-face encounters and against stakeholders by spectators in a sports venue should present bases for disciplinary actions. It should be added that the reason behind restricting certain expressions is not the supposed harm they suffer; rather it is the moral powers of individuals, along with the taking away of the chance to rebut the expression. Finally, it has to be suggested that this should not be the grounds for disciplinary practices that are too strict. In the 'fight against discrimination' a well-structured mix of education, denouncement and sanction should be implemented, because, as was argued in Section 4.2, sanctions by the SGBs act as a way of dissociating from a certain viewpoint. If disciplinary sanctions become the sole manner of dealing with discrimination, then the results would be limited to their goal of realising the freedom of association of the SGBs. The social, psychological and economic causes of discrimination would remain unaddressed.

Conclusion

7.1 Introduction

Sport is one of the most important phenomena in the lives of many. A great number of people follow sport by either attending the competitions or by tuning in to broadcasts. Sport generates income and it is in a close relationship with politics and politicians. The sports events that become the centre of attention of states, sponsors and society are produced by SGBs. The SGBs lay down the rules for both the smooth-running of the industry and the protection of their interests. The restrictions of certain expressions by the SGBs have to be analysed by taking account of these points.

In the wake of NFL player Colin Kaepernick's protests, despite a recent surge of interest in the regulations and practices of the SGBs that have an impact on freedom of expression, the literature lacks a general theory of freedom of expression in sport. There are jurisdiction-specific analyses of the subject, but a work that strives to bring together the experiences from different jurisdictions and sports events have been lacking. Furthermore, the philosophical arguments for freedom of expression are either not utilised or utilised sparingly only to support a point, so they are unable to provide a foundation for broader discussion of the matter. Finally, the role of international SGBs in the curbing of freedom of expression has been mostly neglected. Taking into account the importance of sport and the gaps in the literature, this work has aimed to understand the practices of the SGB regarding freedom of expression and their effects on the athletes, spectators and audiences.

In order to address the aforementioned issues, the work has sought answers to the following questions: i) what would be the legal and philosophical foundations for a defence of freedom of expression in sport, and accordingly; ii) what is the nature of the interplay between measures taken by the SGBs against non-commercial expressions and the interests protected by the SGBs?

7.2 The Road Taken

Within the complex regulatory framework of SGBs, prohibitions as to certain expressions are warranted. The IOC, UEFA, FIFA, as well as the NFL, MLS and NBA, have provisions targeting political expressions. Therefore, the question is not whether or not there is prohibition. Rather specific questions arise from the positions of the individuals before the SGBs and their regulations. In this sense, the use of the word 'defence' in the research questions is no coincidence. The reason is that it is asserted upfront that regulations restrict the freedom of expression of individuals. It is maintained that there *is* an 'attack' on freedom of expression and therefore the defence against the attack has to be well-organised. For the purposes of this work, the organisation of the defence was 'sphere-specific'; that is, only the sport industry was analysed. The sphere-specificity of the defence came to the fore in such a way that it delved into the governance structures of sport, along with the production and consumption of sport.

The second part of the question which aimed to discover the underlying reasons for the restriction of certain expressions arose from the need to justify the defence of freedom of expression. Due to the fact that they are private bodies, the general goals of the SGBs and, in particular, their intentions in restricting expressions had to be laid bare. In trying to find a plausible defence of freedom of expression, the rhetoric of 'politics-free sport' had to be examined. In tandem with these, the practices of SGBs concerning freedom of expression and political expressions were analysed.

In its aim to present a defence for freedom of expression within the context of sport, the work particularly took its cue from the governance structures in sport, the transnational legal approaches, the arguments for freedom of expression and the human rights discourse. Thus, in Chapter 2 the governance of sport, as well as the regulatory, adjudicatory and enforcement powers of the SGBs were analysed. The importance of the idea of the autonomy of sport and its relationship with the powers of the SGBs became the foundations of other arguments such as the 'suspicion of governance' and the universalisation of freedom of expression in sport. Furthermore, the foundations of the arguments pertaining to the relationship between sport, the state and the market were laid.

