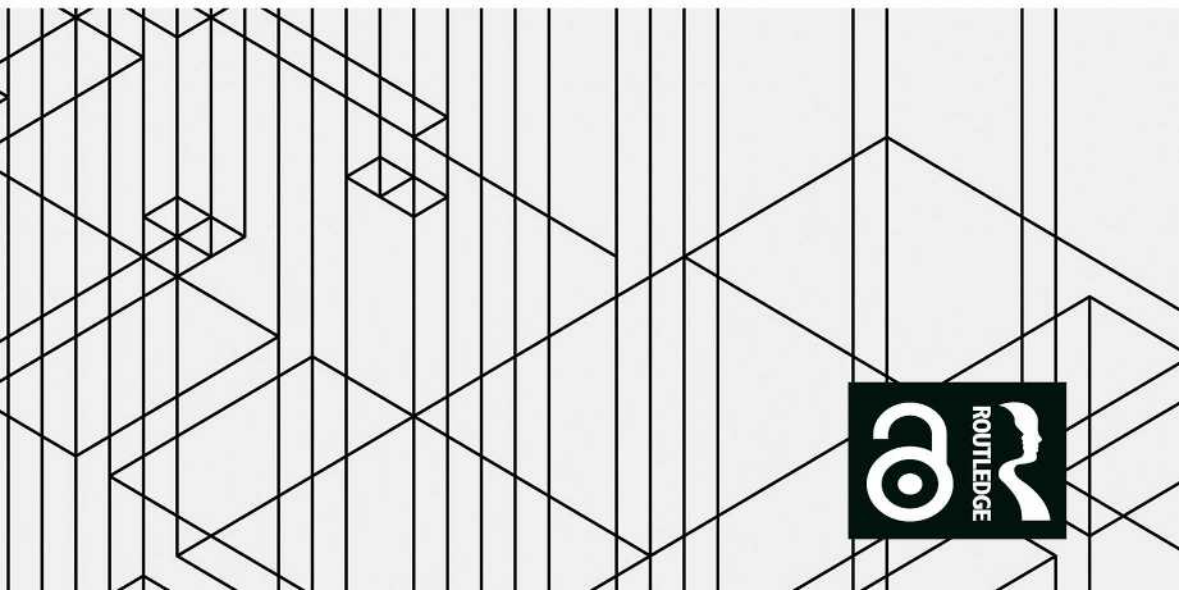


Ethics and Sport

POLITICAL EXPRESSION IN SPORT

TRANSNATIONAL CHALLENGES, MORAL DEFENCES

Cem Abanazir



Political Expression in Sport

This powerful new book looks at how private institutions governing and organising sport restrict political expression. Uniquely, it makes a case for the freedom of expression for athletes, spectators and audiences built upon philosophical foundations.

In the era of Colin Kaepernick and taking a knee, politics and protest in sport have never been more visible and immediate. Drawing on a wide range of international cases, including protest actions from athletes such as Tommie Smith and John Carlos, Naomi Osaka and Feyisa Lilesa, as well as the reactions from sport organisations including the IOC, FIFA, UEFA and the NFL, the book argues that the organisation of sport at the hands of associations and leagues and their transnational power to regulate, adjudicate and enforce matters according to their interests lead to the restriction of freedom of expression. Focusing on the individual, the book presents a framework for the defence of freedom of expression in sport on moral grounds and also explores the limits to freedom of expression, especially those arising from hate speech, that might better serve both the individual and sport as an institution.

This book is fascinating reading for anybody with an interest in the ethics, philosophy or politics of sport, sport governance, the relationship between sport and wider society, or moral or political philosophy.

Cem Abanazir works as an independent researcher, Turkey.

Ethics and Sport

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Political Expression in Sport

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To those who fight for the right to be treated as an equal.



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A Note to the Reader

Before the reader steps into the book, I would like to present a few statements as to the manner in which I tackle specific issues:

1. I use the pronoun 'they' for many persons named (commentator or not) in this book. The instances I diverge from this general rule are the cases where the person in question would prefer to be called as 'he' or 'she'.
2. Since I do not wish to reproduce the violence of words and terms which are or might be considered 'hate speech', I either obscured them through asterisks (*) or left those parts ambiguous.
3. Except for quotes, I use UK spelling and conventions throughout the book.
4. This is the only part in which I use first-person narrative.

Abbreviations

CAS	Court of Arbitration for Sport
CBA	Collective Bargaining Agreement
ECtHR	European Court of Human Rights
EPL	English Premier League
The FA	The Football Association
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
NCAA	National Collegiate Athletic Association
NFL	National Football League
NHL	National Hockey League
SFT	Swiss Federal Tribunal
TFF	Turkish Football Federation
UEFA	Union of European Football Associations
UEFA	CEDB Union of European Football Associations Control, Ethics and Disciplinary Body
USOPC	United States Olympic & Paralympic Committee
WNBA	Women's National Basketball Association

Written Norms

CEV Beach Volleyball Guidelines 2021 Edition
Curt Flood Act of 1998, The
Equality Act 2010
The FA Disciplinary Regulations 2021–2022 v. 1.0
FIFA Stadium Code of Conduct for the FIFA Confederations Cup Russia 2017
and the 2018 FIFA World Cup Russia
FIFA Statutes 2021 Edition
IFAB Laws of the Game
IIHF Official Rule Book 2021/2022
MLB Basic Agreement 2017–2021
MLS Fan Code of Conduct
NBA Collective Bargaining Agreement 2017
NBA Constitution and By-Laws 2019 Edition
NFL Collective Bargaining Agreement 2020
Olympic Charter 2021 Edition
PyeongChang 2018 Terms & Conditions of Ticket Purchase, Possession and
Use
Rule 50.2 Guidelines—Olympic Games Tokyo 2020
Rule 50.2 Guidelines—Olympic Winter Games Beijing 2022
Sex Discrimination Act 1975
Ticket Conditions of Sale and Entry Australian Open 2022 Melbourne Park
Title IX of the Education Amendments of 1972
UEFA Disciplinary Regulations 2020 Edition
UEFA Equipment Regulations 2021 Edition
UEFA Fair Play Regulations 2015 Edition
The United States Olympic & Paralympic Committee, US Olympic and
Paralympic Trials Participant Rules: Demonstrations
United States Soccer Federation 2019–2020 Policy Manual

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- 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*.
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- CAS 2012/A/2913 *Mu-yen Chu & Chinese Taipei Olympic Committee v International Olympic Committee (IOC)*.
- CAS 2013/A/3047 *FC Zenit St. Petersburg v Russian Football Union (RFU)*.
- CAS 2013/A/3094 *Hungarian Football Federation v Fédération Internationale de Football Association (FIFA)*.
- CAS 2013/A/3139 *Fenerbahçe SK v Union des Associations Européennes de Football (UEFA)*.
- CAS 2013/A/3324 *GNK Dinamo v UEFA & CAS 2013/A/3369 GNK Dinamo v UEFA*.
- CAS 2014/A/3562 *Josip Simunic v Fédération Internationale de Football Association (FIFA)*.
- CAS 2014/A/3578 *Koninklijke Nederlandse Voetbalbond (KNVB) v Fédération Internationale de Football Association (FIFA)*.
- CAS 2014/A/3759 *Dutee Chand v Athletics Federation of India (AFI) & The International Association of Athletics Federations (IAAF)*.
- CAS 2015/A/3874 *Football Association of Albania (FAA) v Union des Associations Européennes de Football (UEFA) & Football Association of Serbia (FAS)*.

- CAS 2016/A/4558 *Mitchell Whitmore v International Skating Union (ISU)*.
- CAS 2017/A/5166 & 5405 *Palestine Football Association v Fédération Internationale de Football Association (FIFA)*.
- CAS 2018/A/5683 *Juventus Football Club S.p.A. v Envigado Football Club S.A. & Fédération Internationale de Football Association (FIFA)*.
- CAS 2018/A/5888 *Centro Atlético Fénix, Club Atlético Boston River, Club Atlético Cerro, Club Atlético Progreso, Club Atlético River Plate, Danubio Fútbol Club, Defensor Sporting Club, Liverpool Fútbol Club, Cerro Largo FC, Central Español Fútbol Club, Club Atlético Villa Teresa, Racing Club de Montevideo, Club Sportivo Miramar Misiones, Montevideo Wanderers F.C., Club Atlético Juventud v Fédération Internationale de Football Association (FIFA) & Confederación Sudamericana de Fútbol (CONMEBOL) & Asociación Uruguaya de Fútbol (AUF)*.
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Introduction

Globalisation has had a profound effect on how sport is governed and marketed. Especially since the 1990s, globalisation has shaped and nurtured sport while in its turn sport has acted as a catalyst for it. In line with the commercialisation of sport, the influence of sport associations¹ over their stakeholders and other persons has increased significantly (Giulianotti and Brownell 2012, 203–4; Rowe 2003, 284–85). The influence comes in the shape of norms along with their interpretation, adjudication and enforcement at domestic and international levels. The norms have a transnational effect, in that the individual, in their position both as stakeholder and spectator, may act according to these norms within the context of sporting activities. Inherently related to globalisation and commercialisation, competitions such as the Olympic Games, FIFA World Cup, EPL and NBA enjoy global audiences.

The scope and reach of these global and domestic competitions point up the global effects of the policies and norms of international and domestic sport associations. Among the effects, the rights of those who take part in, attend, watch or listen to these competitions have come to the forefront. In view of the NFL player Colin Kaepernick's protest, the Black Lives Matter movement as well as the increase of the instances of hate speech on and off the field, a theoretical and practical approach to freedom of expression in sport is necessary. Some of the central questions are as follows:

- 1) what would be the moral foundations for a defence of the freedom of expression of the athletes, spectators and audiences,
- 2) what is the source of the sport associations' power over these elements,
- 3) what is the nature of the interplay between measures taken by these associations against political expression as well as economic interests and political interests,
- 4) what are the limits of freedom of expression in sport, and finally,
- 5) how should the sport associations deal with hate speech?

This book will time and again refer to the rhetoric of 'politics-free sport' and 'political neutrality'. In parallel to the view that sport is autonomous from the state, the

market and society, political expression has been condemned when it is associated with sport. In reality, sport does not have absolute autonomy from society. As Steenbergen and Tamboer (1998) have noted, '[i]n the stormy ocean of society, sport is neither an island nor a plaything whose direction is completely determined by the waves'. Therefore, despite its particularities, values and mechanisms that aim to maintain it, sport finds itself a place within the criss-crossing networks of society. The issues concerning sport are never solely sport-specific. They concern society in general, especially on issues pertaining to morals (39–44). Sport is not insulated from 'outside', especially from the state and the market. Even if the spectators and audiences may have an escapist notion of sport and agree with the idea of insulation, the facts that the actors in the production and consumption of sport include persons who have roles in 'real life' and what happens in sports venues reverberates in 'real life' weaken that argument (Kadlac 2022, 5).

In view of the multi-dimensional relationship between sport and other spheres of activities such as the market and politics, this book argues that the regulatory, adjudicatory and enforcement powers of sport associations (cumulatively called 'RAE powers') enable specific processes for maintaining the political and economic interests of sport, the state and the market. For globalised sporting events, the process is transnational, meaning it transcends the human-made borders of the state and continents. Such transcendence is cemented by the increasing power of non-state regulation and the interpretation and enforcement of entities other than state courts.

Of first-rate importance is the assertion that sport associations discriminate against political expression according to their viewpoint. The state and the supporters of the status quo already have the means and the arena to convey their version of politics through national team competitions, ceremonies, and sport association-approved expressions; whereas expressions that go against the status quo are restricted in line with the rhetoric of politics-free sport and political neutrality. 'Articulate consistency', a notion set forth by Ronald Dworkin, sheds light into the matter.² 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. 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 (Dworkin [1977]2005, 88). Throughout the work, due to the contention that expressions are not treated equally in the eyes of football associations, calls for articulate consistency will be made. Pérez Triviño (2017) has suggested that either all political expression should be allowed or all of them should be restricted (42–45). In accepting articulate consistency as the basis of an analysis of freedom of expression, this book defends the idea that in sport all political expression should be allowed regardless of their viewpoint, but subject to limitations introduced in the final part. The emphasis on the equal treatment of expressions derives from the idea that a failure to do so would have a negative effect on the individuals who convey and receive them.

Since the terms ‘freedom of expression’ and ‘sport’ are deep and wide in scope, certain limitations to the analyses will be in place. As to the former, the notion is loaded with meaning, capable of drawing up support from different societies and ideologies. The problem of categorising expressions notwithstanding, freedom of expression may pertain to political expression and personal expression that may reflect the moral powers of an individual and ‘commercial speech’, to name a few. This work focuses on political expression. Concerning the persons involved, adult athletes, spectators and audiences are the primary subject matter. The focus on the most important elements in the production and consumption processes in sport is crucial because most of the literature on the so-called ‘sports law’ (*Lex Sportiva*) focuses on the dominant institutions such as sport federations as well as the various elements of the market (McArdle 2015, 24). Finally, sports venues constitute the spatial limit, which leaves comments on traditional media and social media out of the scope of investigation. Yet in certain cases, social media comments help advance and support certain arguments. Whilst avoiding a discussion on the parameters for calling any activity a sport (e.g. esports, running, boxing), the book covers sports with similar production and consumption processes but does not claim to explicate the situation in motor racing and road cycling. The crucial point in the exploration of the subject is that it stays silent on the motivations and intentions of the individuals, as this would require a separate project which takes account of the psychological and moral psychological aspects of the individual and groups of individuals.

To summarise, this book does not aim to fill a gap in the literature, but rather it takes the first step in the creation of a literature on the subject by providing a meaningful framework for a defence of freedom of expression in sport. It does not claim to be the only way to defend the freedom of expression of athletes, spectators and audiences. The defence and its limits could also be woven by taking account of paradigms that are out of the scope of this book, such as social contract-informed approaches to sport or utilitarian or functionalist defences of freedom of expression. The book at hand is incisive, not decisive. Nevertheless, it is brave enough to explore novel ways of approaching a fundamental issue in sport.

In the first part of Chapter 1, the focus is on the links between sport, the state and the market, whilst the second part of the chapter theorises how sport can get away with certain practices that would be considered illegal and immoral in other spheres of activities. The RAE powers are of concern in Chapter 2. This chapter, by giving an overview of how sport associations affect the conduct of participants and spectators alike, explains how norms, as well as their adjudication and enforcement undergird these effects. This chapter also takes a look at how sport associations invert the legal/illegal and moral/immoral dichotomies in the context political expression. Chapter 3, which closes Part I, challenges the ideas of politics-free sport and political neutrality that shape the restrictions of political expression along with their interpretation. This chapter tracks the nationalistic, militaristic and inconsistent practices of certain international and national sport

associations. Concerning the latter, the US, England and Turkey will be the source of the examples.

Part II focuses on freedom of expression. Chapter 4 presents a brief overview of the philosophical arguments for freedom of expression, and opts for the individualistic, rights-based and moral argument by David AJ Richards for this book. This chapter also confronts the theoretical problems that come with this choice. Chapter 5 expands upon this model and adapts it to sport. In essence, the ideal characteristics of the individual as informed by literature based on Kantian ideals are at the forefront. Since athletes, spectators and audience are individuals with moral powers, the restrictions of political expression become the main targets of autonomy-based arguments for the right to freedom of expression.

Part III aims to introduce limits to freedom of expression in sport. In Chapter 6, general restrictions as to political expression are the centre of discussion. Taking account of arguments for restricting certain expressions, the situation in sport and the ideal position of sport associations provide the necessary commentary for both how things are and how things should be. This chapter will also clarify what is implicated when an expression is deemed to be 'political'. Finally, Chapter 7 strives to present a coherent framework for restricting 'hate speech' in sport. As hate speech has been an integral part of especially football, the chapter argues for sport-specific restrictions for expressions which might otherwise be political. It will conclude with an overview of the problematic relationship between sport, the past and the expressions that derive from the latter.

Notes

- 1 The term 'association' is an overarching term that will be used to describe all sport governing bodies. Of course, this is not true because not all legal persons governing sport could be brought under the rubric of a legal association. This being the case, sport invariably includes the coming together of competitors under certain rules, which points out the fact that they create a sort of association consisting of natural and legal persons.
- 2 Schauer (1983), too, claims independent creation of the notion if not to originality (1296, footnote 62).

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Part I

Sport, Politics, the Market and the Law



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The Autonomy of Sport

1.1 A Worthy Foundation

Arguably, the clearest account of the autonomy of sport is Geeraert, Mrkonjic, and Chappelet's (2015) re-contextualisation of Chappelet's (2010) previous work on the subject, which had put forth that the autonomy of sport is not made up of a single dimension but is a concept made up of conceptual, psychological, political, legal and financial dimensions as well (29–33). In the re-contextualisation, the authors removed the psychological dimension and defined the various dimensions as 'political autonomy', 'legal autonomy', 'financial autonomy' and 'pyramidal autonomy'.

Having classified the types of autonomy within the context of international sport associations, the later work goes on to broach them separately. The authors define political autonomy as 'the historic and path-dependent autonomy of an [international sport governing body] to fulfil its primary function built upon freedom of association, without being subject to political interference from public authorities'. In its turn, legal autonomy is 'the private autonomy of an [international sport governing body] to fulfil its primary function with a legal impact at national or at international level, determined and confined by the legal framework imposed by public authorities'. Financial autonomy pertains to 'the capacity of an [international sport governing body] to fulfil its primary function, while not relying on external public investment, internal systemic resources or sponsoring from a single commercial partner'. Finally, pyramidal autonomy is 'the autonomy of an [international sport governing body] to fulfil its primary function within a hierarchical pyramidal system'. The common ground for the various types of autonomies is that 'within the networked governance that emerges in international sport, [international sport governing bodies] act according to a rational choice logic, deploying proactive strategies to safeguard each of the dimensions of their autonomy as much as possible' (footnote omitted) (Geeraert, Mrkonjic, and Chappelet 2015, 474–82).

Despite the clarity and soundness of the various types of autonomy, there are certain problems with the account, which to an extent overlap with the

self-presented caveats by the authors (Geeraert, Mrkonjic, and Chappelet 2015, 483). The authors mainly focused on the Olympic Movement and FIFA, whereas this book has a broader scope. More importantly, the moral aspirations of sport have to be taken into account. Geeraert's (2021) later contentions on the two further dimensions of autonomy are useful. 'Internal autonomy' depicts a picture where stakeholders wield more power in shaping the policies of the associations they are a part of, whereas 'external autonomy' points out that the state and the market have the potential to affect their moves (255). The chapter will mostly deal with the latter, claiming that the state and the market do have links to sport and they do affect the way sport associations administrate sport, and vice versa. As Allison and Tomlinson (2017) have argued, there is the 'myth of autonomy' that supports the practices of sport associations.

1.2 Rethinking Autonomy

1.2.1 *Interlinked Autonomies*

Sport associations and society misconstrue the separation of autonomies to support the contention that the state, the market and civil society have different functions, and thus they are separated from each other. In reality, the state deals with interpersonal and intragroup relationships—the political sphere engages with the market and sport. Sport is not only a part of civil society but also consists of sport associations that could be considered as 'corporate actors' (Weinberg 2015, 17–24) and as a market due to their creation of the 'transfer market'. Going beyond the problems of locating where sport stands vis-à-vis the state and the market, and assuming that Geeraert, Mrkonjic and Chappelet's theorisation of autonomy is an analytical rather than an empirical account, this section argues that in certain cases the borders between autonomies are either non-existent or ambiguous.

The separation of the financial, political and cultural spheres is intricately linked to the claims that 'sport and politics do not mix' and 'amateurism is the essence of sport'. Especially with the help of a rich theoretical arsenal, Marxist studies of sport have refuted these claims: there is no liberal separation of practices (Morgan 2017, 96–96). Anticipating 'the myth of autonomy', John Hargreaves ([1982]2014) underlined the facts that:

sports partake of the economy, in so far as they require resources, which in capitalist societies are mostly allocated on a commercial basis; they partake of politics, in so far as they serve as an agency of political mobilisation on occasions; and they partake of culture, in so far as they are a popular form of leisure activity.

(49)

The autonomy of sport is compromised in the interpretation and adjudicatory processes of the bodies that have jurisdiction over sporting matters. Yet sport is

neither dependent on the state and the market nor an exact reflection of the forces that affect it (Andrews and Giardana 2008, 396–98). More importantly, this chapter and the following one suggest that despite the collaboration between the state and sport, there is also a clear conflict between them.

Congruent with this general picture, globalisation (or this ‘phase’ of globalisation) changes the way the state, the market and sport interact. Governments, and nationalism, have not left the stage with the entrance of corporations. Rather the interplay between these forces has evolved. Various disciplines have made an issue of the close proximity of these forces in the context of sport. Gammelsæter’s (2019) assertion regarding the ‘interdependency’ between the state, the market and sport is key in that regard. There are tensions between the legs that have their separate ‘institutional logic’s, but ultimately the state has the potential to be an actor in both sport and the market, and the market has definitely transformed the sporting landscape. The attraction of sport could work against sport because it becomes exposed to other spheres that aim to recast and define it, and in the last instance, benefit from it. Similarly, the idea of a ‘governance network’ where civil society, the state and the market ‘interact’ with each other is apt in depicting the current shape of things in sport. According to this conception, the interaction between these legs is a reflection of the commercialisation of sport and the resultant network made up of business interests and sport. Politics not only compete with the network, but also deeply affect it. Even the consolidation of the sport associations’ legitimacy might hinge on the state or transnational orders (Geeraert, Scheerder, and Bruyninckx 2013, 115–19). In essence, sport has never been politically neutral or politics-free, and it has 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 (Bourg and Gougnet 2010, 24–32).

Sport associations guard their activities from undesired political intervention. Their constitutive documents can oblige their members to be independent from third party influence. The emergence of independence as an obligation has even paved the way for the suspension or expulsion of members. 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. In addition to these, a new kind of power has emerged in the form of cancelling the hosting rights to a mega-event (Meier and García 2015, 900). As in the case of FIFA’s declaration regarding the Gulf Crisis, which situated Qatar against other states in the Arabian Peninsula, sport associations may also declare neutrality (Næss 2018, 148–49). Non-neutrality may result in being suspended. For instance, the International Cricket Council (‘ICC’) suspended the Cricket Association of Nepal due to the Nepalese government’s creation of an ad hoc committee in place of the duly elected committee (Haynes and Marcus 2019, 17–18).

Nevertheless, sport and politics are so intertwined, international sport associations act as ‘the fulcrum on which the relationship between “sport and politics” rests’ (Jedlicka 2018, 290). Sport is inherently political because political

considerations play a part in the membership processes of sport associations, as well as the carrying out of sporting activities. Israel, before becoming a part of UEFA in 1994, drew against teams from Oceania for the 1986 and 1990 FIFA World Cup Qualifiers and from Europe for the 1982 edition due to the tensions between Israel and the Arab countries. Likewise, football matches including clubs from Israeli Settlements within (Occupied) Palestinian Territories have been a matter of dispute before several FIFA Congresses and the CAS (CAS 2017/A/5166 & 5405). Crucially, in 2022, within a week of the start of the Russian Federation's invasion of Ukraine, FIFA and UEFA banned Russian teams from their competitions. Other international sport associations either banned Russian teams and athletes or removed the hosting rights of international tournaments.

Domestically, state intervention differs from jurisdiction to jurisdiction. The differences in regime and political climate lead to differences in the way that sport is governed. Moreover, there are 'national umbrella organisations' that seek to act as a bridge between national federations and the public authorities; which, in some cases, enjoy powers delegated to them by public authorities (Siekmann and Soek 2010). As in the case of the aftermath of *Bosman*, politicians, too, enter the fray in the shaping of the sport industries' policies and regulations, in effect shaping both sport and the market (Geeraert, Mrkonjic, and Chappelet 2015).

Regarding the content and definition of financial autonomy, the power of the market is of utmost importance. In that regard, Maguire and Falcous' (2005) summary sheds light into the matter:

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 patterning of global sport.

(24)

Sport is a 'product' which comes into being through the cooperation of competitors in a competition with pre-set rules (Blair 2012, 47; Peeters and Szymanski 2014, 347). Brand image and marketability are a part of sport (Section 2.2). After all, the 'back-pass rule' was adopted in accordance with the needs of television broadcasts, and in 1973, the American League (but not the National League) of MLB amended a more than 100-year-old rule 'in the hope that it would make the game more exciting and, in a heated media environment, would gain more viewers' (Durbin 2018, 423–24).¹ The globalisation of sport broadcasts has had a direct impact on the way sport is consumed.

On the other hand, the state financially supports sport, which can be viewed as a direct or indirect means of affecting sporting activities. Thus, especially concerning non-European associations,² the definition 'not relying on external public investment, internal systemic resources or sponsoring from a single commercial partner' is inadequate. Even if there might not be a single commercial partner, the source of the funding may come predominantly from a single source,

the state and its enterprises. Since they necessitate the economic and political power of states mega-events like the Olympic Games, the FIFA World Cup and the UEFA European Football Championship lay bare the juxtaposition of the political and economic logics. Mega-events are the showcases and exercises of the state and civil society. The bidders for mega-events are motivated primarily by economic factors, which are usually based on overly optimistic and biased data (Horne 2007, 85–88; 2012, 42; Müller 2014, 635–37). Tangible and intangible positive—if any—residues of the mega-events are hailed as their ‘legacy’, a term with rhetorical power. 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 (Grix and Houlihan 2014, 578–81; Tomlinson 2014, 137–41). 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’ (Divišová 2019, 761). Consequently, states undertake projects and investments in order to ensure the achievement of pre-set tangible and intangible goals.

International sport associations also directly receive the support of state-owned enterprises. For instance, until UEFA’s termination of its agreement following the Russia Federation’s invasion of Ukraine, Gazprom, a Russian majority state-owned enterprise, was a sponsor of both the UEFA Champions League and the UEFA European Football Championship. Likewise, the state-owned Qatar Airways sponsored the latter along with the 2018 FIFA World Cup in Russia, the FIFA Club World Cups, the 2019 FIFA Women’s World Cup and the 2022 FIFA World Cup in Qatar. On the national level, TFF presents the ideal example where its sponsorships are intertwined with state enterprises. The TFF’s sponsors include the Turkish Airlines. 49.12% of this company’s shares belongs to the Turkey Wealth Fund, which is headed by President Recep Tayyip Erdoğan (Turkish Airlines 2022). The Deputy Chairman of the fund was Erdoğan’s son-in-law, the Minister of Treasury and Finance, until 27 November 2020 (Bloomberg HT 2020). Another sponsor is the PTT, the Postal and Telegraph Corporation, whose shares were transferred to the fund in late 2018. Furthermore, Spor Toto, which is a subsidiary of the Turkish Ministry of Youth and Sports, was the title sponsor of *Süper Lig*, the highest tier of the football system. The sponsorship lasted between 2010 and 2017, as well as during the 2018–2019 Season. Spor Toto is also, at the time of writing, a sponsor of the Men’s National Football Team. Since the 2012–2013 Season Ziraat Bankası is the title sponsor of the national cup. The bank’s only shareholder is the Turkey Wealth Fund, which acquired it in early 2017 (KAP 2022).

State policies may differ but the differences in the level of intervention do not break the link between sport, the state and the market. Polar opposite regimes such as Qatar and the United Kingdom may have similar views regarding elite sport’s benefit to society and the state. Moreover, thanks to globalisation and the movement of capital, different types of regimes, their subsidiaries and other persons operating in a given regime, could come into contact, cooperate or clash (Jedlicka, Harris, and Reiche 2020). Professional sport is an economic activity carried out

within states and their political subdivisions. What's more, as a result of the movement of capital, states have become overseas investors. With the help of sport, states create G2C (Government to Consumer), G2B (Government to Business) and G2G (Government to Government) relationships with a view to gaining 'soft power' and goodwill (Chadwick, Widdop, and Burton 2020). Economic and intangible benefits that a global brand might bring attract foreign investors with links to the state such as wealth funds and subsidiaries. The forerunning example to this phenomenon in the EPL concerns the controlling of Manchester City by Abu Dhabi United Group for Development and Investment. Sheikh Mansour bin Zayed Al Nahyan, a member of the Abu Dhabi Royal Family, owns the company. Consequently, the term 'state' should be wide enough to include not only the state where the footballing activity takes place, but also other states.

Although private funding by the clubs/team owners and the marketing of certain rights and seats could become the financial source of stadiums, public funding remains the most important source for building new stadiums (Baker 2018, 285–93). Between 2001 and 2017 of all stadium projects in the NBA, MLB, NHL, NFL and MLS only 16 out of 52 of them had less than 50% public funding (Schein, Phillips, and Rider 2017, 95–101). In addition, the stadium is not the sole source of government expenditure. Stadiums require infrastructure and adequate transporting capabilities so that thousands of individuals are able reach the stadium, spend some time in and around it, and later leave the vicinity (Baker 2018, 288). Franchise relocation—one of the consequences of the 'closed league' system where there is no promotion and relegation at the end of the season—has prompted cities to become or remain a 'major league city'. Growth-minded local politicians and businesspersons aim to build 'large, visible projects rather than less spectacular, community-centered projects'. The growth also pertains to the population of a city, and accordingly, its tax base. In order to keep the populations and taxes growing, keeping a city attractive is crucial (Delaney and Eckstein 2007). The land where the stadium is to be built could be the property of private owners. In these cases, the term 'eminent domain' which denotes the power of the government to seize private property for public use comes into the forefront. Armed with arguments for the public benefits of stadiums and teams, local governments could take the necessary steps for clearing the land for the use of teams, breaking up communities in the process (Bennett 2012, 123–25, 148–52).³

Finally, pyramidal autonomy should be briefly touched upon. UEFA and some commentators have put forth that the international sport industry is structured as a pyramid. The so-called 'European Sports Model' is argued to resemble a pyramid where the top of the pyramid is occupied by a global sport federation. With each step down, associations have less power, but they are more numerous. Clubs, athletes and grassroots organisations constitute the lower levels of the pyramid. Nevertheless, the perceived resemblance to a pyramid is misleading. As indicated, modern sport consists of transnational 'governance networks' with different actors from different jurisdictions and political territories. The separation of the levels of pyramid is not neat and grassroots institutions, clubs, associations and umbrella

associations are not the only actors on the scene. The internal autonomy of sport has witnessed the emergence of different actors in the shape of sponsors, and stakeholders such as International Federation of Professional Footballers ('FIF-Pro') and the Association of European Professional Football Leagues ('EPFL') as forces that affect the way sport is governed (Geeraert, Scheerder, and Bruyninckx 2013, 116–24). Accordingly, relations within the transnational governance network itself, meaning the relations between different actors within the same network, as well as the relations of the networks with entities such as sponsors, states, and the EU call for a more nuanced approach. The answers to a complex web of relations between sporting and non-sporting actors cannot be simplified. Furthermore, since associations are legal persons, pyramidal autonomy cannot be severed from legal autonomy which allows the creation of hierarchies in the first place.

Concordantly, the market and the state's relationship with sport (which is positioned as being a part of civil society due to its positioning as a network of associations, but also a market due to its control over the economic aspects of the sphere and its being a product) should be evaluated in an integrated manner. The complete separation of financial and political aspects of sport is untenable. As in the cases of Turkish Airlines, Gazprom, mega-events and the construction of stadiums, the state and the market are sometimes so intertwined that they are inseparable.

1.2.2 Legal Autonomy

The preceding arguments point out sport's exposure to various social spheres. From a normative perspective, sport is 'semi-autonomous'. According to Sally Falk Moore (1973), semi-autonomous systems have the capability to 'generate rules and customs and symbols internally, but that it is also vulnerable to rules and decisions and other forces emanating from the larger world by which it is surrounded' (720). Indeed, sport enjoys the autonomy to create policies, moral standpoints, values and norms; however, it is in tension and in cooperation with the state and the institutions created by the state. The EU and states have the potential to influence European and international sporting activities. The state, to protect its interests, may intervene in the production and consumption processes of sport. There are still immigration laws restricting the entry of foreign athletes, or as in the case of EU Member States, athletes from non-EU and non-EEA countries. More significantly, states' laws and courts have accepted that on-field conduct could result in civil and criminal liability, whilst anti-sport violence legislation creates sport-specific legal regimes supervised by the state.

The emphasis on the term 'semi-autonomous' implicitly provides a picture where autonomy comes in degrees. The autonomy of sport is not a binary of 'autonomous' and 'non-autonomous'. It consists of a spectrum from '-1', to '0', and finally to '1'. Since the social, economic and legal pressures on sport do not allow a one-size-fits-all approach to all jurisdictions, national and international sports associations can fit anywhere within the spectrum, say '-1' being fully dependent

on the state and/or the market, '0' being fully autonomous, and '1' being semi-autonomous. The two extremes, '0' and '1' seem very hard to achieve. At the very least, a sport association, whatever its legal personhood entails, has to be founded in some state by taking into account the legal provisions relevant to the foundation of this type of legal persons. In our neo-liberal times, professional sport cannot be completely separated from the market either, because otherwise it cannot be consumed. On the other hand, a totalitarian state regime where the state both controls the market and the relevant aspects of sport could be possible, but in these cases, national associations cannot be totally independent from their international counterparts as the former have to be a member of the latter and abide by their norms.

Legal autonomy may be limited by the laws of the state that they operate in or by the transnational regime(s) that they are bound by, such as the EU. In France, thanks to the *Code du sport*—which provides a large margin of autonomy for national sport associations—the state could have a supervisory role as regards the sport industry. The *Code du sport* sets forth standard disciplinary rules to be followed and obliges the associations to notify all changes to its norms to the Ministry of Sport (van Rompuy 2015, 189). As to the manoeuvring space, Parrish fully quoted Beloff and others who posited that ordinary courts have respected the territories of the decision makers within the sport industry unless there are compelling reasons to intervene (Parrish 2003, 16). In Switzerland public policy (*ordre public*), which is also presided over by the SFT deciding on cases regarding CAS awards, can delimit the powers of the sport associations. The annulling of CAS' *Matuzalem* award by the SFT rests on the idea that an unlimited occupational ban on an athlete is contrary to public policy (SFT *Matuzalem*). This was despite the SFT having a limited set of tools and a statistically lower chance of setting aside an award, as well as freedom of association, which is broader in Switzerland (Baddeley 2020, 4–5, 15; van Kleef 2014, 27–28). Finally, competition law could result in the scaling back of the legal autonomy of sport associations. Market- and competition-friendly state courts and authorities have intervened in certain aspects of sport when necessary. As in Australia, the competition law of a state may apply if the sport association stops sportspersons from taking part in competitions organised by other sport associations (Mitten and Opie 2012, 7–8). Likewise, the German *Bundeskartellamt* considered the advertising restrictions for athletes and their sponsors contrary to competition law. In this case, the *Bundeskartellamt* moved the IOC and the German Olympic Sports Confederation (DOSB) to reframe and relax the Olympic Charter ban on using the images and likenesses of the athletes for advertising purposes before, during and after the Olympic Games (Bundeskartellamt 2019).

Another limit that works against sport associations is EU Law. The former European Court of Justice's *Bosman* ruling (Case C-415/93), the Court of Justice of the European Union's *Meca-Medina* judgment (Case C-519/04), and the European Commission's *International Skating Union* decision all had lasting impact on the way the sport works (Case AT.40208). Sport associations are not insulated from state

courts or EU law. The latter along with the national laws promulgated in parallel to it, present leverage for stakeholders who challenge the rules and regulations within the sport industry. After *Meca-Medina*, sport associations enjoy limited autonomy in relation to their legislative and administrative actions. The reflection of this situation is that, in theory, sport associations have autonomy as long as they are proportionate with their legitimate objectives. EU law is applied ‘on a case-by-case basis, requiring compliance with the Treaty provisions but contemporaneously having regard to the specificity of sport’ (van den Bogaert 2013, 99).

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 9th Circuit did not apply US law to the Olympic Games as it deemed the Olympic Charter as an international agreement (Duval 2018, S263). Wong (2010) interprets this as the reluctance of the judiciary to meddle in the world of sport. Nevertheless, the exhaustion of administrative remedies with the sport associations and more importantly the incorrect application of their rules, may lead to intervention (163–64). Olympic ice skater Tonya Harding’s case (*Harding v United States Figure Skating Ass’n*) sums up the approach of the courts in the US perfectly, in that the court 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’ (emphasis present). In any case, intervention to the merits of the dispute is illegitimate (1479).

Despite the relatively large leeway for sport, recent developments have shown that the state and its courts have started to take a more critical look at sport and its use of RAE powers. The stance of the federal government acts as an insulation for sport, but adds that the fight against doping and athlete abuse constitute exceptions to the ‘hands-off’ approach (Koller 2016, 2018). Second, although it concerns college sports and the NCAA, contentions of the US Supreme Court in *NCAA v Alston* are a sign that the Court could challenge certain ‘traditions’. The US Supreme Court showed that the NCAA’s restrictions against non-pecuniary benefits such as computers and internships are in violation of antitrust law. It is telling that the final sentence of the decision, with Kavanaugh J. concurring with the Court, is that ‘The NCAA is not above the law’. Finally, the relationship between the league and players is set out in CBAs between the leagues and player associations. Although labour arbitration is the preferred means, disciplinary processes and labour disputes could end up before state courts. Theoretically, and subject to the limits set by the US Supreme Court, arbitration awards pertaining to these types of disputes could be vacated by these courts (Lipinski 2003, 335–44).

The case of Tom Brady entertains this possibility and shows that courts not only take into account the law of the land but also the idea of fairness as interpreted in sport. In this case—dubbed *Deflategate*—Brady received a four-game suspension for allegedly being aware of the deflation of balls in the American Football Conference Championship game in the 2014–15 NFL playoffs. The implicit reason for the

sanction was that deflated balls gave the New England Patriots (when attacking) undue advantage over the opposition. The NFL Commissioner, while not clearly pointing out the suspension's true reason, likened the player's alleged deflating of the ball to the first use of steroids by players. The Commissioner pointed out that both offenses are detrimental to the league as they gave the perpetrators undue advantage. The Second Circuit found neither a defect in the reasoning nor the Commissioner's power to create analogies with other types of immoral conduct (Berger 2017, 489–93). In essence, the court adopted the fairness parameter. In addition to this, in these kinds of disputes, courts cannot resolve 'merits of parties' labor disputes on basis of its own factual determinations, no matter how erroneous the arbitrator's decision' (*Major League Baseball Players Ass'n v Garvey*, 511). Therefore, the specificity of sport and the arguments that derive from them along with general state laws could preclude the courts from intervening in the labour and disciplinary relationships between athletes and leagues.⁴

Therefore, legal autonomy is not simply the insulation of sport from the norms and courts of the state. The interests of the market could affect the sports associations' norm- and decision-making processes. The state and the market may affect the way sport operates. An integrated conception of legal autonomy is necessary. Under this conception, not only the state's norms and courts present adversaries to sport associations but also the market could have an impact on the way sport norms and sport are produced.

1.3 The Moral in the Normative

Except in the discussion of US cases, the previous section ignored the moral aspect of sport; however, a theory of autonomy cannot be complete without exploring the moral aspirations, ideas and claims of sport associations. The principle of fair play and other moral standpoints such as political neutrality and the equality between competitors that guide the regulations and practices of sport must be integral parts of the theorisation process. For this book, the 'moral autonomy' of sport is key in the introduction and maintenance of practices that might be in violation of the policies and laws of the state. According to this conception of the autonomy of sport, semi-autonomous orders in sport derive their meanings and present their defences against outside forces, from moral autonomy. With the help of moral autonomy, the semi-autonomous order can 'modify or suspend the scope of general moral rules' (Butcher and Schneider 1998, 3–4). The modification and suspension not only legitimise certain on-field behaviour that would be considered as criminal in a non-sporting context, but they also act as defences to be deployed whenever the normative order's well-being is at stake—the subject matter of the next chapter.

Moral autonomy radiates to legal autonomy and other types of autonomy so that the sport association keeps the state and the market at bay when the normative order's aims and interests are under threat. It helps to pass, interpret and enforce sport-specific norms. Prohibiting recourse to state courts is justified through the

speedy, cost-effective and expert-driven nature of sport arbitration whereas financial fair-play regulations, salary caps and drafts curb the spending power of the teams and clubs so that competitive balance is achieved. Likewise, mixing sport and politics is argued to be to the detriment of competition in particular and sport in general.

Sport associations have their specific approaches to morality. Terms such as fair play, political neutrality and the equality of competitors are enshrined in official documents. Sport associations introduce, embrace, designate, produce and interpret values and moral standpoints, which act as moral guiding principles. The verbs 'introduce' and 'embrace' denote a multi-sided relationship. On the one hand, sport associations may introduce a separate conception of morality compared to the state, other normative orders and the market. On the other hand, the associations, due to their interaction with other normative orders, may also embrace a conception which has its roots in a different normative order.⁵ To put it differently, sport associations decide on how sport is to be played; however, because they are semi-autonomous they are exposed to the morals-driven interventions by outside forces.

To depict the situation through one of the most controversial aspects of moral autonomy, as in the cases of Caster Semenya and Dutee Chand, the moral stance of sport associations could result in the exclusion of hyperandrogenous individuals from competitions. The assignation of sex to an individual through tests that disregard the cultural and social markers of gender for sporting purposes works against respect for the individual (McNamee 2016, 11–12). To achieve 'a level playing field', sport associations exclude certain individuals although the same exclusion would be seen as anathema in the rest of (any liberal) society. The downside of the move is that the acceptance of these arguments may also provide the scaffolding for political pledges. For instance, the former President of the United States Donald Trump's first in-person public address following his defeat in the 2020 US presidential election included the question of transgender athletes (Ennis 2021).

The moral standpoints of sport associations may also affect the reasoning of legislators and courts in more specific instances than the general ideas of fairness and equality. One such instance is separating men and women, for whatever reason, in sporting activities. The separation of individuals according to their sex and gender would be seen as reactionary in most cases, but social activities such as religion and sport strive to morally justify their practices. Even the EU, which has limited the autonomy of sport in various cases, accepted the idea that 'separate competitions for men and women' reflect 'the specificity of sport' (European Commission 2007, 13). Likewise, in the jurisdiction of England & Wales, as well as Scotland and to a certain extent Northern Ireland, Section 44 of the repealed Sex Discrimination Act 1975 and Section 195 of the Equality Act 2010 include exemptions to equal treatment. Concerning the latter, in an Act which aimed 'to harmonise discrimination law, and to strengthen the law to support progress on equality' possible unfair advantage due to strength, stamina and physique of the competitors became the justifications for separate competitions for men and women. The

example for application states that: 'It would be lawful to have men and women, though not necessarily younger boys and girls, compete in separate 100 metre races' (Equality Act 2010 Explanatory Notes, Introduction s. 10 and Commentary on Sections, Part 14, s. 195). In the US, Title IX of the Education Amendments of 1972 ('Title IX') and its implementing regulations, charge educational institutions that receive federal funding with creating equal opportunities for athletes, while retaining their separation in sport. The separation includes not only the creation of separate teams and their support, but also the application of different rules, making them 'less demanding' and 'less strenuous' for women. The toning down of the rules has been mostly affirmed by the state courts (Brake 2010, 15–39).

Finally, the nationalistic views of sport have the potential to override legal discourse. In the case of the 'Baseball Exemption' and its interpretations, a romantic view of the 'national pastime' is apparent. The lure of baseball parks and the excitement of the crowds were at the forefront. Curt Flood, a Black athlete, challenged this view and the 'reserve clause' which allowed MLB teams to keep the services of a player. In the process, the law's possible intervention to the 'game' was equated with the loss of the World Series as an institution. The MLB argued that the abolition of the reserve clause, and the resultant 'free agency' system would result in the death of baseball. Right from the start, the stakes were high, both sentimentally and practically. From an antitrust law perspective, even though the US Supreme Court called it 'an aberration confined to baseball', the reserve clause remained intact (*Flood v Kuhn et al.*, 282; Ross 1994, 175–76). The Justice writing for the majority wrote an 'ode to baseball', conflating romance and reality as well as the status of baseball as a game and as a business. The Justice and the baseball fan became one entity (Woodward and Armstrong 1981, 224–26).⁶ The Curt Flood Act of 1998 considers the employment of major league baseball players within the scope of antitrust laws; exemptions still apply for broadcasting matters, the umpires and other individuals employed by major baseball leagues, minor league players, as well as the internal relationships of the owners/teams.

An explanation of the complex legal and moral situation, moral autonomy and their interplay with legal autonomy would ideally be built upon the idea of '*nomos* and *narrative*' as introduced by Robert Cover (1983). According to Cover, *nomos* is the normative universe consisting of binaries such as 'legal/illegal' and 'moral/immoral'. The binaries bind humans inhabiting the universe, and yet *nomos* does not appear on its own—there is also the *narrative* acting as its constructor. *Narrative*, through histories, myths and 'official' documents, creates moral standpoints to be used in the interpretation of the *nomos*, and is the yardstick in the judging of actions. It has a hand in the prescription of future conduct as well as the prediction of the consequences of such conduct. *Narrative* allows the moral judging of the norms.

The universe is not monolithic, because the creation of legal meaning, *jurisgenesis*, is a sociocultural process. Even in cases where there is a single *nomos* consisting of norms prescribing the conduct of humans and acting as signals of communication between them, its interpretation by different social groups—public

and private—can be different. The underlying reason is that, the *narratives* of groups might differ. Therefore, the groups interpret the *nomoi* with the help of *narratives*, rendering them legal or illegal and moral or immoral. To conduct the process, norm-maintaining processes should be in place. The *nomoi* created by a group are enforced by ‘institutions’, which have the power to interpret them, and eventually hold the group together. Hierarchical social control may realise this goal but the *narratives* of different groups may persist.

Continuing with Cover’s account, the interpretation and enforcement of norms due to differing interpretations create tensions between the state and the groups with respect to both *nomos* and *narrative*. The clash of the state’s powers and the freedom of association of groups is the primary source of tensions. The groups may try to achieve ‘insular autonomy’ by challenging the state’s prescriptions but stay within their shells. The challenge is real because the group perceives its interpretations as equal or superior to that of the state. Such challenges and the possible insulation resulting from them are essential to the creation of separate norms with their distinct set of moral standpoints, obligations and enforcement methods. Contrariwise, ‘redemptive constitutionalism’ pertains to groups that both challenge the state and strive to change the social world that they inhabit. These groups have the power to create *nomoi* in line with their own views of the present and future worlds. When the interests and objectives of the group are integrative, their *nomoi* differ from insular communities. Depending on the groups’ objectives, their world-changing characteristics can be negligible or considerable.

Cover’s arguments regarding the intricate relationship between *nomos* and *narrative* have an uncanny fit with sport. Despite judicial supervision (and intervention if their practices are not justified) by the state and the EU, *nomoi* are created, recreated and amended by sport associations. The *nomoi* is alive because new challenges bring about the necessity to address them, and failing to do so would be detrimental to the political and economic interests of the association. Sport associations have to bear in mind economic logic and political logic, and accordingly the universe outside its semi-autonomous normative order (Cover 1983, 39; Extabe 2010, 122–23). This was the primary reason why the IOC and FIFA chose to address criticisms concerning their lack of regard for human rights abuses within the supply chains of the Olympic Games and the FIFA World Cup. Concordantly, the sports associations themselves maintain and defend the objectives, values and norms of their semi-autonomous orders. Violations of the objectives, values and norms result in disciplinary charges, duly adjudicated by the same associations or the ‘independent bodies’ they help constitute. The last two points are crucial for this book, because the concern for human rights as well as the prosecution of illegal/immoral conduct also act as communications to other spheres. With the help of freedom of association, sport associations communicate to the outer world their dissatisfaction with the conduct of their stakeholders. They can, and do, brand conduct (on-field and off-field) both illegal and immoral.

The illegality and immorality of a conduct differs from state to state and institution to institution. In sport there is a further layer to the already complex set of

binaries. Sometimes the legal/illegal and moral/immoral binaries of the state and the sport associations overlap—a conduct could be deemed illegal/immoral for both institutions. Nevertheless, this is not the only scenario. In some cases, the ‘legal’ for the state might become ‘illegal’ for the sport association, and vice versa. Then the question is how could sport, in general or through the associations that organise its specific instances and competitions, justify the creation and maintenance of legal/illegal and moral/immoral binaries that go against the understandings of the state and the national and transnational institutions that they create? This is where *narratives* come into the picture. The *narratives* created by histories, myths and ‘official documents’ shape how sport associations, the keepers of semi-autonomous normative orders, interpret the *nomoi*. Therefore, the sport associations’ *narratives* enjoy a similar process when compared to those of the states and their sub-communities.

The *narratives* bind (together) the ‘sporting community’. The associations, their stakeholders and spectators adopt the *narratives* pertaining to moral standpoints. Since the sporting community is a social group that ‘is not grounded on blood, race, ethnic origin or any other “essentialist” attribute’ (Extabe 2010, 118), anyone can become a part of it. Yet after becoming a part of it, the individual has to take account of the practices of the community such as segregation according to gender and the policing of gender. Hence, *narratives* are a form of moral defence.

One (or as it is accepted by a multitude of sport associations, a group of *narrative(s)*) argue(s) that sport is something ‘special’. Following on from EU documents, court rulings and the literature on the subject call this the ‘specificity of sport’ or the ‘specific nature of sport’ argument. This argument purports that sport has inherent characteristics which are *sine qua non* for sport, differentiating it from other social and economic activities (European Commission 2011, 10–11, 2016, 3; Hendrickx 2016, 138–40). This way of looking at things helps sport to create and maintain semi-autonomous orders where moral and (quasi-)legal sport rules are interpreted and applied. These characteristics allow sport to be judged differently compared to other activities. Closely linked to the inalienable characteristics, the *narratives* imagine and publicise sport as politics-free, politically neutral, equality-conscious and fair play-guided. Sport has to be politics-free, politically neutral, and has to engender equality and fair play. As mentioned in the case concerning free agency in baseball, the *narratives* present the rejection of these moral standpoints as the end of sport as an activity and as a sociocultural phenomenon. If these standpoints are ignored, sport would simply cease to work. The moral appeal of political autonomy, political neutrality and the equality between stakeholders act as shields.

There is also a consequentialist appeal to sport. The *narratives* imagine sport to have not only ‘inherent’ moral characteristics but also desirable moral consequences. In addition to this, the ‘social function’ of sport leading to positive externalities for society is crucial for the acceptance of certain practices in sport. Such functions are thought to have the power to ‘bring people together’, to stay healthy, to contribute to the moral education of individuals and to create a morally inclusive society has been an important part of sport’s *narratives*. The sometimes

exaggerated positive externalities of sport give the moral high ground to institutions that strive for autonomy.

Essentially, *narratives* have two uses. First, they partake of the autonomy of sport to the point that even where FIFA was bogged down in allegations of corruption, bribery and money laundering, authorities in the US that conduct the investigation saw regulation within football as the way out (Henne 2015, 325). The *narrative* indicating that it has inherent moral good as well as morally good consequences helps sport to create *nomoi* that sometimes go against the *nomoi* of the states they reside or operate in. These moral standpoints provide defence of sport from outside interventions along with the necessary overriding elements in the maintenance of the normative order. Simply put, the justifications of the practices of sport through its *narratives* can stop the state as well the national and transnational institutions that they create from intervening.

As a result, even though state courts (especially Swiss courts due to their jurisdiction over CAS awards) and those of transnational institutions such as the Court of Justice of the European Union have the power to evaluate whether the regulations, sanctions and practices are in line with the law of the land(s) and if they are justifiable or not, the moral standpoints of sport as informed by the *narratives* become the deciding factors in their decision whether to intervene or not in the inner workings of associations. Sport associations muster their *narratives* not only to defend their semi-autonomous normative orders from regulatory interventions, but also against non-regulatory modes of governance and activities that could be carried out by the state along with the national and transnational institutions that they create. In addition to this, sport associations carry out their defence of normative orders against the EU and its member states as well as non-EU states where sport is produced and consumed. Even where the *narratives* contain myths as in the case of the arguments for antitrust exemption in the US, courts could still defer to them.

The second use of *narratives* in sport is that it gives sport the power to interpret ideas and create new meanings that are in line with their political and economic interests. The *narratives* solidify freedom of association and freedom of business. Sport, through its RAE powers, keeps the interpretation of its objectives, values and norms within itself. The self-generation and self-referencing of the characteristics of sport as well as the interpretation of the scopes and limits of rights become its pillars along with the processes within it. The heart of the matter is the 'rights' part of this position because the institutions having RAE powers have the authority to interpret rights in view of the constitutions of states and human rights documents along with their official interpretation by national and international courts. They also conduct the interpretation process in view of the sport associations' constitutive documents, the norms based on them and the moral aspirations enshrined in both. The interpretation thereof has the power to draw stricter limits for the rights, categorise them and finally limit them through categorisation.

The norms, moral stances and practices of sport associations could be different. Sport associations mostly have their separate RAE powers, and accordingly their

narratives and *nomoi*, even where they are linked by membership or cooperation, could be different. A national association's take on equality and political neutrality could be different than those of international sport associations. The moral/immoral binaries for on-field conduct could differ within the same sport. Whereas the NHL allows the unwritten 'code' of settling disputes by fighting on ice within certain limits to the point that one NHL Commissioner said that 'fighting is part of hockey',⁷ the International Ice Hockey Federation strictly forbids it, and indicates that "Fighting" is not part of international ice hockey's DNA' (ESPN 2007; IIHF Official Rule Book 2021/2022, Rule 46). More different still, sport associations and their officials have different views of how a given sport should be played. Baseball should not resemble wrestling, because their coming into being and the philosophy behind them are different (Russell 1999, 28, 34–37).

Bearing the foregoing in mind, the rhetoric of politics-free sport and its progeny political neutrality, along with the utilisation of moral aspiration are the prime movers in the restriction of political expression. *Narratives* emphasise that the inherent characteristics of sport should stop individuals from making political statements. Accordingly, they claim that they have created an insulated sphere devoid of any political expression where stakeholders and non-stakeholders are not allowed to further their political aims through sport. Political neutrality means not taking sides in political conflicts or allowing political expression, the latter of which could be seen as condoning the expression and thus taking sides. The RAE powers of institutions and the social control that they maintain over individuals make sure that the *nomoi* that they have to take account of and the *narrative* in the shape of political neutrality remain intact. The *narratives* also argue that moral autonomy of sport is critical in the sense that if not for these restrictions, the positive moral consequences in the shape of health, social progress, unity, peace and education would be in danger. Sport fosters an outlook which tends to be adopted by athletes, spectators and commentators alike. Nonetheless, those *narratives* are indeed a myth and the *nomoi* only enable the states to impose their dominant views on the citizen consumers, and the market to sell products efficiently.

Despite the ideal fit between Cover's theory and sport, the former has certain features that should be reimagined and restructured by bearing in mind the particularities of sport. They should be rethought by taking the transnational nature of sport as well as the universal human rights aspect of the transnational society. First, sport associations have to bear in mind *nomoi* of the state that the associations reside or operate in. While mostly tolerant, the state and the institutions that are created by it, in certain cases may not tolerate sports norms along with the decisions that are reached through the utilisation of these norms. Therefore, unlike Cover's account of the tensions between the constitution of the state and the *nomoi* and *narratives* of social groups, there is more than one state-operated *nomoi* that exert pressure on sport. The tension is multi-dimensional. Similarly, even though there is no 'world constitution' and not even a European constitution, a transnational legal order such as the EU has the power to influence the way sport's *nomoi* are shaped.

The second point is that unlike the case of states where constitutions act as the ‘supreme text’, there are many texts, practices and values in sport. As legal persons, sport associations have their constitutive documents, statutes, rules of the association, constitutions and so on. The texts lay down their objectives, values, powers and a framework for the legal/illegal along with moral/immoral binaries. There is a plurality of constitutive documents, because the structure is hierarchical, meaning each step in the hierarchical ladder has its own norms and objectives. Nevertheless, in line with the powers of associations, in certain cases, a national sport body should abide by the constitutive documents, objectives and values of the associations that they are a part of, such as regional federation, continent-wide confederations and international federations. Likewise, since national leagues like the EPL and the NBA are broadcast worldwide, the regulations of these institutions as well as their enforcement could have effects beyond the border of the state they reside in. Consequently, *nomoi* could be of transnational nature.

Finally, Cover views the state as the aggressor in its relationship with the communities living within it. State courts are ‘jurispathic’ in the sense that they use ‘violence’. The violence is directed against the laws of the communities. The state aims to be the sole law- and meaning-giver (Cover 1983, 40–44). In the utilisation of violence, a theme that Cover expanded upon later (1986), against sport or the associations that use RAE powers, subtlety is warranted, even though, as laid bare in this chapter, the state or the EU may intervene in the regulation and governance of sport. Especially in the case of Switzerland, the desire to commit violence is mostly curbed by the state itself. The states even adopt certain aspects of the *narratives*. Concordantly, the relationship between the state and sport is not solely based on violence. As the next two chapters will argue, depending on the interests of the state, the relationship includes cooperation, co-optation and complementarity, but also repression and subordination.

Notes

- 1 This does not mean that every spectator-induced change to the rules of sport is negative. Just as the introduction of the shot clock and three-point field goal improved basketball as a sport, the back-pass rule which prohibits the goalkeepers from handling of intentional passes with feet from outfield players even within the penalty area considerably improved football (Simon, Torres, and Hager 2018, 202).
- 2 Here the word especially brings about a qualification as to the scope of the claim. In Hungary, in line with the idea ‘Greater Hungary’, Orbán’s authoritarian regime has invested in Hungarian minority clubs beyond the country’s borders. Both the state and corporations have channelled funding to various sports clubs. Concerning the latter, tax reliefs for Hungarian corporations have eased the process (Plaza Martín and Alarcón Hernández 2021, 332–35).
- 3 This seems to be the situation elsewhere. In Sweden, local governments function in an ‘unpredictable, messy, and complex situation’ where political logic is dominant. Accordingly, ‘large image-intense projects, which include political ambitions with their own goals and agendas’ (Alpenberg and Karlsson 2019, 903) pave the way for ‘super investment projects’ including sports venues to become feasible for the politicians themselves (Alpenberg 2020, 419, 424–28).

- 4 This was also the basis of the majority opinion that dismissed the allegations of unfairness, contending that the notion of fairness is distinct in the sporting and legal contexts due to the 'expertise of those knowledgeable in that sport' (*Mercury Bay Boating Club v San Diego Yacht Club*, 265).
- 5 This point situates the outlook closer to JS Russell's (2007) 'continuity thesis'. The thesis 'claims that moral values that are most fundamental to sport—namely, those that are constitutive elements of sport—are expressions or reflections of more basic values found outside of sport' (55–62).
- 6 This was not the only instance where the person judging on the case missed the boundary of being a Judge and a baseball fan. In the appeals court Judge Cooper embellished their opinion on the refusal of a request for preliminary injunction with baseball terminology. In the trial phase, they also invited a retired Jackie Robinson to their chambers and asked for Robinson's autograph (Crepeau 2014, 35–36).
- 7 When Vancouver Canucks player Todd Bertuzzi struck from behind Colorado Avalanche player Steve Moore, the NHL suspended Bertuzzi for the rest of the regular season and playoffs, and implemented a fine of \$250,000 on the Canucks (Westhead 2004).

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Power Over Stakeholders

2.1 Introduction

There are a multitude of norms and normative orders whose sources might be different. The state and its institutions, corporations, associations, communities, tribes and transnational bodies all create rules. In this multi-layered (vertical) and juxtaposed (horizontal) normative landscape, depending on their adjudicatory and enforcement powers, non-state entities could be the decider in the guiding of individual and collective conduct. As an extension of this picture, sport associations use their RAE powers to supervise their normative orders in accordance with their interests.

Since this book is concerned with freedom of expression, its focus will be on disciplinary processes and, at one point, the authority of sport associations and their adherents over the selection of athletes. Under this conception, the RAE powers have the potential to affect both a prospective speaker's decision to express themselves and the recipients' ability to receive an expression. There is also the possibility of non-normative order actors taking part in these processes. A state court or a separate entity like the CAS or an international sport association other than the IOC at the Olympic Games could have adjudicatory and enforcement powers. Even if that is the case, whenever these adjudicators and enforcers acknowledge the applicability of the sport associations' norms and whenever the former adopt the latter's moral justifications, the regulatory powers of sport associations remain intact. Hence, the norms restricting freedom of expression could still guide the behaviour of the adherents of the sport association.

2.2 Maintaining the Normative Order

Norms, adjudicatory processes and the enforcement thereof play a central role within the sports associations' normative orders. To secure the well-being of their orders and interests,¹ sport associations preside over tailor-made norms and processes. They create binaries in the form of legal/illegal and moral/immoral, take disciplinary actions, decide on them and enforce those decisions. In sport, normative orders are based on associations that enjoy RAE powers or at least have

the authority to regulate required conduct. Whether or not one calls them legal regimes, sport associations and their separate semi-autonomous normative orders have the potential to guide the behaviour of natural and legal persons through ‘rules, principles, categories, concepts, standards, notions, schemes of meaning’ that they introduce, modify, define and stabilise. The interests, ultimately, restrict the autonomy of their adherents (Frydman 2014, 193–94; von Benda-Beckmann 2002, 48).

A CAS case that deals with the improper conduct of the supporters of Feyenoord Rotterdam presents a clue as to one of the underlying reasons for disciplinary processes. Here, the CAS panel explained that:

Disciplinary law implemented in [UEFA’s] 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.

(CAS 2007/A/1217, para 13)

‘Order within the organisation’ and ‘assert[ing] statutory standards of conduct’ are the two outstanding and related terms in the award. Similar to Durbin’s (2017) point that underlines the guidance and ordering aspects of the rules of games in the construction of the possible but unattainable ‘perfect game’ (109–11), the claim is that in the absence of disciplinary processes there would be legal and moral disorder. Legal disorder would occur when stakeholders and spectators act in ways that jeopardise the smooth running of the game and the competition. Sport relies upon strict schedules and the division of labour between every element within its production and consumption processes. The consequences of the (perceived) disorder would be the disruption of said processes and even the exposure to safety and security hazards. Moral disorder is at issue when stakeholders and spectators conduct themselves in an ‘immoral’ manner. Supported by *narratives*, sport has strict conceptions as to what sport is and how it should be played.

This outlook is not limited to international sport associations. Leagues such as the MLB, NBA, NFL and MLS should be considered as having their separate normative orders, not only because of their RAE powers but also because of their ideas of ‘best interests’. To exemplify, the NBA Commissioner, who is appointed by team owners, 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 Association or of a Member’ (NBA Constitution and By-Laws, art. 35(d)). In the NFL, the 2020 CBA sees ‘conduct detrimental to the integrity of, or public confidence in, the game of professional football’ as within the jurisdiction of the Commissioner’s powers (NFL Collective Bargaining Agreement 2020, art. 46(1)(a)). Finally, the MLB Basic Agreement that was valid between 2017 and 2021 stated that conduct that is ‘materially detrimental or materially prejudicial to the best interests of Baseball’ could be sanctioned by the Commissioner (MLB Basic Agreement, Art 12(B)). Consequently, the desire to protect the best interests of

the 'game', that is, the normative order, is at the forefront of the leagues' concerns. So as to protect these interests, and thus maintain the well-being of their normative orders, the leagues apply their RAE powers as introduced in their constitutions and/or CBAs.

Nonetheless, to view the maintenance of normative orders as unidimensional operations would be a gross simplification. Due to the economic dimension of their practices and market pressure, sport associations are burdened with a double role as associations and businesses. It is in their interest to reach their objectives both as associations and businesses. Since economic logic is intertwined with associational activities, the well-being of normative order entails economic well-being. In order to stay alive in a competitive environment, sport associations and their events are commercialised. Commercialisation, an 'adaptive strategy' in a hyper-competitive environment, helps sport associations achieve financial self-sufficiency, certainty and efficiency (Clausen et al. 2018, 374–76). Sport, as a 'product' which comes into being by the coming together of competitors, has to be marketed to consumers who are willing to pay for it and its side-products such as merchandising.

In the process of commercialisation, sport associations and their events have turned into 'brands', a type of communication. Although the term has suffered from overuse and misuse, the brand is 'a symbol of something that makes us recognise 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). It acts as a 'guarantee' to consumers, and it is something to be associated with (Söderman 2013, 185). The brand is the voice of the entity that offers the product or service. More importantly, it can be described as 'a cluster of values'. The values that relate to the sport association and the ones that summarise the brand have a hand in its positioning before legal and moral phenomena. These values reflect the brand identity of sport associations. The values are internally consented to and monitored because they have a crucial role in the creation and maintaining of the perceptions of the public. The public have specific perceptions concerning the brand and the values it emanates (De Chernatony 2001 referred by Urde 2009, 620–21). The presence of various actors in sport means that the interaction between them has the potential to create and change 'brand meaning' (Ströbel and Germelmann 2020, 4–6). Hence, athletes, spectators and audiences could have an effect on the brand.

Closely related to this is the fact that sport associations have to bear in mind their brand image, which Keller (1993) defined as 'perceptions about a brand as reflected by the brand associations held in consumer memory' (3). Sport associations develop strategies where they have an active role in the protection of the brand images of both themselves and the sponsors. Sport associations heed the preferences of the state and the market because the relationship between them and the sponsors is as a strategic alliance rather than a one-sided relationship (Farrelly and Quester 2005; Jeanrenaud 2006, 49). If not for such protection, the brand image of the sport association, which, among other advantages, defines and

enhances the sponsor's image and reputation, becomes a detrimental feature of the relationship between the sponsor and the sponsee. In these cases, brand image cannot realise its potential to generate ever-bigger sponsorship fees (Westberg, Stavros, and Wilson 2011, 603–4). The brand and image of the sport associations 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' (World Taekwondo 2017). WTF stands for 'What the Fuck' in internet slang.

Thus, sport associations have to remain vigilant as to whom or what viewpoint they seem to be approving, for allowing one viewpoint within their respective normative orders may be considered as approval or condoning. The danger here is that appearing in the same sentence with an expression or an incident that consumers and businesses might shun or may call 'scandalous' could² have far reaching consequences. In particular, media attention concerning morals-laden crises such as adultery (Tiger Woods), gun violence (Malik Beasley), domestic violence (Ray Rice), doping (Maria Sharapova, Lance Armstrong and Team Festina), corruption (FIFA, UEFA, IOC), biting and hate speech (Luis Suárez) raises the stakes. Unless the various actors that have an interest in the particular issue at hand deploy effective communication strategies, their brand images could be tarnished, resulting in the loss of sponsors (Schafraad and Verhoeven 2019; Westberg, Stavros, and Wilson 2011, 604–7). The state also has a stake in the matter. Since state-owned, -managed or -financed entities invest in sport, negative connotations concerning sport associations or their stakeholders could also tarnish the image of the state.

The final point brings a caveat to the rest of the chapter. The aims to protect the order and the image of sport associations are realised not only through the adjudication of the matter, but also through formal and informal actions of sport associations. That is, not adding an athlete to the roster of a club, team or national team should be considered as within the powers of sport associations. For example, after taking a knee, Colin Kaepernick remained a free agent because NFL teams were not interested in their services. Concerning national team rosters, the relevant national sport association could have absolute power over the selection of athletes. Following his Nazi salute after scoring a goal in a domestic match, the Hellenic Football Federation banned Greek footballer Georgios Katidis from the Greek National Team for life (BBC 2013). This being the case, roster selection will not be a subject of this chapter.

2.3 Regulatory Powers

In accordance with their objectives and *narratives*, sport associations or the bodies they delegate their power to, draw up rules, regulations and other norms that provide the bases of governance, the *nomoi*. The regulatory powers of international sport associations give support to Cotterrell (2008), who has suggested that transnational regulations 'relate to the interests, experiences, allegiances and values

associated with transnational networks of community' (5). Political and economic interests lead to the adoption of certain norms as well as their adaptation to the changing political, economic and social landscape.

Regulating and settling a subject could become a multi-dimensional and multi-stakeholder enterprise. The most controversial norm concerning political expression is the (in)famous Rule 50 of the Olympic Charter, which reads 'No kind of demonstration or political, religious or racial propaganda is permitted in any Olympic sites, venues or other areas'. Although sport associations' constitutive documents and disciplinary regulations have specific provisions and sanctions concerning political expression, the restrictions may also appear in other regulations. These regulations expressly restrict political messages within and in the vicinity of the stadium, before, during and after competitions. Further to these, in football, the 'Laws of the Game' restrict expressions on the equipment and the undergarments of the footballers. Even though they do not constitute the sport itself, they regulate the behaviour of footballers (Borge 2019, 133–36). Likewise, as in the case of beach volleyball competitions organised by *Confédération Européenne de Volleyball* (CEV), the rule could be adopted for non-Olympic competitions (CEV Beach Volleyball Guidelines, art. 43.1). Finally, due to their position as member associations, national sport associations make specific references to international sport associations.

Although the NFL, NBA, MLB and MLS are the keepers of their respective semi-autonomous normative orders, their regulatory powers appear through the coming together of teams. The team owners' means of cooperation and dispute settlement are subject to regulation. The teams have to abide by the relevant constitutions, by-laws, regulations, rulebooks and manuals. In the next step, since they are the main actors in the production of sport, athletes have to be brought within the normative order through CBAs. In most cases, the constitutions and by-laws are mostly superseded by the CBAs, the former is supplementary; however, the NBA Constitution that regulates the conduct of the players and the power of the Commissioner is binding upon the players through a reference in the CBA (Bukstein 2020, 2 and 10). The norms could range from the uniform/standard contracts, player compensation and mobility of the athletes to athlete conduct, and doping. They also lay down the procedures for the resolving of disputes as well as disciplinary actions.

In any case, in the framing of behaviour, the norms are not solely rooted in rules of the game or the regulations. The *narratives* of sport associations too provide the bases for their interpretation and application. That is, the moral standpoints and guiding principles such as fair play have an effect on the way that the norms are accepted and interpreted. While there is no agreed-upon definition and scope of fair play, the ideal one emphasises being 'just and honest' and playing 'according to the rule'. Concerning the 'dark side' of sport (e.g., doping, corruption and match fixing) remaining 'unblemished and clean' is at the forefront (Loland 2002, 13–15). Their opaqueness notwithstanding, notions such as 'fairness', 'integrity', 'unsportsmanlike[sic] conduct', 'bringing the game into disrepute', 'respect for

opponents', 'misconduct', 'the spirit of good sportsmanship[sic]' and 'image' act as adhesives in the interpretation of rules. Different sports and even different sport associations within a given sport have different takes on the *narratives*. Enjoying separate normative orders, sport associations take different approaches to fundamental questions with their jurisdiction.

Concerning the spirit of the game the sanctioning of Luiz Adriano for their goal after the ball was lofted in their direction, despite the fact that it was meant to be played by the opposing team, is of utmost importance. In football if an attack is broken off because of an injury, the defending team should send the ball to the attacking team when the play restarts. In this case, UEFA sanctioned the footballer for unsporting conduct (Pérez Triviño and Torres 2013, 4–5). Nonetheless, as in the case of fighting in ice hockey, sport associations could interpret the spirit of the game and the conduct of their adherents differently. The interpretations could be so different they could reach opposite decisions through opposing views of sport and morals. For instance, McNamee (2014) has criticised the sanctioning of a German bobsledder by the German Bobsleigh, Luge, and Skeleton Federation 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. The sanction was later rescinded by the national federation following public pressure. Despite the serious misstep in the 'renting' of equipment, there is no doubt that the German bobsledder acted according to any understanding of fair play, which shows that the values are open to debate and interpretation (1–2). Consequently, whilst care should be taken in perceiving the values of the sport associations as monolithic, uniformly interpreted and implemented phenomena, their values also become the starting points and the primary justifications for the strict control over the athletes.

The foregoing depicts, of course, a small sample of the current normative landscape and possible norms restricting expressions, political or otherwise. The crux of the matter is that sport associations use their regulatory powers in a way that would help them achieve their objectives as well as the objectives of the associations they are members of. Regulatory powers are of concern because *narratives* become vessels in limiting expressions. The limits could stem not only from the rules of the game, but also from other written norms, the *narratives* and a general understanding of morals, or rather its interpretation at the hands of adjudicatory bodies. In order to ensure that the behaviour of stakeholders and spectators are in line with the sport associations' objectives and interests, sport associations' objectives and moral understandings, as in the case of Luiz Adriano, certain sanctions might be needed. This is the point where the adjudicatory powers of sport bodies enter the scene.

2.4 Adjudicatory Powers

In respect to the source of the power to adjudicate matters, 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' (citation omitted) (CAS 2008/A/1583 and 2008/A/1584, para 41). International sport associations residing in Switzerland benefit from these freedoms which constitute the basis and defence of their RAE powers (CAS 2018/A/5888, para 198). Concerning disciplinary sanctions of international sport associations a CAS panel has stated that its scope of review is narrower and more limited compared to other instances of appeal (CAS 2018/A/5683, para 63). On the national sport associations' front, there is no single way of determining whether or not their powers are delegated. There might even be confusion as to the status of a sport association, such as in Turkey, where commentators and courts still try to find a way to determine and explain the nature and the source of the sport associations' authority in Turkey.

The league commissioner, committees, boards or tribunals established within sport associations or bodies and arbitrators that enjoy delegated authority by the association or the CBA are the lynchpins of disciplinary processes. For instance, within their jurisdictions as drawn up by their constitutive documents and the associations they are a member of, sport associations provide for the necessary steps for charging and adjudicating a stakeholder. In certain cases, the decisions could be appealed before internal bodies. For the Olympic Games, the IOC may delegate certain disciplinary powers to international sport associations that organise the sport; however, the details, scope and exceptions as to the delegation are less than clear. When foreseen in the sport associations' norms, or if the parties implicitly agree, decisions of these appeals bodies could be brought before the CAS; however, the disciplinary bodies' discretion is wide and only overruled by CAS panels where the sanction is 'evidently and grossly disproportionate to the offense' (CAS 2018/A/5939, para 68). The CAS also establishes ad hoc divisions for the Olympic Games.

It is impossible to present an all-encompassing theory of disciplinary processes of national sport associations. Each sport and each association could introduce different procedures with varying degrees of autonomy from both the state and the associations that they are a member of. Local differences stemming from municipal law could have an impact on the way these processes impact the behaviour of the athletes and spectators. Laws on labour, labour arbitration, anti-trust, competition and anti-violence could guide the creation of the relevant bodies along with their interpretation of municipal, international and sporting norms. Some national sport associations even have designated the CAS as an appeals body.

Essentially, disciplinary processes help to maintain their normative orders and thus protect their economic interests. They serve sport associations' double role as associations and businesses. Freedom of association, which turns on the idea that the association could disown certain conduct and thus condemn and exclude the perpetrators, becomes the legal and moral basis for the disciplinary powers of sport associations. To survive in the hyper-competitive environment of the experience industry where different sectors fight for the consumers' limited resources (i.e.,

time and money), as well as the favour of the political status quo, disciplinary sanctions are introduced to confirm the binaries of 'good'/'bad', moral/immoral and legal/illegal. In the same sense, disciplinary processes based on the same binaries exclude the perpetrators (Patel 2015, 11).

One issue should be clarified. Unlike certain institutions with regulatory powers, sport associations do not 'assert their dominion' over a natural or legal person by extending their RAE powers to those who are on the wrong side of the binaries (Berman 2012, 205–7). On the contrary, due to the presence of associational activities whose ultimate goal is to produce the game, these persons are already within the sport associations' jurisdiction. The membership could be direct or indirect, the latter of which is based on tournament-specific registration processes. They include the acceptance of both the norms that will be applicable and the possible means of settling disputes. Accordingly, the participants also accept the disciplinary processes as foreseen by sport associations (Reilly 2012, 67; van Kleef 2014, 35–37). In the case of US leagues, the CBAs cover the issue. The athlete has to bear in mind the disciplinary mechanisms of the league even if the CBA was signed before their starting to take part in a league. In parallel with the non-US sport bodies, since the CBAs include specific disciplinary and dispute resolution processes, the league and commissioners do not assert their dominion over the athlete.

The processes also allow the associations to communicate their positions as to the conduct of stakeholders. Inspired by Wringer's (2017) theory of the 'expressive function' of punishment in criminal law, sanctions should be deemed as signals to the direct and indirect members of the association and the public. Disciplinary proceedings and sanctions signal that authorities resent, disapprove and disavow certain conduct. Stakeholders are the targets of sanctions because they, individually and cumulatively, constitute the primary elements of the production of sport. Stakeholders are bound by the RAE powers of the association, and as the next section suggests, they cannot escape the enforcement leg of the triumvirate. Concerning the public, individuals could have the status of spectator if they attend competitions, and in any case they are citizens and consumers. If the association makes the sanction public or if the sanction is perceivable by the public (the suspension of an athlete or the non-admittance of spectators to the sports venue), then the public becomes an obvious recipient. Sport associations expect the public to understand their official stance and the reasoning behind the sanction.

By sanctioning a stakeholder, the association dissociates (separates) itself from the conduct (Smith and Keeven 2019). Recall, the brand is the voice of the entity that offers a product or service. Accordingly, disciplinary processes tune down the voices of those that might interfere with the brand. They try to keep the brand image of sport associations as well as their stakeholders and their partners as clean as possible. These processes allow adjudicatory bodies to interpret the *narratives* and confirm the *nomoi* (also recall, they are plural due to the multitude of normative orders in sport). The *narratives* of politics-free sport and political neutrality result in political expression being illegal and immoral. The disorder that the illegal

and the immoral could bring would be to the detriment of the brand, the brand image and ultimately the economic and political interests of associations. Thus, in theory, political expression should be sanctioned by the relevant disciplinary entity. Nevertheless, what is 'political' is in the eye of the beholder. The nature and scope of what is indeed political and what is not are contentious. Crucially, the duty to interpret these contentious subjects lies with the disciplinary entities that are linked to the sport associations themselves. Even where the sequences of appeals might include third party bodies (e.g., CAS or labour arbitration) and state courts (e.g., SFT or US courts) the limited review capacities deriving from the law or the acceptance of the *narrative* present barriers for the rethinking or rectification of such interpretation. This general point will reappear throughout the book in different guises.

2.5 Enforcement Powers

The sub-sections on norms and adjudication bring about the question of their enforcement. As Verbruggen (2013) has posited, '[t]ransnational private regulation can be effective only if compliance therewith can be enforced vis-à-vis those to which such regulation applies' (514). Indeed, this applies to both transnational and national normative orders in sport because an ineffective regulation or decision would fail to create the desired effect on the stakeholders and spectators. The efficacy of the norms and decisions hinges on their enforceability.

Two types of enforcement can be identified. The first is the direct enforcement of norms, without the implication of a competent disciplinary entity, and the second is the enforcement of competent entity decisions. In either case, it is the agents of sport associations or other persons that enforce them. The term agent is broad, as it includes the referees, umpires, match delegates and so on and the administrative organs of a sport association. The agents have the power to directly enforce norms, including the ones pertaining to freedom of expression. Agents can restrict an expression. Take the case of referees in football. If the fourth official notices an expression that they judge to infringe Law 4 of the Laws of the Game before a substitution, then the footballer has to abide by this judgement. Otherwise they will not be able to take part in the game (IFAB Laws of the Game, Law 04 and Law 06). Off the field, match delegates, as the representatives of the football association, have the power to move the member associations and clubs to take certain measures and warn them as to certain conduct. Finally, the administration has the power to allow or reject an expression. Clubs send their match shirts to UEFA for examination if they take part in the UEFA competitions. The examination includes the evaluation of shirts under the UEFA Equipment Regulations that restrict political expression as well as shirt sponsors depicting strong alcoholic drinks and tobacco products. In addition to this, UEFA Match Delegates have a duty to report infringements (UEFA Equipment Regulations, arts. 5, 6 and 55).

In these scenarios, the expressions are cut off from the bud, without the speaker being able to convey them or the recipients being able see them. There are also

instances where the administration and adjudication legs of sport governing bodies might not agree on the legality of an expression. As in the showing of ‘a big banner with the Champions League trophy and logo of the Club incorporated’ by Paris Saint-Germain FC supporters, an agent can deem an expression as illegal—even though the body adjudicating the case considers it legal (UEFA CEDB, *Paris Saint-Germain*). Consequently, an expression can be wrongfully restricted by the ‘judgement’ of an agent. Since the recipients do not receive the expression, they may not be able to know what expressions were judged to be illegal.

The authority of other persons such as security (such as police officers and stewards) also guide the way that expressions are conveyed. Depending on the power-sharing structures in a state or competition, security may receive orders from state officials, member associations, clubs, host countries, agents or the administration. In addition to this, they could be ordered to just implement the framework they are presented. In these cases, the persons enjoying the power interpret the norms and make a ‘judgement’ as to the legality of an expression. The consequence of such power is that expressions can be stopped from being conveyed. The processes are different, but the outcome is the same. There are at least two very topical examples this type of situation. First, two spectators were removed by stewards from a 2019 FIFA Women’s World Cup Finals match in France. The spectators were removed due to wearing t-shirts calling for Iranian women’s entry into stadiums in Iran. Thus, without any adjudication on the matter at hand, the person having the power, in this case the steward(s), was able to judge that the t-shirts were not fit for a sporting event. FIFA later apologised for the incident (Magowan 2019).

Similarly, in January 2022, it was reported that at the Australian Open grand slam, police and security personnel ordered a woman to remove their shirt that bore the question ‘Where Is Peng Shuai?’ and initially confiscated a banner asking the same question away from the court (Church and Watson 2022). Since the whereabouts of the tennis player concerned the transnational society and some parts of the sporting community the question was relevant to sport. Shuai had disappeared from the public and social media following their post on Weibo that accused former Vice-Premier Zhang Gaoli of coercing them into sexual intercourse. Nevertheless, in the eyes of Tennis Australia, police and security personnel, the question ‘Where Is Peng Shuai?’ was solely of political nature. Just like the Iranian women’s silencing at the hands of FIFA, individuals who were seeking justice were silenced at the hands of Tennis Australia. Again, as in FIFA’s case, Tennis Australia had to reverse its practices following public outcry (BBC 2022).