In Chapter 3, in its search for a plausible defence, the work turned to the philosophical arguments for freedom of expression in general. In this step, various justifications that arose mostly from the First Amendment were heeded. In view of these, it was argued that with the notable exceptions of the arguments from autonomy and self-fulfilment, as well as the argument from democracy in certain cases, freedom of expression could be justified through an overlap of different arguments in certain subjects. Nevertheless, the suspicion of government, which is an overarching sceptical stance toward the intentions of the legislature, along with the moral powers of individuals as introduced by Rawls and transposed to the freedom of expression discourse by David AJ Richards, became stalwarts in the defence of freedom of expression in sport. This line of defence accepted that individuals have inherent moral powers due to their rationality and reasonableness. In addition to this, equal respect and concern for all humans informed how freedom of expression would be analysed and interpreted.

This being the case, the peculiarities of the sport industry led to the next step. Chapter 4 went underway with the aim of achieving universality. Globalisation has increased the mobility of sportspersons, spectators, capital and services. In parallel with this, due to the transnational nature of sports events, the regulations and practices of the SGBs also have transnational effects. The laws of the state can and could be overruled by these regulations and practices; while the notions of autonomy and politics-free sport cater for the corrosion of positive law. Regarding competitions consisting of natural and legal persons from different countries, this problem becomes even more acute. What make the situation truly global are the global broadcasts of mega-events. The consumption of sport is, thus, global. Here, the question turned on the morality of regulations and practices of sport entities which have a direct impact on the freedom of expression of individuals in countries beyond the border of the country where the competition is played.

This situation moved the defence of freedom of expression in sport to a moral and universal plane, rather than a legal and state-bound one. The regulatory, adjudicatory and coercive powers of the SGBs, the alliance between the state and SGBs, and the perceived social function of sport in both the national and international arena paved the way for the sport-specific reasons for taking a more universalist approach. On the other hand, the uncertainties concerning the scope and application of the (uneasy) consensus over international human rights documents, the

ambiguous exceptions to them, and the goal to universalise the protection of moral powers of everyone involved, resulted in taking a moral-based route to defending freedom of expression in sport. Equal concern and respect and the two moral powers that are inherent all humans went on to be the foundations of a universalist defence of freedom of expression in sport.

Chapter 5 dealt with the implications of the philosophical foundations of freedom of expression within the context of sport. It established the link between the SGBs, their interests and the nature of the rhetoric of politics-free sport. It then went on to disprove this rhetoric by laying bare the intimate relationship between the state and SGBs when it comes to freedom of expression. It also analysed the economic incentives of restrictions of freedom of expression. The impact of globalisation, commercialisation and the market on sport were the pillars for this analysis. Through the examples concerning national and international situations, this part of the work found that SGBs are selective in their restriction of political expressions. By utilising the framework laid by David AJ Richards, which asserted that equal concern and respect for individuals required the aversion from assigning roles to individuals, it was further argued that athletes and the spectators have preassigned roles which are to be fulfilled as per the expectations of the SGBs and society. It was suggested that the preassigned roles were instrumental in maintaining the myth of political neutrality as well as the likeability of the sport industry in the eyes of the market.

The work's rejection of preassigned roles strengthened the position of the individual before both state and the SGBs. In this sense, the next step, naturally, was to reject autonomy-based defences of freedom of expression. By showing that the adjudicatory powers of the SGBs mean that the judging would be done by the same SGBs, the work called into question the notion of the weighing of the interests. Since 'the individual as means' was rejected previously, the weighing was also rejected. In the final phase of the chapter, the positions of the spectators and the audiences were focused on. That is, the fact that an expression by an athlete or a spectator would have to be seen by others meant that the moral powers of the individuals exposed to unwarranted expressions might be hindered. Nevertheless, it was maintained that there was no hindrance, because the spectators and audiences opened themselves to expressions by being present in the sports venue or tuning in to their devices.