The enforcement leg of the RAE powers also relates to the enforcement of adjudicatory entity decisions. For international sport associations and their members, the defence for enforcement comes in the shape of a CAS award.³ 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 (CAS 2006/A/1008). The decision of the FIFA body was based on 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, and in this case the FIFA Players' Status Committee. The SFT affirmed the award, indicating that the sanction against the club did not go against public policy (Levy 2012, 35–36).

The importance of the *Rayo Vallecano* award arises from the fact that since natural or legal persons are within the sporting system, they have no chance of avoiding a sanction in the event that they do not comply with the decision of a competent body. A stakeholder may be refused to take part in a competition, or a club may have its points deducted. The threat of sanction could be overt, public and ruthless. Unable to take part in the Olympic trials for the 1992 Barcelona Summer Olympics, US sprinter Harry 'Butch' Reynolds challenged anti-doping violation decisions against them before US courts, including the US Supreme Court. The story did not end happily for the athlete as success in the courthouse did not matter on the track. The then IAAF declared that 'every athlete who competed with Reynolds at the U.S. Olympic trials would be ineligible to compete in the Barcelona Olympics', and later postponed the events (*Reynolds v IAAF*, para 14).

Consequently, the power to enforce a norm or a decision is indispensable for international sport associations and their members. Yet as witnessed in the *Matuzalem* case, the associations' powers are not unlimited. 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 SFT 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' (SFT *Matuzalem*, para 4.3.5). Thus, the efficient enforcement system within FIFA was found to be illegal due to its efficiency that limited the fundamental rights of the athletes. The moral and legal autonomies of FIFA did not present sufficient barriers against the intervention by the SFT. The *narrative* of efficient regulation, adjudication and enforcement thereof was unsuccessful in fending off the state's powers. The SFT, in view of the public policy of Switzerland, found the decision to take away the livelihood of an individual 'sufficiently repugnant' and thus refused to recognise and apply it (Berman 2012, 289).

On the national level, the FA has a similar system where each person including the footballer, has to abide by the decisions taken by the FA. The clubs have the responsibility to enforce suspensions (meaning not being able to take part in a sporting activity) and fines, the failure of which results in the immediate suspension of the person 'from all or any football activity for such period and on such conditions as it considers appropriate' (The FA Disciplinary Regulations, art. 58). Just like their European counterparts, the US leagues have the power to enforce their decisions. Their position as enforcers has two aspects. First, the commissioner can stop a suspended person from taking part in a match. Second, CBAs 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 can be withheld from the athletes' salary, creating an efficient way of enforcing the decisions (NBA CBA, Exhibit A, s. 6; NFL CBA, art 46 s. 6).

2.6 A Plurality of Normative Orders

Chapter 1 underlined the possible differences between the legal/illegal and moral/immoral binaries of the state and sport. Implicit in this argument is the idea that there is a plurality of interests, normative orders and norms. Indeed, there is a plurality of norms and normative orders, and the normative orders go beyond municipal and international law, which Twining (2010) called the 'Westphalian duo' (507). Whilst the state draws up policies, promulgates laws and implements them, private entities regulate their specific areas. These areas can be local, regional, national or transnational. As a political community, the state has its interests, laws and courts. Meantime, business enterprises/corporations (as associations)⁴ and sport associations introduce norms, enforce them and designate the means to (re)solve disputes. The plurality leads to the conclusion that persons are not solely bound by the laws of the state. That persons' behaviour is also guided by non-state institutions is especially true for sport (Duval 2013).

The analysis as to what Cover (1981) called the 'overlap'/'concurrency' of normative orders (640) within the context of sport is the culmination of what has gone before. The normative orders of sport associations and the state *may* overlap, because each actor has its separate powers to regulate, adjudicate and enforce norms concerning the same act and subjects, that is, political expression and freedom of expression. The emphasis of the word 'may' has its roots in the fact that states and sport associations may have their distinct understanding of human/constitutional rights on private activities. For instance, in the US, due to the 'state action doctrine', the scope of the First Amendment does not extend to private activities such as the NBA and NFL (Zick 2018, 1450–51). On the other hand, human/constitutional rights may have an effect on the way that sport is interpreted and adjudicated. The powers of a sport association which is a member of another sport association may be limited by the policies and norms of the hierarchically superior associations. In addition to these, the state and sport associations' (especially the ones residing in Switzerland) powers to regulate, adjudicate and enforce norms are separate. For international sport associations, these powers are the extensions of freedom of association. This section does not explore the cooperation between the state and sport bodies as regards a common goal such as fighting against sport violence or the COVID-19 pandemic. Rather, the focus will be on the interaction between the normative orders when their goals or approaches differ.

Due to the limited scope of the First Amendment, an analysis of the overlaps between the powers of leagues such as the NBA and NFL and federal law is unwarranted. This being the case, it is hard not to appreciate the interaction between distinct normative orders concerning international sport associations residing in Switzerland. The Rule 50 of the Olympic Charter restricts political expression,

but through specific ‘Guidelines’ the IOC somehow relaxed the rule for the 2020 and 2022 Olympic Games. The Guidelines indicated that before media, in social media, during team meetings and on the field of play prior to the start of the competition, athletes were allowed ‘to express their views’ provided that the views were consistent with the Fundamental Principles of Olympism, were not disruptive or harmful, did not target an organisation, a country, a person ‘and/or their dignity’, and did not contravene with the norms of their national Olympic committees and international associations (Rule 50.2 Guidelines—Olympic Games Tokyo 2020; 50.2 Guidelines—Olympic Winter Games Beijing 2022).

The USOPC, which is a constituent of the Olympic Movement, was not of the same opinion. At the 2019 Pan American Games in Lima, fencer Race Imboden took a knee at the podium because of racism, gun violence, mistreatment of immigrants and President Trump. Hammer thrower Gwen Berry raised a fist at the podium for similar reasons (Brewer 2019). The USOPC gave the athletes 12 months of probation (Bieler 2019). The usual debate regarding sport and politics ensued, to no effect. Following the murder of George Floyd and the resulting protests both on and off the field, the USOPC changed its view and confirmed that expressions such as ‘Holding up one’s fist at the start line or on the podium’ and ‘Kneeling on the podium or at the start line during the national anthem’ are permitted (The USOPC, US Olympic and Paralympic Trials Participant Rules: Demonstrations). In effect, the USOPC brought into force norms that went against those of the sport association that it is a part of. The two normative orders regulated the same conduct differently, and the individual became the subject of competing norms and normative orders. In the context of the Olympic Games, members of Team USA were not only bound by the norms of the USOPC but also by those of the IOC and international sport associations. In addition to this, the process is indeed transnational. From the perspective of the 2020 Tokyo Olympic Games and the 2022 Beijing Olympic Games, US citizens competing in Japan and the People’s Republic of China had to behave in accordance with the norms of a US association and a Swiss association. Since international federations organise Olympic events, the members of Team USA also had to take into account the norms of the international sport association. To make things even more complicated, as in the cases of the World Karate Federation and the World Curling Federation, not all international sport associations reside in Switzerland. Therefore, some athletes were bound by both the IOC and a non-Swiss association.

These arguments apply to the overlapping normative orders of the state and sport associations. In that regard, a CAS panel emphasised that these orders do not compete; rather they are ‘complementary’ (TAS 2006/A/1119, para 49). The CAS panel further stated that to ensure uniformity it can replace disciplinary sanctions of national nature, and 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 (TAS 2006/A/1119, para 50). Thus, even though there may

be anti-doping related exceptions (Casini 2011, 1335–36), the state has to respect the autonomy of sport.

A rosy picture depicting a smooth *modus vivendi* between the normative orders of the state and sport is both deficient and too optimistic. It is deficient because the presence of and interaction between different normative orders are not based on complementarity *per se*. These orders do not go about their separate businesses or cooperate with each other but decide to assert jurisdiction only when another jurisdiction decides not to do so. In the same vein, these normative orders do not ‘fill different niches’ or act as normative laboratories to create sector-wide standards (Bartley 2011, 524). The state reserves its authority over certain aspects of sport and society in general. In addition to this, sport associations themselves, under certain conditions, defer to the findings and interpretations of the state and its institutions. It is optimistic, because cooperation, complete separation, voluntary assertion of jurisdiction and refraining from asserting jurisdiction are not the only possible scenarios (Berman 2012, 239–40). Normative orders also contest, clash or adapt to the situation in cases where different normative orders have overlapping powers about the same subject. Finally, they create symbiosis, subsume, avoid or imitate each other, converge, partially integrate as well as subordinate, repress and destruct one another (Berman 2007, 1158–59; Twining 2010, 489). To sum it up, overlapping normative orders could potentially affect each other. These points warrant expansion and clarification.

The obvious reflection of the state’s influence on sport associations is the former’s take on freedom of association and its interpretation. Ultimately, sport associations constitute and function according to the law of jurisdiction that they are founded on or the ones they conduct their business in. There are duties, responsibilities and advantages that come with the type of legal person that the state allows or imposes. The association or company laws of the state and its federal subdivisions that the association resides in can also act in the same way. In addition to this, the state may regulate and adjudicate subjects such as safety and public order at sport competitions. For instance, following the death of 96 (later rising to 97) people at the Hillsborough Stadium in 1989, the authorities within the jurisdiction of England & Wales took drastic measures regarding the safety and security at football matches.

Sometimes the semi-autonomous normative orders of sport associations ‘push against’ the state laws’ claim to ‘legal unity and hierarchy’ (Zumbansen 2010, 148), and even trump them. The trumping can entail a transnational aspect because the IOC and most international sport associations, while residing in Switzerland, operate in states beyond their residences. UEFA’s sanctions on FC Barcelona, FC Schalke 04 and FC Zürich are apt in depicting the possibilities. In the first two the effects are transnational, and in the second they are local. The cases are indicative, as they give a glimpse of the treatment of political expression at the hands of UEFA. They also show how complementarity can fail.

FC Barcelona and FC Schalke 04 supporters, respectively, unfurled *Estelada* flags, and ACAB (All Cops Are Bastards) banners in the stands. Although public

authorities in Spain and Germany deemed the expressions legal, UEFA bodies considered them political, hence illegal (UEFA Appeals Body, *FC Barcelona*; UEFA CEDB, *FC Schalke 04*). The illegality stemmed from a particular understanding of Swiss Law. UEFA's argument before a CAS panel positing 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' (CAS 2012/A/2702, para 91), supports the reasoning of the *FC Barcelona* and *FC Schalke 04* decisions, along with their interpretation. In another case a CAS panel was of the opinion that 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 (TAS 2002/A/423, paras 33–38).

That the UEFA drew upon Swiss Law in the interpretation and the defence of its normative order does not signify total deference. On the other extreme, the following is not the evidence of sport's total independence from Swiss Law. The situation is more subtle. In line with the interpretation aspect of pluralism the *FC Barcelona* and *FC Schalke 04* decisions do not take account of the Swiss state's, its cantons', its institutions' or its courts' understanding of constitutional law, constitutional rights or in general the Swiss neutrality (von Benda-Beckmann 2002, 64). Rather, the decisions interpret the expressions by going beyond the confines of the interpretation of Switzerland and its institutions. The decisions enjoy the manoeuvring space provided by Swiss Law because, after all, UEFA is a Swiss association. Concordantly, the RAE powers that UEFA enjoy thanks to the Swiss law of associations and the specific interpretation of the Swiss Federal Constitution justify the restriction of expressions that are actually not restricted by the other states. In that regard, the *FC Barcelona* case deserves full quote:

as to the argument of the Appellant that UEFA as a Swiss private organization is subject and bound by imperative laws such as the Swiss Confederation Constitution, which is why a principle like the freedom of speech which is stipulated in the Swiss Federation Constitution should prevail over the UEFA Disciplinary Regulations, the Appeals Body emphasized that in Swiss law, the basic rights, and in particular the fundamental freedom rights such as the freedom of expression (cf. Article 16 of the Swiss Federation Constitution), have to be regarded as defensive freedom rights protecting the individual against the state . . . and not against other private individuals (citation omitted).

(UEFA Appeals Body, *FC Barcelona*)

The previous paragraph is very clear as to where it stands, and thus does not require further elaboration for now. Put simply though, it argues that the constitutional right to express one's views does not apply in sport, an argument which has undergone changes due to the IOC, FIFA and UEFA's acceptance of human rights norms and principles.

Fortunately, the decision against FC Barcelona is detailed when compared to the UEFA CEDB's reasoning in its *FC Zürich* decision. The said decision arose from the Swiss club's supporters' expressions and conduct in the match against Turkish club Osmanlıspor. Among other things which will be revisited in the next chapter, the supporters unfurled banners of the Kurdistan Workers' Party/*Partiya Karkerên Kurdistanê* (PKK). Turkey deems the PKK a terrorist organisation but Switzerland does not. Confronted with differing viewpoints, the UEFA CEDB stated that 'it is completely irrelevant whether a gesture, message, banner or chant is legal or illegal in the respective country, given that for the assessment of a possible violation of the UEFA Disciplinary Regulations, only the latter are of relevance primarily' (UEFA CEDB, *FC Zürich*). When compared to the fully quoted decision of the UEFA Appeals Body, the UEFA CEDB made relatively short work of the arguments of illegality, and for the worse, because at least in the *FC Barcelona* decision the UEFA body based its reasoning on a specific legal understanding of the Swiss Federal Constitution. In any case, the Swiss understanding of what is an expression and that of UEFA were not complementary—they overlapped, and the latter prevailed.

The consequences of these decisions and awards are substantial. First, UEFA's regulatory power allowing it to pass regulations that restrict political expression, its adjudicatory power paving the way to decide on the case, and finally its power to enforce the decision create a situation where a private institution could outweigh the state's legal regime. In effect, UEFA recast a conflict of normative orders—between municipal law and the UEFA regulations—in a way that would enable it to vault-over municipal law (Teubner 2012, 153–54). The norms of an association dislodged the municipal law and affected everyone concerned. UEFA also reversed the legal/illegal and the moral/immoral binaries as promulgated by municipal law and as interpreted by state courts. The illegality and immorality of expressions is affirmed despite the fact that—geography-, legal doctrine-, and democracy-wise—they should have been legal. Specific understandings of Swiss constitutional law and the law of associations became the trump cards in the overriding of both Swiss and foreign normative orders, reaching beyond Switzerland. Finally, and most importantly, UEFA set the standard of tolerance. Whilst UEFA 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 fell into the same trap. UEFA's alleged concern for equality brought the tolerance level 'down' rather than 'up'. The race to the bottom was made beyond the auspices of the municipal law and the constitutional law, and it was made possible by utilising the RAE powers.

The overriding of the municipal law by the normative orders of sport shows that their overlapping normative orders do not enjoy a happy *modus vivendi* by default. They negotiate and engage with each other. They also defer to one another's findings, and finally in certain cases they disrupt other normative orders. The final point as depicted in the *FC Barcelona*, *FC Schalke 04* and *FC Zürich* cases is elementary because private normative orders can override the individuals' freedom

of expression even where the states' normative orders deem the expressions legal. The next chapter will focus on further implications of such an outlook as well as on instances where the interests of the state and sport associations converge.

Notes

- 1 This is not their sole function. Normative orders require or incorporate other functions such as 'social control, conflict resolution, reaffirmation of expectations, social regulation, coordination of behaviour or the disciplining of bodies and souls' (Teubner 1997, 14–15).
- 2 The findings are mixed, and depict a complex picture (Abeza et al. 2020, 132–35).
- 3 The enforcement thereof is not closed shut from the states' law. National courts could be implicated in the process, either through national procedural law or 'The Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (the New York Convention). Nevertheless, statistically speaking, the chances of taking this road are low, as there are more efficient ways to enforce an award or a ruling (van der Harst 2016, 295–97).
- 4 The underlying reason for separating corporations from sport association is that, as Muñiz-Fraticelli (2014) points out, 'some of the features of business corporations sit oddly with a broader category of collectives that act with a unity of separate from and reducible to that of the members' (194–95). Corporations are both owners of property and are themselves owned; however, unless the teams create a separate company, there are no association owners *per se*.

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Political Sport

3.1 A Brief Overview of Nation-States, Politics, Symbols and Sport

This chapter expands the arguments in the previous two chapters by taking into account political and symbolic expressions. Chapter 1 argued that sport is closely linked to the state and the market. The extension of this way of looking at the interplay between these forces is that contrary to the *narrative* of neat separation between sport and other spheres of life, sport is not insulated from the influences of the state and the market.

The fallacy of trying to achieve ‘physical insulation’ from the outer world was pointed out in the case of the UEFA U21 European Football Championship Qualifier match between Turkey and Sweden that was played in 2013. The match was played during the backdrop of Gezi Protests that erupted because of the policies of 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. In the 23rd minute, the referee stopped the play due to the pepper spray deployed by the Turkish police against a political rally protesting the death of one of the protesters (Milliyet 2013). Therefore, physical externalities created by political action disrupted sport. In a similar fashion, in 2020 a plane carrying the banner ‘White Lives Matter’ flew over Manchester City’s Etihad Stadium in an EPL match that was played without spectators due to COVID-19 restrictions. The Burnley FC supporter implicated in the incident stated that they did not want to offend the Black Lives Matter movement, and just ‘believe[d] that it’s also important to acknowledge that white lives matter too’ (Reuters 2020).

On the ‘non-physical’ side of things, the interdependence of sport and the state becomes more pronounced. On a meta-level, sport acts as a nation-building, emotion-generating and solidarity-inducing activity. It is a catalyst for maintaining nation-states’ identities as well as their differentiation and those of their representatives. Within a state, sport can be a vessel for the education of minorities on the dominant culture, and depending on the brand of nationalism, sport can also be a vessel for excluding, marginalising, demeaning and belittling the ‘other’. The

situation can be summed up as follows: whilst the production and consumption processes of sport go hand in hand with globalisation, the state is still the starting point. Athletes, as individuals and team members, represent an entity which, at the bottom of it, is intricately linked to the state. Whilst they compete against athletes from other nations on the international stage, 'imagined communities' attend the competitions or follow them through broadcasts, engaging in the same subject. Despite the rhetoric of sport being a 'neutral ground' or being 'above politics', the state and politics are never truly neutralised. The state uses the 'contest' aspect of sport to its advantage, in that sport consolidates nationhood and political unity through national teams. Sport can even pit national and regional identities against each other. Likewise, the states and those who follow their specific ideologies instrumentalise sport in the battle of ideologies. The 'Miracle on the Ice' becomes a triumph of capitalism against socialism and Jesse Owens' victory turns out to be a symbol against racial policies of Nazi Germany. Not contesting a game can also be ideological. The Soviet Union National Team decided to forfeit its FIFA World Cup Qualifier match against the Chile National Team because the game was to be played at the *Estadio Nacional de Chile*, the site where the Pinochet dictatorship had recently tortured and executed members of the opposition. Sympathisers of the Ukrainian cause praise a Ukrainian gymnast who won the gold medal at the International Gymnastics Federation (FIG) Artistic World Cup circuit, while condemning the third-placed Russian gymnast who wore the 'Z' symbol supporting the Russian Federation's invasion of Ukraine (Agergaard and Lenneis 2021, 1976–81; Atwell Seate et al. 2017, 431–33; Giulianotti and Robertson 2012, 227; Lenger and Schumacher 2015, 43; Mutz and Gerke 2018, 606; Pavitt 2022; Rowe 2003, 286; Serazio 2019, 253; Vaczi 2015, 196–98).

Symbols have a central role in these processes, for they are crucial ingredients in mass political mobilisation and the creation of continuity with the (ideal) past through 'invented traditions'. In line with their role in public rituals, sports events and their insignia help create the links between individuals and community, and are also a source of common identity (Lenger and Schumacher 2015, 45; Zuev and Virchow 2014, 192). Economic logic's close proximity to political logic is also witnessed here because the media has an active role in creating and reminding the differences between 'us' and 'them' through symbolism. Symbols even have the potential to affect the consumption of sport and attitudes towards sponsors and their products (Alonso Dos Santos, Velasco Vizcaíno, and Pérez Campos 2020; Horne et al. 2013, 98; Mutz and Gerke 2018). State-related symbols appear separately or together. Wasserman (2004) has called this 'patriotic symbolism' (392). Due to the difference between patriotism and nationalism, the term patriotic seems lenient. Patriotism and nationalism have differing frames as to the relationship between 'us' and 'them', as well as the 'ingroup' and 'outgroup'. While the former is 'focused on promoting the welfare of one's nation but is neutral with regard to the evaluation of others', the latter entails superiority and domination, which have close connections to militarism (Kemmelmeyer and Winter 2008, 863;

Li and Brewer 2004, 728). Therefore, 'nationalistic symbolism' would better reflect its causes and consequences.

Nationalistic symbolism is multivalent. State and politics show their face in the use of 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 (Tännsjö 2007, 431). 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 'relatively innocuous and widely accepted' (Gelber 2012, 165). On the other hand, symbols can become effective political tools for disempowered or unrecognised groups in inter-group struggles. Transnational, regional and local groups use flags and chants to publicise their versions of a nation or their being separate nations. These symbols are disseminated domestically and worldwide. As expressions, they could both shape the individual in a 'top-down' manner and help the individual construct national identity 'from below'. In either case, they are broadcast to the masses, creating a temporally bounded link between spatially distant individuals (Fox and Miller-Idriss 2008). The broadcast can imbue the competition with narratives of national values and national interests. In the process, 'internationalism' in the form of global kinship remains on the sidelines. The contest aspect of sport prevails (Billings et al. 2013, 914–15, 927–28).

The same goes for other symbols such as national anthems and shirts. Singing the national or official anthem before and during the match is ubiquitous, and sport associations require certain decorum on the part of all persons within the sports venue. Symbols pertaining to mythical pasts as well as past or present grievances also provide points of reference. For instance, in its official statements for the launches of its match shirts for the 2016 UEFA European Football Championship, TFF indicated that the geometric patterns on the home and away shirts were inspired by both the mosaics used in Turkish architecture and chainmail worn by medieval Turkic warriors (TFF 2016a; TFF 2016b). The next edition of the tournament saw Ukraine unveiling a match shirt with a Ukrainian map including Crimea as well as two phrases in Ukrainian. Russia had annexed the region in 2014, which also led to the separation of Ukrainian and Russian teams in draws for both national and club championships organised by UEFA. UEFA approved the map and the phrase 'Glory to Ukraine' but rejected another one ('Glory to the heroes') due to its military connotations (TRT World 2021). Similarly, in the post-9/11 atmosphere, the US brand Ralph Lauren designed ceremony uniforms for Team USA that resembled military uniforms. Ironically, explicit militarisation did not protect the then United States Olympic Committee from political backlash that resulted from the origin of the uniforms, Mainland China (ESPN 2012).

Consequently, nationalistic symbolism, which includes state-related expressions, and expressions that glorify the nation, that is, political expression, is allowed. Yet the *nomoi* and *narratives* of sport associations indicate that political expression should be restricted for sports' sake. At first, this may seem confusing but with the

help of the term 'viewpoint-neutrality', the picture becomes clearer. The term has its roots in the US doctrine positing 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' (Sunstein 1993, 796). An emphasis on the 'viewpoint' of the speakers results in the assertion that in sport, restrictions on political expression are not viewpoint-neutral. In practice, non-conforming expressions of stakeholders and spectators are restricted, while the conforming ones are an integral part of sporting activities. This should come as no surprise, because in the words of Numerato and Baglioni (2012) '[s]port associations represent potential spheres where macro-societal patterns of exclusion are mirrored and reproduced' (600).

This picture contrasts with the *narrative* of neutrality, but first the term should be clarified. Depending on the context neutrality could pertain to:

(i) the idea that a *justification* (say, of a policy) should be neutral; (ii) the claim that the *aims* of policymakers should be neutral; (iii) the claim that the *effects* of policy should be neutral. Yet interpretations of neutrality are far more diverse than most analyses recognize. Neutrality is sometimes understood as a doctrine about: constraints on legislation or legislators, . . . the prohibition of the state 'taking a stand' on some issues, . . . or the requirement that the state take a stance of impartiality (citations omitted) (emphases present).

(Gaus 2009, 81)

Under this conception, 'not taking sides' in a debate seems to be the best way to transpose the discussion to the case of associations. Nevertheless, limiting the analysis only to this aspect of neutrality would be deficient, for the policies and the use of RAE powers produce negative effects on the stakeholders, especially dissenters. Despite the *narratives* of political neutrality and politics-free sport, their effects through *nomoi* as well as their interpretation show that sport associations are not neutral in terms of their policies, and the effects they have upon persons. Citing neutrality and stating that they are politics-free, sport associations justify the restriction of political expression while at the same time allowing others to glorify certain nations and nation-states. This situation results in the sport associations taking sides in the guise of neutrality.

Since sport associations should be free to designate their associational goals, and thus should be able to take sides, the chapter will not call for neutrality but will criticise the cynical use of the *narratives* of neutrality and politics-free sport when certain viewpoints come to the fore. So, the target will not be the selection of associational goals but the disjunction between the theory and the practice. Neither will this chapter argue that sport associations should be neutral concerning their procedures and goals (a point that will undergird the restriction of 'hate speech' in Chapter 7). That would amount to the transposition of a liberal conception of neutrality to sport. Unless supported theoretically and practically, such a move would conflate the duties of the state and sport associations. Yet in view of the idea of 'articulate consistency', this chapter will argue that cases concerning

political expression having similar facts and applicable norms must be treated similarly. It will constitute a crucial step in the argument that in sport all political expression should be allowed, regardless of their viewpoint.

3.2 Sport Associations as Collaborators

3.2.1 The Setting

Globalisation, cosmopolitanisation and transnational institutions cast doubt on the powers and the position of the state, challenging the idea of societies that coincide with the borders of the state (Beck 2004). In sport, the state and societies are still important but, at first sight, paradoxical actors. On the one hand, the cultural landscape is dominated by sporting events. Their production and consumption have become globalised and standardised, and the rhetoric of locals becoming 'citizens of the world' through consumption looms large (Whitson and Horne 2006, 83–84). On the other hand, the state and sport, and especially high-performance international competitions, are intricately linked to each other. Despite the strengthening of sub-national and supra-national identities, national identities should not be ruled out not only in general but in sport in particular. According to Houlihan (1997), cultural globalisation itself is one of the prime movers in the states' increasing support for sport. Unable to insulate their cultures, states have found new ways to achieve national unity and (re)claim national identity through sporting events that 'mix . . . classical allusions, militaristic triumphalism, fashion show glamour and a degree of national sentimentality that would have embarrassed Walt Disney'.

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 (1984) arguments as referred to by Polo (2012), 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, are supported by the practices of the state and sport associations (69). In international competitions, national teams compete for their 'countries', which are deemed to be sovereign. 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 like the Turkish Republic of Northern Cyprus have to take another course.¹ Finally, sport reflects public feeling which may include antagonising current and historical adversaries, revanchist tendencies or showing support to state policies. Turkey's prolonged EU candidacy, when mixed with the revanchist feelings and historical tensions, could move Turkish supporters to chant 'Europe, Europe, hear our noise (voice)/This is the sound of Turks marching' (Gökaçtı 2008, 291–92; Polo 2012, 82). Likewise, the public feeling in the West (which overlapped with the Western countries' foreign policies) against the Russian Federation in the wake its invasion of Ukraine in 2022 moved international sport associations to ban Russian athletes from competing in their competitions. The public feeling was so strong,

FIFA, UEFA and the International Paralympic Committee's interim measures where Russian teams and players would compete neutrally was met with criticism, nudging the associations towards harsher sanctions. Thus, the pressure exerted by political logic to sport is conspicuous.²

For this book, public feeling turns out to be one of the most important elements in the explication of political expression in sport and its interpretation. The questions 'what constitutes the public' and 'what is public feeling' have complex answers. The production process is globalised because individuals as well as national and club teams from different states compete against each other. Continental and international competitions, by design, bring together participants from different states, and thus entail a transnational following. The consumption of sport is transnational. National, continental and international competitions are followed by not only the citizens of the states whose teams or athletes are represented. National competitions like the NBA and the EPL have a worldwide following. Adding the facts that individuals and groups live beyond the borders of the state they are citizens of and that they could have multiple citizenships stops the analysis from pinpointing public feeling within strict national borders. However, transnationality does not result in the homogeneity of public feeling. National and continental competitions involve or touch upon a specific state, nation or individual. Accordingly, as in the following case concerning Mainland China, individuals who are spatially far away may become involved. Competition organisers acknowledge the role of nation-state. They admit and categorise participants according to their state of origin or sporting nationality, creating, maintaining and exacerbating nationalistic or patriotic fervour. Under these circumstances, the transnational public divide along the lines of nationality and identity.

Public feeling is, mostly, not an empirical notion. Even though, as Thorson and Serazio (2018) have shown in the case of the US, the aversion for the 'partisan' mixing of politics and sport could be entrenched in the more conservative parts of the public, there is a diversity of opinion and ideology across different publics. Public feeling is intangible, mercurial and hard to gauge. Due to these characteristics, the public feeling as perceived by the associations having RAE powers and the real public feeling could diverge in some instances. Sport associations might misjudge the situation. The public outcry following the WNBA's fining of Indiana Fever, New York Liberty, Phoenix Mercury and their players for wearing plain black warmup shirts in order to protest police shootings, led to the sport association's backtracking (Eilerson 2016). Also, certain parts of the public could be silent (for whatever reason) on the matter, which may disguise the true public feeling. Finally, the scope of public feeling should be expanded. The public is not only a signifier of international and domestic politics because the individuals that make up the public entail both political logic and economic logic. The previous chapter emphasised that the well-being of the sport associations' normative orders include not only order within sport but also the maintenance of their brands. Since the brands' force and appeal are in the eyes of current and potential consumers, their standpoints have to be taken into account. To protect their brands,

sport associations have to monitor public feeling as it is not temporally and spatially fixed—it can change in parallel to political and social climate. These points inform the discussion at hand.

3.2.2 *The Practices of International Sport Associations*

Sport's interplay with the state and the market, sport associations' RAE powers and public feeling result in the restriction of political expression according to their viewpoints. Whilst desirable expressions, such as nationalistic symbolism, are prevalent, undesirable expressions challenging the status quo or the dominant public feeling may lead to disciplinary sanctions or societal backlash. Although there are different ways to dissent, 'symbolic counter-speech' will be the first step in the series of analyses due to it being at the forefront. A term coined by Wasserman, symbolic counter-speech denotes the compelled expression's (e.g., the flag, the national anthem) becoming a tool in the individual's dissent against the entity that these symbols represent (Wasserman 2004). In fact, symbolic counter-speech at a victory ceremony is the source of Rule 50 of the Olympic Charter. Although temporally outside the scope of the book, it is important to frame the argument through exploring the actions of Tommie Smith and John Carlos.

African-American sprinters Tommie Smith and John Carlos' multi-faceted expressions during the medals ceremony in the 1968 Mexico Summer Olympic Games led to the explicit restriction of political expression at the Olympic Games. The athletes wore black gloves on one of their hands to emphasise black power, refused to face the flag and bowed their heads in remembrance of those perished in the struggle against oppression. They went shoeless to the podium to underline the poverty that disproportionately afflicted African Americans. Smith wore a black scarf as an emblem of racial pride, and Carlos wore beads around their neck to commemorate the victims of racial violence (Cooper, Macaulay, and Rodriguez 2019, 159; Rounds 2020, 120). The constitutive document of the IOC 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 (Nafziger 1988, 97–98). As Wasserman (2004) has pointed out, the athletes were banned due to their drowning out of the 'symbolic speech' (consisting of the flag and the national anthem) through their symbolic counter-speech (398).

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 Smith and Carlos' symbolic counter-speech—did not result in a disciplinary action and was seen 'as a heroic individual resistance' by 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 (Henderson 2013, 48, 95), became the spearhead in the sanctioning of the protesters who 'threatened the ideological links between sport

and ideas about the United States as a meritocratic liberal democracy' (Rorke and Copeland 2017, 90–91), 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' (IOC 2022); whilst lamenting that in the case of Smith and Carlos 'the brilliance of all three athletes was overshadowed by the protest on the podium . . .'. This 'history' informs that Smith and Carlos did not take part in subsequent Olympic Games without mentioning the reason why (IOC 2013).

While the *narrative* restricted the ability of the athletes to express themselves about racial and social injustices, it approved of the anti-communist expression, which was compatible with the public feeling of the better part of the West. 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 demonstrate that the silencing of the Black athletes was a consequence of the US Cold War policy that considered international sport competitions as a means of furthering political interests (Henderson 2013, 15, 96). The restrictions as shaped by the *narrative* created inequality and injustice—the same inequality and injustice that Smith and Carlos protested in the first place. Articulate consistency was 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. The *narrative* of politics-free sport and the IOC's RAE powers led to different consequences, but protected the same interests.

The cases of Ethiopian runner Feyisa Lilesa and South Korean footballer Park Jong-woo underline the international order and public feeling. Feyisa Lilesa did not lose their medal but was warned for crossing their arms after crossing the finish line 2nd in the Men's Marathon at the 2016 Rio Olympic Games. The athlete's aim was to show solidarity with the Oromo people who have suffered from Ethiopia's systemic targeting. As in the case of Čáslavská, this action was perceived as noble, heroic and non-threatening (Rorke and Copeland 2017, 91). At the 2012 London Olympic Games, after they won a bronze medal with the South Korean Men's Football Team, Park Jong-woo held a banner in support of South Korea's territorial dispute with Japan. First, the footballer was stripped of their medal as stipulated by the IOC Rule prohibiting political expression. Later, following meetings and lobbying on the part of the Korea Football Association, the footballer had their medal returned since the expression had not been premeditated and because they 'showed sportsmanlike[sic] behaviour to Japanese players after the match' (Grohmann 2013). Consequently, a political expression referring to a dispute that did not occupy an important place in the international agenda and did not reflect the global public feeling resulted in a slap on the wrist.

At this point, it might be objected that the relaxation of the 'Rule 50.2 Guidelines' for the 2020 Tokyo Olympic Games and the 2022 Beijing Winter Olympic Games constitutes a compromise. This is surely not the case because the Guidelines underline that solely expressions that do not directly or indirectly target a people,

a country, an organisation 'and/or their dignity' were to be allowed. A question as to possibility of a state or legal person having dignity notwithstanding, a ban on directly or indirectly targeting a state or an organisation considerably restricts the athletes. Dissent inherently targets a person, society, state or organisation. In these cases, the dissenting individual considers it necessary to express their displeasure over the policies of a state, organisation or society. When this aspect of political expression is removed, what is left is its shell, hollow and devoid of sense and purpose. Black Lives Matter does not make sense without the structural injustices perpetrated by the US and its institutions. One cannot support the Uighurs without involving Mainland China or the Chinese Communist Party. Generally, how does one propose change to unjust institutions (as the speaker perceives them to be) if the targets are untouchable? Should not one be able to criticise the Ku Klux Klan, an organisation?

Another dimension to the question at hand is that since 2008, states with poor (contemporary) democracy records have often organised mega-events. The Russian Federation and Mainland China have organised three Olympic Games and a FIFA World Cup between them. In the run-up to the 2014 Sochi Winter Olympic Games, the Russian Federation enacted 'anti-propaganda' laws to curb 'propaganda of non-traditional sexual relations and attitudes' through administrative fines against 'informative' acts where any show of sympathy for LGBT+³ rights were perceived as an infraction (Postlethwaite 2014, 269–70). The Russian Federation, in effect, had a chilling effect on the athletes, who were only able to protest and show solidarity in the pre-qualifying stages (Ekberg and Strange 2017, 542). 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. Here, the IOC used the *narrative* of political neutrality to the fullest, with its President stating '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' (Postlethwaite 2014, 270–71). Inaction amounted to action. The IOC collaborated with a regime that views non-heterosexuality as an aberration.

This manner of dealing with anti-LGBT+ sentiment on the part of authoritarian governments and societies was also apparent when UEFA refused the Munich councillors' call to light the Allianz Arena stadium's façade in rainbow colours. The call came before the 2020 European Football Championship match between Germany and Hungary in Munich. The Mayor indicated that they would like to show solidarity for the LGBT+ community as a result of Hungary's anti-LGBT+ legislation. UEFA indicated that it 'is a politically and religiously neutral organisation' and that the request is political, so UEFA rejected the call (Deutsche Welle 2021). Therefore, while the Hungarian Prime Minister Orbán was able to capitalise politically from Budapest's hosting of certain matches in the tournament, UEFA silenced the reaction against anti-LGBT+ legislation spearheaded by the same person.

Dominant public feeling and a lack of articulate consistency seep into the interpretation of expressions. In that regard, the *FC Barcelona* case (Section 2.6) is

one of the high-profile incidents of sanctioning a club on the grounds of their supporters' expressions. 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 Catalan 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' (UEFA Appeals Body, *FC Barcelona*)—which is a historical error because actually it 'coincide[s] with the year 1714 in which Catalonia . . . lost certain public freedoms that had been held since the Middle Ages and which had given them a political singularity compared to the rest of Spain' (Pérez Triviño 2017, 37).

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 their political dimension. The body 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. Therefore, UEFA took sides with the help of the *narratives* politics-free sport and political neutrality. The approval of expressions which use symbols of nation-states recognised in the international stage, and conversely, the restriction of expressions which are symbols of the parties in tension with them point to partiality on the part of UEFA. In a situation where there is tension between Spanish and Catalan flags, UEFA, in effect, weighed in on the side of the Spanish state. UEFA crystallised the status of Catalonia as a 'submerged nation', because the political awareness and agenda-creating aspect of the nationalistic expressions became the primary reasons for restriction (Whigham, Lopez-Gonzalez, and Ramon 2019, 221–24, 233). UEFA called forth the *narrative* of politics-free sport to the extent that a more conformist strand of nationalism, namely the nationalism of the nation-state prevailed. After all, the UEFA emphasised the expressions' political nature by bearing in mind 'the relationship between the potential message and the football match 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' (UEFA Appeals Body *FC Barcelona*). The public feeling, meaning the cumulative views of the consumers and would-be consumers alike, paved the way for the restriction of the less influential feelings of the individuals who had expressed their desire for an independent Catalonia. Conformism, of course, is closely related to status quo. Therefore, supported by *narratives*, the RAE powers of UEFA upheld the political status quo and kept abreast of the dominant public feeling.

Another aspect to the subject at hand is that restricted expressions are not necessarily generated from local politics; they also stem from a non-resident's view of the politics of a foreign country. Globalisation, cosmopolitanism, and the forced

displacing of dissidents could be seen as the reasons why expressions sometimes do not concern local politics. While there is not enough evidence as to who was behind them, the messages by the supporters of Swiss club FC Zürich is apt in showing that disapproval can transcend borders. In the UEFA Europa League fixture against Turkish club Osmanlıspor, the supporters of FC Zürich, among other expressions against their opponents, criticised President Erdoğan. According to the UEFA Match Delegate Report, ‘[a]n anti-Erdogan slogan was shown by the home-team supporters in sector D29. Every single one of those supporters wore a white T-shirt with one character written on it. When looking at all T-shirts together it was written: “Dictator Erdogan”’. The club conceded that the expression was a violation of the UEFA Disciplinary Regulations, and thus without further examination, the expression was added to the reasoning for a determination of a fine. UEFA, by adding together the various infringements, fined the club €40.000 (UEFA CEDB, FC Zürich). UEFA therefore sustained the political status quo in Turkey by sanctioning a club whose supporters criticised Erdoğan. The question is: what happens if one praises Erdoğan?

The answer to this question lies in the approval of expressions by UEFA. In the 90th minute of the 2017/2018 UEFA Champions League Qualifier match between İstanbul Başakşehir Futbol Kulübü and Club Brugge, the supporters of the Turkish 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 (Sabah 2017). Erdoğan’s position as the commander-in-chief of the armed forces of Turkey had nothing to do with the game and was apparently political. The evocation of a military function is important due to the *coup d’état* attempt against Erdoğan the year before by the armed forces of Turkey and the cross-border military operations in Syria at the time. Here, articulate consistency demanded the *Estelada* flags and the *Başkomutan* banner be treated the same. They were both the expressions of spectators, they were both political expressions and they were both communicated in the same competition, the UEFA Champions League. Nonetheless, there were no reports of a disciplinary charge against Başakşehir. Even if there were a sanction, since it was not communicated to the public, it should be considered a lame duck because it does not include an important part of the disciplinary structure. To sum it all up, UEFA sanctioned a club whose supporters bore a political expression criticising Erdoğan, but allowed another that praises him—or sanctioned them, but in a discreet manner.

The cases of FC Barcelona, Başakşehir and FC Zürich lead to the same conclusion. The steps UEFA took 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 cases is that whereas UEFA took an action by charging FC Barcelona and FC Zürich in order to defend the political status quo and conform to the public feeling, it did so through inaction (if indeed the absence of any report on the subject points 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. In the last instance, while UEFA was perfectly happy with the *Başkomutan* banner, it relegated FC Barcelona and FC Zürich supporters to ‘abusive’ elements in football just for the reason that their expressions were non-conforming.

3.2.3 Domestic Sport Associations’ Front

In the restriction of undesirable expressions, domestic sport associations use the *narratives* effectively, in that public feeling and national policies pave the way for their practices. In these cases, nationalistic symbolism may include the playing of the national anthem and facing the flag, whose common point is that their introduction coincides with times of adversity for the country (Wasserman 2006, 559–60). In parallel with this, the militarisation of society (realised through the intimate relationship of culture and the military) paves the way for the ‘silencing of public discourse’ (Fischer 2014, 200–1). Yet public feeling and national policies may change, and thus sport associations have to steer their policies accordingly.

As in international competitions, whilst nationalistic symbolism is put to good use, non-conforming expressions tend to be seen as political expression, and thus castigated and restricted. Morgan (1999) is correct in stating that:

The patriotic refrain that runs something to the effect, ‘that’s not the way “we” do things around here,’ is, therefore, at bottom a moral one, since it stakes out where ‘we’ as a people stand with regard to the good—indicating which desires, values, actions, and forms are worthy of ‘us’ as a people and which are unworthy.

(50)

As in nationalistic symbolism, one should view these points as depicting nationalism rather than patriotism, for the same reasons. Morally creating and maintaining ‘us’ and ‘them’ entail nationalism. In this case, the moral dimension to nationalism acts as a frame for the interpretation of political expression. ‘Our’ values determine the binaries of moral/immoral and legal/illegal. This does not mean that every domestic competition would have a similar approach to nationalistic symbolism and militarism. As Fischer (2014) experienced it first-hand, the singing of the national anthem and displaying the national flag before a match would have different (historical) connotations in the US and Germany (200). Furthermore, the differences between jurisdictions are linked to social relationships. A state that perceives associations as its extension would have a different view of them when compared to another state that views them as the building blocks of a plural society (Muñiz-Fraticelli 2014, Chaps. 2–4). These related points do not mean that comparing the US, England and Turkey is similar to comparing apples with oranges. On the contrary, the inclusion of domestic sport associations residing in distinct regimes and social realities aims to show the prevalence of nationalism

and militarism globally. Despite being regarded as distinct, the two phenomena situate these regimes and societies closer than one might expect.

3.2.3.1 *The US*

US sport associations have had similar but separate policies concerning match-specific militaristic spectacles and the equation of war and sport within the sport vernacular. 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 (Briley 2017, 118; Wasserman 2006, 559–60). It is also reported that the singing of the 'Star Spangled Banner' in the NBA has its roots in World War II (McKinny 2003, 243). The NFL responded to this conflict by playing the national anthem before the matches, and strengthened its policy in 2009 (Crepeau 2014, 31; Edelman 2018, 3–5). The downside is that in times of adversity nationalistic symbolism increases, and sport becomes a vessel for intolerance towards unorthodox and unpopular viewpoints (Wasserman 2004, 402–28). Militarism and nationalism become the supporting grounds for those having the RAE powers. Enforcers tend to become overzealous to the point that a fan's not being present during the airing of 'God Bless America' could result in their being forcibly removed from the stadium (Briley 2017, 126).

As in international sport competitions, nationalistic symbolism may breed symbolic counter-speech. One of the important domestic symbolic counter-speech acts against the national anthem was executed by the African-American Muslim NBA player Mahmoud Abdul-Rauf. In 1996, for more than 60 games the athlete remained in the locker room, and thus did not attend the pre-match singing of the national anthem. Following a basketball fan's inquiry on a radio show, the athlete's conduct became public. The athlete alleged that the singing of the national anthem and the reverence shown to the flag which, according to them, is a 'symbol of oppression, of tyranny' were against the teachings of the Quran. Abdul-Rauf's not standing 'in a dignified posture' during the singing of the national anthem as per NBA rules resulted in a one-match suspension without pay. Later, the NBA repaid the fine and the parties reached a compromise in which the athlete would stand with other athletes but would lower their head and offer a prayer for those who are suffering; however, the damage was already done. Abdul-Rauf had to play abroad and when they returned to the US, the athlete's home in Mississippi was the target of various acts of white supremacist vandalism post-Katrina (Jackson 2014, 116–18). A private protest became a public sensation due to its manner and justification, which were against the dominant view of society. Public feeling ousted the athlete from the production process of NBA basketball.

The case of Colin Kaepernick who first remained seated and then took a knee during the singing of the national anthem before matches as a protest against police brutality directed against African-Americans is a more recent example for domestic symbolic counter-speech. Again, at first the expression remained unnoticed but images of the athlete sitting on the bench was disseminated worldwide.

The alternating expressions produced no disciplinary charges, as there was no rule prohibiting such conduct. The NFL tried to clarify the situation by stating that '[p]layers are encouraged but not required to stand during the playing of the national anthem' (Wyche 2016). Other stakeholders joined the protest in the course of the season and the next. Donald Trump intervened in the matter, and called the NFL owners to 'fire' the athletes who protested. Kaepernick became a free agent but the teams in the NFL refrained from adding the player to their squad despite the athlete's solid statistics. To add insult to injury, the Miami Dolphins signed a white player out of retirement despite Kaepernick had better statistics (McNeal 2017, 160 footnote 66). The conduct of the owners resulted in a collusion lawsuit, which was settled out of court. In fact, the NFL itself did not restrict the symbolic counter-speech but the owners comprising it indirectly disciplined the player by not signing them.

In 2018, to deal with the negative consequences of the protests, the NFL (2018) also decided to introduce a National Anthem Policy, emphasising that:

It was unfortunate that on-field protests created a false perception among many that thousands of NFL players were unpatriotic. This is not and was never the case.

This season, all league and team personnel shall stand and show respect for the flag and the anthem. Personnel who choose not to stand for the anthem may stay in the locker room until after the anthem has been performed. . . . The commissioner will impose appropriate discipline on league personnel who do not stand and show respect for the flag and the anthem.

The National Football League Players Association thwarted the NFL's attempt to back its nationalistic stance with RAE powers (Bukstein 2020, 159–61). Therefore, just as Carlos and Smith 'threatened the ideological links between sport and ideas about the United States as a meritocratic liberal democracy', Kaepernick threatened the US's favourite pastime's position as a state-, owner- and sponsor-created bastion of nationalism. In doing so, the athlete compromised the sanitised versions of sport, citizenship and consumerism. In the midst of compelled expressions at an 'American football' game, they took a knee against police brutality, racial inequality and social injustice. This was despite Kaepernick's engaging in dialogue with a veteran whose arguments guided the athlete to tweak the protest. Despite all, the perception of certain parts of society was negative. The protest was deemed anti-military and anti-American because it infringed upon 'American values' (Schmidt et al. 2019). The expression against injustice came at a time when society is polarised. Polarisation and the resurfacing of 'enemies' such as migrants, China, North Korea, Iran and the 'radical left' resulted in nationalistic backlash. Hence, considered as a 'threat' to the league and its nationalistic stance, Kaepernick was removed from the NFL's production processes. Similar to disciplinary processes, this was done for the well-being of a league created by team owners.

The exact opposite is also true. The previous chapter touched on the USOPC's policy change concerning podium protests as an example for the possible differences between international sport associations and their members. The policy change following the murder of George Floyd should be deemed as a public feeling-led move. The US Soccer Federation's change in course regarding political expression is also worth noting. The US Women's National Team player Megan Rapinoe supported Kaepernick, taking a knee during the national anthem before National Women's Soccer League and international matches. Despite the fact that she, like Kaepernick expressly stated that her activism related to social justice and not the military or the 'American values', the backlash against Rapinoe was similar to the one directed against Kaepernick. This time, instead of the specific values of America(ns), Rapinoe's ability to represent the US on the international stage through the US Women's National Team became one of the outstanding themes (Schmidt et al. 2019). Following the protest, the association amended its 'Policy Manual', commanding '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' (United States Soccer Federation 2019–2020 Policy Manual, Policy 604–1). The killing of George Floyd in 2020 and the resulting public feeling moved the US Soccer Federation to amend its Policy Manual, allowing peaceful protests (Graham 2021). This is a happy ending, but it was possible because the public feeling had changed and sensible politicians acknowledged the essence of protests. Political logic and economic logic accepted that there was indeed a problem, and condoned peaceful protests. Taking a knee stopped being an instance of dissent. Therefore, the national association went for the safer route. Nonetheless, the interpretation of the terms 'peaceful', 'protest' and 'political' are still in the hands of national associations (Section 6.4).

Public feeling is not a monolithic concept. The differences in consumption processes of competitions create differences in the way associations interpret expressions. Although it presents a slight expansion of the scope, the NBA's rift with the public feeling in Mainland China is illuminating. The downside of globalised consumption is that expressions which might damage the brand are conveyed globally. In late 2019, the Houston Rockets was at the centre of controversy. The then Houston Rockets General Manager Daryl Morey tweeted their support for Hongkongers who protested against Mainland China's proposed security law. The Mainland Chinese reacted to the tweet violently, deeming it 'a foreign-backed separatist movement'. The General Manager apologised and later resigned from their post. Yet the goodwill created by the Houston Rockets through Yao Ming—to the point that it was nicknamed the 'Chinese National Team'—was negatively affected. Mainland Chinese broadcasters declared that they would not broadcast the team's games. The public feeling in the US that supported the protesters and the dominant (and perceived) public feeling in Mainland China clashed, and the latter, through coercion, mitigated the effects of the tweets and had its way (Xu et al. 2020, 1139–42, 1148–49). The NBA was not silent either. A short time after

Morey's tweet, the NBA officially stated that 'it was "regrettable" that Morey's tweet "deeply offended many of our friends and fans in China"'. The NBA Commissioner Adam Silver later backtracked by alleging that while they were sympathetic to the interests of the NBA and Mainland Chinese, they also will stand by the values which include freedom of expression. Silver also alleged that they did not bow to the Mainland Chinese government's demand to fire Morey (Deb 2019; Gallagher and Young Lee 2019).

In the end, the public feeling of an increasingly aggressive (politics- and economy-wise) Mainland China set the course of events. The citizens of the country who are also much sought-after consumers rendered the discourse on human rights 'hazardous'. Even though they were not sanctioned for their expressions, political expression on foreign events has led to a career change for Morey, who became the president of Basketball Operations of the Philadelphia 76ers. Crucially, the story shows how the 'sensibilities' of different societies could act as limits to freedom of expression. This point will be the focus of Section 6.3.

3.2.3.2 *England*

In England, nationalism and militarism appear under various guises. In some cases, sport equipment has become militarised and sponsors use sport to support the military whilst sportspersons pay respect to the military. The remembrance of the losses in past wars converges on the support of current wars. Simply, the individual is bombarded with militaristic and nationalistic messages (Kelly 2017, 150, 155). The FA allows and actively supports the wearing of poppies which has strong links with Remembrance Day and Armistice Day and the holding of a minute's silence.⁴ Activities include gestures by England players and special events with the participation of the military. The position of the FA can be summed up by its chief executive who emphasised that 'Remembering and commemorating the men and women who have served this country is ingrained in our nation' (The FA 2017).

According to Kelly (2012), the practice started in the 2008/2009 Season and it has an important role in the "'Hero"-fication' of British Militarism in post-9/11, which is an extension of the cultural and political landscape of the period (731). That the 'tradition' started in the midst of the Global Financial Crisis and the Great Recession presents parallels with the cases of the US and Turkey. Dire straits call for praise for the nation and its heroes; hence the public feeling is apparent when the individual goes against the nationalistic and militaristic expressions. The public, through boos and sectarian abuse as in the case of Irish footballer James McClean who refused to wear poppies due to the role the British Military had during the sectarian violence in Northern Ireland, makes itself heard in its defence of the status quo.⁵ Those who refuse to join the ceremonial ritual become unpatriotic, irrational—they become outsiders and 'other's' (Kelly 2012, 732–34). The contests between 'us' and 'them' on the field and off the field walk hand-in-hand. Even though the FA sanctioned Barnsley FC for its supporters' conduct against

McClellan, the sanction removed the symptom for one time only and not the cause (*The FA v. Barnsley FC*).

There is also the minute's silence. With the help of the FA, militaristic and nationalistic tendencies are generated and disseminated. Commemorations create 'fictive kinship' in society, demonstrate loss or lead to empathy with others' loss. The close links between the military, its symbols and football appear in the EPL and the lower professional leagues. The English Football League designated the charity 'Help for Heroes' as a partner in the 2009/2010 Season where 'each of the 72 clubs staged a designated Football for Heroes match, provided a promotional photo featuring players with Help for Heroes banners and balls, emerged from the tunnel behind a Help for Heroes banner and ensured captains and officials posed at kick-off with a Help for Heroes banner' (Kelly 2012, 731).

Kelly (2020) has argued that the various military-oriented campaigns including the poppies, acted under the rhetoric of an apolitical military. In effect, the military made good use of the idea of politics-free sport to 'camouflage' the former's political aims. Combined with the 'selective amnesia' about the essence of the military and militarism, such rhetoric obscures the true meaning of both. Even if it is presented as a line of 'work', 'mission' or 'duty' which should garner 'respect' and 'appreciation' by the public, the armed forces' *raison d'être* as well as their use in past and recent wars leaves no doubt as to the fallacy of alleged depoliticisation. There is a method to the fallacy. The depoliticisation of an institution and the expressions that pertain to it are in accordance with the *narrative* of politics-free sport. Obscured by the camouflage (of course, a military technique), sport remains politics-free because it supports an apolitical institution. Softened by remembrance, reflection, respect and appreciation, the public feeling supports the expressions and showed overt hostility to those who were of a different opinion. The FA collaborated with the depoliticised military and embraced the public feeling. Even if there have been no sanctions for dissent, the fear of going against public feeling has the potential to curb it.

3.2.3.3 Turkey

Jingoism and militarism have been at the forefront of Turkey's political landscape, and in extension, of sport from the start (Gökçağı 2008). Especially in team sports, carrying banners while stepping into the field of play is a way of both raising awareness and strengthening the bond between the state and sport. Banners denouncing femicide and domestic violence have been some of the more politically charged ones, though they are not considered as political *per se*. Celebrating the establishment of the police force or a branch of the military, commemorating the failed 15 July *coup d'état*, remembering the soldiers who died in the line of duty and even calling for the paying of taxes have become ubiquitous. The remembrance of soldiers (called 'martyrs'/*şehit*) also lead to a minute's silence. Arguably the most enduring and everyday nationalistic ritual is the practice of singing the national anthem before football matches. The ritual dates back to the 1990s, which was a

time of increased attacks by the PKK (Irak and Polo 2018, 668). The ritual was not a part of the rules and regulations of the TFF, but later the TFF added the ritual to its official match-day schedules in its league regulations. Likewise, Karşıyaka basketball team supporters have time and again stopped play because of their singing of the national anthem. In some cases the gesture becomes a joyous occasion where the supporters of the opposition team, athletes, coaches, stewards and police join the ritual (Fanatik 2014). This is not surprising because sports clubs in Turkey have various branches. Some supporters attend not only the matches of the football team but also the teams in other branches especially in basketball, volleyball and handball. Therefore, the supporters carry the rivalries and practices prevalent in football to other sports, and vice versa.

In times of military operations, the nationalistic and militaristic feelings increase, and the period in which an unorthodox expression is conveyed may directly affect the manner that it is dealt with. For instance, the *Süper Lig* match between Trabzonspor and Beşiktaş in March 2018 was played against the backdrop of the Turkish Armed Forces' cross-border operation into Syria against the Kurdish People's Protection Units (YPG). In line with the nationalistic stance 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 incursion. In the meantime, the fans in the stands concertedly shouted 'The martyrs won't die, the Land won't be divided' (Milliyet 2018). The Turkish Wrestling Federation went one step further and organised a special event in support of the military operation. In the event, the national team wrestlers came on stage with Turkish flags and a banner supporting the troops. Following talks by state and sport bureaucrats, prayers were read and the athletes gave the military salute (TRT Spor 2018).

In a relatively calm period for Turkish politics where a peace process between the state and the PKK was under way, footballer Özgür Nasuh received a two-match suspension from the TFF for unsporting behaviour due their not facing the Turkish flag during the playing of the national anthem before a match (2009/650 *Esas*, 2009/621 *Karar*). On the other hand, after the crumbling of the peace process the magnanimous stance of the TFF gave way to a stricter one. In the midst of the Turkish Armed Forces' operations in the south-eastern provinces of Turkey, the disciplinary committee sanctioned Amedspor, a team invariably linked to Kurdish (political) identity from Diyarbakır, for its supporters' 'ideological propaganda'. The expressions that moved the disciplinary committee to fine the club and force it to play a match without supporters was its supporters' unfurling of a banner reading 'Peace despite all', their chants 'Everywhere is Cizre, everywhere is resistance' and 'Don't let the children die, let them come to matches' (Cumhuriyet 2016). Public feeling as well as the practices of the state and sport converged, creating a hazardous environment for dissent. Nationalism and militarism that increase in times of military operations (but always remain in the background because of the ritual singing of the National Anthem) set the tone of the sport

association. After all, the state is its main sponsor (Section 1.2.1), and civil society is shaped to protect the interests of the state.

3.2.4 A Possible Objection

The counter-argument for the contextualisation of the relationship between sport associations, the state and the market would point out that sport associations should enjoy freedom of association. Actually, another objection based on freedom of association is possible but for the time being this is beside the point (Section 5.4) because the former concerns solely the characteristics of the market while the one deferred also deals with the characteristics of the individual.

The first assertion would correctly point out that associations have the ‘freedom not to associate’ or ‘freedom to dissociate’ from undesired relationships and communications. Associations allow individuals to come together towards pre-set goals. In this sense, sport’s autonomy from outside interference and the freedom to express and associate as an association deems fit are crucial. Securing a place in the market, and, if possible, expanding it are its two important goals. Naturally, an association excludes an individual or a legal person if they do not agree with the goals or the means of the association. Maintaining the order and not associating with a person (either through not accepting the person to the association in the first place or removing them) are at the heart of freedom of association.

The second assertion moves on from the idea that institutions are not just recipients or forums for the dissemination of expressions, but also speakers (Fiss 1986, 1410–11). Sport associations use disciplinary proceedings as a communications strategy. Essentially, an association dissociates from an expression or a viewpoint through these proceedings, which actually become a part of the public communications strategy. Generally, sport associations should have the ‘right to choose to send one message but not the other’ (*Boy Scouts of America v Dale*). In accordance with their goals and interests sport associations should have the power to send their own messages, restrict expressions that are not aligned with their goals, and accordingly send a message to the public at large regarding its particular stance on that subject. Crucially in sport, the brand is the associations’ voice, and therefore any expression not approved by the association may be seen as interference.

There are flaws with the counter-arguments. To concede one aspect of the counter-argument, following Day (1983), one has to acknowledge that sport associations, whether national or international, have ‘*the collective liberty of associations* (plural) to do X, to do Y, to do Z . . . etc’. As collectives, associations select their goals and values within the confines of the municipal laws that preside over them (23). This highlights the importance of protecting the interests of the association, and to a certain extent, the persons that make up the association. Disciplinary proceedings and sanctions send out the message that an expression ‘is dealt with’ and/or ‘has no place in <insert sport/competition>’ and thus is officially condemned. Sport associations indeed have to protect their businesses and brands

so that they remain marketable. Their desire to be vigilant as to whom they are associating with is understandable and tenable.

Nonetheless, the criticisms hereof neither stem from the selection of their values or their desire to protect their business interests, nor is a lament to amateur sports. This does not reject a Neo-Aristotelian or Stoic view of sport, either on the part of the sport associations or commentators. Sport indeed can be viewed as a moral laboratory, a modern morality play or a contest of virtues, which have been defended by McFee, McNamee and Mumford respectively (McFee 2004, Chap. 8; McNamee 2008; Mumford 2012, Chap. 10). As Chapter 5 will emphasise, finding virtues and acting on them are important characteristics of the individual. Subject to the qualifications in the said chapter, sport associations could emphasise and promote virtuous activity along with moral education. In the same sense, as associations and businesses, sport associations have to designate certain goals, but these must not present reasons for departing from equality of *all* individuals irrespective of the expressions they convey. Provided that they satisfy articulate consistency, they can restrict *all* political expression in sporting activities. This, of course, is impossible since international sporting organisations are ultimately linked to states and nations. The Olympic Games, world cups, nations' cups, continental cups and transatlantic tournaments bring athletes from different states and nations. The unbreakable link was apparent in the case of Russian athletes' participation at the 2020 Tokyo and 2022 Beijing Olympic Games. Despite the ban on the Russian Federation as a participating country, Russian athletes were able to take part under the banner of the Russian Olympic Committee (ROC), whose logo includes the Russian flag in the shape of flames. Even in club competitions or individual competitions, state- or nation-specific quotas include or exclude participants. Finally, some international sport associations like the International Tennis Federation have member tiers that are established according to the state of sport in a country.

Sport associations strategically deploy the reason-giving and justificatory *narratives* of neutrality and politics-free sport. Accordingly, the criticisms in this chapter arise from the sport associations' failure to employ articulate consistency and their cynical use of these *narratives*. Sport is neither neutral nor politics-free. The *nomoi* created and interpreted with the help of the *narratives* serve purposes other than the moral arguments introduced by sport associations. In direct contrast to the sport associations' *narratives*, the *nomoi*, simply, lead to politicisation, polarisation and inequality. The pragmatic use of the *narratives* in the creation and maintenance of a semi-autonomous normative order through their RAE powers, brings about doubts as to the sincerity of the lofty ideals of sport associations. 'Political expression' is restricted but common identity is produced, reproduced and presented by institutions that are protected and supported by the state. In line with the national and international policies of the state as well as the public feeling sport associations silence dissenting voices against the (nation-)state. By sanctioning dissenting expressions despite fostering nationalistic and militaristic

tendencies of sport and its followers, associations assist the states in their domestic and foreign policies.

The assistance and conformity come at a steep price. Sport associations create a difference in status between speakers who conform to the dominant viewpoints and those who do not. More important, as in the cases of Carlos, Smith and Kaepernick, dissenting voices remain outside of the production process of sport, or they have to play in foreign countries and have their private lives affected like Abdul-Rauf. Following Fischer (2014), one may consider this from a racial perspective. That is, the athletes were also punished for not being ‘fully incorporated and integrated into American national identity’ (212). The perceived threat to social identity in the form of a fear that group membership is ‘compromised’ paves the way to the desire to repress undesirable expressions and identities through RAE powers (Sanderson, Frederick, and Stocz 2016, 302–7). The RAE powers and squad selection capacities of sport associations, clubs and teams make sure that the individual stays on the right side of the moral/immoral and legal/illegal binaries.

Under these circumstances, an activity that nurtures an individual from a young age scraps the individual’s career when it does not align with its interests. The professional athlete trains to become a participant in top competitions, to improve their performance and, ultimately, to earn income through sport or sport-related activities. When the individual becomes a threat to the status quo that is carefully wrapped in symbols-infused notions like values (e.g. the ‘X values’ and ‘X way of life’) (Jackson 2014, 74–75), they are duly neutralised. Since sport associations are monopolistic, the dissenting individual is rendered invisible to the public in the context of sporting activities. Ultimately, sport associations defend the carefully choreographed false messages of ‘unity’ and ‘peace’. The messages are false because, after all, the presence of the national anthem and the flag as well as the rituals appended to them does not entail unity: rather the inherent polarisation (Butterworth 2020, 464–66). If there was not disunity and restlessness in the US, UK and Turkey, there would not be nationalistic and militaristic rituals. The refusal to acknowledge differences in views and ways of life is to the detriment of the individual, both as a singular concept and as a member of various groups. The self-interested nature of sport associations and the false *narratives* should lead to a different take on the status of the individual. The individual, whether as an athlete, a spectator or a part of the audience, should be of equal status regardless of what they express, support, praise or criticise. This point will be the starting point of the next Part.

3.3 Final Remarks

This chapter brought together what has been discussed in previous chapters, and took a critical look at the practices of international and national sport associations concerning freedom of expression. The main claim is that in sport, the freedom of expression of individuals is under pressure from both the state and sport. In a

plurality of normative orders, due to sport's *narratives* in the process of interpreting political expression, the state defers to sport associations. These two factors present a situation where in accordance with the associational goals and interests of sport associations, illiberal restrictions are accepted. The autonomy of sport stops individuals from contesting the restrictions before state courts. As will be exemplified in Section 6.3.2., the autonomy is so entrenched that before the eyes of the state court the interests of the athlete and the federation could be one and the same.

The close proximity of sport, the state and the market has created a legal and moral landscape where the political status quo and public feeling have to be confirmed and protected. The *narratives'* rejection of the intimate relationship between sport, politics and the market, and the separation of sport from the two legs serves the status quo. The economic and political interests lead to another *narrative*, which defends that the change would be catastrophic and thus the status quo is unchangeable. Even where it is challenged, the result is evolutionary, not revolutionary, and 'compatible with existing structure of interests' (Hargreaves [1982]2014, 39). The defence also includes fighting against 'political' expression because as Magarian (2017) 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' (34). Concordantly, in sport, dissidents are prohibited from expressing themselves. Whereas freedom of expression requires a higher threshold for justifications of its violation, the normative orders of sport associations, with the help of their autonomies, restrict expressions that they deem political. Since the *narratives* argue otherwise and since the individual has to abide by the *nomoi* of sport associations, the dissidents' freedom of expression is restricted just because they are branded as 'political'. The dissident and the audiences cannot break away from the confines of the *nomoi* and the *narratives* of sport; neither can they appeal to the state, its courts or the transnational institutions like the EU. Worse, the individual is at the mercy of the dominant view in society. Dissent could become acceptable after some time, but as in Kaepernick's case, the damage to the career of the individual could be irreparable. This is the reason why the book's primary concern is the individual.

Against this backdrop one could take the road of criticism towards the RAE powers and their reflections on freedom of expression cases. The criticisms would point out the structure of the RAE powers as well as the specific cases where the structure produced unjust decisions. The former was the preferred method of commentators from the US in their CAS- and FIFA-bashing in the wake of the FIFA corruption scandal. While these are valuable attempts at dealing with the question of the determinants of justice and injustice, they do not tell us about the importance of the *narratives* that constitute the foundations of the norms and decisions. The role of various interests in the acceptance and proselytisation of the *narratives* should have more weight in the discussions. If the *narratives* do not change or are not discarded, then the justifications for restricting dissent will survive. This was the starting point of the current chapter and it will help provide for a defence of freedom of expression in sport developed in the coming parts.

Notes

- 1 Tournaments organised by the Confederation of Independent Football Associations (CONIFA) constitute one of the possible courses. The confederation comprises football associations of *de facto* countries, and regions that cannot be represented in competitions organised by FIFA and UEFA. Therefore, this exception does not break the link between being recognised as a country and being able to compete against other recognised countries.
- 2 The opposite may also be true where sporting issues become 'political'. As Seippel et al. (2018) have theorised, provided that specific prerequisites are satisfied, sporting issues such as gender equality, doping or legalising a sporting activity (e.g., professional boxing in Norway) could become political and enter society's agenda.
- 3 The author is aware that the use of the term LGBT+ may lead to the homogenising of different sexual identities, genders and sexual orientations. Specifically, the position of transgender individuals defies easy ways out. Since the term is well-known in society the author would like to use it without going into the theoretical discussion as to its suitability.
- 4 In 2018, the FA 'asked to hold a minute's silence, wear black armbands and to consider adding poppy shirt logos to their shirts for the weekend' (The FA 2018).
- 5 McClean, born in Northern Ireland, opted to play for the Republic of Ireland National Team. McClean has publicly underlined their Irish identity and pride for playing for the latter. The player has become 'a new *bête noir* for Unionism and Football' (Breen and Huddleston 2021, 47–48).

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Part II

Defending Freedom of Expression



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Arguments for Freedom of Expression

4.1 Introduction

This chapter presents the prominent justifications for freedom of expression in the literature. The focus will be on philosophical and moral arguments that distinguish freedom of expression from other liberties. Before embarking on this phase of the project, a clarification is necessary. Although a frequently appealed notion, the content of freedom of expression could remain unclear unless one delves deeper into what an expression means. The discussion among commentators on the issue results in different takes on the subject. For example, one view sees no difference between ‘speech’ and ‘expression’ and thus uses them interchangeably (Barendt 2005, 75). The question is whether or not a message 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 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 conventional sense and do not use words to get the message across.

In both cases, the actions should be accepted as expressions because they convey a message about an understanding of the context or the normative (moral, legal, social, religious or a combination of some or all) landscape (Cover 1983, 8). For instance, in our polarised times, not wearing a face mask has become a means of expressing one’s political and moral stance. Whichever way one looks at it, the speaker should have communicative intent.

4.2 Argument from Truth

This argument claims that the exchange of ideas between persons is essential for reaching the truth and advancing society’s knowledge in general or of the person to whom the communication is directed to. The place where this exchange takes place is pictured as a ‘marketplace of ideas’. Although it has faced certain challenges from rapidly advancing forms of communication, the term along with the notion of ‘exchange’ has garnered support from the commentators and the judiciary.

The Anglo-Saxon branch of this argument has its roots in John Milton, who presented a case against the authorities' prior approval and licensing of books and pamphlets. The central proposition is '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' (Milton [1644]1969, 216). John Stuart Mill followed a similar route, focusing on a possible loss of individuality, diversity of opinion and the truth itself. In that regard, Mill focused on the individual and its interactions with society. The emphasis on the interaction with society—thus not just with the government—was deliberate. Society has to be guarded not just against the will of the government or the magistrate but also against its own will—which is more rigid—consisting of the prevailing opinions and the compelling of individuals against their own will. The fallibility of humankind and its epistemic limits must give rise to the free expression of beliefs and ideas. The truth might be out there (Mill 1991, Segment: 'On Liberty').

While the noble search for truth through a clash of ideas in the 'marketplace of ideas' for the greater good of society sounds attractive, there are epistemic loopholes. According to Schauer (1982), 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 (18–25). 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. Given 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'. To support the aversion of a quest to find the 'truth', Redish's (1984) warning as to the abuse of institutions that enjoy 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 off expression of any views that are contrary to this 'truth'.

(46)

Experiences and empirical data resulting from scientific studies may produce valuable results for anti-discriminatory measures; however, the notions of discoverable truth and being closer to certainty become self-defeating in the search for truth in other subjects.

Another criticism to the consequentialist¹ tendencies of this argument is that if indeed there is a marketplace of ideas, then the promotion of an idea gains unnecessary importance. The marketplace is a phenomenon where products

compete for the customer's attention, and the 'packaging' of the products along with the purchasing and consumption behaviours of the targets dictate the terms. Concordantly, the idea of a marketplace hinges upon the relative power of its constituents. Like in an actual marketplace, the marketplace of ideas favours the ones that have the more efficient, the more frequent and the more powerful means of communicating their ideas. While it may be argued that the diversity in the means of communication brings about a better-running marketplace, the assertion that not every idea has an opportunity to be heard for various reasons has been one of the staples of the discussion on the argument from truth. The marketplace 'significantly favours established groups and values' (Ingber 1984, 77).

The underlying reason for this is the interplay between the values determining the public feeling and the inherent necessity to grow the market. Since the market growth hinges on new consumers or an increase in the consumption by old consumers, the desire to appease them is of the essence. The dominant view has continual access to the means of communications, whereas their adversaries have to fight to be heard. Chevigny (1988) has argued that the relationships and the goodwill of the advertisers supporting the mass media render the latter prone to agenda-setting, in general. Mass media becomes dependent on the market (125–26). Therefore, any harm to the goodwill, image and in general the economic prospects of an enterprise through harm to the consumers' values and beliefs should be avoided. Closely related to the public feeling explicated in the previous chapter, this argument leads to the fastening of the desirability of expressions to the demands of the lowest common denominator. The values and the level of tolerance of the majority directly affect the media's view towards unpopular values and expressions. More importantly, changing one's opinion through their exposition to various opinions in the media might be too optimistic because reinforcing previous ideas would only serve the illusion of an effective marketplace, which in its turn serves the status quo (Baker 1989, 16). Even where the status quo is challenged, its defenders do not listen to the expression of dissenters and vice versa. In effect, the marketplace fails to appear in the first place. Echo chambers are the norm rather than the exception.

Although it has its shortcomings, the theory of the discovery of truth and its ally, the marketplace of ideas, help open up different doors. The necessity to receive different opinions in reaching a life-affecting decision renders the marketplace essential even if the decisions themselves are irrational (Redish 1984, 47). The Millian thought focusing on engendering diversity helps the cause of freedom of expression because it offers more choices for society and the individual. Diversity provides an essential anchor for this book, in that sport associations curb the diversity of ideas by restricting expressions of dissent in sporting venues and beyond. Moreover, their *narratives* introduce truths about sport and how it should be produced and consumed. As the next chapter will assert, these truths lead to rigid roles for both athletes and spectators.

4.3 Argument from Democracy

This argument focuses on the importance of political expression in the democratic process. As a pioneer, Alexander Meiklejohn put democratic institutions and political expression at the centre of freedom of expression. This freedom is intricately linked to the self-government of the people, a 'power'. Meiklejohn later tweaked this approach to expand the protection to other types of expressions. Expressions pertaining to 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' (Meiklejohn 1948, 1961, 255–57).

Despite the expansion in scope, the heart of the argument did not change. 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 (BeVier 1978, 309). Simply put, political expression constitutes the 'core' of freedom of expression. Its primacy is based on the fear of the insulation of government through censorship, the government's bias towards certain views and the contention that curtailing political expression results in more damage than it does to other expression types. Disapproval of policies may not be the reason for abridgement; however, the limit to protection is damaging expressions and expressions unrelated to self-government (Meiklejohn 1961, 258–60; Sunstein 1992, 304–10). Sunstein (1995) based the argument from democracy on a Madisonian understanding of the First Amendment that brings 'government by discussion' to the fore.

First of all, the argument's emanation from the romantic view of US history and a specific interpretation of the US Constitution and its amendments leads to an exaggerated causality between the deliberative process in governing a political unit and political expression (Shiffrin 1993[2014], 68). Second, the idea of democracy does not have an all-encompassing legitimising factor. For instance, 'epistemic democracy' argues that democracy aims to 'track the truth', and that truth is independent of the procedure (List and Goodin 2001, 277–80). Unlike 'deliberative democracy' epistemic democracy downplays the focus on procedure and introduces 'the quality of outcomes' as an important element of democracy (Holst and Molander 2019, 541–42). Likewise, 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 (Fuerstein 2008, 83–85), 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 impact the deliberation process through intense lobbying, campaign donations or the power over mediums of communication. As Cohen (1986) has argued, the perceived bias of the 'speakers' or conduits of an expression might move the individual to discount it, in which case the expression would not foster democracy. This brush with reality warrants scepticism as to

the viability of solely protecting political expression (36). If freedom of expression is desirable so long as the deliberative process is rectified, this consequentialist approach fails because the utility of political expression is doubtful.

Another problem is that 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 (Redish 1982, 601–2). 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 at the other end, only the expressions that are relevant to certain regimes and societies that are closer to the democratic end would count. As the next chapter posits, losing freedom of expression for being a citizen of or residing on the wrong side of the spectrum cannot be justified. Furthermore, freedom of expression can be instrumentalised to attain the right to self-government in regimes that do not provide that.

Likewise, in general, the argument from democracy perceives the individual as a vessel for democracy rather than the goal itself, and this is related to the romanticisation of democracy. The image of citizens getting together in a public forum to deliberate public matters is indeed enticing; however, this ideal image appears at the expense of other types of expressions. The categorisation and hierarchisation of expressions (where the political ones sit at the top) erect barriers to disseminating and receiving ideas that could be branded as non-political. The apolitical individual is rendered silent. The judicial defence of categorisation and valuing of speech also helps reinvent the rhetoric of democracy as a goal. Section 6.4 will broach the demarcation in a more in-depth manner, but in essence, there is an inherent difficulty in differentiating between political and non-political expression. The political might include the profane, and the profane might include the political. The very narrow protection of expressions leaves out essential parts of human communication. Moreover, when non-political expression is given less or no protection from sanction, the institution that does the categorisation is given a shortcut to restricting ‘undesired speech’.

If the only protected type of expression would be political expression 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 necessary for different conceptions of democracy (Goodin and K Spiekermann 2018, Chap. 9; Ladha 1992, 622–24, 630–32; Müller 2018, 1270–73).² Instead, it challenges the consequentialist view that freedom of expression is essential solely for the well-being of the deliberative process.

Negative externalities of the focus on democracy are particularly exacerbated in sport. The *narratives* of politics-free sport and political neutrality help curtail certain political expression for every stakeholder and spectator. This presents a paradoxical challenge for the argument from democracy. If political expression is at the core of freedom of expression, a private institution with RAE powers must refrain from prohibiting them. Nevertheless, sport associations restrict a type of

expression, which is precisely what the argument from democracy sees as untouchable. In that regard, this argument seems to be at odds with the selective restrictions in sport. The reliance on this argument would be erroneous in another sense, as it does not expand to the citizens and residents of non-democratic regimes which take part in competitions. Consequently, a more inclusive and potent foundation for a defence of freedom of expression in sport should be introduced.

4.4 Arguments from Autonomy and Self-Fulfilment

Having separate bases for the defence of freedom of expression, arguments from autonomy and self-fulfilment take different aspects of human good as desired consequences, such as developing rational capacities and protecting human autonomy from the government. According to Redish (1984), ‘individual self-realisation’ is one such consequence. The two aspects of self-realisation are the development of an individual’s faculties and self-rule/self-governance. Self-realisation is the ‘ultimate normative source’ that is served by ‘all forms of purely communicative activity’ (4, 11 and 36). The value contains ‘sub-values’: the ‘checking function’, the ‘marketplace of ideas’ and the ‘political process’ (Redish 1982, 594). Similarly, in devising the ‘Liberty Theory’, Baker (1989) 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—speech in itself contributes to self-fulfilment (47 and 54).

Mill (1991), too, in a consequentialist and utilitarian manner, defended autonomy as an important actor. Praising authenticity, employing one’s faculties in making choices, gained importance, deprivation of which would lead to ‘ape-like imitation’. Mill thought that society has indirect interest in what an individual experiences in its private life. The individual has to have freedom of conscience, thought and feeling, and expression, leading to freedom of tastes and pursuits, and in general, ‘doing as we like’. The state must allow the individuals to expand and elevate their mental faculties (65 and 128). Ultimately, the development of mental faculties caters to happiness and the discovery of truth.

Despite later changing and rejecting some aspects of it and even rebuking it (Scanlon 1979, 530–35, 2011), Scanlon’s (1972) autonomy-based ‘Millian Principle’ is an important contribution to the argument. This approach deals with the limitations on the government restriction, rather than the rights of the individuals—distinguishing it 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’ (214). Scanlon’s (1972) autonomous agent compares competing reasons, creates beliefs and ultimately ‘decides to do what he decides to do’. The individual realises these processes independently. Yet this does not mean that the individual is immune from state restrictions. There are instances where the individual has to obey obligations set forth by the state. The legal restrictions and

interventions that 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 of the weak points of the arguments from self-fulfilment and autonomy comes to light with the question of whether 'hate speech' contributes to these goals (Wolfson 1997, 29). Chapter 7 argues that in sport hate speech should not be protected, even where the speaker's self-fulfilment is realised. Another defect in these arguments is that the difference between this argument and other libertarian theories and moral arguments is not apparent. 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 (Barendt 2005, 13; Schauer 1982, 52). This criticism aptly points out that the argument from self-fulfilment does not clearly answer the reason why expressions are protected or better protected. When the answer to this question is unconvincing, freedom of expression must 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' (Schauer 1982, 49–50).

The final concern is that some strands of the arguments from autonomy and self-fulfilment have consequentialist and, more specifically, utilitarian characteristics. The downside is that these approaches can give the weighing of rights more importance than they are due. Larry Alexander's (2005) insights are of value. Alexander emphasised that in cases where an expression has the potential to damage, the individual expressing their ideas may be defended through 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 be defended. In this case, the consequences of the expression (the potential damage or level of offensiveness) are taken into account. In order to decide which autonomy deserves more protection, an agency that balances and weighs competing sets of autonomies should be in place. Moreover, questions arise regarding whose autonomy and interests overrule the other and if the autonomy and interests would be the sole measures in judging the situation. The values and judgements of the agency would be omnipotent, to the detriment of freedom of expression (131).

Therefore, in tandem with the emphasis on suspicion of governance presented in the next section, this book is sceptical of the impartiality of the agency that would do the weighing. The underlying reason is that utilitarianism-inspired processes would always have the risk of resulting in the loss of autonomy or the failure to realise the self-fulfilment of the individual. These arguments could 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. These shortcomings become clearer in sport. In sport, sport associations (or the entities that they delegated their powers) turn out to be *the* agencies undertaking the weighing and valuing. These agencies consider their

interests, aims, values, goals, political logic and economic logic. These points will inform the arguments in Chapter 6.

4.5 Suspicion of Government

Suspicion of government is a negative and overarching argument for freedom of expression. It is negative because it dwells on the ‘evils of regulation’, through which it differentiates from positive arguments focusing on the advantages of freedom of speech (Barendt 2005, 21). The argument takes its force from a sceptical look towards the government’s regulation and restriction of expressions. The central concern of this argument is that the government might take measures that deprive the public of certain viewpoints to protect its interests or those of private entities. These goals may be reached by the outright restriction of a certain subject or viewpoint, or by finding subtler means, including the designation of harm as a pretext for the restriction, to keep less popular ideas at bay.