Throughout the work, it is argued that political expressions should be allowed within the context of sport. However, this approach brought about the question of whether or not freedom of expression in sport is absolute. Chapter 6 sought tenable ways to answer this question, and it strived to provide grounds for restrictions of expressions in ways that would not only not hinder the moral powers of individuals but also protect them. The 'harm' aspect of expressions was broached and linked to the sport industry. Furthermore, the safety and security of persons along with a reflexive approach—which gives a central position to the context in which the expression was made—were vital instruments in the analysis of the subject. Finally, the valuation and the categorisation of expressions were analysed. It was maintained that these processes could act as shortcuts to restriction of expressions, and that there are clear examples of this in the context of the SGBs categorisation of personal expressions as political.

The final step was to create a framework for hate speech in sport. In Chapter 7, arguments for and against the restriction of 'hate speech' in general were presented. The tools acquired from the debates concerning hate speech were later transposed to the context of sport while taking into account the particularities of sport. Here, it was maintained that while a general restriction of hate speech in sport would be contrary to the moral powers of everyone involved, depending on the context, restricting certain expressions would be appropriate. In this chapter, it was argued that while in certain cases the hate speech aimed at society in general should not be restricted, face-to-face expressions and the expressions by the spectators that target certain individuals should warrant sanctions. The expressions' connection to 'public discourse', the context in which they were made and the possibility to rebut the expression became the yardsticks for the presentation of a framework on the subject. In essence, the call for restrictions was based on the idea that the preassigned roles of the athletes and their inability to properly refute hate speech would require the SGBs to act on behalf of their stakeholders. Therefore, the particularity of sport production, yet again, affected the analysis. Finally, the SGBs' view of expressions with historical connotations was analysed. It was argued that while expressions pertaining to certain conflicts were approved, the others about the same conflict were restricted and sanctioned by the SGBs. In essence, this chapter carried out further analysis, and reached results similar to the preceding chapters.

7.3 The Findings

The idea that a private entity whose primary goals are to draw up the rules of a certain sport, organise competitions related to it, and generally secure operating profits could curtail freedom of expression, is jarring. Inasmuch as, the individuals' fundamental rights that are enshrined in the constitutions of states as well as human rights documents are negated by domestic or transnational private entities. The fact that the same private bodies, namely SGBs, have the regulatory and adjudicatory power over sport matters complicates the situation even more when it comes to defence of freedom of expression. In view of these, as has been argued throughout the work, a moral powers-based defence of freedom of expression better meets the specific concerns that arise from the production and consumption processes in the sport industry. This defence took its power from constitutional concerns but turned for a more universalistic approach due to the failure of nation state-induced municipal law and constitutional law within the context of sport. When freedom of expression was understood as both conveying and receiving messages, the scope of restriction expanded to global audiences who follow sports events on their devices. Such an expansion supported the search for a universal defence of freedom of expression in sport.

It can be maintained that the move towards a position that is closer to naturalism due to governance structures, as well as the failure of positive law to stop certain practices, is not novel. The same desire to appeal to something 'higher' is also apparent in the American Revolution.[1] Concerning a more recent and international appeal, it should come as no surprise that the idea of universal human rights became the basis of international legal documents in the wake of the atrocities committed by Nazi Germany and its allies.[2] The position of the positive law of a state as the catalyst for atrocities, the inability of other states to legally and peacefully intervene, along with the trans-border effects of the laws of Nazi Germany due to invasions, annexations and the coercive power over its allies became the foundations of change. The general approach adopted in this work is of the same breed: the negative effects of the transnational regulations, the coverage of sports events and the insufficiency of constitutional and municipal laws has resulted in a defence that is more in line the 'higher' concepts, namely moral powers and equality.

[1] JH Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980) 49.

[2] GY Kao, *Grounding Human Rights in a Pluralist World* (Georgetown University Press 2011) 158.

One of the premier concerns of this work had been the unequal treatment of expressions at the hands of the SGBs. In chapters 5 through to chapter 7, a call for articulate consistency—which asserted that principles, rules, theories, standards and justifications utilised in reaching a decision or implementing a practice should also be utilised in cases with the same set of facts[3]—was repeatedly made in tandem with the call to recognise the moral powers of individuals by the SGBs. The reason for the constant call was due to another finding of the work, namely the selective disregard of the moral powers of individuals on the part of the SGBs. It was claimed that the SGBs restrict political expressions on the basis of the individuals' viewpoints and the contents of the expressions that they convey. Whilst nation states flaunt their version of nationalism and aim to achieve societal cohesion through symbolic expressions of a political nature—compelled or voluntary—, non-conforming expressions are categorised as political and therefore restricted.