The adverse effects of regulation and restriction of expressions have always been a concern. As touched upon earlier, Mill (1991) was aware of the dangers presented by the implementation of the will of society. Nevertheless, before that, Milton [1644] (1969) 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 (166)? Arguably, the most forceful argument for suspicion of government comes from Schauer, who posited that:

Freedom 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.

(Schauer 1982, 86)

This way of approaching the question of governmental power makes this argument an overarching one because it can be used as a basis for each argument for freedom of expression. So, it does not claim to be *the* argument. The target of suspicion is the entity which, ideally, should ensure freedom of expression since the same entity may stifle it by using its power. In the first step, the suspicion presupposes that institutions have intentions that might be separate from the natural persons that constitute them and that these intentions are normatively relevant (Zamir and Medina 2010, 68–70). Later, it catalyses the defence of the freedom of expression by critically examining the intentions of the institutions that have legislative power and the justifications set forth by the adjudicating and executive branches. These intentions are assumed to be better comprehended by comparing the institution’s stance on similar viewpoints or subjects.

These characteristics render suspicion of government invaluable for any evaluation of freedom of expression. Nonetheless, a plurality of normative orders and

the presence of RAE powers in sport result in the dominance of private power. The effects of these normative orders and their outweighing of the state-made legal orders were depicted through the sanctions against FC Schalke 04, FC Barcelona and FC Zürich. These were clear cases where the collision of normative orders in a normatively plural environment resulted in restraining the behaviour by a private legal person.

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’ (Cotterrell 2012, 515–16). This presents a challenge for analyses that solely take account of the government. It is of no consequence whether the power to organise sports events are delegated from the state or not, or if there is a hierarchy between transnational institutions and international associations. Rather, the effective, efficient and interest-focused RAE powers—that are the reflections of the aims and values of sport associations—are valid reasons for the suspicion toward them. Robert Cover’s (1983) words sum up this view:

Just as it is our distrust for and recognition of the state as reality that leads us to be constitutionalists with regard to the state, so it ought to be our recognition of and distrust for the reality of the power of social movements that leads us to examine the nomian worlds they create.

(68)

The RAE powers of sport associations affect the way stakeholders and spectators behave. Moreover, they act as sieves regarding the services and information audiences receive. Therefore, the RAE powers and the interests and values that they protect warrant suspicion towards the sport associations’ intentions. In this instance, the government is not the sole source of danger. A Millian distrust of society (which wields direct and indirect power over the individual) and its extension to the market and non-public institutions reflects more aptly the current situation in sport. 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 depiction of the landscape leads to the restatement of the negative and overarching argument of ‘suspicion of government’ as ‘suspicion of governance’.³

4.6 Constructivist/Rights-Based Approach

David AJ Richards’ account of freedom of expression presents an invaluable source for this book. Richards (1986) rendered freedom of expression indispensable by means of a Lockean understanding of social contract, the adoption of toleration as defended by Locke and Bayle, and a historical approach to the US Constitution. Freedom of conscience is the primary and inalienable right whose application and scope must be expanded to other rights (61–62). The support

comes from Ronald Dworkin's concept of 'background rights', which allows the positioning of this freedom as a right capable of setting the stage for other rights and freedoms (Richards 1986, 31, 68–69).⁴

To lay out a rights-based theory, Richards delved first into the matter of what a person is. In that step, following the Kantian model and a Rawlsian approach, the person becomes autonomous in the sense that the capacities of an individual, that is, autonomy (freedom), are the foundation of being a moral agent. Autonomy implicitly appeals to the 'twin moral powers' of rationality and reasonableness, in that the individual is 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 individual is capable of originating, expressing and revising claims with their own judgement, self-reflection and will. The individual 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 (Richards 1986, 71–77).

The theory combines the characteristics of the autonomous individual with the Dworkinian notion of 'equal concern and respect' (Dworkin [1977]2005, 198–201, 272–78). The rights-based interpretation of the autonomous individual is universal and anti-utilitarian. Rights are 'trumps'⁵ that are available to everyone, and these characteristics emphasise that individuals, not pleasures, are equal. Here, the right to conscience is 'an inalienable human right' situated at the core of the notion of autonomous individuals 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 given the contractualist nature of the theory (Richards 1986, 70, 84–85).

Richards 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 powers of individuals reflect through expressions, and conversely, they are fed by the 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 an individual 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, expressions critical of the state (usually) tend to be curtailed due to their content. This is unacceptable because the equal protection of every type of expression regardless of their (supposed) content rests on the principle of equal respect. If not, the individual would not be able to originate, express and revise claims. Taking the exercise of an individual's moral right as bearing and supporting it with the expansion of the freedom of conscience, the protection goes beyond political expression and covers issues central to the independent exercise of freedom of expression (Richards 1986, 177–78).

4.7 The Way Forward

The overview of the arguments for freedom of expression leads to two inferences. First, other than ‘suspicion of government’—which is a negative argument—the speakers’ right to freedom of expression is based on their desire to change society or their lives. Whether with the intent to achieve self-realisation, realise the two moral powers, contribute to the marketplace of ideas or the democratic discourse, the speaker sends some message to the outer world. Second, a single argument or approach cannot be considered the foundation for protecting expressions because their scopes and coverage areas are limited (either self-imposed or due to inadequacy). When the fact that they all suffer from structural defects is 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.

Richards’ rights-based approach, along with Dworkin’s idea of equal concern and respect for individuals, will constitute the foundations for the defence of freedom of expression in sport. This being the case, the fact that it is based on the interpretation of the First Amendment presents problems for the subject matter of this book. Sport is based on private and transnational relationships.⁶ Therefore, in sport, speakers and recipients of expressions could be beyond the polity of the state where the expression took place—they might not be the citizens of the state. The right to freedom of expression’s defence against the actions of other natural and legal persons as well as those of the state, its components and its enterprises would fail to translate to sport, a separate activity having distinct justifications.

There are at least three ways to deal with the obstacle. First, the states’ view of fundamental rights would be adapted to sport. Second, the human right to freedom of expression, as enshrined in international human rights documents, would become the basis of the defence. However, neither path would produce the desired protection for athletes, spectators and audiences. In that regard, the states’ and international entities’ partiality towards sport is the main detractor. Since sport is perceived as a social function and positive externalities, their interpretation of fundamental and human rights could be biased. Crucially, the associational aspect of sport is of the essence. The athlete, with their accession to the association or the collective bargaining agreement, and the spectators, with their acceptance of the terms and conditions of a ticket, waive their rights as per the associations’ interests. The RAE powers in sport, especially adjudication processes with an international dimension, constitute on the transnational aspect of the question at hand. In these cases, the application of national laws as primary sources would, as one CAS panel has warned, result in ‘regulatory diversity’ where the legal body has to choose and interpret the ‘right’ norms in every case (CAS 2018/A/5955 & CAS 2018/A/5981, paras 62–83). In each of these scenarios, the rights would remain idle in the protection of the individual.

The final path is to set the discourse on a moral plane and reshape arguments for freedom of expression in view of the particularities of sport—the preferred

method in this book. The globalised production and consumption processes in sport and its monopolistic and semi-autonomous structure undergird the reshaping of the moral defences for freedom of expression. The core of the next chapter is the idea that the individual is a moral agent with specific characteristics that are to be adapted to the production and consumption of sport. Essentially, the duty to respect the moral right to freedom of expression will be there, but legal or institutional enforceability does not play a part as moral rights inform 'an enlightened and sensitive conscience', not legal duties (Feinberg [1980]2014, 187, 194). So, the moral right to freedom of expression is pre-legal. Since the claims for human rights mostly appear when a state or entity violate or take away the individual or groups' civil, political, economic and social rights, the legal recognition of the right to freedom of expression is not a prerequisite for its defence. This is not a sleight of hand. The appeal for a morals-supported view of freedom of expression in sport sits comfortably with the morals-laden RAE powers of sport associations. Especially in the adjudications and enforcement legs of these powers do not suggest purely legal reasoning because the *narratives* of sport could trump the legal reasoning of the states, its courts and international courts. Similarly, moral human rights are prior to legal human rights and stand irrespective of their becoming law and enforcement at the hands of legal institutions (Tasioulas 2007, 84–88). Therefore, a view that brings to the fore moral reasoning would better suit the undertaking at hand. Finally, in view of their RAE powers, sport associations will be the primary duty-bearers in the right to freedom of expression.

Such reconstruction surely takes sides in the debate on the nature of human rights. In the past decades, the debate turned on the arguments for their being 'political' or 'orthodox' rights. Arguments and theories positing that human rights should be considered 'political' take into account human rights' place within international politics and the international human rights documents. Contrariwise, the orthodox view of a human being underlines the moral aspects of human rights where a human *qua* human has certain inalienable rights. This book's critical views concerning the link between sport and politics naturally result in embracing a universalistic moral view of human rights. Even though individualistic conceptions of human rights have been the target of much criticism, again, the private and transnational nature of sport will be the decider in choosing a moral defence of a right to freedom of expression. Rights, generally, constrain states and persons and empower individuals (and for some, groups of individuals). That is why 'human rights is the language of the victims and the dispossessed' (Donnelly 2013, 20). These characteristics lend support to the claims made throughout the next chapter. The differences in interpretation of political expression (deeming some as immoral/illegal according to their viewpoint) result in going back to the starting point, the individual.

There will also be drastic departures from the literature. Inspired by Richards, the next chapter will fashion the individual for sport and defend their freedom of expression by considering sporting practices. The reason is that conceiving the individual as a moral agent (as an athlete, a spectator or as a part of the audience),

which is bound by various national, international and transnational private normative orders, necessitates a departure from the literature on moral human rights. Semi-autonomous orders, especially those of sport associations, pertain to social relationships and interactions. Here, the cliché ‘sporting community’ becomes relevant. The coming together of athletes and other persons to create the product, its consumption by spectators and their being subject to the semi-autonomous orders reflect the nascence of a community. In that regard, Minow’s (1987) claim that rights are dependent upon the community order and help establish relationships with individuals within a community is a significant step towards the contextualisation of the problem (1875–76). The acceptance of the claim that the individual has the right to freedom of expression supposes that the individual, as a moral agent, has a place in the community. Finally, since citizen-consumers have an unmistakable effect on how sport is produced and consumed, the individual must be defended against the many.

Notes

- 1 According to Fish (1994) ‘in a consequentialist argument freedom of speech is not identical with the good but is in the service of the good; it is not a prime but a subordinate value, and when its claims conflict with those of its superior, it must give way’ (14). The importance of putting the good first will become apparent in the next chapter.
- 2 On the other hand, one has to bear in mind that false facts are hard to unlearn (Goodin and Spiekermann 2018, 94).
- 3 According to Ciacchi (2014), ‘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 without a government, policy making with or without politics’ (citations omitted) (124).
- 4 Background rights ‘are rights that hold in an abstract way against decisions taken by the community or the society as a whole’ (Dworkin [1977]2005, xii).
- 5 See (Dworkin [1977]2005, xi).
- 6 In addition to this, a contractualist approach, as in Loland’s (2002) case for fair play, is a possibility. Nevertheless, that project would require a deeper understanding of the role of the bundle of relationships between different stakeholders within the sport industry as well as their relationships with the market elements, such as the sponsors and broadcasting companies.

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Athletes, Spectators and Audiences as Individuals

5.1 Introduction

In sport, the individual has inherent characteristics that must not become defunct beyond the borders of a given (liberal) political order or within the private relationships within the same order. Although their scope is limited to political liberalism and its particular reflections in the First Amendment, the characteristics of citizens as presented by Rawls, Richards and Dworkin constitute the framework for the arguments of this chapter. In the quest for an acceptable theory of freedom of expression, their arguments will be the stepping stones; however, they will also be re-moulded according to the particularities of sport. The defence of freedom of expression and the assertion that all political expression in sport should be allowed, will be founded on the idea that individuals are moral agents. One important limit is that the discussions will assume that all individuals are adults. This is a step towards the hypothetical due to the fact that grassroots sport, and other professional sporting activities (especially gymnastics and figure skating) include minors, both as athletes and spectators.

5.2 Fashioning the Ideal Individual for Sport

Individuals should be deemed as moral agents and subjects (of rights) who, in the words of Hill (2000), 'adopt ends, recognize means, and are disposed to take the necessary means to their ends, when available'. The individual has both interests and 'an awareness of others' (71). Such awareness leads to the individual's capacity to cooperate with others, which in its turn leads to their being reasonable and rational. The two moral powers constitute the bare minimum for being a cooperative member of society: 'reasonableness' in the shape of 'a capacity for a sense of justice', and 'rationality' as 'a capacity for a conception of good'. The individual is reasonable because they have the power 'to understand, to apply and to act from the public conception of justice'. Their rationality derives from their ability 'to form, to revise, and rationally pursue a conception of [their] rational advantage or good' in line with their ends in life. These ends influence the way they associate with others. Due to their moral powers, individuals are free and equal (Rawls 2005, 19).

The individual has the *ability* to make their own moral judgements about ‘right’ or ‘good’ decisions thanks to their moral powers; in fact, they might even fail to reach right or good decisions or decide to follow unreasonable doctrines. This does not mean that the individual’s decisions, beliefs or lack of cooperation would render them unreasonable, irrational and unequal. Likewise, greater or lesser capacities of rationality and reasonableness do not provide grounds for not treating individuals as equals.

In other spheres, the individual might not desire to cooperate with other individuals or they might even decide to be a recluse; however, athletes and spectators will still have to deal with the relevant persons in the production and consumption of sport. That sport cannot come into being without the cooperation of individuals and institutions undergirds this position. The individual is a constituent of different levels of communities, sub-national, national or transnational, and thus they have the capacity to cooperate, to further their interests and to furnish justice. Individuality does not result in being asocial or antisocial. Both socialisation and training shape the moral life of the individual. Through them, the individual expands and cultivates their moral life, their conception of moral rightness (Larmore 1987, 85–86). The individual is not egoistical either, because they do not always limit moral concern to themselves. As Appiah (2001) has aptly summed up, they are ‘social individuals . . . living in families and communities, usually, but still individuals’ (110–13).¹ Their individuality is not atomistic. Firstly, there is an epistemic consequence to this assertion. Since the individual is not (and will never be) omniscient, they require other individuals, groups and institutions. If the individual ‘is prepared to acknowledge that in certain cases someone else may be in a better position to gather morally relevant information’, the ‘others’ could advance the epistemic status of the former (Kuflik 1984, 273). Secondly, there are social consequences. The individual needs to create, revise and break off associations (in their intimate sense, such as friendships etc.) as well as to create, join, have an active role in and refrain from becoming a part of associations (in their legal person sense). Generally, the sense of justice provides the framework and limits individual actions, which are directed to a specific conception of the good (Rawls 1980, 528–30). Cooperation and the social welfare might derive from the Kantian idea that “‘we owe it to ourselves’ to do all we are capable of in fulfilling our moral duties to others’ (Louden 2011, 11, 17–19) or they might appear due to the selection of purely other-regarding virtues and values, or they might become a tool for maximising utility.²

The individual, due to their being rational, is free to develop, revise and pursue a conception of the good (Rawls 2001, 21, 45). They find a specific understanding of morality, self-regulation and self-realisation. Concordantly, through moral deliberation, they find the values and virtues they want to set as beacons in their lives. The verb ‘to find’ rather than ‘to choose’ better explicates the issue because the individual is not an abstract, ahistorical and acultural being who chooses these values and virtues from an abstract menu. Historical and cultural forces in a given time along with kinship surely have a say in the pursuit of the individual (Hill

2000, 73–74). Accordingly, the individual uses their moral powers to find the values, as well as act from or develop virtues. This is crucial because it stops the state, society and private institutions from unduly and unjustifiably imposing their versions of the good. From a Millian perspective, the individual cannot be forced by the state, society or their institutions to comply and conform to their customs, feelings or viewpoints. The individual, as a singular unit in a given community, must have leeway to stand apart from their peers, morally and practically. Here, (unlike Mill) the fear is not ‘collective mediocrity’ but (like Mill and Alexis de Tocqueville) ‘the tyranny of the majority’ (Mill 1991, 8–13, 73–74).

Closely linked to this point is that the pursuit of the good and the tendency to cooperate entail moral autonomy. It is essential for the individual to deliberate on an issue and make decisions about themselves without undue hindrance from others. What the individual finds is of no concern: the state and institutions that claim universality cannot force a conception of the good, or the ‘right choice’. The individual has the moral autonomy to act and find purposes with the use of their two moral powers. Yet there is a limit to the finding of values and virtues. As the individual has an awareness of others, when acting they have to bear in mind the moral powers, autonomies and interests of other individuals. They are burdened with the duty to not find and act upon values that would hamper the autonomy, moral powers and pursuits of others or refuse equal concern and respect to them. The duty and the accompanying limit heed Gerald Dworkin’s (1988) call for the disambiguation of the autonomy of judgement and autonomy of action (41). The moral agent enjoys the autonomy of judgement in view of their moral powers, yet the agent’s acts must reflect the fact that there are ‘others’ in a given social sphere. These spheres, with the help of their semi-autonomous powers, could bring limits to the autonomy of action of the individual. By extension, provided that they justify them and their case-specific implementation, the state and other institutions such as sport associations could regulate and restrict expressions.

Since the individual can find values and virtues that will guide specific actions, the individual is free to find their beliefs. Freedom of conscience, as a background right, radiates to freedom of religion and freedom of expression. The individual has beliefs according to their epistemological and moral capacities. Equal concern and respect for the individual provides protection against unreasonableness and irrationality on the part of other individuals and institutions as well as the state.

Naturally, the pursuit of the good along with the finding of values and beliefs bring about the choice to express them. The individual, in line with their autonomy but within the limits set in the next part, has the right to express their beliefs. Baker’s (1989) point that ‘respect for individual integrity and autonomy requires the recognition that a person has the right to use speech to develop herself or to influence or interact with others in a manner that corresponds to her values’ sums up the situation (59). If the individual regards it as important, they can ‘politicise’ an aspect of their lives, express their approval or rejection of the boundaries of the officially recognised points of view. The individual, individually or within groups, challenges and resists established norms through expression.

When the individual expresses themselves, they deem it important to share something with others. Sharing, which denotes interaction with other individuals, is at the heart of freedom of expression. The individual's aims to disseminate their beliefs, to inform and persuade others, to have the potential to change the epistemic status of others, or just to cooperate and socialise with other moral agents are central to being a rational, reasonable and autonomous moral agent. Sharing also distinguishes freedom of expression from freedom of thought, which is concerned with the individual's inner world. Nevertheless, there are two fears concerning this freedom of expression. First, the individual cannot be compelled to express themselves. In the last instance, such decision lies with the individual. Compelled expressions run directly counter to the idea that forcing a particular viewpoint, orthodoxy and ritual—the incarnations of the values of the state, society and private institutions—are anathema to the autonomy of the individual.³ Second, dissent in any manner is an expression which fluctuates between trying to articulate similarities between individuals and groups, as well as proving the division between them. It attacks icons, symbols, customs, traditions, habits, dogmas and authorities in any sense (Ivie 2005, 280; Shiffrin 2000, 10). Dissent, as an expression, has social and moral dimensions because it is directed at the world at large, making use of language and symbols that are inherently social. It brings attention to a perceived injustice which could feature a social dimension. Therefore, in order to attain the moral agent's ends, the two moral powers work together.

For the individual, the receipt of information from the outside world is equally important as it helps the individual add data to their pool of information. Thus, freedom of expression is shaped not only by the speaker's freedom to choose an audience, but also the recipient's freedom to choose a speaker (Richards 1986, 170–71). The possibility of depriving the recipients of a chance to perceive a message should be reason enough for giving some thought on this question. The recipient has the moral requirement to have the relevant information regarding their pursuits. The addition of information may or might not result in a change in the individual's conception of the good, beliefs, aspirations and virtues. The consequences and functions of the information are irrelevant. The heart of the matter is the right to receive the information without undue interference from the state, society, market or their institutions so that the epistemic status of the individual can advance. Without the ability to receive information the individual would be at the mercy of the dominant ideologies in the spheres they constitute. Inflexible epistemological stances, that is, traditions and dogmatic preconceptions about the state, society, institutions and their moralities (Richards 1999, 45–46) have the potential to act as *narratives*, and thus justifications for undue interferences. Since the individual has the conceptions of the right and the good, any institution that unduly interferes with the reception of information disrupts the autonomy of the individual.

If one accepts that the individual can distinguish the good from the bad, and the right from the wrong, institutions having RAE powers have to leave the process

to the individual. As Richards (1981) posited it, the use of the term autonomy signals that ‘the standards of self-critical evaluation are determined not by the will of others but by arguments and evidence which one has oneself rationally examined and assented to’ (11). The individual has to cut through ‘false’, ‘bad’, ‘fake’ and ‘wrong’ information that they receive. The individual, guided by their two moral powers and their previous experience in society, has to do the weighing. They might receive help from others in the process but they do not need strong paternalistic institutions that decide which information the individual receives, and in effect do the weighing in place of the individual. Should the individual decide to defer the weighing to the state, so be it. The choice is theirs, and yet this does not mean that the individual does not have the *ability* to make the right judgement. The belief in the individual and its capacities naturally leads to the suspicion of governance.

This is an extension of the individual’s moral rights. Rights act as shields against states and other persons. In extension, states, sport associations and individuals have the correlative duty to not interfere with the processes of imparting and receiving expressions. Since duties can be interpersonal, individuals have duties against each other. Another possible duty would be to open up various platforms to the individuals for imparting expressions. For instance, sport associations share the burden in opening up platforms for dissenting voices. After all, the national symbols of nation-states and dominant beliefs easily find themselves a place in sport. This path will remain unexplored due to the constraints purposefully placed upon this book.

Finally, and linked to the foregoing, the individual must be treated with equal concern and respect by all institutions and others. The individual has the right to be treated as an equal (Dworkin [1977]2005, 198–201, 272–78). This right stops them from assigning lower or higher status to individuals or groups of individuals. The terms ‘all institutions’ and ‘others’ undergird the universalisability. They also allude to the presence of a multitude of normative orders and the individuals’ duty to show equal concern and respect for other individuals. Since there are a multitude of normative orders and jurisdictions, the rights of individuals vary according to the norms of normative order. As Ford (1999) has rightly pointed out, ‘In a sense, jurisdictional distinctions are simply a different form of these more obvious status distinctions’, and the state utilises its jurisdiction to shape the individuals within its borders (865 and 897–900). As this book emphasises, associations act in a similar way. In order to mitigate the consequences of such devastating and negating plurality, the inherent characteristics of the individual are not hinged on human-made borders or human-created spheres of activity—they are universal. They do not fail to apply in cases where the individual enters a normative order where individuals are not treated as equals. Exclusionary borders and spheres cannot act as barriers that restrict the autonomy and moral powers of individuals. The individual might be the legal member of an illiberal society where the moral status of individuals varies due to the law of the land, as in Nazi Germany, but this does not change the fact that they are moral agents who have

to be treated as equals. That the individual might carry out their relationships in the private sphere does not rebuke the foregoing. An institution deriving its powers from private law should have no effect on the position of the individual. Their right to be treated as an equal remains intact.

Equal concern and respect for the individual, in this case,⁴ results in the entrenchment of the individual's status and role. That is, the individual cannot have a preassigned role due to their beliefs, abilities or occupation. The status of the individual cannot be demoted at will, without justification and without articulate consistency. Alleged hierarchies in beliefs, individuals, roles and occupations cannot become grounds for demotion in status. The foregoing are neither inferior nor superior, meaning there are no superior or inferior conceptions of moral personalities. Richards' (1986) contention that if a person's role in society is preassigned, then the person lacks autonomy as they have shed their moral powers informs the subject at hand. 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)'. 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. This leads to the rejection of epistemic certainty along with the 'natural hierarchies of order and submission'. Revisability should prevail and preconceptions (epistemic certainties, epistemic calcifications) in a society should be tested against the inherent characteristics of the individual. Preassigned roles in society and stultifying conventions—with their obstruction of a person's power to originate and express claims as well as self-direction—lead to the loss of autonomy (71–84).

5.3 Global Entertainment and the Role of Borders

In the process of fashioning the individual, the final point underlined the universality of equal concern and respect due to an individual. In view of the common moral characteristics of human beings, individuals, universally and inherently, have freedom of expression. This sub-section develops the universalist argument by taking account of the global production and consumption of sport.

At its most basic, within the production process, athletes from different nations and teams take part in national and international competitions. A clear reflection of globalisation, the mobility of teams, sportspersons and capital across borders is one of the fundamental characteristics of sport. On the spectators' side of things a similar picture can be presented. Spectators get together for national and international competitions, and especially for mega-events and important national or international competitions. They travel around the world to watch their favourite teams and athletes.

Such mobility brings together teams, athletes and spectators from a wide gamut of regimes. Also, mega-events take place in both democratic and non-democratic regimes where delegations and travelling spectators have to reside temporarily.

Since 2010, states with poor (contemporary) democracy records have often organised these tournaments. The Russian Federation organised the 2014 Sochi Winter Olympic Games and the 2018 FIFA World Cup, while Beijing was the host for the 2022 edition of the former, and Qatar hosted the FIFA World Cup the same year. Likewise, Baku, Budapest and Saint Petersburg were selected as host cities for the 2020 UEFA European Football Championship. The illiberal practices of Azerbaijan, Hungary and Russia—or rather the Aliyev dynasty, the Orbán administration and Putin’s Russia—openly corroding and despising basic human rights did not have an effect. On the contrary, it was reported that because of local legislations UEFA asked its sponsors not to advertise their products with rainbows in Baku and St. Petersburg (Deutsche Welle 2021).

The individuals traveling to illiberal regimes are not the only aspect of the production and consumption processes of sport. The acceptance of freedom of expression as a right that is not subject to borders includes the domestic competitions played in illiberal regimes. Every regime has its dissenters, and freedom of expression, as a moral right, covers them. A moral conception takes into account the dissenters that risk criminal charges for expressing their discontent with the state they live in—or the state they are in. In addition to this, diasporas of competing nations attend sport events. Their dissent from afar (as in the case of the Iranian women attending a FIFA Women’s World Cup Finals match in France) offers a legitimate reason for the recognition of the right to express their discontent against the states they do not (or cannot) live in. Essentially, 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 (Dworkin 2009, ix). Accordingly, the morality and the culture of the society or government that they are linked to cannot justify constraints to the dissenters’ autonomy and powers.

From the perspective of global audiences, thanks to technological advances, sub-national discourses become national discourses or are globalised, and global discourses become localised. 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 identities’ (Levy and Sznaider 2010, 8, 32). Sounds and images spread through various means, and these resonate both locally and globally. Concordantly, equal concern and respect requires that the advantages of new technologies for disseminating expressions be under the command of not only the state, the market and the sport industry, but also the dissenters. Crucially, freedom of expression is not isolated from other rights (Zick 2018, Chap. 2). It informs others of rights violations. Where the interpenetration of discourses is concerned, rights violations in a given locality (whether sub-nationally, nationally or globally) can be disseminated through traditional and social media and the places that they focus on.

The mobility of individuals, the evolution of the notion of citizenship and the advances in technology invite a more critical approach to borders. Even where an individual, spatially speaking, stays put, the global dissemination of information through global networks inform them of rights violations. The local, without having to become national first, could inform the individuals beyond the borders of the state, and could even become global (Sassen 2003, 10–13, 2006, 303–7, 338–40, 370–75). The global condemnation of the murders of George Floyd and the Saudi journalist Jamal Khashoggi are recent examples. In a world of increased connectivity where ‘the people’ has evolved into something that is not strictly territorial (Scholte 2008, 313–17, 330), 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 of different beliefs and citizenships.

Global audiences in sport present a similar picture where sport associations cater sport to physically distant present and future consumers. Demand for elite sports has led the EPL and NBA as well as the teams and athletes that take part in their competitions to seek new markets to sell their products. Territory-specific marketing of broadcasts and the ubiquity of sporting goods and merchandise have allowed the sport associations and other stakeholders to reap the benefits of increased interest. Global coverage of sporting events allows the dissemination of sounds and images globally, in that, depending on the competition, the audience may include the better part of the world population. Global consumption of sport results in the creation of links between different communities. The said consumption patterns and the interpenetration of the local and global should move one to perceive political expression in sport as important outlets of information.

These points need to be concretised. An expression in a globally consumed event has the power to inform a part of the citizens of a given country, whilst an expression concerning local politics made in a globally consumed event can become a part of the global discourse. In like manner, expressions conveyed during a sporting event would both inform people and become the starting points for solidarity between various parts of globalised society. National politics can inform other groups and individuals who suffer from the same ills the expression targets: it could induce solidarity and it has the power to inform other societies of the situation, whatever the consequences of such informing may be. These were the reasons why in the wake of the murder of George Floyd, people from different nations, states and cultural backgrounds expressed themselves against police brutality and structural injustice. Carlos, Smith and Kaepernick’s expressions became the rallying point for those who call for the right to be treated as an equal. Athletes, and later with the resumption of attendance to competitions spectators during the COVID-19 pandemic, rendered national and international competitions a forum for raising national and transnational grievances. A transnational struggle against anti-racism and justice was possible (Burdsey 2021, 99–101).

A universalistic equal concern and respect for all individuals presupposes a view of freedom of expression where moral sensibilities of individuals breach

human-made boundaries of nation-states. Individuals and societies within the borders of a given state choose and interpret cultural, political, economic and legal borders. The interpretations can exclude an individual or a group of individuals. In these cases, oppressive regimes use cultural relativism and anti-Westernisation against the universalistic premises of human rights (Giulianotti 2004, 363–64). The so-called ‘Asian values’ (or for that matter any regional, national or religious ‘values’) can become the starting points for attacks against the ‘Western’ idea of individual rights. Asserting that rights and equality as the incarnation of ‘Western’ imperialism, the hegemonic and strictly hierarchical regimes evade a healthy discourse on (human) rights.⁵ Worse, the resisting hegemons themselves are usually ‘Westernised’ elites who at the same time homogenise the culture within their respective jurisdictions with vigour (Donnelly 1984, 411–13, 2013, 110–11). This is not surprising because in the process of creating ‘alternative modernities’, the elites ‘appropriate Western knowledges and *represent* them as truth claims about their own country’ (emphasis present) (Beck 2002, 22).

Confronting this, universalism ignores borders which become delineating tools. Under this conception, Sir Sykes and Monsieur Picot’s imaginary lines in the sand (like other imperialistic lines in the hills, plains, mountains, jungles, savannahs and deserts of colonised continents) become morally redundant. Generally, the Westphalian conception of the world and its peoples has less say in deciding who has freedom of expression. Otherwise, human-made boundaries would marginalise certain parts of the world in terms of receiving and imparting expressions. Even though ‘sovereignty’, ‘territorial integrity’ and ‘domestic affairs’ have become justifications for illiberal regimes that encroach upon human rights, global social interaction and interdependence as exacerbated by globalisation should rule out such nationalistic and communitarian approaches (Waldron 1992, 772–81). These points also apply to domestic competitions organised in illiberal states.

In sport, the states and societies seem hypocritical in their views of the role of markets on the one hand and undesirable expressions within ‘their’ respective jurisdictions and domains on the other hand. Just as, ‘Capital tears down all national boundaries and jumbles together that which is “one’s own” and that which is “foreign”’ (Beck 2004, 137), global audiences follow and consume sport from lands afar. They watch the people and capital move between borders. They watch a Greek-Nigerian (Giannis Antetokounmpo) athlete becoming the NBA Champions and the NBA Finals MVP. They watch a Brazilian footballer (Neymar) whose transfer between a club playing in the top Spanish division and a Parisian club owned by Qatari Sports Investments (Paris Saint-Germain) incurred the world’s highest transfer fee for association football. Through a Qatari platform, they watch the latter club’s bid for the UEFA Champions League, which is sponsored by, among others, PlayStation and FedEx.

Put in this way, one can see the disparity between both the capital’s and undesirable expression’s positions vis-à-vis human-made borders. The capital, subject to sport association-specific exceptions, could move from one state to another. Qatari, British, Bahraini, Chinese, American, Russian, Emirati and Thai capital

moves from one jurisdiction to another, and in the process negates and morphs borders and regulations. Yet the autonomy of individuals as well as their right to be treated as equals confronts the same borders but fails to overcome these obstacles due to national laws and even international human rights documents interpreted at the hands of regional human rights courts. The borders, that are permeable for the market, solidify in the face of the rights of individuals.

Consequently, if one defers to the *nomos* and *narrative* of sport associations and the legal orders of states that restrict an expression due to their content, it would mean that not everyone has equal moral status. The underlying reason is that the deference is an implicit acceptance that there are those fortunate enough to impart and 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. Equality does decrease or increase in relation to borders. In essence, 'the accident of birth into a particular social group or culture is not an ethically relevant circumstance and thus has no bearing on that individual's intrinsic human worth and her or his entitlement to be treated as a human being' (citations omitted) (Zechenter 1997, 320).

5.4 The Monopoly of Sport Associations

Section 3.2.4 asserted that there are two separate objections deriving from freedom of association: one from solely the characteristics of the market, and the other from the characteristics of the individual. For the characteristics of the individual are now in place, this sub-section focuses the latter.

Since autonomy, moral powers and the equal concern and respect due to individuals are the foundations of freedom of expression, private law bodies organising sport do not stop these characteristics from being applicable in the relationship between sport associations and the athletes—or the spectators. The moral framework which has no regard for the adjudication and interpretation of legal institutions protects the individual from the *narrative*-laden interpretations of constitutions and the rights therein such as the one made by UEFA in its *FC Barcelona*, *FC Zürich* and *FC Schalke 04* decisions. Autonomy does not become defunct in relationships founded on economic or associational activities. Simply, the inherent characteristics of individuals informing their equal moral status radiate to all normative orders.

Associations cannot be neatly classified as sports associations, creedal organisations and marketplace associations. Having the designation 'association' does not remove a legal person from other aspects of society (Alexander 2008, 13). So, the fact that they are associations does not nullify sport associations' business interests and business-related activities. These associations deem brands and brand images as things that should be vigilantly protected through their RAE powers (Chapter 2). Nonetheless, although with the help of globalisation the RAE powers of sport associations affect everyone who takes part, attends or tunes in to a competition, sport associations present themselves as just another private

association. Especially international sport associations' emphasis on their characteristics is cynical, as, depending on the context, they claim to administer a practice with 'social function' or they claim to be only associations that happen to reside in Switzerland. These chameleon-like justifications appear due to the sport associations' self-interested nature and their desire to protect the well-being of their normative orders.

The position of most⁶ international sport associations as monopolies runs 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 (Colombo 2015, 68–70). These entities have monopoly over both the organisation of competitions and the mandatory licensing processes for athletes and other stakeholders. In effect, sport associations limit the individual (singular) freedom of association which is based on the individual's freedom to associate, to not associate or to dissociate (Day 1983, 23). The individual mostly cannot opt to become a part of another international sport association whose goals, values and norms are more in line with their personal goals and values. 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, paras 219–67). Likewise, the Australian experience in the creation of rival leagues and the intervention of the state in competition law issues (Chapter 1) necessitates a case-by-case approach. This being the case, sport associations could still subject their members to draconian methods of dissuasion. For instance, having sporting contacts with non-FIFA members and their stakeholders is subject to the permission of FIFA, the failure of which could result in suspension or expulsion (FIFA Statutes, art 71). In any case, the monopolistic nature of these associations' processes stops other competitions from appearing. As witnessed in the creation and demise of the European Super League, the RAE powers of sport associations have the potential to curb breakaway leagues.

In short, there are crucial differences between sport associations and the National Angora Rabbit Breeders Club. The former have the sole power over a sector of society and the activities that derive from it: contrary to what Volokh (2005) has argued for other sectors, athletes cannot 'easily switch to a more tolerant employer' when their means of carrying out their trade are severed by the sanctions of sport associations (1440). The athletes are overspecialised in their disciplines; and thus they cannot move on to try their luck in a different sport. For American football, the situation is even grimmer because the teams separate as 'defense' and 'offense', both having specialised tactics and personnel (Loland 2000, 41–42, 47). Commanding the athlete to change their occupation or disregard their being an athlete when they are 'politicised' (as the former New York Jets player Rev. Michel Faulkner did when he stated on a CNN debate that 'Playing football is not the only thing in life' and urged [jokingly?] movie director Spike Lee to 'Put him in the movies') is inimical to the individual's quest to find virtues and know what is good (Wulfsohn 2017).⁷

One could defend that individuals have the foreknowledge of the moral and legal limits that come with the decision to strive to become an elite athlete. On the contrary, Spracklen and Lamond's (2016) question if the individual indeed has the choice merits a second look at the issue. That is, the young individual might not have meaningful choices or capabilities other than being an athlete. Even if they enjoy them, it might be too late to leave the occupational path that one takes. After spending much of one's teenage years and even childhood training in a specific sport or discipline, the cost of changing the path for broader autonomy would be too high. Forcing the athlete to opt for the latter would be much to ask. In a similar vein, castigating the dissident athlete for making the 'wrong choice' (i.e., continuing on the sporting path) would be to ignore their autonomy. One could liken the individuals to enslaved persons who are trained to become gladiators (Spracklen and Lamond 2016, 79). Another perspective would link the more recent past to the present, comparing the working conditions of the modern athlete to slavery in the antebellum US. The Black baseball player Curt Flood, whose struggle for free agency in the MLB constituted an example to the force of the *narrative* in Section 1.3, saw themselves as a 'well-paid slave' and 'a piece of property' (Aboud 2013, 473–75). The situation has not been that different since Flood's revolt. The lopsided racial power relationships between the owners, administrations and the athletes have also resulted in the NBA and the NCAA being accused of treating athletes as chattels (Griffin and Phillips 2014, 62–64). In any case, sport associations, through strict *nomoi* and *narratives*, unduly limit the autonomy of an individual, and position them below fellow humans.

Thus, sport associations erect barriers for the athletes' livelihood. The individual can get suspended for their views and expressions, and lose their livelihood temporarily or permanently. Their lives as athletes are on hold or terminated, and this is done through a misleading *narrative*. The threat of sanction or unofficially becoming *persona non grata* is a powerful deterrent. The way to ensure continuous employment is to suppress a part of moral personality.⁸ Even if there could be other sport associations within a given jurisdiction, the fact that the one established before with a strong consumer and media following would render them less popular. Footballers cannot find another FIFA World Cup, UEFA European Championship or EPL to compete in, and NFL players cannot reach the same level of salary and competition elsewhere. The same applies to the NBA and the Olympic Games. As the showcases skill major competitions undoubtedly have a positive effect on the income potential of athletes. Especially the Olympic athletes, who usually remain obscure to spectators and audiences because of a lower level of public attention to their sports or disciplines, have their chance to both excel in their discipline and translate their performance to income through sponsorships and state incentives.

On the spectators' and audiences' side, the argument concerning international competitions applies. That is, they simply cannot attend or tune in to equivalent competitions, because not all competitions are akin to mega events. Likewise, the UEFA Champions League, the Grand Slams in tennis and the NBA do not

have equivalents. There is also a moral psychological aspect to being a spectator. Expressive allegiance of fans to teams and athletes results in a situation where the individual cannot easily change the team they support. The bond between the individual 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. The bond is strong enough to eliminate demand for other products. (Gerrard 2006, 29; Simmons 2006, 79). As acknowledged by the European Commission, spectators or the audience would not give up the FIFA World Cup finals for the Wimbledon finals (Commission Decision 2000/400/EC, para 41, footnote 11).

One option is to stop following a team, sport or an athlete. After all, when compared to athletes their position is less precarious as they do not risk losing their livelihoods. There is neither a 'right to follow sport' nor a 'right to be entertained'. This conclusion poses a serious challenge to the *narrative* pertaining to the 'social function' of sport. The reason is that it would ignore two aspects of the spectators' and audiences' bond with sport. First, the bond between an individual with their team is an 'intimate association', but this point does not require explication within the scope of this book. Second, when sport alienates the part of the globalised society that does not support the status quo, an important *narrative* becomes inutile. Sport associations argue that sport brings people together regardless of their nation, creed, political opinion or ideology. Sport, along with the market and the state that collaborate with it, drive home the message of togetherness and being united. The *narrative* is so ubiquitous, in 2021 the Olympic Movement changed its motto to 'Higher, Faster, Stronger—Together'. Thus, individuals who might stop following the sport would not be sharing with other people, and, justifiably, would not perceive themselves to be a part of the whole. In the sharing and coming together through sport, the individual encounters the prerequisite of abiding by the status quo, and not challenging the *nomos* and *narrative*. Social function derives its power from the idea that sport leads to desirable consequences like reducing the crime rates and guiding the youth on the right path (whatever that is). In cases where a part of society is left out of the picture, it serves only a 'select' part of society—it stops being social.

5.5 Preassigned Roles in Sport

5.5.1 Overview

Sport suffers from the preassigning of roles for athletes and spectators alike. Sport associations, the state, the market and the public all apply pressure on the individual. While athletes are positioned as role models who must keep out of politics and avoid activism, the spectators are expected to refrain from engaging in non-conforming political expression. The individual, when their viewpoints are not in line with those of sport associations, is expected to sacrifice their autonomy so that the production and consumption processes safely continue. The ones who agree or go along with the political and economic logic can breach sports' artificial and

inarticulate bubble, but the ones who reject and challenge the logics have to face the consequences. This calls for an analysis of the role of athletes (with the possibility to extend it to other stakeholders) and spectators. In this respect, the focus will be on the arguments regarding the preassigned role of an individual and its negative impact on their autonomy.