The same dynamics are also noticeable in the case of hate speech. The SGBs restrict all kinds of discriminatory expression, including the ones referring to historical events and symbols with 'unappealing' connotations. One such restricted subject of history is the Nazi Germany and its allies, along with atrocities such as genocide or, in general, a repressive regime. However, at the same time, SGBs permit symbols and hallmarks of other historical events and regimes which have had massacres in their pasts. On the other hand, in the case of hate speech, it has to be suggested that the SGBs also maintain tenable and defendable practices. For example, the expansion of the scope of sanctions to any expression that might be regarded as creating 'other' is apt in capturing the essence of hate speech restrictions.

In view of the above, it was argued that the SGBs' restriction of non-conforming expressions went hand in hand with 'political logic' and 'economic logic' that keep abreast of the state and the market;[4] the latter two being the remaining two legs of the triumvirate of the 'governance

[3] R Dworkin, *Taking Rights Seriously: New Impression with a Reply to Critics* (Duckworth 2005) 88.

[4] J-F Bourg and J-J Gouguet, *The Political Economy of Professional Sport* (Gerry Goodman tr, Edward Elgar 2010) 24-32.

network' of sport.[5] This way of looking at sport emphasises the contention that sport, the state and the market are interdependent. When supported by the finding that SGBs are selective in their restrictions due to concerns pertaining to the market and the state, this leads to the conclusion that the legs of the triumvirate support and shelter one another. In the current shape of things, this cooperation seems closer than ever.

On the economic logic side of things, interests and correspondingly economic worries drive the SGBs to avert situations where they might be associated with 'undesirable' expressions. The desirability of expressions is measured by their conformity with the public feeling and how effectively they manage to protect the status quo within the international arena. The public is made up of consumers; therefore any association with an expression that might be deemed 'unpleasant' by the target public/consumers is anathema. Wrong association with a fact or opinion bring about the loss of goodwill and brand value, which in its turn have adverse effects on the marketability of the product. Concordantly, Nino's words indicating that 'the market is not often neutral concerning preferences that are incompatible with the expansion of the market itself'[6] are highly relevant in this context. After all, it is maintained that the SGBs disregard the freedom of expression of individuals in their quest to protect their interests, which include economic ones, and to reach their associational goals. In that regard, the SGBs effectively utilise the rhetoric of 'politics-free sport' as an overarching reason for restricting expressions by stakeholders and spectators alike.

Concerning politics, it is maintained that the SGBs give a helping hand to nation states in their aim to create cohesion within their respective societies and attain soft power in the international arena. From the perspective of freedom of expression in sport, the SGBs, through the elimination of dissenting voices under the rubric of politics-free sport, assist the nation states' in the implementation of their policies. Moreover, in allowing uncontentious expressions, such as flags of the countries that take part in the events, and making them part of their ceremonies; the SGBs actively take part in the nation states' quest for unity. That the catchphrase 'One Nation. One Team.' has been prominent in the communications strategy of the US Soccer Federation in

[5] A Geeraert and others, 'The governance network of European football: introducing new governance approaches to steer football at the EU level' [2013] 5:1 International Journal of Sport Policy and Politics 113, 115-120.

[6] CS Nino, *The Constitution of Deliberative Democracy* (Yale University Press 1996) 163.

recent years and that the same SGB—following the US Women's National Team member Megan Rapinoe's taking a knee—commanded its stakeholders to line up in a 'dignified posture' during the singing of the National Anthem[7] reflect the intricacies of the alliance between the SGBs and the state. On the other side of the bargain, states allow, within certain limits, breathing room for the SGBs in the form of autonomy that enables them to overrule municipal law through their regulations and practices. The state, in general, establishes 'receptive conditions for expanding the football "industry"'.[8] However, this assertion does not ignore the possibility that the states may have other motivations in respecting the autonomy of the SGBs to a certain limit.[9] Likewise, tensions between the state, the market and sport should not be understated.