5.5.2 The Athlete: ‘Additive Identity’?

Only in theory can the athlete not engage in political expression within sports venues; they are selectively depoliticised. Sport associations’ *nomoi* and *narratives* concerning political expression along with the interpretations thereof create hierarchies between athletes and other individuals. Even though, ideally, citizens can engage in political expression, athletes face restrictions that go beyond the confines of the sports venue and cover expressions made through traditional media and social media. In the same vein, athletes become compelled to express themselves by ‘showing respect’ to the flag and the national anthem or taking part in a choreographed show of respect and unity.

Another hierarchy concerns the interpretation and application of the *nomoi* at the hands of the relevant body. As Chapter 3 has shown, sport associations allow and condone certain political expression while restricting others, resulting in the inequality of treatment between individuals. The *nomoi* make sure that the athlete stays within the boundaries as set by sport associations. Meantime, *narratives* provide the moral defence of the hierarchy. Sport associations can be paternalistic. For instance, the ‘Rule 50.2 Guidelines’ for the 2022 Beijing Winter Olympic Games explicitly stated that ‘The Rule is also aimed at protecting athletes from the potential consequences of being placed in a position where they may be forced to take a public position on a particular domestic or international issue regardless of their beliefs’. So, the IOC stopped the athletes from expressing themselves because somehow they might be forced to take a public position. The questions here should be ‘then why did the IOC allow political expression in certain areas within the venues? Would the athletes not be forced to take a public position in these times and places?’ The Guidelines fail to justify the restrictions to freedom of expression and the *narratives*.

The athletes’ struggle for basic rights and mobility has encountered charges of greed and ungratefulness. As ‘big earners’, athletes are expected to bow to the demands of team owners or sport associations. If not, they are perceived as greedy, not appreciating the fact that they earn much more than the national average salary. Being compared to the doctors and lawyers who do not strike, the athlete is expected to be grateful (Oriard 2010, Chap 2). In Mahmoud Abdul-Rauf’s case, ‘earning millions’ thanks to the US and the American values became an argument against dissent. Being ungrateful for what was ‘given’ to Abdul-Rauf by the state, society and sport amounted to hypocrisy and treachery in the eyes of society (Jackson 2014, 123–29). Concordantly, with help of (but not deemphasising their importance in racial relations) Tarver’s (2017) observations concerning white

fans' depreciation of Black and Latino/a athletes, one can claim that on either side of the Atlantic the public constituted their relationship with the athletes not on concern and respect for the individual but on their instrumentalisation in the production of sport. Identification with the athletes in good times may give way to 'disidentification' when adversity arises. Worse, Abdul-Rauf might not have been a 'hero' or 'one of us' in the eyes of fans. The athlete had been a non-threatening individual who acted within the confines of pre-set roles and expectations, but they became a threat when they challenged these phenomena (Chaps 4 to 6).

This position gives support to Kadlac's (2022) assertion that athletes are objectified. Among other pitfalls, they are reduced to their bodily activities, their appearances. They are a means in the entertainment industry and thus they do not deserve autonomy. Ultimately, they are silenced (61–71). Objectification and the limited, conditional and racialized affection on the part of society render the athlete vulnerable to backlashes. *Narratives* and an athlete's role in the eyes of the market and society is so entrenched, those who wish to go beyond the pre-assigned role of entertainer 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' (Cole 2018). Leaving aside James' commodification of dissent through commercial deals and campaigns (which became the subject of a lawsuit) (McCann 2020), and their devaluing of fellow athletes, the commanding tone is a result of the consumers' power over the product of sport.

Societies, as aggregates of consumers, wield great power over how the producers and the product should be. Just like the practices and interpretations of sport associations, society is selective in their condemnation of athletes. Expressions that are in line with the dominant public feeling are welcome; however, not wearing poppies or conducting counter-speech against nationalistic symbols pave the way for vilification and demonisation on traditional and social media. The ones who dissent against the dominant way of looking at current or past events of nationalistic and militaristic nature run the risk of being branded as 'politicised'. Challenging the public has grim consequences; for Abdul-Rauf, Kaepernick, Carlos and Smith, they included being pushed outside of sport's production process.

One of the major threats comes in the form of the alienation of present and potential consumers. Despite their expressive allegiance fans may stop spending time and money for a sport and its constituents. If sports events are not produced by likable entities and individuals, then the brand images of these events, sport associations and others may suffer, leading to a decrease in the perception and engagement of the consumers (Schmidt et al. 2018; Volokh 2005, 1423–26). After all, provided that the person is able to consume the service or the product, choosing to consume and choosing not to consume are two sides of the same coin. One consumes by refusing to consume other things (Hogg and Banister 2001, 76–78).

Taking sides in contentious issues undoubtedly alienates a part of existing or future consumers. Even though the true reasons for disengagement might not become obvious, the fear of losing consumers to competing forms of entertainment,

and thus losing income moves the sport associations, athletes and sponsors to tread carefully. From the perspective of the athlete negative perception could lead to the termination of endorsements (Serazio 2019, 226, 266). The key is that bad publicity garners more attention than good publicity, multiplying the risks associated with an athlete's 'negative' behaviour (Peetz and Lough 2016, 128). The situation can be summed up thusly: 'the existing literature on athlete activism demonstrates that a fan's stance on the issue, as expected, will dictate their reaction and attitude toward the athletes engaging in discussion' (Mudrick, Sauder, and Davies 2019, 180).

Another way of legitimising the one-dimensional athlete is through the notion of role model. Society (in collusion with the media and politicians) and sometimes the athletes, expect from other athletes to act as role models and to not cross the red-lines that come with the notion. It has to be emphasised that in view of the inherent characteristics of the individual, unless the athlete explicitly or implicitly accepts the role or expresses their intent to become a role model, where there was no pressure for them to do so, being considered one unduly limits the autonomy of the athlete (Spurgin 2012, 121–24). The stakes are high because the red-lines are widely drawn to include both the on-field activity and the personal lives of athletes. The role is omnipresent and comprehensive, and spills over to other aspects of an athlete's life (Feezell 2005, 31–32). The individual is, first and foremost, a role model athlete, therefore different aspects of their life remain two steps behind. Furthermore, in this way, the athlete becomes an epistemic and moral-epistemic source. If that was not the case, sport associations would not seek the help of famous athletes (both retired and active) for various campaigns.

Here, a paradox appears: the 'heightened influence on the conduct of others' (Feezell 2005, 21–22) granted to the role model is neutralised and used against the role model when the question of politics arises. Regarding political messages, diametrically opposite beliefs such as 'the athlete ought not to be political' and 'the athlete ought to be political'⁹ lead to the same result where outside forces cast a role for the athlete. 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 society, the autonomy of the athlete is overruled. To put it another way, the other-regarding process of assigning the position of role model to another individual takes away the target's means to aspire for virtues and finding values, and more important, the decision to becoming a role model in the first place. While the athlete could decide to attain moral excellence in one or more selected virtues, say sincerity, fairness, loyalty or honesty and become a role model on or off the sports venue (Jones 2011, 426–27), the decision belongs to the athlete. Therefore, Karl Malone (1993) was wrong in stating that becoming a role model was not fellow NBA star Charles Barkley's decision to make. So, 'be[ing] a good role model or a bad one' must not be 'the only choice'.

In sum, through the use of *narratives*, sport, the state and the market put athletes in an unequal position when compared to non-athletes. At the hands of sport associations they lose their right to be treated as an equal, because they

are assigned the role of entertainer who contributes to the unity of a nation or society. The sport associations' restrictions and the perceptions of consumers have negative implications on the athletes' autonomy and moral powers. The athletes have preassigned roles due to their occupation, roles that are incompatible with the ideas of autonomy and the right to be treated as an equal. In the same manner, public feeling compromises the athletes' inherent characteristics. It helps to assign certain members a role that brings about fewer rights than the persons on the other strata of society. The public feeling also bears upon the interpretation and application of norms and acts, creating further hierarchies between athletes according to their beliefs. Finally, the athlete, since the eyes of many are on them, has the power to convey messages that could mobilise forces against the prevalent hierarchies between individuals and peoples. The selective depoliticisation of the athlete and their pre-assigned roles help to ensure the maintenance of the status quo and the role of sport as 'a cultural ideological outpost' by neutralising one of the potential and powerful spearheads of counter-domination activity (Cooper, Macaulay, and Rodriguez 2019, 160, 173–74).

One may have a more positive view of the current situation, pointing out that protests against inequality and exclusion are now more visible than ever. A view that is concretised by Zirin and Boykoff's (2021) piece in *The Nation*, it would purport that change is under way, and especially that political expressions at the 2020 Tokyo Olympic Games present the shape of things to come. Indeed these Olympic Games saw a limited increase (the 2012, 2014 and 2016 editions of the Olympic Games each had one political expression by an athlete) in political expression. US shot putter Raven Saunders crossed their arms above their head to form an X, which represented 'the intersection of where all people who are oppressed meet'. Race Imboden had an 'X' marked on their hand in the medal ceremony, the Chile and Great Britain women's national football teams took a knee before kick-off, Costa Rican gymnast Luciana Alvarado integrated taking a knee and raising their hand to their programme. Finally, Mainland Chinese cyclists Bao Shanju and Zhong Tianshi both had a pin of Mao Zedong attached to their tracksuits during the medal ceremony.

While this book defends these expressions, one should be sceptical of the circumstances and outcomes. The underlying reasons are that the expressions did not challenge the public feelings of relevant societies. Saunders' emphasis on solidarity is acceptable for all societies. Yet the expression begs the questions of what amounts to oppression and who are the oppressed. States and societies will argue that their practices are not oppressive, or that actually they are the ones that are or were oppressed. The Thirteen Colonies, Mainland China, Hungary, the Russian Federation and many nations who have achieved self-determination have held the role of both the oppressed and the oppressor. Devoid of a clear context, expressions do not impart much. These gestures do not necessarily challenge the dominant public feeling. The argument emphasising the alignment of expressions with dominant public feelings also apply to Alvarado, the footballers and the Mainland Chinese cyclists. Especially, in the latter case, the praise of the founder of a state that is still sovereign should be considered as a status quo-engendering gesture.

Second, and more importantly, the consequences of an expression vary from individual to individual and from society to society. When the precarity of the athlete and the possible loss of income are taken into account, the athlete is invariably dependent on the political and moral stances of the sport associations and institutions. Mill (1991) was aware of the correlation between the individual's financial independence and ability to express themselves. Financially dependent persons are more prone to exclusion due to their opinions and expressions. 'Other people' are efficacious in excluding a dissident from the labour market. Accordingly, the threat of exclusion guides the conduct of those who are not financially independent. On the contrary, financially independent individuals 'have nothing to fear from the open avowal of any opinions' (37). Thus, if the athlete's income is secure or if they do not challenge the dominant public feeling, then the sporting practices and the income remain secure. That there is no dissent in the expressions should suspend premature celebration as a possible loss of income and the ceasing of sporting activities are the two threats that exacerbate the precarity of the athlete. The only positive in this story is the athletes' use of their right to freedom of expression.

5.5.3 The Spectator: 'Multiplicative Identity'?

Spectators were the first group to enjoy watching professional sports. Before the ubiquity of broadcasts, attending a competition was the only means of watching live sporting activities. Although, since the final decade of the previous century, broadcasting income has become the main source of revenue for sport associations and clubs, the presence of spectators is essential for the sporting experience. Accordingly, being forced to play competitions behind closed doors and partial venue closures are two of the harshest sanctions to be imposed on teams and clubs.

Depending on the sport, spectators cheer, sing, shout, boo and chant. These actions make one heard, either as an individual or as a group—they are expressions. Despite being global phenomena, the ethos and decorum of sports differ, and thus the timing and manner of expressions, too, differ. In addition to this, cultural differences result in the diversity of approaches to expressions in a given sport. The irreconcilable views as to how golf should be watched came to the forefront at the 37th Ryder Cup. In this instance, the North American and European ways of experiencing and chanting clashed, and the media jumped on the opportunity to emphasise the differences. One cannot ignore the historical, religious, cultural, social, militaristic and educational aspects of chanting, including in sport (Schoonderwoerd 2011, 120–22). Banners, symbols and flags occupy an important place within the venues. In the same sense, gazes or gestures by spectators could act as both an expression or as an emphasis on the expression, demonstrating the spectators' 'identificatory intention' (Clark 2006, 500). These, too, are the expressions of the individual or the group.

The autonomy of spectators as speakers and their role in sport have a multi-layered relationship. By entering the venue (or the moment they enter a

contractual relationship to buy a ticket), the spectators experience limits to their autonomy. Whatever the reasons are for such limitations—‘anti-hooligan’ measures, maintaining the order within the venue and the brand image of the relevant entities and so on—from then on, they are bound by the club’s and sport association’s regulations such as disciplinary regulations or more specific norms such as the MLS Fan Code of Conduct, along with ticket terms and conditions prohibiting them from communicating certain political expression (Gerke 2021, 190–91; van Rompuy and Margoni 2014, 27). This sub-section will deal with the sport associations’ practices.

Despite being a pre-COVID-19 example, the ‘PyeongChang 2018 Terms & Conditions of Ticket Purchase, Possession and Use’ is useful in exemplifying the assertions hereof. The document prohibited the possession of ‘banners, print-outs, 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’ (‘Spectator Policy’, art 2.1.7). Similarly, although the supporters were allowed to possess ‘[n]ational flags of the registered countries for the [Olympic] Games’, national flags of countries that were not registered to the Olympic Games cannot be unfurled (‘Spectator Policy’, art 2.1.7). Here, the difference between the coercive power against the stakeholders and spectators is that unlike the position of the stakeholders, RAE powers did not amount to banning or fining. The coercive power in this case was the refusal to provide services to the individual. Furthermore, state’s coercive power was felt through the threat of ‘arrest and/or prosecution by the relevant authorities’ in the cases where the spectators violate the terms and conditions (‘Spectator Policy’, art 2.1).

The tendency continues in non-mega events in the post-COVID era. In Section 2.5, a case of silencing in the 2022 Australian Open helped explicate the enforcement powers of sport associations. The example’s link to this sub-section is that the silencing of individuals who asked the question ‘Where Is Peng Shuai?’ was possible due to the spectators’ position vis-à-vis the sport association. In this case, a Tennis Australia spokesperson indicated that ‘Under our ticket conditions of entry we don’t allow clothing, banners or signs that are commercial or political’ (Bruce 2022). The spokesperson was right in the sense that the ‘Ticket Conditions of Sale and Entry Australian Open 2022 Melbourne Park’ stated that clothing that includes ‘political’ items were prohibited (art. 18). The long arm of the law stretched out to get the individuals through the use of ticket terms and conditions.

There is also an indirect way of influencing spectator conduct. International sport associations and their continental and national members have adopted the notion of ‘strict liability’, which results in a club or member association (in national team matches) to be liable for their spectators’ conduct. The liability does not require fault, meaning even if the club or member association had taken every measure to stop spectator misconduct they would still remain liable (CAS 2013/A/3047, paras 96–103; CAS 2014/A/3578, paras 39–44). Spectators could create liability despite being absent from the sports venue. In an extreme case,

UEFA sanctioned a Turkish club due to its supporters' parachuting bengal flares from outside the stadium in a UEFA Champions League Play-off match played without spectators. That the flares reached the stadium was reason enough for the sanction and its approval by the CAS (CAS 2013/A/3139, para 50).

Aware of the fact that their behaviour might result in their teams/clubs being sanctioned, spectators could refrain from conveying political expression. When they do not, cases like *FC Barcelona*, *FC Zürich* and *FC Schalke 04* remind them of the sport association's powers. This results in an asymmetrical relationship between the sport association and the individual. The latter, by attending a competition or even being around it becomes burdened with the duty to comply with the norms concerning political expression. In exchange, they are given the right to enter the venue. For those who do not attend the game, there is not even that right, so there is only the burden just because they are linked to a team, club or nation.

For those who are able to attend the competition, they find and reinforce their, among others, individual, team, regional, national and racial identities (Heere and James 2007, 324–25; Tarver 2017, Chap 2). Nevertheless, commercialism, commodification of every aspect of the production process and the disciplining of the individual through RAE powers are the prominent characteristics of sport. Essentially, sport requires 'tame and obedient' as well as 'civilized' individuals within sports venues (Broudehoux 2012, 46; Law 2014, 205). These individuals are tame and obedient rather than totally passive, because they are allowed to cheer their favourite teams or athletes. The 'top-down' organisation and choreographing of the production and consumption of sport make sure that the two seemingly distinct parts of the experience are realised in an organised manner. The spectators both take in the 'experience' unfolding before them and they have an active role in it. The individual has a double role of the consumer and the producer. They consume the product of sport, but also they are producers, one of the gears in the production process (Bridgewater 2010, 120–27; Giulianotti 2011, 3303; Miller 2012, 29). 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 (UEFA Fair Play Regulations, art 10).

Of course, individuals must act under the guidance of political and economic logic (Giulianotti 2011; Spracklen and Lamond 2016, 138). 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 to attend matches because the club or the national association has responsibility as to the conduct of its supporters (CAS 2013/A/3094, para 100). Even where there is no threat of sanction, being branded as 'problem fans' by sport associations and the state is a possibility. Due to its position as an 'alternative' venue for football spectatorship where punk and hip-hop aesthetics along with the embrace of a distinctly political stance towards football and society, German Football Association (DFB)

and state monitor FC St. Pauli fans with caution (Jack 2021, 27–28). Extreme caution and vigilance ignore the strengthening tide of supporter activism. Collective actions such as supporters' trusts, ticket price campaigns, solidarity campaigns or refraining from consuming commercialised sport against the political and economic logic open up new and rich frontiers of spectatorship and consumption. The bottom-up challenging of the stakeholders whose powers have been calcified through the decades necessitate a subtler approach to the expressions of one of the most important actors in sport (Cleland et al. 2018; García and Zheng 2017).

Consequently, political and economic logic dictate the terms for not only the sport associations that have the RAE powers and athletes that are bound by them, but the spectators to whom the game—as a product—is intended for. Whatever their relationships that they have towards the club, the national team or the athletes, due to the commodification and commercialisation of sport (Giulianotti 2002), the individual has to abide by the RAE powers of the relevant sport association and its commands. Most significantly, the individual's relationship and interaction with other individuals are under the gaze of sport associations.

The gloomy outlook stands in direct contravention to the individual autonomy defended in this chapter. The desire to cater solely to tame consumers and the desire to tame consumers negatively affect the autonomy of spectators. The spectators—and by analogy the audiences that follow sports events from their devices—have to be seen as autonomous individuals whose sole goal in attending sports competitions is not merely for the consumption of entertainment 'together' and as 'one'. Closely related to this, political and economic logic are now vessels for overriding the autonomies of everyone involved. The autonomy of a spectator requires them to express themselves without the fear sanctions from sport associations, subject to the limits set out in Chapters 6 and 7.

5.6 Captive Audiences

So far, apart from the remark in the final paragraph of the previous section 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 contention '[n]o one has a right to impose even "good" ideas on an unwilling recipient' would reflect the essence of the situation (*Rowan v Post Office Dept*, 738), as the listeners do not have to be open to communication at all times or at least to some ideas at certain times.

While it is limited in scope, the US doctrine of the 'captive audience' will constitute the framework for the subject at hand. Under this doctrine, that the recipients cannot ignore a message, image or sound (*Lehman v City of Shaker Heights*, 307) due to the characteristics of the forum in which the communication is received, is the key.¹⁰ If the recipients are able to avert their eyes, to answer in the negative to a solicitation for donation, or in any way avoid the receipt of the communication, they are not captive (*Cohen v California*, 21; *Heffron v Soc'y for*

Krishna Consciousness, 663, footnote 2 of Brennan J., Marshall J. and Stevens J., concurring in part and dissenting in part). Nonetheless, 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.

5.6.1 Athletes, 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 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 sport associations command 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 sport association itself. Finally, the audience following the event on their devices is captive in some situations. The audience is unable to turn off the volume of its device if profane or discriminatory expressions are present 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. 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.

5.6.2 Arguments Against Captive Audiences in Sport

The foregoing arguments might justify the ban on political expression 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. Yet the fact that spectators and audiences are captive does not automatically provide a reason for prohibiting political and personal expressions. Sport associations already hold them captive.

There are various points arguing that the unwilling recipient thesis does not hold in respect to political expression. First and foremost, from the point of view of captive audiences themselves, stakeholders, spectators and audiences are exposed to 'symbolic speech' consisting of expressions consolidating the nation-state and its policies. Stakeholders are expected to show respect to the symbolic speech.

In general, athletes, captive in their workplaces, are compelled to behave under threat of sanction. Second, 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. In a world where it is complained that every blade of grass is a possible advertising space (Levin et al. 2013, 193), 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 expression is something to be averted, then the same aversion should apply to the overwhelming effects of commercial speech during sports events. Third, in normal circumstances, noise is an important factor for captive audiences. Nevertheless, sport spectators and stakeholders alike are captive to crowd noises reaching 142 decibels or instruments such as vuvuzela (Guinness World Records 2022). In sport, these noises tend to be seen as an integral element of the ‘atmosphere’, making the spectacle more attractive (Spracklen and Lamond 2016, 138).

A unidimensional analysis focusing on the exposition to (restricted) political or discriminatory remarks is deficient, for individuals are already exposed to various types of unwarranted expressions. This being the case, the restrictions on political expression are biased and lack articulate consistency. The selective application and interpretation in sport result in commercial expressions and the sport association-endorsed expressions having the advantage of being forced upon a captive audience while other political expressions and personal ones cannot. Beyond that, spectators and audiences shed their ‘reasonable expectation of privacy’ when they enter the venue (in its wider sense) or tune in to an event; they become open for communication (Stone 1974, 263–64, 267).

Finally, even though, as Lefever (2012) has concluded, the interests of the consumers and the citizens could be different (77–80), their roles cannot be clearly disambiguated as ‘viewer as consumer’ and ‘viewer as citizen’. This is especially clear when the viewer is tuned in to sporting events which are both political and commercialised, and the case of Azerbaijan’s sponsoring of Spanish club Atlético de Madrid makes the disambiguation even harder (Atlético de Madrid 2014). Sport strives to maintain the status quo as well as to create and maintain a shared identity while trying to sell goods and services through the use of emotions and nationalism. Nationalistic symbols sell goods and services; in the meantime states open up or secure new mediums that corporations can then exploit. The proposed compartmentalisation of the role of the audience does not apply to the individual, especially in sports events. The interdependence of sport, the state and the market render compartmentalisation impossible, and thus speakers can hold the audience captive. Consumer relationships are not immune to politics. This was the reason why in the wake of the killing of George Floyd various sectors of the economy tried to distance themselves from messages, brands and signals that evoked slavery or colonialism. The (world) citizen and the consumer are one and the same.

To conclude, athletes, spectators and audiences before their devices are captive in the context of events, and this situation may lead one to conclude that they should not be exposed to expressions by the same stakeholders and spectators.

Such conclusion would be wrong in the sense that individuals are already exposed to various expressions in the form of nationalistic speech and commercial speech. The only difference with the two types of exposure is that in the former, sport associations do not allow unapproved expressions, while in the latter the associations approved them. Therefore, individuals do not have absolute protection from expressions that they are unwilling to hear; and accordingly, dissenting expressions should be allowed regardless of whether the audience is captive or not.

5.7 Final Remarks

In sport, various forces apply pressure to the individual. In the production and consumption processes of sport, the individual is subject to the RAE powers of sport associations. The pressure is transnational because sport associations in foreign states might have a say in the way an expression is regulated and interpreted. Sport associations' *nomoi* and *narratives*, the market, the state and society draw certain lines, restricting both the conduct of individuals and the expressions they could receive.

In the search for a tenable basis for freedom of expression in sport (which includes both expressing oneself and receiving expressions), this part first explored the possible legal and philosophical arguments for freedom of expression. Opting for the rights-based arguments as presented by David AJ Richards, this part moved the discussion to a moral plane. To fully take advantage of the moral-based defence of freedom of expression in sport, this chapter fashioned the ideal individual for the purposes of sport. As an athlete, spectator or a part of the audience, the individual has sport-specific characteristics that would defend them from the RAE powers of sport associations. With the help of their moral status, the individual has the right to freedom of expression in sport.

Nevertheless, this is only one part of the picture. A book that aims to create a tenable framework for the much-revered right to freedom of expression must also focus on the right's limits. Almost all rights are non-absolute, meaning they could be regulated and restricted by considering various parameters. The next part will embark upon this project. To fully appreciate the intricacies of freedom of expression in sport, the next part will first examine the possible general limits of freedom of expression. In the process, it will criticise the reasonings of sport associations for restricting political expression. Therefore, one should consider what has gone before and the next part as intricately linked. The criticisms against the restriction of political expression and the fashioning of the ideal individual will inform both the arguments for restriction of certain expression and the criticisms of the practices of sport associations.

Notes

- 1 This book sidesteps the question of group rights raised by Appiah (2001).
- 2 As the reader might have sensed, these paragraphs do not assert any position with respect to the problems concerning the character, predisposition, (natural) inclination

and moral motivation of agents. They are indeed problems because these subjects have set commentators to different camps in the debate between the ones that swear allegiance to virtue ethics and deontology. Assertions concerning these subjects would open another debate on the intentions of agents in expressing themselves and their interpretation at the hands of institutions with RAE powers, which would unnecessarily prolong the discussion.

- 3 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*, 642). Baker (2011) dubbed the opinion 'the poster child of autonomy theory' (270).
- 4 The possibility that the universalisability and equality-based nature of equal concern and respect lead to a utilitarian calculus yields the caveat (Griffin 1988, 167–70).
- 5 This point does not ignore that human rights can act as tailor-made tools (complete with historiographies) for colonial and post-colonial practices of powerful nations (Mutua 2002, Chap 1; Slaughter 2018).
- 6 The multiple international boxing federations along with the presence of private companies like the Amaury Sport Organisation denote the careful approach.
- 7 From a Kantian perspective, the command also curbs the athlete's quest to cultivate their physical and intellectual capabilities (Aboud 2013, 485–86).
- 8 Here, White's (1997) differentiation of 'integrity interests' and 'opportunity interests', and the illegitimacy of losing the latter due to the 'purpose-protecting' practices of associations was the inspiration. While the former relates to the physical security and moral personality, the latter concerns fair access to, among others, employment.
- 9 With the help of political psychology, Klein (2017) has summarised the two arguments, and has argued that athlete activism is not unequivocally good.
- 10 The US Supreme Court formulated this situation as 'so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it' (citation omitted). (referring to *Redrup v New York* 386 [1967] 767 and 769) (*Erznoznik v City of Jacksonville*, 212).

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Part III

Limiting Freedom of Expression



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The Limits of Freedom of Expression

6.1 Introduction

Arguments for freedom of expression are just one side of the coin; the arguments for its limits constitute the other side. This chapter will argue for the possible limits to freedom of expression in sport. This move acknowledges that absolutism is not possible either in general or in the context of sport. 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, but in any jurisdiction an absolutist approach creates more problems than it solves. First, absurdities may arise if individuals are given *carte blanche*. As Berger (1991) 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 (10). Second, an absolutist approach does not explain the interplay between expressions and laws on anti-trust, along with laws prohibiting perjury, fraud and copyright infringements (Shiffrin 2014, 1483–84).

In the case of sport, sport associations reject absolutism. Not being able to express certain viewpoints in sports venues is the norm. The preceding criticisms can be transposed to sport; there should be certain limits to freedom of expression, albeit for different reasons. There are two reservations, though. First, specificities arising from the production and consumption of sport and the regulations governing the behaviour of athletes and spectators pave the way for particularities in the limiting of expressions. Second, the chapter does not propose the types of sanctions against those who go beyond the limits. That project would concern efficiency and proportionality, which are beyond the scope of this book.

6.2 Restriction or Regulation?

Before finding tenable ways of curtailing freedom of expression, the terms ‘regulation’ and ‘restriction’ must be differentiated. 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 freedom of expression (Rawls 1999, 178; 2005, 295–96). The former is consistent with freedom of expression, and may even foster its goals. Regulating persons' having the floor, and accordingly getting their message across without fear of being interrupted are in the interest of both the speaker and the recipients. However, expression must not be restricted through overregulation or abuse (Richards 1986, 173).

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 surface area for sponsors on the shirt (UEFA Equipment Regulations, arts. 5, 27 and 28). They both give rise to disciplinary proceedings since failure to comply with either restriction or regulation of commercial speech would result in a disciplinary charge against the club. Whilst restriction renders certain expressions sanctionable *per se*; regulation allows the expression provided that certain conditions are met.

Finally, for the sake of ease, the word restriction does not have a strict temporal grounding. Restriction, depending on the context, covers the restriction of an expression through regulation *before* its conveying. It also covers restrictions by the agents such as referees and match delegates *during* the conveying. Lastly, restriction could cover the sanctioning of a stakeholder to an expression *after* the conveying of an expression.

6.3 Harms, Rights and Interests

'Interest' and 'harm' are of utmost importance in the debate on the limits of freedom of expression. The harm that an expression may have on the recipients or the targets has been at the forefront of the debates. Courts, commentators and society show the alleged 'upsetting' and 'harmful' effects of expressions as one of the prime reasons for restricting freedom of expression. The literature has been aware that the presence or potential of harm due to an expression would be reason enough for rendering the speaker liable. In general, there are two aspects to harm: physical harm and psychological harm.

Alleged harm leads to the weighing of interests between the speaker, the recipients and in certain cases that of the state. As stated in the previous parts of the book, sport associations have interests. When these interests clash with those of other persons, there should be a mechanism to decide whose interests will prevail. Thus, in sport, harm has intricate links to the weighing of interests.

6.3.1 The Harm in Expression

An expression may cause irrevocable physical harm to the bodily integrity of persons, animals or the environment, and thus they should be restricted. Killing or

maiming a person, destroying a building, burning a forest or damaging a unique item (e.g., 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. Following Kamm (2007), the trees, persons, relics and certain buildings should be treated as ends in view of their intrinsic and extrinsic properties. They have *'moral status when, in its own right and for its own sake, it can give us reason to do things such as not destroy it or help it'* (emphasis present). From another perspective, even where things (whose definition should be kept wide) do not have moral status per se, they could have intrinsic or extrinsic relations to moral agents (228–31). Consequently, in all these cases, the things that enjoy such status cannot be treated as a means to a communication even if the message is of value. Likewise, the use of bodily fluids against another person in face-to-face situations warrants restriction, because these expressions corrode the autonomy of the targets. In sport, spitting, using bengal flares, destroying equipment at sports facilities or throwing a rabbit onto the pitch and causing its death¹ should not be protected. These expressions directly cause physical harm to the means and sometimes targets of the expression.

The case of then RB Leipzig player Timo Werner's substitution in a UEFA 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 32nd minute of the match (The Guardian 2017). There were no reports of Beşiktaş being charged for the conduct of its supporters even though their expressions physically harmed a player on the field. However, 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.

Physical harm can be indirect. In these cases, the recipient moves in accordance with what the speaker has urged. The expression does not harm but leads to harm. Suppose a dissenter (or any 'other' in a given society) takes shelter in a house from a mob consisting of the members of the party in power. The mob surrounds the house and commotion starts. A person from the mob shouts 'Burn down the house!' and a torch is thrown into the house. The house starts to burn; the dissenter exits the house and gets lynched by the mob. Transpose this scenario to sport. A prominent member of a supporter group in a basketball match shouts 'Kill the referee!' after a controversial call. Someone in the stand goes on to punch the referee in the face. While implausible in certain countries and sports, the scenario is still plausible in some contexts. Accordingly, sport associations and security personnel, as in direct physical harm, must take into consideration indirect physical harm. In these cases, the framework on 'clear and present danger' and 'immediate harm' to be presented in Section 6.5. applies.

Psychological harm warrants a different approach. 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 are tethered to the viewpoint of the least tolerant or the most susceptible to critical speech (Wasserman 2005, 382). ‘Sensibility harms’, which include ‘[harms] that cannot be defined independently of the hearer’s attitude’, renders the speakers liable. This situation results in bringing the bar even lower (Anonymous 1988, 687–91). In these cases, the recipients argue that their interests and rights were affected by the expression. From a Millian viewpoint (but without missing the nuance that Mill’s arguments concern non-interference with self-regarding conduct), the outstanding problem is that the values, feelings, nature, likes and dislikes of the individual permeate and constitute the interests (Rees 1991, 182–86; Ten 1991, 214–15). The claim that an interest was violated is necessarily bound to the above-mentioned subjective phenomena. They are phenomena rather than parameters because they are elusive and cannot be anticipated. As they are intricately linked to the mind-set of the claimant(s), they must be considered in an *ad hoc* manner. The downside is that grounding restrictions on the likely psychological harm and offense to recipients also leads to a ‘heckler’s veto’ where expressions are suppressed due a perceived possibility of violent reaction (Wright 2017, 161). The culmination of these fears is that they create a murky climate where the possibility that someone somewhere might be offended would stop speakers from expressing themselves.

The importance of the brand and the brand value undergirds the approach of sport associations. Even where the allegedly harmed person is not a part of sport, that the harm occurred due to an expression of a stakeholder brings about the liability of the speaker. Since their well-being is at issue, sport associations have more expansive views of harms and victims. The sport association is the organiser or the supervisor, therefore a negative expression could contaminate the brands and brand values of other stakeholders and associations. Here, the picture is even more elusive. National, continental and international competitions include participants, spectators and audiences from around the world. These individuals are members of different cultures, and followers of different ideologies that are quite possibly at odds with each other. Accordingly, reliance on the idea of harm cannot justify wholesale restriction of political expression because the standard would then be the least tolerant person, culture or state. This way of looking at things, supported by the characteristics of the individual, should lead to being more tolerant, not less. As an activity including various viewpoints sport carries the same dangers. As seen in the case of the former Houston Rockets General Manager, the lower level of tolerance or limitative feelings in a given society has the power to shape sport (Section 3.2.3). Finally, the level of tolerance of societies is abstract and varying. There is neither a tolerance-o-meter nor a process to fully determine their level of tolerance or their feelings. The parameters of measurement are also elusive because societies are heterogeneous, and the designation of the dominant public feeling in the measurement would result in the contraventions to the arguments presented in previous chapters. More importantly, since the bodies enjoying the RAE powers have the power to interpret expressions, the determinant could be the body itself. Without reference to a specific conception of terms such as

harm, sensibility, offense and provocation, the bodies, by themselves, can and do restrict expression. The focus on dissent and possible or alleged harm coincides with the bleak picture presented concerning the recent expansion of freedom of political expression at the Olympic Games (Section 3.2.2).

On the national sport associations' front, concerning the feelings of a certain part of the public, 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 Kaepernick's taking a knee during the singing of the national anthem. The adjectives 'inappropriate' and 'unpatriotic' were also mobilised by the supporters of the status quo against the athlete who performed a silent form of dissent which did not disrupt the game, the national anthem or the ceremony (Zick 2018, 1450–51). Interestingly, the military personnel who were said to be disrespected by Kaepernick made it clear that they fought for the right to protest even if they did not agree with what is conveyed (Trimbur 2019, 255–56). The cynical use of disrespect and harm is not surprising, since one of the justifications for suppressing anti-slavery speech in the Antebellum US was the protection of the feelings of the slaveholders (Curtis 2000, 384). In this case, the limits of criticism—if indeed it is empirically distinguishable—are brought so low that individuals are silenced or sanctioned. Even if they express themselves on an issue they find worthy, the possible 'disrespect' and 'harm' to faceless individuals or groups of persons could result in the athletes or the clubs/teams being sanctioned by the sport association.

Then, why should we protect expressions that might upset individuals? The answer is that autonomy, equal concern and respect necessitate the protection of expressions that are uncontroversially false and anathema for the majority. Toleration and freedom of expression should be wide enough to cover not just persons with a certain type of belief or viewpoint, but every person even if their views are intolerant to the point where there is a danger of imminent action (Richards 1986, 96–97). If we value the individual as a moral agent, disrespect or offense cannot become the grounds for restricting expressions. As Schauer has emphasised, 'we want to protect speech not because it causes no harm, but *despite* the harm it may cause' (emphasis present) (citation omitted) (Schauer 1983, 1295). Expressions that do not challenge the customs, traditions, dogmas and the public feeling are easy to defend because the stakes are not high. Freedom of expression gains more importance when possible or alleged belief-, desire-, dislike- or feeling-based harms are at issue. From another perspective, the restricted or sanctioned expression might itself be 'right' for other individuals, groups, communities and so on. In the utilitarian calculation which will be criticised in the next section, these individuals, groups, communities, as well as non-utilitarian individuals are not taken into account (Ten 1991, 225–26).

6.3.2 *Balancing*

This sub-section will not make any suggestions about the foundations of rights, that is, whether the interest-based or the choice-based theory of rights, or human

rights, is applicable. In addition to this, it will not explore the consequences of the possibility that interests and rights are separate and have different levels of protection; thus the clash thereof might result in various scenarios with different consequences. Rather, this sub-section will assume that rights and interests are linked (but it will not claim that they are interdependent, which would require further analysis) and that rights protect valuable non-desire-based interests.

When athletes and spectators express themselves in a restricted manner or if the content of the expression is deemed as an infringement, there would be a clash of interests. The heart of the matter is that the possible harm to the interests of sport associations may act as the overriding reason for restricting expressions. Even if there is no physical or psychological harm to the stakeholders, and even when they are not immediate, the harm to the interests of the association could lead to the use of disciplinary powers. When there is a clash of interests and rights between those of the individuals or the public, their balancing with the help of weights becomes the decider. Generally, the adjudicatory body assigns weights to the interests and rights and compares the results.

The short description of the situation seems highly abstract. The picture becomes even blurrier when the interests of the parties and the costs and benefits of the expression are taken into account (Rubinfeld 2001). In order to concretise these points Lindholm's argument would be useful. Lindholm (2017) has argued 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' (2). Providing support for this point, a CAS panel indicated that, in the process of determining a sanction a single yardstick would not work, and therefore a weighing of interests protected by the rights of stakeholders and the freedom of association comes into the picture (CAS 2008/A/1583 & CAS 2008/A/1584, para 42). As argued later in this chapter, the context and content of the expression, in certain cases, should lead to restrictions. Nonetheless, the weighing part is untenable, because perceived, probable or actual harm dealt by an expression would always result in the sport associations' interests outweighing that of the stakeholders, spectators and audiences—in their positions as both speakers and listeners. This position needs to be contextualised and exemplified.

The focus on the interests of sport associations shows that the RAE powers of sport associations bear in mind what is good for sport associations. Different branches of utilitarianism defend their search for an increase in utility, all things considered, through the maximisation of the aggregate or average happiness or desires of all involved. Again, depending on the branch, the interests, desires, beliefs or ideals can be considered in reaching the desired states of affairs. As it is a consequentialist argument, utilitarianism aims to reach the best possible consequences among various alternatives. The best possible consequences for the largest possible number of people would be a legitimate target, especially within communities that are clearly delineable from others. Simply put, good consequences have primacy (Scarre 1996, 10–11, 156–57).

As indicated in Section 4.4, in the analysis of the arguments from autonomy and self-fulfilment, the agency doing the weighing is crucial, because there has to be an institution designating the interests and their weights. In sport, the fact that with the help of their RAE powers mostly the associations themselves adjudicate on the expressions of stakeholders and spectators within their jurisdictions skews the process to the associations' advantage. That is, the agency or the institution that enjoys power through delegation (the CAS, the Commissioner etc.) whose interests are at stake does the weighing. The underlying reason for this aversion—which is informed by the suspicion of governance—is that the brand of the association or the competition tends to be designated as a vital interest of utmost value by the deciding agency. Sport associations, as associations and businesses, strive to have the best possible position in the market, and thus the weighing and valuing would naturally be realised according to their economic and political interests. The narrow manner in which the adjudicatory bodies realise the process stops them from taking a better view at the interests of individuals. They override the autonomy of individuals even in view of miniscule harms to the interests of sport associations.

To remind, an 'undesirable' expression might harm the interests of the sport association. The harm might accrue due to the likes, dislikes, feelings and beliefs of individuals that might guide the individuals or groups to not consume a sporting event. In this regard, even if adjudicatory bodies find a solution to the questions of the quantification of rights and interests along with the commensurability thereof (Tsakyrakis 2009, 472), and even if sport would produce the adjudicatory system where the weighing is made by impartial and neutral bodies the problem would not be solved. Because sport associations make up the main components of the production of sport competitions due to their bringing together of teams, any damage to the brand or brand value of the competition or those of the association would have a detrimental effect on all those who compete in and invest in the competition. The economic and political interests, and generally the brand value of the association and its competitions have the potential to become the overriding factor in weighing. As they are thought to represent the interests of the stakeholders, the sport associations' interests would always outweigh those of the individual or the few. Simply, the latter's interests cannot survive the interests of the many (Berger 1991, 68; Tsakyrakis 2009, 471). The rights of the individual—as an athlete, as a spectator or as part of the audience—would be neutralised by the overwhelming interests of the association.

Recall, the 'best interests' of the leagues is the prominent aspect of the power of commissioners. Similarly, 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 emphasised the interplay between freedom of association and interests:

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 (citation omitted).

(CAS 2012/A/2913, para 114)

Fortifying the interests of sport associations, when the regulations of the association are worded so, broadly drawn-up regulations which aim to protect their interests would be able to protect even remote ones (CAS 2016/A/4558, para 62). 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' (CAS 2014/A/3759, paras 443 and 450). Unless a procedural error takes place or the decision is deemed to be unfair, decisions of the competent bodies are immune from state authority. From the CAS's perspective, only 'evidently and grossly disproportionate' decisions of the associations would be unlawful (CAS 2012/A/2913, para 113).

The defender of utilitarianism and weighing might argue that the foregoing misconstrues utilitarianism and its reflection in the decision-making processes in sport, in that the utilitarian's universalistic, individualistic and welfare-based approach is ignored. Indeed, utilitarians aim for both the largest amount of benefit *and* its widest distribution. The calculation takes all individuals, universally, as the measure of goodness of an action (Scarre 1996, 23–25; Woodard 2019, 25–26). The good of all stakeholders could depend on the sanction of an individual that might damage the prospects of others. So, the utilitarian calculus is truly universalistic and distributive. In the process of balancing, the individual interests are given equal weight. The interests are monolithic, meaning the possible differences are eradicated. Everyone counts as one and only one.

Despite the egalitarian picture, the individual's position before the sport associations and society is of concern. At first sight, the process is impartial to all, and yet 'Utilitarianism violates the integrity of the individual as a being with his own distinctive capacities and preferences, and so with a distinctive utility, not interchangeable with the utilities of others, that he seeks to maximize' (Gauthier 1987, 245). As summed up by Rawls (1999), the process 'does not take seriously the distinction between persons' (24). The lumping together of interests and weighing entails an overbearing situation. With a view to satisfying the interests of others, certain stakeholders' interests could be totally disregarded.

To concretise these fears, it was the specificity and associative nature of sport that moved the German Federal Supreme Court's decision in the *Pechstein* saga. In its interpretation of the right to fair trial in sport, the court deferred to the *narratives* and the importance of the cumulative well-being of sport. This time the foundation of specialness was the alleged expertise of the arbitrators within the list of CAS arbitrators. Worse, the court did not even perceive the International Skating Union and the athlete challenging the decision of the former within

separate camps. Due to the shared objective of keeping doping out of sport, the interests of the athlete were subsumed by the sport association (Bundesgerichtshof [BGH], Az. KZR 6/15, paras 32 and 59). The athlete stopped being an autonomous individual due to their associative activities. The individual had to bow down to the interests of the association that represented the interests of many. Since the International Skating Union is a global institution, the calculation was indeed universalist; however, from a rights-based perspective the individual lost to an institution, losing also their moral status as an equal in the process. Sporting activities render the athlete dependent. Everyone's interests might be given equal weight, but since, from an associational perspective, the interests of the sport association include thousands of individuals and legal persons such as clubs, the dissenting individual is on the losing side.

In addition to the precarity, the positions of the spectators and audiences seem to make little contribution to the crudely utilitarian calculation. After all, the calculation has to designate a group of persons and then lump them together. Arguably, the states' and international institutions' utilitarian calculations are easier to conduct because depending on the case they would aggregate the happiness of all inhabitants or citizens of a state, the region, the continent or the whole world. Concerning the spectators and audiences we might not be able to know if their interests are represented in the calculation. For the former can constitute both speakers and recipients and the latter is solely recipients; sport associations have to clarify their interests in receiving expressions. On the contrary, the weighing of interests is again made in a singular manner even if there are a multitude of individuals. That is, as teams and member associations are liable for the spectators' conduct, it is again a single person's interests (this time, a legal person) that are positioned against the interests of the sport association whose normative order is in question.

Recall, Chapter 2 argued that the sport associations' RAE powers, especially disciplinary powers, maintain the well-being of their normative orders consisting of direct and indirect members. The terms well-being and welfare partake the modern conceptions of utilitarianism, hence the weighing of interests and utilitarian calculations are the foundations of the way expressions are interpreted at the hands of the relevant adjudicatory body. Before expanding upon the analysis of the utilitarian processes, it is necessary to determine the differentiation between the terms 'the good *in* sport' and 'the good *for* sport'. Such differentiation undergirds the scepticism as to the use of the *nomoi* and *narratives* in the restriction of undesirable expressions in sport. The terms are based on Hurka's (1996) point that perfectionism should disregard what is good *for* a person, because that would link the good to benefits, harms and ultimately to furthering one's interests (17–18). Concordantly, the good *in* sport deals with the designated values and virtues from a perfectionist perspective; whereas the good *for* sport deals with the interests of the relevant sport associations as well as the protection thereof.

On the good *in* sport side of things, sport has a tendency for perfectionism. Again, following Hurka's (1996) conception of 'narrow perfectionism', on the one

hand athletes pursue excellence in their fields or pursue valuable goals through sport. Both moral and natural self-development can be realised through these activities (Breivik 2010). The sport associations' objectives, designated as per their freedom of association, guide these aspirations. On the other hand, it is the sport associations that designate what is good *in* sport. Their perception of the good has immense influence on the moral conceptions prevalent in sport. Sport associations not only designate the good *in* sport, but also *in* athletes and other persons. The moral development of individuals is a crucial element in the use of RAE powers where the disciplining of athletes, clubs and teams as well as the emphasis on the moral conceptions of fair play, equality, level playing field and integrity reinforce the good *in* sport. Reasoned decisions lecture stakeholders on the moral aspects of sport and guide them to desired conduct. They 'give a message' to the public, making a morals-laden proclamation that certain conduct is unacceptable in a given sport.

A picture which depicts sport associations as bearers of certain values could become inimical for everyone involved. The concern here is that sometimes what is good *in* sport turns out to be what is good *for* the sport associations. Simply, the perfectionist ideal could collapse into utilitarian calculations that maximise the benefits and/or reduce the harms; and this is where the interplay between the good *in* sport and the good *for* sport makes itself felt. As sport is shaped by 'outside' forces, its values that represent the interests of those forces could be to the detriment of the individual along with their status as moral agent. Chapter 3 argued that the sport associations' unequal treatment of political expression compromise sport's *narratives*. The *narratives* of politics-free sport and political neutrality pertaining to the good *in* sport are mobilised to silence individuals that present a threat to the sport associations, the good *for* sport. A lack of articulate consistency in imposing the good *in* sport leads to suspicion. While not discounting the possibility that the utilitarian calculus may consist of a pluralistic notion of morality complete with primary and secondary principles that point to a hierarchy in values, when the good *in* is dictated by the good *for*, the pursuit of utility maximisation is obscured behind a veil of perfectionism that is decorated by moral virtues. The veil obscures efficiency, which is the true economic and political goal. In other words, the good *for* sport associations is pursued under the guise of the good *in* sport. In those instances, the fine line between what is right and what is wrong, what is to be condoned and what it is to be sanctioned become blurred. More significant, whilst the rules and their interpretations are utilitarian, the same institutions command the individuals to abide by perfectionist values. Athletes and other persons are expected to be virtuous individuals who should bear in mind the image of the game. What is thought to be good *in* sport guides the conduct of individuals. The values which may otherwise be morally defensible become tools for disciplining the individual.

Would the individuals bound by the moral/immoral and legal/illegal binaries in sport and the ones who follow sport be content to follow and support these binaries if they knew that they were introduced for the sake of efficiency rather

than official moral aspirations, and equality? Would they deem it justifiable to see individuals being blamed (sanctioned) for their political expression not due to a justified conception of sport but due to the ultimate goal of efficiency in the production of sport? The two questions sum up the practices of sport associations. The public, the state and the market are happy to view sport as an inherently positive force in a globalised society that is supported by the virtues of political neutrality and politics-free sport; however, it is the sport associations' interests that truly guide sport. Due to false *narratives* and a lack of articulate consistency, disregard of equal concern and respect for individuals are rendered acceptable. Likewise, a lack of openness as to the processes connected to the RAE powers and the sport associations' ultimate goals depreciate both the *nomoi* and the *narratives*. Ultimately, the sanctions against political expression are based on a false premise.

Society has been mostly unaware of the process (or indifferent to it), but drastic changes in public feeling may occur. The state, the market and the public's stances are not fixed in the sense that an 'undesirable' expression could turn out to be one that is embraced in every leg. The public feeling concerning the Black Lives Matter movement presents a picture where an undesirable expression could become desirable. For instance, the changing public feeling, and thus the changing nature of the good *for* sport associations, could move sport associations to make U-turns. The case of the US Soccer Federation's allowing of national anthem protests pinpoints the dominant public feeling's power where the federation reinterpreted the good *in* football denoted by politics-free sport. In the same lines, UEFA was of the opinion that constitutional rights laid down in the Swiss Federal Constitution such as freedom of expression do not apply in private relationships (Section 2.6). Yet UEFA, following the publicising of the blatant human rights abuses in host countries as well as the flaws of the legitimisation practices and the structures of international sport associations resulted in a change of policy (Næss 2019, 131). In the bidding processes for the UEFA European Football Championship, UEFA underlined the importance of human rights, which are more universalistic than constitutional rights. In an unpredictable manner, UEFA revised what is good *in* football according to the changing nature of the public feeling, its economic consequences along with the political landscape. UEFA protected the good *for* the association at the expense of credibility.

So, the sport associations' interests tend to be temporally fluid. The process is crudely utilitarian, which might be scorned upon even by certain strands of utilitarianism. For instance, Harsanyi's (1980) economics-informed rule utilitarianism accepts that rights and obligations allow the individual to create reasonable expectations with regard to social activities and other individuals' future behaviour (127–28). If the athletes and spectators cannot reasonably foresee what factors (interests, rights and their respective weights) would constitute the utilitarian calculation, then no expectations could be created. Similarly, Brandt's (1992) rule utilitarianism posits that rights are overridable only due to extreme welfare demands. The utilitarian calculus cannot override a person's rights because of marginal or substantial demands of welfare (197–200). Sport associations leave

individuals in the dark. Did the interests of the individual lose out to those of the sport associations closely (marginal demand), convincingly (substantial demand) or decisively (extreme demand)? Would a marginal demand be always acceptable to the sport association? For instance, if the individual's interest has 100 units, would the 101 units of interest of the sport association be reason enough to restrict certain political expression? These uncertainties have not only an ethical aspect but also a legal one. One of the functions of law is the settling of a question beforehand, providing certainty for persons, legal and natural. In this case, if the legal/illegal binary fails to be predictable to a certain degree, then the juridification of sport as well as the RAE powers will be unpredictable at the hands of capricious sport associations.

In view of the foregoing arguments, the nature of sport associations, the RAE powers they enjoy and the crude utilitarianism that guides the practices pave the way for the rejection of the weighing of interests. The weighing of interests results in the dissenters being on the losing side and the status quo on the winning side (Baker 1989, 130–31). The weighing is self-interested, bordering on hedonistic because political and economic logic are too tempting. Positive outcomes maximise the (perceived) benefits of the sport association (the well-being of the normative order and the ability secure its objectives) to the detriment of others' interests.

Despite all this, some kind of balancing, which may include trade-offs is necessary if the rights' place in human liberty and deontic restrictions is taken into account, if it is not made in a crudely hedonistic utilitarian manner, if it is not realised on obscured grounds and justification and if it is made between the individuals' rights (Dworkin [1977]2005, 199–200; Heyman 1998, 1353; Kumm and Walen 2014). In the last instance, a rights-sensitive approach cannot escape the fact that rights come into conflict. The duty of the commentator is to accept the conundrum and find a way out of it. Ignoring the problem defers the solution because, as in the case of 'hate speech' the right to freedom of expression clashes with the right to be treated as an equal. Likewise, Section 6.5 will argue that under certain circumstances the greater good of the persons in the immediate vicinity could outweigh the rights of speakers. This is not moral duplicity for one cannot but agree with Larmore (1987) who has suggested that when the source of morality is detached from theological foundations, the primary consequence of the loss (or emancipation) is that one has to accept that morality is heterogeneous. That is, even though deontological considerations might have primacy, they do not eliminate independent non-deontological ones as reason-giving forces (137–38). The complex, global, associational production and consumption processes in sport both necessitate and foster heterogeneity.

6.4 Valuation and Categorisation of Expressions

6.4.1 The Foundations and Their Critique

Valuation and categorisation of expressions are important because they may act as shortcuts to restriction. The challenges presented by the First Amendment have

moved some commentators to contend that certain 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 expression and expressions that are concerned with the behaviour of public officials, they have higher value than other types of expressions (Sunstein 1992, 301, 308, 1995, Chap 5). This results in some expressions having 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, whereas obscenity, profanity and commercial speech are types of expressions that are not considered to be in this category. 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. In essence, expressions of lower value are protected less because they fail to justify the protection provided by freedom of expression.

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 and categorising expressions (Chevigny 1988, 108; Redish 1984, 69). 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*'s uncut version titled *The Revolution Is My Boyfriend*, even the political and the pornographic may be combined (LaBruce 2004). That version of the movie can be seen as shuttling between gay pornography, a political statement and a feminist manifesto. 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.

In certain cases, the category of expression may be easier to distinguish. For example, the deciding institution has an easier job in distinguishing commercial speech from political expression; however, the caveat 'in certain cases' stands. The source of the reservation is due to the case of Azerbaijan's sponsorship of Atlético de Madrid where the state became the main shirt sponsor of the club along with other spaces where the advertisements would be visible. 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.

From another point of view, terms (or jargon) used in judgements regarding categorisation are not unambiguous enough to become standards. Even if the terms were clear enough, the changing standards would render them useless (Shiffrin [1993]2014, 30). 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 weighing, but stated that the judiciary had no power to add new categories to unprotected expressions that are historically and traditionally unprotected (470–72). Then, depending on the

decision maker,² 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 aspect of categorising. When the full protection is limited to a certain category, the institution deciding on categorisation and valuation in borderline cases becomes too important. The valuation and categorisation of expressions cannot be entrusted upon one institution, because it may tend to categorise expressions to the detriment of freedom of expression (Schauer 1982, 144; Strauss 1991, 342). Arguably the most important criticism to valuation comes from Lakier (2015) who has pointed out:

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 (footnote omitted).

(2172)

Governments' intervention to the discourse within society because it deems some of its constituents of lesser value goes against autonomy of the speakers and recipients as well as the idea of equal concern and respect. 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. One can notice that *The Revolution Is My Boyfriend's* reading was but one possible way to interpret the movie. Another person may regard the movie differently, leading to alternative interpretations and conclusions. The state's lack of power to value an expression spills over to the ratification of the judgements 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. The damage is collateral in view of the moral powers exercised (Richards 1986, 167–72).

6.4.2 The Situation in Sport

In sport, the difficulties in distinguishing political and non-political expression and the problems of defining persist, 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. Yet exactly what is political is not clear.

One example that would shed light into the problematic nature of categorisation is the prohibition of messages underneath football shirts, exactly what is political, personal or discriminatory cannot be analysed in a clear-cut manner,

even though IFAB has tried to introduce interpretations as to what political means (Laws of the Game 2021/22, 56–57). Contrary to what IFAB argues, the ‘personal’ cannot be clearly defined, neither can the ‘political’, therefore a list of what is political is self-defeating. A personal statement might be politically charged, and a political expression is a personal statement because ‘the personal is political’. Hanisch (2006) (who wrote the paper that popularised the phrase but actually did not coin the phrase), has asserted that the term political covers not only electoral politics but also power relationships (1). In the same lines, Susan Moller Okin (1998) convincingly argued that the public/domestic dichotomy prevalent in liberal thinking leads to the calcification of domestic power dynamics, which are mostly shaped towards the creation and maintenance of male domination. The division of labour between the male and the female helps to keep the latter out of the public. It strengthens the position of the former as the breadwinner, rendering *him* indispensable and inescapable. The same goes for the discourse on the LGBT+ community. Being stuck in the domestic sphere and having to embrace their gender identity, love and sex only within a spatially designated place—the home or discrete public spaces like bars—is a political issue.

Not being able to appear in the public sphere as a moral agent with a distinct set of preferences or (inherent) characteristics is political. The Russian Federation’s anti-LGBT+ legislation and its strict enforcement, and the IOC’s silence on the issue support these points. In these circumstances, the power relationships that stop the individual from expressing themselves also render non-appearance political. When the personal expression in a competition concerns domestic violence, the position of women in domestic life, gender, marital status, sex, appearance, abortion and so on, the expression is political. It aims to challenge the dominant power relationships, and if there have been advances in the past, it aims to defend them. Thus, US Olympic fencers’ protest by wearing pink face masks against the inclusion in the Olympic team of a fencer who was accused of sexual assault was indeed political (Scully 2021).

This manner of putting things expands the scope of protection for freedom of expression, which was the previous chapter’s primary concern. To put it another way, when political expression concerns individuals who are stuck in power relationships in various spheres, their expression should be protected. Through a new understanding of the relationship between the personal and the political, freedom of expression expands to cover ‘personal’ expressions against the status quo and reactionaries. The expansion of the political does not mean that the human aspect of power relationships and the personal are squashed in a very tight spot. On the contrary, since the individual is the main focus of the human right to freedom of expression, the move renders the political liberating.

One issue to address is that the remoulding and expansion of the ‘political’ goes counter to the views of certain spectators and stakeholders—some parts of society and sport view politics and the political negatively. Having been equated with pragmatism and unethical conduct, the political is evaded, sometimes at the cost of integrity. Likewise, the power relationships and moralism that come with

politics may cause the public to distance itself from politics. The aversion to the political puts stakeholders and spectators on the defensive and leads to the arbitrary categorisation of expressions. To justify their stance or remain neutral, they repackage political expression as ‘non-political’ and ‘personal’ or rebrand them as ‘human rights’ issues. Spectators can cloud anti-discriminatory, anti-fascist and pro-immigration expressions with alleged neutrality. To escape the charge of being political or defuse tensions, they may assert that the expressions or the individuals themselves are not political (Gerke 2021, 187–89).

In like sense, in the wake of the restriction of ‘Where is Peng Shuai?’ shirts, former tennis player Martina Navrátilová stated that ‘This is not a political statement, this is a human rights statement’ (Kemp 2022). Notwithstanding the debate over the possible political foundations and justifications of human rights, Navrátilová ignored that sexual assault is political because it reflects the power relationships in the ‘domestic sphere’. The use of force by a male against a woman inevitably concerns politics. Furthermore, the fact that the alleged perpetrator is Zhang Gaoli, the former senior Vice Premier of the State Council of People’s Republic of China situates the case firmly within the realm of politics. In essence, putting human rights beyond the pale of the political is rife with contradictions because, as Wendy Brown (2011) has argued:

Human rights activism is a moral-political project and if it displaces, competes with, refuses, or rejects other political projects, including those also aimed at producing justice, then it is not merely a tactic but a particular form of political power carrying a particular image of justice, and it will behoove us to inspect, evaluate, and judge it as such.

(134)

The downside of categorisation and the aversion to the political were also evident in UEFA’s refusal of the Munich councillors’ call to light the Allianz Arena in rainbow colours during the 2020 European Football Championship match between Germany and Hungary. The move came in the midst of the Hungarian State’s and Hungarian supporters’ negative views and expressions of the LGBT+ community. In rejecting the call, UEFA stated that the request was political but the rainbow flag is not (UEFA 2021). The reasoning suggests both verbal juggling and misconstruction. That is, by rendering apolitical a powerful political symbol (which the creator of the rainbow flag, Gilbert Baker, has concurred) (Reininga 2015), UEFA gave the impression that it supports anti-discrimination and fundamental rights. UEFA also gave the impression that it is consistent in its treatment of the rainbow flag. Manuel Neuer, goalkeeper of the German Men’s National Football Team wore a rainbow armband in the team’s matches against France and Portugal at the same championship. Two days before the statement concerning the rejection of the call, it was reported that UEFA halted its disciplinary proceeding against the symbol (Hamilton 2021). UEFA cast and recast what is political, it disregarded articulate consistency and took the most convenient course of action in each case.

Concordantly, the categorisation and valuing of expressions are to the detriment of dissenters, which is consistent with claims that sport is political, and that it conducts its business in line with domestic policies, the power struggles within the international stage and the public feeling. The suspicion of governance stemming from the distrust of the self-interested nature of institutions having RAE powers guides an inherent distrust of categorisation. The regulators, adjudicators and enforcers can create and manipulate categories of expressions, value them and accordingly create stronger shields, maintaining the well-being of their respective normative orders. The way out, as argued previously, would be to allow all expressions except hate speech without categorising them; however, limits should be set regarding certain expressions.

6.5 Arguments for Restriction

The arguments in the previous chapter and this chapter do not result in the conclusion that all expressions should be allowed. In addition to the arguments presented earlier 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 (Heyman 1998, 1340, 2002, 709). This 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. Further, certain contexts should pave the way for repercussions where restrictions on expressions infringing upon the autonomies of recipients and their deliberative processes, such as fraud, intimidation as well as physical and mental coercion are justified.

In addition to the general limits just presented, the adaptation of Richards’ contentions to sport would be helpful. In that regard the ‘clear and present danger test’³ would take into account the context of the expression, the imminence of harm and the possibility of a rebuttal of the expression (Richards 1986, 96–97, 181–85). Starting from the point where this book diverges from Richards’ account, 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’ autonomies. The perpetrator might not be identifiable by the athlete due to the size of the sports venue, or the expression might already have put negative conduct in motion. The sport associations, their agents and their stakeholders might not be in a position to rebut an expression. Reaction to expression in the form of a rebuttal by an athlete is in most cases sanctionable. The exact opposite is also 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.

Second, the context of the expression and the imminence of violent actions, either due to the persuasiveness of the expression or the expression being positioned

against the speaker, are important. Immediate and direct threats to the security of the state, and persons living, residing or visiting it warrant restriction. 'The imminence of harm' points out that the harm (or unlawful harm) should be taken cumulatively with its imminence. The requirements of harm and imminence cannot be applied independently of each other. An application to the contrary would result in remote harms and immediate non-harmful content being restricted. The logic behind this is that in order to be restricted the expression should immediately and directly cause unlawful, violent actions. 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 (Zamir and Medina 2010, 196–99). Correspondingly, the context of speech is crucial. Violent reaction appears against certain backdrops. These contexts are the cumulative reflection of social, historical, sociological and sporting determinants. Different contexts generate different consequences both individually, and—if the recipients are numerous—collectively.

The reflection of these points is that, for example, a friendly curling match between Canada and Chile is different from a FIFA World Cup Finals match between Germany and England. On the one hand, the former's context lacks both historical context 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 role of sport in creating narratives for the nation was touched upon. Accordingly, a match between Germany and England is likely to be fuelled by narratives about past confrontations both on and off the field. It has the potential to become an instrument to remember and to forget (Young 2007). As Pérez Triviño (2017) has pointed out, the troubles both on and off the pitch in the 2016 UEFA European Football Championship Qualifiers match between Serbia and Albania that was played in the backdrop of the Kosovo conflict warrant a subtler exploration of the subject at hand. International and regional tensions between states and peoples could result in political expression having a fulminatory effect (40–41). Hence, the complex relationship between the past and the present requires strict scrutiny. Each case should be strictly evaluated, and the scope of protection should be wide enough to ensure the upholding of the autonomies 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' the expression should not become the grounds of sanctions (citation omitted) (Zamir and Medina 2010, 223).

Another 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 higher-tier or continent-wide competitions may have sufficient security and safety, the same cannot be said of lower-tier competitions and competitions of disciplines which do not receive adequate funding. In these cases, Schauer's (2017) concern regarding speaker security may be justified as 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 (if any) enough time to intervene. Moreover, the physical features of sports venues should warrant an exception for the protection of expressions. The barriers separating the pitch/field/tatami and so on and the stands (again, if any) might not be enough to deter a determined individual. Spectators could stand too close to the place where the sporting contest takes place. Consequently, the characteristics of the competition and the sports venues have to be considered in deciding whether an expression is restricted or not. This does not stand awkwardly in the face of the points made in this book. The reasons are that, (a) the right to freedom of expression is not absolute; and, (b) situations where the bodily integrity of individuals is at stake should result in a non-utilitarian and individual-to-individual balancing of rights and interests. The bodily integrity of an individual outweighs the non-absolute right of freedom of expression of the speaker and potential receivers. Put differently, the immediate interests of persons as well as their rights could outweigh the rights of speakers and recipients (Schauer 1993, 417, 422–24).

6.6 The Impact on Play

This chapter has so far argued that, except for certain situations, political expression of stakeholders and spectators has to be protected but the one element that has not been discussed is the impact on play.

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 and the cameras of the broadcasters or sport associations should be sanctioned. Here, the word 'play' warrants emphasis since it leaves out pre-match activities, breaks and post-match activities. Additionally, late start or re-start of play are not reason enough to restrict expressions. In these cases, the concern for the flow of play does not arise from a commercial agenda pertaining to economic logic; rather it is closely linked to the autonomy of athletes. Their position as the most important actors in the production of sports gives them protection from other elements such as spectators and audiences. The protection includes the individuals' positioning against the interests of the many. The arguments made earlier as to the weighing of the sport associations' interests and those of the athlete apply here. The athlete's interests must not be weighed against the spectators' or the audience's interests. Otherwise, through a crudely utilitarian calculation, the athlete would always be left to the mercy of many. The desires and wants of the many would guide the conduct of the individual, overriding their autonomy and moral powers.

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. Pussy Riot's (a punk rock band and a performance art group) pitch invasion in the FIFA 2018 World Cup Final in Russia is important in depicting both the problem

at hand and the argument that conduct can count as expression (Walker 2018). 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.

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. Nonetheless, this argument would beg the questions of which regimes are clean enough so that prohibiting such an act would be in line with what has been argued throughout this work, and which natural or legal person decides on the cleanliness of a regime. Both questions point 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.

A possible counterargument to this line of thought would point out that a political expression is more important than the audience's entertainment. While a thought-provoking assertion in its own right, this would lead to a valuation of different ways of life. This book's understanding of autonomy rejects the idea that one's choice of values and lifestyle could be given priority. 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 months of hell'.⁴ Athletes perform activities that encompass an important part of their lives. In the case of professional and semi-professional sports, it is their livelihood and years of hard labour. An important competition becomes the apex of an athlete's career and a showcase for their talent. Allowing, disrupting political expression would amount to perceiving the ways of life of individuals who are more interested in politics as more important than the ones who would rather not see their favourite pastime disrupted. 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.

Although one has to bear in mind the downsides of a strict understanding of the term for the purposes of the philosophy of sport, the ethos of spectatorship is different for every competition or sport.⁵ Whereas the shouts and chants of thousands of spectators and their choreographed shows are the part and parcel of sports such as football, basketball or American football, the same cannot be said for all sports. Golf, tennis, 100m sprint and weightlifting all require silence at certain moments. Even though they signal important points in the game, a birdie is not the same as a free throw or a penalty kick. Furthermore, during mega-events the host nation could utilise its home advantage in contravention to the ethos of a sport. Dixon relates that at the 1996 Atlanta Olympic Games, the home crowd chanted their support for Team USA during its opponents' routines (Dixon 2000, 75). Whereas this can be acceptable in some sports, the concentration required for

the execution of a routine overrides the expressions of the spectators. Concordantly, utterances that might distract athletes on the field of sport such as golf and tennis would be left out of the scope of protection (Wasserman 2006, 534). The nerve of the matter is that the possible psychological harm, the expressions might produce on the athletes is of no consequence. Rather the athletes' autonomy and ability to perform in the ideal conditions of a given sport is of the essence. Nevertheless, even in golf and tennis, annoying or offending the spectators should not be a basis for sanctions.⁶

Political expression by athletes should be protected even if they interrupt or diverge from the normal flow of play. After all, as the most important stakeholders in sport, athletes should have the ultimate say in the flow of play. They are the ones that invest 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. Their view on a certain subject that is conveyed through the use of sport deserves protection. Under this view, for example, footballers' protests of one minute's inaction after the kick-off against unpaid wages 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' are justified (The Guardian Website 2016; Milliyet Website 2018). 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. Los Angeles Clippers players' pre-match protest against racist remarks of the team owner and Naomi Osaka's wearing of face masks emblazoned with the names of 'Black people who died either at the hands of the police or in violent struggles with whites believed to be motivated by racism' are worth mentioning (Markazi 2014; Porterfield 2020). These expressions have to be viewed as instances of the use of the perfect platform for getting the message across. Last, but not least, an 8-minute 46-second silence and protest before an MLS match after the killing of George Floyd shows that the moral powers of athletes come before the market and the state (Sigal 2020).

Notes

- 1 Supporters of Akhisar Belediyespor threw a rabbit onto the pitch during the match against Tavşanlı Belediyespor, causing its death. '*Tavşanlı*' means 'the place with rabbits' in Turkish (Hürriyet Spor 2017).
- 2 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 (Dzehtsiarou 2011).
- 3 Introduced in *Schenck v United States*, it requires that the harm due to an expression is highly probable and imminent. The danger of harm must be great (Posner 2002, 122–23).
- 4 This was a response from rowers who took part in the cancelled annual boat race between the University of Cambridge and the University of Oxford due to protest (Dart 2016, 296–97).
- 5 For the presentation of the ethos of sport view and its criticism see (Borge 2019, 144–57).
- 6 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 perceived sympathetically. In view of the contentions within this work, they are not supportable grounds for the charging or sanctioning of a person (*Brutus v Cozens*).

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Hate Speech

7.1 Introduction

Although the previous chapter criticised the categorisation of expressions, a separate analysis of so-called ‘hate speech’ is imperative. The reason is twofold. First, international and national sport associations have distinct provisions with heavy sanctions against discriminatory expressions. Second, the increasing hostility (both in sport and in other social spheres) towards individuals and groups who are deemed as the ‘other’ in any way undergird the necessity. This crucial instance of political expression calls for an approach that takes into account the literature on hate speech in general. Scope-wise, the chapter does not deal with whether hate speech should result in enhanced sanctions. Also, the focus is on the restriction of hate speech in sport, with an emphasis on football. Despite the ‘increasingly fluid social structures’ paving the way for a more inclusive approach to football, football has been the primary stage (but not the only, as witnessed in the targeting of Gareth Thomas by Castleford fans in the Rugby Football League) player in conveying discriminatory expressions (Cashmore and Cleland 2012, 372–75).¹

7.2 What Is Hate Speech?

First, the decision to have a separate analysis of hate speech, and even the use of the term, must be justified so that there is no logical inconsistency between chapters. The analyses and arguments hereof does not alter the claim that certain expressions are inseparable either from the context in which they are made, 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 expression. An insult that juxtaposes denigrating and explicit words presents an insurmountable challenge for the analysers who wish to divide and rule as the sentence could include sexism, racism, profanity, ageism and religious discrimination.

Arguments for categorisation, in this case, claim that a strong dislike for a particular idea, term, action, behaviour and so on or disagreement with them could be separated from hate. Likewise, arguments for hate speech restrictions assert

that the dislike and the disagreement could be separated from the dislike of and disagreement with persons and regimes that follow them. The previous chapter's argument can still be defended, in that Post's (2009) questions 'Is speech attacking Islamic fundamentalism for its homophobia and suppression of women hate speech or critique? Is it hate speech or critique to attack the Catholic Church for its pedophilic priests or for its position on abortion?' must be considered before acceding to the idea that hate speech indeed is a progeny of hate (125–26).

Brown's (2017a) explication and criticisms are useful regarding the designation 'hate speech'. Overuse and misuse deprive the term of its legal and moral connotations (422–27). Furthermore, it is ambiguous and non-neutral because it has the power to mobilise rhetoric and feelings of society. The word hate, if it is the right word in the first place, renders the expression negative (Brown 2017b, 563–65, 574–75).² Another problem is the grouping together of expressions as hate speech law. Brown (2015) has identified ten clusters of hate speech on national, sub-national and international levels (19–41). Therefore, the term's content is not apparent. Despite these claims, for this book the term hate speech shall denote—without supporting such a definition and its possible content—expressions including, but not limited to, 'incitement to hatred', 'incitement to violence', 'group libel', 'group epithets', 'xenophobia', 'denying violence or genocide', 'discriminatory harassment', 'group vilification', 'negative stereotyping' and 'stigmatisation'. Sporting norms indeed group such expressions. The transnational nature of the norms and the expressions as well as their fluidity and spontaneity, defy compartmentalisation. The limited space that this book enjoys does not allow a clustered approach to the subject at hand. Likewise, to keep matters short, certain arguments for restricting face-to-face hate speech will appear later. They will constitute the basis for restricting hate speech on the part of the athletes.

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. They underline dignity and equality, along with the self-worth of individuals as values to be protected, whilst warning that hate speech calcifies the power dynamics within society (Delgado 1982, 143–46; Waldron 2012, 59–60). Matsuda (1989) has forcefully argued that hate speech can cause subordination. 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 can be seen as a 'pre-emptive strike' (Lawrence 1990, 452–53, 462–66). Of first-rate concern is that personal attacks and isolated events are the signposts of a greater, society-wide problem. Hate speech-led violence is a distinct possibility. Hate speech should also be restricted for fear of the destruction of democracy. More importantly, hate speech has the potential to create a 'toxic' environment for the 'others', harming, in most cases and contexts, not immediately but gradually (Tirrell 2017). Commentators have also embraced a Rawlsian perspective, and argued that the dangers to the equal status of individuals and the cooperation thereof are reason enough for restricting hate speech (Quong 2010,

306–10; Waldron 2012, Chap 4). Finally, one branch of this camp argues that hate speech has the power to ‘constitute’ subordination and to silence powerless members of society through ‘speech acts’ (Langton 1993, 2012; Maitra 2012).

The opposite camp presents its reasons for protecting hate speech in certain circumstances. 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. Another argument suggests that restriction of hate speech might fail to produce desired results, as there is no empirical evidence proving the efficiency of the restrictions. Beyond that, hate speech restrictions might even lead to the opposite effect and exacerbate racism (Baker 2009, 149–55; Strossen 1990, 515–17, 554–61). Heinze (2016) 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. In this 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 the hate speech that is expressed face-to-face are extrapolated—without clear empirical evidence—to hate speech within public discourse (75–76 and 126–28). The steps taken to erase hate speech and discriminatory expressions create their own system of discriminations, rendering some discussions ‘dangerous’ and ‘harmful’ (108–9). The two instances of hate speech, namely in face-to-face confrontations and within ‘public discourse’,³ 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’. Ronald Dworkin (2009, vii–viii), and to some extent Richards (1999, 126–37), have posited that taking away the voice of citizens brings about suspicions as to political legitimacy. For well-established democracies, restrictions on hate speech reflect the distrust of society due to a fear of its being unreasonable, incapable of making responsible choices and having a tendency to be persuaded to ‘dangerous or offensive convictions’ (Baker 1997, 991; Dworkin 1996, 200–1; Stone 1987, 56–57).

Given the concise summary of arguments of the defenders and opponents of hate speech laws, and the arguments for restriction presented in the previous chapter, one needs to distinguish between face-to-face expressions conveyed to specific persons—‘targeted vilification’ (Greenawalt 1995, 93–94)—and expressions conveyed to unspecified persons or groups of persons (Weinstein 2009, 35–38). Non-face-to-face hate speech within public discourse is another issue, and it brings about different takes and results. Nations and regimes have different experiences of the past. They enjoy different levels of stability—the context of hate speech can be diverse. Yet to avoid certain traps (especially relativism), a general outlook should be in place. There are two separate but related issues in this matter. The first is the speakers’ autonomy and moral powers, and the second is those of the recipients. In this way, arguments that would be justified regarding

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.

7.3 The View from Sport

7.3.1 Overview

The rest of the chapter argues for possible autonomy-led restrictions in that the individual's moral powers and autonomy will be the fulcrum. As this book does not reject the idea that sport is an associational activity that aims to reach pre-determined goals (primarily the production and consumption of sport), certain arguments for and against hate speech restrictions do not apply to sport. The characteristics of sport, which have led to a defence of political expression, work against a more tolerant approach to hate speech.

From the viewpoint of sport associations, human dignity is indispensable (CAS 2013/A/3324 & CAS 2013/A/3369, para 9.12; CAS 2015/A/3874, para 172). On the other hand, this is only one part of the argument for restricting hate speech. Concerning the much-discussed notion of harm (as a reflection of the desire to maintain their well-being and their normative orders) sport associations are also interested in the perceived harm to the sport (CAS 2014/A/3562, para 114), harm to the organiser (UEFA Appeals Body, *Zenit St. Petersburg*) and harm to the reputation of the competition (UEFA Appeals Body, *Legia Warszawa*).

A brief detour is necessary before going for more in-depth arguments regarding hate speech in sport in the following sections. One point that arises due to the particularities of the production and consumption process of sport has to be clarified. Unlike what Dworkin has argued, in sport an attack against hate speech restrictions grounded solely on their domestic political legitimacy, might turn out to be deficient. In concrete, 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 is the FA's sanction against French footballer Nicolas Anelka because of the '*quenelle*' gesture following a goal in an EPL match. '*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 rant. In the process of 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 (*The FA v Nicolas Anelka*, paras 47–58). Theoretically, the '*quenelle*' incident pertains to a French footballer's message about French politics in an EPL match that was broadcast worldwide. 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 ‘no’. First, the impact of private institutions on democratic legitimacy should be questioned. Suspicion of governance provides a tool to redirect suspicion of the intentions of the institutions that have RAE powers. Yet altogether different kinds of reasoning and conclusions would appear if such suspicion evolves into a challenge against the legitimacy of the democratic processes of sovereign states, especially in transnational settings grounded on mostly private relationships. Second, states evolve under the influence of globalisation, and so do citizenship, democracy and sovereign power (Sassen 2003, 245–46; Scholte 2008). If hate speech restrictions are to be criticised by putting political legitimacy to the forefront, then the global impact of the dissemination of expressions has to be borne in mind.

The natural step forward 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. The political legitimacy objection against hate speech restrictions—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, in transnational sport, equal concern and respect for individuals from diverse cultures have to be retained, while political legitimacy arguments should be dropped, at least for this book.

These points should be transposed to the scenario where hate speech itself negatively affects democracies in the long run. Based on the interwar experience in Weimar Germany and Italy, one strand in the literature goes on to assert that hate speech could lead to fascism, which actively suppresses freedom of expression. Although fascism unmistakably implicates the suppression of diversity and expression, this argument will not work in transnational sport. As Heinze (2016) has pointed out, from a socio-political point of view there is a world of difference between the Weimar Republic and modern democracies (129–32). Also, it is hard to imagine how hate speech by the athletes or spectators can cause a democracy to fall apart. It would require unequivocal evidence to show that hate speech in sport can damage democratic processes. For instance, one must show that ‘racist behaviour’ by the supporters of Serbia, S.S. Lazio, Olympiacos FC and FC Dynamo Kyiv in 2013 derailed the democratic processes in Serbia, Italy, Greece, Ukraine as well as those of the opponents, respectively, England, Germany (VfL Borussia Mönchengladbach) and France (Montpellier Hérault SC—Paris Saint-Germain FC).⁴ Was a youth international match between Serbia and England complicit in Brexit? Did Marine Le Pen gain ground thanks to Greek and Ukrainian supporters? Is there a causal link between the rise of Matteo Salvini, *Alternative für Deutschland* and the expressions of Italian football fans? Were democracies affected because the matches were broadcast live globally?

7.3.2 *Expanding the Scope of Hate Speech*

The defenders of hate speech laws underline the need to restrict racist and sexist expressions (as the institutions judging them have perceived them to be). Nevertheless, such restrictions leave important aspects of discrimination like homonegativity, transnegativity, ageism, or physical and mental capabilities out of the scope. Inspired by Heinze's (2009) challenge to the scope of hate speech laws (274–82), and supported by the fact that this book deals with hate speech on a moral rather than legal plane, it would be natural to extend restrictions to protect all 'others', except the ones created in 'party lines'. That is, in sport except the ones about governments, political parties, classes and ideologies, every type of expression that has the potential to 'other' an individual due to their supposed distinctness in a negative sense or their supposed lower positions in society (or as in dehumanisation, their 'sub-humanity' or not being a part of the humanity at all) should be restricted. The focus is on the lowering of an individual's position by emphasising the target's 'normatively irrelevant features'. The ones who express themselves by pointing out a group's perceived undesirable traits and characteristics equate and extend them to the target individual or group. It creates or reinforces the (alleged) divide between 'us' and 'them', and can lead to inclusion and exclusion, respectively. Provided that an evaluation of the expression against its background can be made, undesirability lowers the moral and social status of the targets, at least in the eyes of the speakers and listeners (Parekh 2012, 40–41). For Chapter 5 rejected hierarchies (and this hinged on equal concern and respect for the individual) the moral status of an individual turns out to be a crucial characteristic, which has to be protected against othering. The selection of othering is also of theoretical concern. Brown (2017b) has shown that the Wittgensteinian concept of 'family resemblances' that aims to see the similarities in the use of terms is relevant to hate speech. According to this conception, even if a term resists a precise definition capturing its sense or characteristics, hate speech can be understood by using overlapping characteristics and similarities (596–604). From what has gone in Part II, the overlapping and overarching characteristic of hate speech is the possible loss of the equal moral status of individuals.