Consequently, the sport industry fails to treat the freedom of expression of its stakeholders, spectators and audiences in an equal and consistent manner. The interest-driven *modus operandi* of sport confirms the status quo. The means of getting oneself heard or on a more primal level put one's moral powers into practice, are thus restricted. Facts and opinions that do not confirm the status quo, the nation state or the market are rendered out of the competition through restrictions. Sport can and should be a platform for dialogue and critique;[10] and yet in the current shape of things, in place of dialogue, the imposition of idealised versions of nation, nationalism and consumption reign supreme. Likewise, the critique of national and international institutions (in the broader sense of the word) is curbed at the hands of the SGBs so that the status quo is strengthened.

This work is of a normative nature and thus it should be perceived as a case of 'legitimate utopianism'.[11] It is well aware that the reality is stark in the sense that through the

[7] United States Soccer Federation Policy Manual, Policy 604-1 <https://cdn.ussoccer.com/-/media/project/ussf/governance/2019/bylaws/2019-20-policy-manual-20190530.ashx?la=en-us&rev=2a49dbc8143848cba47c637e4398ed07&hash=1515E0FE993A626A07E9BBC8EC8D23F1> accessed 20 August 2019.

[8] R Giulianotti and R Robertson, *Globalization & Football* (Sage 2009) 112.

[9] SR Jedlicka, 'Appropriated authority: a theory of transnational sport governance' [2018] 10:4 International Journal of Sport Policy and Politics 637, 648-650.

[10] L Trimbur, 'Taking a Knee, Making a Stand: Social Justice, Trump America, and the Politics of Sport' [2019] 71:2 Quest 252, 262.

[11] 'Legitimate utopianism sets forth an ideal model of society that is perhaps unattainable but does not treat as equivalent all situations which do not fulfil the model. It orders those situations according to how far they are from satisfying the elements of that ideal model'. Nino (n 6) 145.

instrumentalisation of the SGBs' interests, inequalities would prevail. However, this situation should not make anyone surrender in despair. The underlying reason for this view is the contention that the interests and the market which set the tone for the policies of the SGBs might turn out to be unlikely allies for the defence of freedom of expression. In that regard, Nike's advertisement campaign which featured Colin Kaepernick with the slogan 'Believe in something. Even if it means sacrificing everything' showed that defence of freedom of expression and dissent in general could be profitable.[12] The profits, of course, originate from the consumers' view of the brand which includes the meaning the consumer derives from the advertisement and the feeling that the advertisement evokes. Therefore, while it is again the market that has the power to reshape interests so that they can accommodate non-conforming views and expression, this might be the way to go, through changing the views of consumers. One should never underestimate the power of economic logic.

7.4 Future Directions

This work dealt with only a small portion of the problematique regarding freedom of expression in sport. It did not analyse the expressions directed against the SGBs and their agents. Neither did it broach the purely commercial or purely profane expressions. More importantly, it did not aim to present a framework for the clubs' and teams' expressions. After all, since legal persons also have autonomies linked to their interests, the expressions that reflect their stances on certain subjects should also be dealt with.

It can be argued that depending on the subject and the legal or natural person that conveys the message different sets of variables would come into play. Whereas the place of purely commercial expressions in sport might take into account not only freedom of expression but also matters arising from competition; expressions against the SGBs and their agents might be enlightened by this work' arguments regarding the preassigned roles of the athletes and the spectators.

[12] D Mosbergen, 'Nike's Market Value Surges By $6 Billion After Controversial Kaepernick Ad' (*Huffpost*, 23 September 2018) <https://www.huffingtonpost.com/entry/nike-market-value-colin-kaepernick_us_5ba7693ae4b0375f8f9dcb09> accessed 20 August 2019.

Consequently, as long as there are restrictions on freedom of expression in support of the interests of the SGBs, and as long as their interests as well as the market's and the states' interests become the prime movers of these restrictions, there will always be enough subjects to analyse and examples to draw from. So, there is an inverse correlation between freedom of expression and subjects to analyse. That is, while freedom of expression withers, academic discussion thrives—at least in circles where such discussion can be made—with the help of freedom of expression.

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