The emphasis on othering is also helpful in other senses. It does not get bogged down in the correctly criticised term 'vulnerable minorities' (Barendt 2019, 542–43). This is noteworthy because in transnational sport, who is vulnerable or 'historically oppressed'/'historically identifiable minorities' (Gelber 2017, 625) and who is not might not be apparent. A Jew might not be vulnerable in Israel but might be elsewhere. Some see Catalans and Kurds as historically oppressed groups respectively within Spain, Turkey, Iraq, Syria and Iran; however, some reject the notion. Moreover, in Turkey, conservatives can be deemed historically oppressed, but Erdoğan's policies since 2002 (and continuing at the time of writing) have turned the tide. Crucially, an Asian watching the match in the stands in a stadium in Hong Kong may not be vulnerable because they are 'at home'; yet a Bahraini

footballer's imitation of their facial characteristics is hate speech as it others. This implicitly accepts that the targets of hate speech could also become the perpetrators of the same act. Othering includes, for instance, a Muslim's hate speech against an Asian. In this regard, FIFA's banning and fining of Bahraini footballer Sayed Baqer's 'pulling his eyes to the side in an attempt to imitate an Asian's physical features as the teams go to the locker rooms after the final whistle' of Bahrain National Team's away match against Hong Kong cannot be justified in terms of power relationships (FIFA Appeal Committee, *Sayed Baqer*).

In the first instance, this line of reasoning accepts and extends Long and Spracklen's (2011) distillation of various critical and social researchers on race and racism. That is, 'The prime target of racism may vary from one context to another and shift through time' and thus 'We need therefore to consider "racisms" rather than racism' (5). Second, this move rejects the assertion that hate speech by vulnerable minorities against the members of dominant groups do not constitute hate speech because it does not perpetuate historical hierarchies or contemporary 'systemic discrimination' (Gelber 2021; Matsuda 1989, 2361–63). While commentators that call for the protection of hate speech by vulnerable minorities deal with a specific jurisdiction, the transnational nature of sport should deter one from following this course of action. As this book has time and again emphasised, sport includes individuals from different social, economic and religious backgrounds. In national, continental and international competitions, athletes and spectators come from states and societies whose racial dynamics widely differ. If one does not embrace the idea that the hate speech of vulnerable minorities counts as hate speech, then individuals who had nothing to do with the speakers become legitimate targets. Suppose a Hispanic American calls a Slovenian 'whitey'. Even though they are white, did the Slovene have anything to do with the historical vulnerability of the speaker? Does the colour of one's skin make them responsible for the unjust treatment of non-white individuals? The Slovene, obviously, had no hand in the perpetuation of race and power relations in the US.

Thus, since othering is a means of creating hierarchies, equal concern and respect require expanding the scope to all 'others' if the restrictions pass rigorous case-by-case scrutiny. Here, a bright-line test for the designation as to who would be protected is bound to fail, because characteristics, identities and statuses that are to be protected hugely vary (Brown 2016, 276–82). Equal concern and respect for individuals should stop one from introducing such tests unless clear and empirical evidence that would clear doubts is produced.

UEFA and the FA's practices parallel what this work argues. UEFA, in addition to the ones about the religion and gender of the target, perceives expressions pertaining to the sexual orientation, ethnic origin of persons discriminatory (UEFA Disciplinary Regulations, art 14). The UEFA case law contains incidents where expressions denigrating the sexual orientation of persons are sanctioned (UEFA CEDB, *Crvena Zvezda*). It also includes similar expressions of footballers against other stakeholders, such as denigrating the assistant referee in view of their supposed sexual orientation (UEFA CEDB, *The Football Association of Wales*), or

equating individuals and groups with certain ‘others’ or vilifying them, as in the case of calling a Serbian team’s supporters ‘c*****’ which means g***** in Serbian (UEFA CEDB, *Budapest Honvéd*). So, UEFA’s practices 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.

Unfortunately, the lower tiers of the English league system provide examples of how hate speech is hydra-like. In that regard, the FA deems expressions with connotations of sexual orientation as ‘aggravated breach’. In parallel with this, expressions with a negative view of people with health conditions or impairments are dealt with under the same heading. The sanctioning of stakeholders because of the words that point to disabilities present examples for this justified stance. Finally, disciplinary commissions have an expansive view of nation- or race-based expressions. The fact that the English lower tiers (including youth, amateur, semi-professional and professional ones) are of multicultural and multiracial nature has become an issue for stakeholders and spectators who cannot appreciate diversity. One could add the cases stemming from the specific competition categories. Competitions including mixed-gender teams or male competitions refereed by female referees and assistant referees can become the stage for sexist expressions.⁵ Expressions on the immigration status of the target, their being a member of the Roma or simply their being foreign have been the reasons for sanctioning footballers and clubs.⁶ Furthermore, expressions and their interpretations at the hands of disciplinary commissions can reflect Brexit. Referee Vitalii Burnus could become the target of expressions such as ‘Brexit is coming soon no worries mate’, and these are interpreted as aggravating factors (*The FA [ex parte Cambridgeshire FA] v. Ryan Hayward*).

7.3.3 Hate Speech on the Part of Athletes

Regarding hate speech on the part of athletes, the oft-referred conceptions of equal concern and respect, autonomy, and particularities of sport set the tone. Face-to-face hate speech might have negative effects on the autonomy of persons. Even if the speakers’ autonomy might deserve protection, unprovoked expression that leads to (supposed) hierarchies between people or deprive the targets of moral powers without reference to public discourse require the target’s protection. Moreover, even if the face-to-face message were within public discourse, a lack of relevant context would render the message outside the scope of protection. In these situations, hate speech regulations restricting expressions conveyed in order to provoke a fight or hurt an individual without provocation or without relevant context would be necessary. In line with the arguments in the previous chapter, restrictions on expressions that threaten, defraud, and in general violate the personal security of the target, as well as ‘fighting words’ that do not ‘open a discussion, invite counter-arguments, advocate a view or to convince one’s audience’, should be admissible (Heyman 1998, 1340, 2009, 161–66; Sadurski 1999,

68, 114). These restrictions would help protect the autonomies of the targets. The nerve of the matter is, in face-to-face situations without a pretext, the threat is 'in flesh' and tangible. Besides, the status of the individual as an autonomous being is directly called into question (Tucker 1985, 139).

The context of the expression, the positions of the speaker and the recipients should be taken into account. While disregarding the harm aspect of consequences, this way of looking at things takes seriously the targets' loss of autonomy. During sporting activities avoiding a face-to-face expression in the field and around it and talking back may be impossible. Hence, the target may be helpless. The target's autonomy, which is 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, or as pointed out previously, to open up a discussion. The lack of viability also stems from the way rules and regulations function. As their conduct is regulated by norms, the athlete 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 rebuttal (Brown 2015, 257–59), in some cases, rebuttal may not be a viable option. It may not be possible for the fact that the person in charge (the referee, umpire etc.) is seen as the only person who has the duty to keep things in order. A reaction could be perceived as a challenge to the referee's powers or the notion of fair play, and might result in the sanctioning of the athlete and the team by the official and the disciplinary bodies. Laying down the problem in this way points to the sport associations' condemnation of athletes to the role of 'Stoic' athletes through what they call 'simple Stoicism'. As distinct from its namesake that has its roots in Classical Philosophy, simple Stoicism, perceives the athlete as devoid of emotions, unwavering in the face of adversity and stiff in general (Stephens and Feezell 2004, 196–200). Simple Stoicism ignores the fact that the person, and in our case the athlete, is a moral agent. To counter this situation, as moral agents with their own autonomies, athletes have to have the means of personally reacting to adversities created by other moral agents.

Even if there were no barriers to non-violent reaction, the efficiency of counter-speech is fraught with uncertainties. In cases where what is expressed is not clearly understood due to a difference in the mother languages of the speaker and the target, counter-speech might become impossible or inefficient. What is expressed might be vague or ambiguous, which would create a lack of confidence on the part of the target in clarifying the expression (Brown 2015, 261). Competitions bring together athletes whose mother languages might be different. Even if the athletes add to their portfolio of languages in the course of their education and careers, some expressions would be outside the scope of their understanding. The athlete cannot counter an expression that they cannot understand. In like manner, even if the target athlete can understand the expression, a lack of time and confidence may stop them from clarifying the expression. Expecting an athlete to ask the speaker if the expression was of particular meaning in the region they were born and raised, or if the speaker had mispronounced it before countering

the expression would be too much. The burden would be greater when the target is defending a corner kick or lined-up along the sides of the 'paint' before a free throw.

That was what happened in the case of Luis Suárez and Patrice Evra. The former, a Uruguayan international called the latter, a French international of Guinean and Cape Verdean descent, *negro* ('black') in Spanish. The FA Regulatory Commission spilt much ink on whether the word was discriminatory based on experts' opinions 'on the various linguistic and cultural interpretations of the word "negro" or "negros" in Latin American Spanish and especially Spanish as spoken in the River Plate region (castellano rioplatense)'. If it takes seven pages consisting of 40 paragraphs by two experts who are affiliated with the Centre for Latin American and Caribbean Studies at the University of Manchester to reach the ideal epistemic state about an expression, we cannot expect the athlete to efficiently counter hate speech even when the play stops (*The FA v Luis Suarez*, paras 162–202).

Suárez subjected Evra to words highlighting their skin colour. There was a dialogue between the two footballers, but rebuttal was impossible since the incidents happened in the field of play. The referee did not discipline Suárez, but the FA sanctioned the footballer subsequently. Consequently, the sanctions against the footballer should be deemed justified: the FA intervened in the situation and upheld the target's autonomy whose means of avoiding the expression and rebutting it was limited. More importantly, the target did not accept the abuse and moved on. One cannot overemphasise this point because 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' (Carrington 2012, 962). Equal concern and respect due to the athletes cannot be nullified through the *nomoi* and *narratives* of a private organisation. The alleged 'characteristics of the game', which are the incarnations of the moral autonomy of sport associations, cannot insulate sport from the outer world selectively. The *narrative* presented by sport associations must not act as a wild card when the image of sport is thought to be at stake. On the contrary, the *narrative* must be drawn up to support the most important actors in sport, the athletes. Rules and values must be shaped so that the autonomies of the stakeholders are efficaciously protected just as they should be protected beyond the confines of sport.⁷

These points lead to the argument that the sport associations which inhibit the athletes should be the ones protecting them because they take away the athletes' means of responding to hate speech. Sport associations should have the duty of protecting the autonomies of their constituents while showing equal concern and respect for each and every one of them. As a part of their associative activities, sport associations enjoy RAE powers. Accordingly, sport associations must put their associative activities to good use. These activities should not be one-sided, meaning the sport associations' sole concern should not be the well-being of the normative order. As associations, they have to uphold the well-being of their direct and indirect members, along with the athletes who produce the game. This is their *ratio operandi*. Therefore, sport associations should protect athletes from

hate speech by other stakeholders in and around venues. The protection should not be based upon UEFA's consequentialist statement that hate speech might have 'the potential to provide a team with a sporting advantage if the performance of the victims of abuse suffers as a result', and that they might affect their 'sense of well-being and belonging' (UEFA CEDB, *Rangers FC* of 22 August 2019). Rather the focus should be the autonomies of the targets as well as their status as equal moral agents.

Concerning athletes' expressions towards spectators in and around sports venues or no one in particular, a case-by-case scrutiny of the circumstances is the best way to approach the issue at hand. Although the following arguments could not provide for an all-encompassing account of hate speech due to the infinite possibilities of interaction between stakeholders, along with the contexts in which they take place, a rough account will be in place.

First of all, being face-to-face and the context of the expression are both of concern. In line with the aforementioned general principles, an athlete's hate speech against an identifiable spectator or group of spectators should present grounds for disciplinary charges. Spectators do not shed their autonomy at the turnstiles. The more contentious part of the discussion involves athletes' expressions in sports venues against a large group of supporters, for example, a specific part of the stands or all of the stands or no one in particular. These expressions should not be protected even if they are a part of public discourse. The underlying reason for the change in stance is that sport associations can legitimately select non-discrimination or the fight against all types of discrimination as their objectives. Indeed, especially international sport associations follow this course and commend their members for embracing it. Consequentialist defences of hate speech restrictions would add that not sanctioning hate speech might be to the detriment of the brand image of the sport association.

Non-face-to-face speech is political and can be a part of the public discourse; however, from a moral point of view, hate speech aims to create, condone or sustain imagined hierarchies between the statuses of moral agents. When the explication of the practices of sport associations unhinge from their legal groundings and move towards a moral plane, the RAE powers can help the moral aims of sport associations and the *narratives* of non-discrimination and equality within and through sport. As associations, sport associations can take the required steps in reaching their associational goals. On that path, they can be non-neutral in accepting non-discrimination and rejecting discrimination. Non-neutrality, which (depending on the regime) is fundamental to a state and its sub-divisions, does not necessarily apply to associations. In terms of hate speech, inspired by Post's (Post and Molnar 2012) position, it should be stated that, arguments for state neutrality as to the public discourse and non-neutrality in terms of state policies do not automatically apply to sport because of associativity (25–26). Sport associations can introduce anti-hate speech norms that are not 'viewpoint-neutral'. Accordingly, the progeny of a moral standpoint that views othering as immoral is normatively acceptable (Altman 1993, 303–6).

The contention that hate speech is political does not mean that its restriction in these circumstances reverses the preceding chapters. Recall, the criticisms of the interpretation and application of the *narratives* of politics-free sport and political neutrality were not based on the negation of these objectives *per se*. Rather, the lack of articulate consistency in these processes, the selective silencing and sanctioning of individuals, the non-adherence to the *narratives* as well as the characteristics of transnational sport and individuals underpinned the arguments for freedom of expression. In the same sense, provided that articulate consistency in interpretation and enforcement is achieved, sport associations may restrict hate speech when athletes engage in hate speech towards the spectators or no one in particular. Crucially, the individual, as fashioned in Chapter 5, enjoys equal moral status. The natural extension of this characteristic to the subject at hand is that expressions that jeopardise the equal moral status of agents can be restricted per associational goals.

Another aspect of the question is the spectators' ability to rebut hate speech. This line of argument intersects with the one concerning rebuttal by athletes who are the targets of hate speech. As in the athletes' case, the spectators might not rebut the expression due to legal or epistemic constraints. Spectator conduct produces liability for the teams or clubs they follow. Because the rebuttal might include insults or further hate speech, the spectators might not be able to rebut the expression. They would think about the consequences for their team or club.⁸ With regard to the epistemic constraints that the spectators might encounter, the arguments concerning the Suárez and Evra case apply. That is, the spectators in a sports venue might be unable to understand or interpret an expression. Similarly, Nicolas Anelka's *quenelle* gesture has France-specific connotations which would have slipped through the interpretative capabilities of most spectators in the stadium. Even if the expression was not directed against them, had they known the possible meanings of the expression the spectators might have attempted to rebut it. The impossibility of rebuttal and counter-speech should not protect athletes engaging in hate speech. On the contrary, due to the impossibility, hate speech could be sanctioned later by the relevant authorities.

Furthermore, the spectators' sentimental investments may be disproportionate to the competition at stake. Both the spectators and the media further accentuate competitions between teams from nations that are historical or contemporary rivals. Thus, the mood within a venue may become even more prone to the perceived or real negative effects of the expressions by the footballers, who are in the spotlight, and actually, by the persons the spectators have come to watch. In cases where a clear and present danger might manifest itself, hate speech should not be protected. In addition to this, the safety and security concerns presented in Section 6.5 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. It was indicated that in certain cases, the creation of restrictions might be the best way to proceed. Yet, in any case, the judgement on danger should be made in an objective manner. The decision-maker has to rely on admissible facts, not suppositions.

The suspicion of governance still prevails, but there should be room for an objective evaluation of the facts of any given case.

7.3.4 Hate Speech on the Part of Spectators

Regarding the spectators' hate speech against persons in and around sports venues, it is possible to extend the arguments presented previously regarding the athletes' expressions against fellow stakeholders. The previous sentence contains the word 'persons', because clubs, coaches, medical personnel, security personnel and other individuals could be the targets of hate speech. Sport, after all, can be a means of disseminating hate speech where spectators coming to a football match in a sports complex could target a track and field athlete while they train on the track (El País 2022).

The focus of this section will be the expressions against no one in particular or the athlete who is somehow a part of the sport association that enjoys RAE powers in a competition. Generally, sport associations should lend a hand in protecting their 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 autonomy and their status as equals.

The key in this respect, as argued previously, are the rules and regulations of sport associations that stop athletes from taking certain actions or expressing themselves. The athletes' interaction with spectators is curbed, and thus they cannot rebut the expressions immediately. Three examples from three different football leagues are apt in depicting the picture. First, the inhibition is evident in Ghanaian footballer Sulley Muntari's sending-off—later rescinded by the Italian Football Federation (FIGC)—because of their protests against racist abuse. Having received a card for informing the referee in a protesting manner of the racist abuse by rival supporters, Muntari received a second yellow card for walking off the pitch (The Guardian 2017). The rescinding of the red card by the FIGC cannot be seen as a mitigating aspect, as the team had to play with one less player for the remainder of the match.

On the other hand, FC Shakhtar Donetsk's Brazilian footballer Taison did not receive much sympathy from the Ukrainian Association of Football (UAF). In 2019, in the Ukrainian Premier League match between FC Shakhtar Donetsk and FC Dynamo Kyiv, Taison received discriminatory abuse from the FC Dynamo Kyiv fans. The referee showed the footballer red card for putting up their middle finger and kicking a ball in the abusers' direction. The footballer had to serve the automatic ban for the sending off as it was not rescinded. In the wake of the abuse, Taison shared their feelings on Instagram by writing 'My tears were of indignation, repudiation and helplessness, helplessness that I could do nothing at that moment!' (Church and Grez 2019).

A counter-example to this argument is the Barcelona footballer Dani Alves' peeling and eating of a banana, which was thrown towards the footballer during a match (BBC 2014). Nevertheless, 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.

Restrictions should cover not only overt and clear instances of hate speech such as monkey noises (UEFA CEDB, *Bulgarian Football Union*) and stereotyping through words and actions (UEFA CEDB, *FK Partizan*), but also veiled dehumanisation such as 'sexual dehumanisation' that reduces individuals to their perceived or apparent sexuality (Richards 1999, 58). Reflecting the violent, hypermasculine and hypersexual language prevalent in the discussion of athletes and sport (Burdsey 2021, 39–42; Tarver 2017, 98–100), in an EPL match, Manchester United fans chanted about their team's Belgian/Congolese footballer Romelu Lukaku's supposed penis size. The FA did not charge the club, and *Kick It Out* drew attention to the issue (BBC 2017a). The chants calcify the stereotypes about the Black male, and dehumanise him sexually because of the supposition that he is 'well-endowed'. The toxic mix of violence, hypermasculinity and hypersexuality is also at the root of expressions against women stakeholders indicated in the final paragraph of Section 7.3.2. Regardless of any possible statistics on the matter, the stereotyping belief and its expression is a moral matter, in that, it morally wrongs a moral agent. It calls into question the target's moral standing (Basu 2019). The athlete, whatever the reason (one should not expect an athlete to submit an official complaint before the presiding sport association against their team, club or association), is unable to react during the match, but can only appeal to the fans for putting an end to such chants. Therefore, despite the justified actions by the FA in the Suárez and Evra case, this incident, from the viewpoint of the RAE powers, was ignored. In parallel with the arguments in this section, the club should have been sanctioned. That the chants were not directed towards an opponent is of no consequence, because the autonomy of individuals knows no colour or jersey.

As can be noticed in the foregoing arguments regarding the athletes' position, potential psychological harm and the possibility of violent response were absent. At the bottom of it, there is not enough evidence about the negative impacts of hate speech on the stakeholders. What makes it even more difficult is that stakeholders who are the targets of hate speech react differently. Muntari left the pitch, whereas Taison and Alves responded directly to the abuse. Concordantly, upholding the autonomy of athletes is more appropriate for the question at hand. Just as the previous chapter did not make psychological harm an issue in drawing up the general limits of expression, concerning hate speech alleged harm should not be in the equation when deciding on the scope of protection for such expressions. Simply put, since not all athletes may feel or react the same way, attempting to justify restrictions on hate speech in sport through the instrumentalisation of harm would be counter-productive. That is, being 'stoic' would result in remaining unprotected from hate speech.

The points in the previous sub-section concerning a possible failure to rebut hate speech are also applicable in this sub-section. Consider a scenario where 20,000 basketball spectators engage in hate speech against a member of the opposing team and suppose that the athlete's teammates would like to protect them through rebuttal. Here, 20 people (including the team and the staff), would be striving to rebut the expressions in a closed and hostile environment for the targets. One might argue that the team members should engage in rebuttal. In most cases, this might be impossible because of the disproportionate burden placed on the athletes and other team members. Unless they have authority over the spectators as possible moral epistemic sources, they might themselves become the targets. A portion of the 'us' might become the 'other' instantly or the rebuttal might pour gasoline on the fire.

The same goes for the spectators. A CAS panel's burdening of individuals with the duty to turn on the perpetrators (also made an issue in Section 5.5.3) is an aberration because the needs of a sport association come before the well-being of individuals ('FIFA needs the good fans to turn on the perpetrators'). It is quite easy to burden individuals whose bodily safety might come under threat at the hands of a group of 200–300 individuals who engage in 'fascist/racist, chanting anti-Semitic songs or sayings, in particular about the Holocaust' (CAS 2013/A/3094, paras 99–100) from the comfort of temporal and spatial distance. Even though in some cases the odds might be in favour of the persons who engage in rebuttal, the sport association that enjoys the RAE powers must, in every case, take steps to alleviate the situation and sanction the team or club.

In cases where a group of spectators do not target a specific athlete but target legal persons such as clubs, certain groups including the opponents, or sometimes to no one in particular, two possible paths are apparent. The first path is that, in line with the defence of autonomies of the spectators, even when they are directed against certain groups of people, hate speech might be protected. Following Wasserman (2006), one would emphasise that all 'oral, symbolic, or written on signs, banners, clothing, and body parts' is 'cheering speech' and thus part of public discourse (528–29). After all, a group of people chanting on their chosen subject would pertain to public discourse. The autonomies of both the speakers and recipients should be protected, and thus the possible undesirable effects on both cannot act as reasons for restriction.

The second, and the preferred path for this sub-section, would follow the arguments for restricting hate speech in sport. That is, supported by their associational goals, sport associations can restrict hate speech that discriminates against persons. Since the right to be treated as an equal is one of the foundation stones of the conception of the individual in sport, the sport association can enforce its view of equal moral status. For instance, FIFA's treatment of a popular Mexican chant should be discerned by bringing together fragments from Mexican history as well as contemporary Mexican football. The homophobic aspect of the expression is that the speakers aim to 'feminise *and* queer' males, (supposedly) situating

them at the bottom of the supposed hierarchy of groups and individuals (Hidalgo and Hortua Vargas 2021). Depending on the culture, the expression may require a more nuanced look because in the case of Argentinean fans the expression 'is a symbolic gesture of subordination and control, used to reify the in-group', and that the meaning of the word depends on the listener (Rodriguez 2017, 716, 719–22). 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' (CAS 2017).

Here, the athletes' status as equals is of utmost importance because they are the most important elements in sport's production process—they are the constants of the process. The athlete may move from jurisdiction to jurisdiction as part of their sporting activities or compete locally, regionally or nationally. In each of the cases, the sport association organising and supervising the event, in some cases international sport associations, must ensure that other stakeholders and spectators do not encroach upon the idea of equal concern and respect. The athletes have to feel that sport associations effectuate the notion of equal concern and respect, togetherness. In a social sphere where LGBT+ people indicate that sexual and gender minorities are (and feel) excluded from sport, especially due to homo- and trans-negative expressions (Hartmann-Tews, Menzel, and Braumüller 2021), the *nomoi* must correspond to the *narratives*.

Waldron (2012), who asserted that an aspect of hate speech is the inherent message that the 'other' is not welcome, may inspire a spectator-specific argument (95–96 and 166–67). If inclusion and non-discrimination are the two fore-running justifications for restricting hate speech, Waldron's contentions would be applicable to sport associations that embrace them as *narratives*. When 50,000 English fans chant 'I'd rather be a P*** than a Turk' against Turkish fans watching an international football match in the away stand, the mood would be less than friendly (Barclay 2004).⁹ The chant drips of racism through the choosing of the lesser of two evils, so it should be sanctioned. Likewise, the above-mentioned Mexican chant is apt in exemplifying the fans' viewpoint. In a conversation between the authors, whilst some interviewed fans who identified themselves as Mexican, Mexican American and Salvadoran were against the chant because attendance to a match is a 'family event', Melissa Hidalgo has clearly underlined what is at stake by stating that 'As a queer fan, I don't necessarily want to go see the Mexican national team at the Rose Bowl because of this fan environment. I don't want to be subjected to this word, the violence behind it' (Hidalgo and Hortua Vargas 2021, 137–38).

Here, the concern is not the creation of 'an uncomfortable experience for other supporters and attendees at the match who behave appropriately', as the UEFA CEDB has suggested in another case (UEFA CEDB, *Rangers FC* of 22 August 2019). Comparisons between 'behaving' fans and others are not legitimate bases for sanctions. Rather the individuals' inherent equal moral status is more appropriate as a guiding principle. The primary reason is the denial of equal

moral status and the resulting direct or indirect exclusion of individuals or groups of individuals from an activity. If sport associations include non-discrimination in their constitutive documents and utilise togetherness as a narrative, then excluding a certain part of the sporting community, whether as athletes, spectators or audiences, would be contrary to these projects.

In essence, if the 'other' is not welcome in sport, they might have to start following another sport, or give up watching sport altogether. Othering inherently excludes individuals and groups from social spheres. Therefore, following their *narratives*, sport associations have to act to prevent or rectify the negative consequences of exclusion. Of course, these practices have complementary aftereffects. Whilst the processes are inclusive in that they give the message to the ones who were the (general) target of othering that 'they are welcome', they involve exclusion because the ones threatened with or imposed with disciplinary sanctions must act accordingly or risk being banned, that is, risk non-participation.

If this path is taken, articulate consistency must undergird the practices. The interpretation of a discriminatory expression at the hands of the relevant body must involve consideration for similar cases and their possible impact in the future. Thus, the reasons for restricting expressions must be justified through the (transnational) nature of sport. A valid reason for restricting certain hate speech in a given state, region or continent might not apply in other situations or geographical areas. Again, the different safety and security measures taken at different levels of competition as well as the sentimental investment of the individuals and groups involved must be taken into account. In cases where immediate and direct harm due to these expressions is possible, restrictions to hate speech should be in place. The limits presented in the previous chapter apply, and they cover the 'incitement' aspect of hate speech. In like sense, balancing does not have a say in the interpretation process. The fact that the moral status and autonomy of the individual are of concern removes balancing from the picture.

Finally, the arguments hereof should not be the grounds for bland disciplinary practices. In the 'fight against discrimination' a well-structured mix of societal and associational education, denouncement and sanction should be implemented, because sanctions by sport associations 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 freedom of association, and thus the social, psychological and economic causes of discrimination would remain unaddressed. Moreover, since civil society has been active in the fight against discrimination in sport through associations and collectives, sport associations should also embrace a bottom-up approach rather than a solely top-down one. Communication between sport associations, spectators and audiences can result in sport- and country-specific paths for engendering equal concern and respect. Redressing must accompany retribution, prevention must precede sanctioning. However, before these steps are taken, the sport associations, civil society, market and state should go deeper in their analyses of the situation as an othering expression can flag systematic or institutional othering.

7.4 Histories

Chapter 3 argued that sport associations lack articulate consistency in their restriction of freedom of expression—sport associations restrict expressions according to their content and viewpoint. Another subject giving rise to contradictory implementations is the sport associations' view of history. Certain messages derive their meanings from history; yet from a certain point of view they may pertain to hate speech. This section analyses the intricacies of interpreting the historical and the contemporary, as well as the political and the discriminatory. The arguments made against categorisation of expressions play an important part in the analysis of the 'unacceptable'. In the process, the section mostly shirks from underlining the moral consequences of judging history, because that would require an in-depth discussion on the temporal scope of human rights and the ethics of world history.

7.4.1 *Challenging Histories*

The title of this sub-section has a double meaning. Society and the state can challenge histories, redefining, historically, the right and the wrong. Therefore, challenging histories has a moral dimension. In another sense, histories are challenging. Sometimes the right and the wrong might not be apparent. Likewise, even if they constitute or insinuate hate speech, certain expressions' meanings and targets might be far from clear from a historical point of view. In these cases, clarification and contextualisation are warranted.

Concerning the review of the right and the wrong of histories, the murder of George Floyd at the hands of the police speeded up the process of confronting history and erasing the symbols that commemorate wrongs.¹⁰ The tragedy led to protests on and off the field, and the place of historical figures in a society became more pronounced. Especially, the historical figures that had perpetrated or profited from slave trade, along with their defenders were the targets of the off-field protests. These protests included expression through language and actions in the shape of attacking or toppling statues of the figures. At the same time, the presence of symbols that evoke slavery and the calamities dispensed upon indigenous populations by colonisation turned out to be an integral part of the public discourse. Flags used in the Confederate States of America ('CSA'), especially the Confederate battle flag, along with the statues of Confederate generals such as Robert E. Lee in public spaces were challenged. On the other side of the Atlantic, a statue of a 17th-century slave trader was toppled and thrown into the river. Governments also officially banned or removed these symbols. New York banned the sale and display of the Confederate battle flag on state grounds, whilst the US Military banned its display in military installations (Asmelash 2020; Browne and Starr 2020).

The challenge to oppressive symbols spread to sport. The use of CSA symbols in sporting venues became a point of debate. Although they are beyond the scope of this book, the NCAA and the National Association for Stock Car Auto

Racing's ('NASCAR') banning the Confederate battle flag resonated in the public discourse (Gelston 2020; NCAA 2020). The Cork County Board of the Gaelic Athletic Association ('Cork GAA') in Ireland too banned the flag (Roche 2020). Similarly, the names and mascots invoking Native Americans once more came to the foreground. Washington Redskins gave in to public and legal pressure after years of denial. The franchise had to defend the name and imagery against calls for disuse and various lawsuits concerning the use of disparaging trademarks (McNealy 2018). The 'tomahawk chop' of Atlanta Braves and Kansas City Chiefs fans, which the National Congress of American Indians categorised as dehumanising and racist (Zaru 2021), and team names have also (re)found their place in public discussion.

Concerning the challenging nature of histories, two examples would help to concretise the issue. Thanks to globalisation, expressions migrate, leading to difficulties in interpretation. The particularities of the production and consumption of sport in a given sport or jurisdiction should nudge one to take a more nuanced look at the subject. The 'tomahawk chop' in Turkey and sectarian chanting in Scotland are good examples for each contention. First and foremost, rather than the MLB Commissioner Rob Manfred's immediately rebutted assertion that the Native American community in the region around Atlanta is supportive of the gesture, one should agree with the interpretation of the National Congress of American Indians and deem the tomahawk chop racist and dehumanising (Anderson 2021). Contrary to what some defenders of pseudo-Native American symbols argue, the gesture does not honour the Native Americans. As in the case of pseudo-Native American mascots, the 'chop' creates and maintains stereotypes of a 'savage' culture whose prominent feature is the taking of lives. Creating caricatures and mascots excludes/others individuals from the community. The 'chop' reduces the moral status of Native Americans in the eyes of society, equating them with violence and 'savagery'. Finally, it is callous in the sense that the historical context along with the perpetrators and the victims of the actual 'chop' are swept under the rug (Burkley et al. 2017; McNealy 2018, 310–11; Tarver 2017, 75–76).

Despite this somehow clear-cut conclusion, the context changes and blurs when the chant migrates to Turkey and scarves replace the 'tomahawks' (YouTube 2022a). Do the expression's racist and dehumanising roots taint the Galatasaray fans' choreography? Recalling the scenario that includes a Hispanic American and a Slovenian athlete, one should ask, does the expression constitute hate speech when Turkey, the Ottoman Empire and Galatasaray had nothing to do with the past and present calamities brought upon the Native Americans? Is it hate speech when the Fenerbahçe, their arch-rivals, replace the chant with a remixed version of the track 'Promontory' from the soundtrack of the movie *The Last of the Mohicans* (Jones 1992; YouTube 2022b)?

Second, in the eyes of UEFA, a chant becomes hate speech when the word 'Fenian' becomes the focus of expression (UEFA CEDB, *Rangers FC* of 30 August 2019). On the other hand, some sectarian chants do not necessarily denigrate the opposition but recall past glories. For instance, the song 'The Sash'

(also known as ‘The Sash My Father Wore’) in itself might not constitute hate speech. Yet with an ‘add-in’—a lyrical addition that inflects the meaning of songs—against the Pope at the end of the song should require a more careful reading of the circumstances and lyrics. The same goes for Irish Rebel Songs on the other side of the ‘binarisms between Catholicism/Protestantism, Irish nationalism/British unionism and republicanism/loyalism’. Whilst non-sectarian in their familiar versions the add-ins to nationalist songs can result in their being sectarian (Millar 2016; UEFA CEDB, *Rangers FC* of 22 August 2019).

In line with the arguments in this chapter, expressions with connotations to the past should pave the way for consistent analyses that take account of the context and content of expressions. Indeed, messages that support status differences between individuals and groups by glorifying past atrocities may be restricted. Although, as associations, sport associations may restrict hate speech provided that the restrictions do not lack articulate consistency, a lack of consistency in the interpretation of expressions by decision-making bodies will provide the basis for the discussion in the next sub-sections.

7.4.2 Unacceptable Histories

Symbols and expressions with connotations to World War II bring about close scrutiny. The ‘FIFA Stadium Code of Conduct for the FIFA Confederations Cup Russia 2017 and the 2018 FIFA World Cup Russia’ binding for all spectators who bought tickets for the said competitions had specially tailored provisions. In addition to restrictions as to ‘political’ actions and messages of any kind (banners, signs, posters etc.), ‘materials of an extremist, offensive, or discriminatory nature containing Nazi symbols or attributes, or attributes similar to Nazi symbols, and/or extremist organisation attributes’ were in the list of prohibited items (arts 5.1.14, 5.1.36, 6.1, 6.1.16 and 6.1.22). UEFA has a similar approach in its jurisprudence. In addition to a ban on variations of Swastika, ‘SS’ symbols, runes with connotations to the ‘SS’, combinations of numbers such as 18 (‘AH’ denotes Adolf Hitler as they are the first and eighth letters in the alphabet) and 88 (‘HH’ denotes ‘Heil Hitler’ as it is the eighth letter in the alphabet) and Nazi salutes are subject to sanctioning. The list is not exclusive, geography-wise or subject-wise (UEFA CEDB, *CSKA Moskva*; UEFA CEDB, *Football Association of Serbia*, UEFA CEDB, *Hungarian Football Federation*; UEFA Appeals Body, *Juventus*; UEFA Appeals Body, *S.S. Lazio*). Finally, UEFA considered calling a rival team (which had nothing to do with the match) Jews was anti-Semitic (UEFA Appeals Body, *ŠK Slovan Bratislava*).

Contemporary culture, which has links to history, may also present itself as grounds for sanctions. 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, an academic known for their Holocaust denial (Heinze 2006, 551).¹¹ In *Anelka*, relying on one of the expert opinions in the case, the disciplinary body perceived the Holocaust denial as anti-Semitic. Therefore, considering the expression’s 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 when Anelka made the gesture did not make things any easier for him (Ervine 2017, 243–44). Despite the complex nature of the gesture, the FA and society deemed it to be solely of an anti-Semitic connotation. Holocaust denial was linked to an a priori hatred of Jews, which is in itself problematic (Brown 2017a, 456–57). The weight of history is brought upon a footballer who might have just made a point against what the footballer believed was the establishment (Ervine 2017, 244–46).

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').

(CAS 2014/A/3562, 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 Nazi Germany. The panel indicated that expressions associated with the *Ustaše* regime would indeed offend the dignity of certain groups and individuals. Resultantly, the panel confirmed the FIFA Appeal Committee decision regarding the suspension of 10 official matches, which practically ruled the footballer out of the FIFA World Cup Finals (CAS 2014/A/3562, paras 60–93). As was indicated, possible harm to FIFA's interests came to the forefront in deciding the outcome. In this case, FIFA aimed to exercise its 'freedom not to associate' to the fullest, gave a message to the public and strived to protect the brand image of itself and the FIFA World Cup.

A related decision 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 the 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 political and not discriminatory 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.

(UEFA CEDB, *Zenit St. Petersburg*)

This case presents evidence for the argument regarding categorisation at the hands of decision-makers. The CEDB deemed the expression regarding Ratko Mladić—without adequate grounds for doing so—to be only discriminatory rather than political, as if the situation can be untangled by simple categorisation. The body downplayed the political aspect of the expression to re-categorise it with a view to implementing harsher sanctions for the club. The CEDB made an effort to distance UEFA from anything that may have discriminatory overtones. In this regard, expressions on phenomena with connotations to a discriminatory background became automatically discriminatory without regard to other possible dimensions.

These criticisms do not reject the possibility that expressions with historical connotations may be considered hate speech. As signalled in the previous subsection, provided that the decision-making bodies conduct the necessary analysis and satisfy articulate consistency, they could restrict this manner of expressions. On the one hand, indeed, praising the perpetrators of genocide and their allies may amount to hate speech. The expression indirectly supports the idea that murdering individuals due to their supposed inferior moral status is admirable. On the other hand, without clear evidence, the misconstruction of an expression is as damaging as silencing. Worse, as the following sub-section will attest, sport associations lack articulate consistency in the interpretation and categorisation of hate speech.

7.4.3 Acceptable Histories

Whilst sport associations 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’ (CAS 2014/A/3562, para 112), at arm’s length, certain dark chapters of history are the bases of chants, national symbols and football club names. Notwithstanding the prevalence of the contention that political expression should be protected in the context of sport, chequered practices of the associations concerning the question at hand have to be analysed.

Regarding chants, the ‘Dambusters March’ sung by England supporters would be an apt example (Davies 2006). The Dambusters March is the theme for the movie *The Dam Busters* that depicts the 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 (Anderson 1955). The dilemma at hand is whether to sanction the FA for its fans’ chants or not. In general, associations 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 should be proud of’, institutions 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—in a similar manner (The Telegraph Website 2017).

A lack of articulate consistency can also be witnessed in the case of FIFA where it allowed ‘*ushanka*’s—a type of fur hat with ear flaps—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 of Remembrance Day and has close links to Armistice Day, both related to military conflicts. As was pointed out in Section 3.2.3.2, the FA has been supportive of activities related to Remembrance Day and Armistice Day. Politics and politicians, naturally, entered the fray. The then British Prime Minister Theresa May openly supported the use of poppies in sporting events, calling the ban ‘utterly outrageous’ and indicated that the footballers’ desire to recognise and respect ‘those who have given their lives for our safety and security’ is righteous (Elgot 2016). In line with the domestic public feeling, the FA insisted on wearing poppies, a move that garnered support from the third leg of the triumvirate, politics. Even the German Football Association (DFB) agreed to wear poppies on their shirts against England on 10 November 2017. DFB president indicated that poppies are in no way political propaganda, they are the symbols of respect, tolerance and humanity (BBC 2017b). 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 poppies do not ward off the criticisms (Magraw 2019, 112). They render the link between history, state and sport unbroken because significant national and international events are anchored in the nation-state. Therefore, in line with the notion of articulate consistency and the contention that some histories are unacceptable for sport associations, 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? In essence, if, contrary to the moral powers of all those involved, expressions regarding past conflicts are to be sanctioned, then expressions about the winners have to be treated in the same manner as the ones about the losers.

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 the Ottoman Empire nostalgia swept across the cultural landscape of Turkey and Erdoğan’s Neo-Ottomanist policies became more prevalent, the club created a new identity. The TFF accepted the name change and allowed the banners of the newly created fan group *Yeniçeriler* (Janissaries), named after the elite troops of the Ottoman Empire (Irak 2020, 683–88). 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 the Armenian Genocide. 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 genocide should have been reason enough to bar the club from a Europe-wide competition (Balint 2013). The ambivalent practices of football governance in this issue become more evident when one focuses on 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' (CAS 2014/A/3562, paras 62 and 72). 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 the Armenian Genocide. Even though the club changed its name back to Ankaraspor, that the name Osmanlıspor shows in the results of 10 matchdays of the 2016/2017 UEFA Europa League Season means that a historical name evoking an empire whose swansong was methodical atrocities against its population has become a part of the history of UEFA.

The key to understanding the dissimilar implementations of regulations by especially international football associations is by focusing on 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 and the desire to send a message to the market. A possible association between such expression and the governing body or its competitions would damage the brands of both itself and its competitions. The last thing the television networks, the sponsors, and the football associations want is to alienate consumers. The judgements as to the perceived dangers are founded on the fear that the expression might cause harm to football. Symbols and expressions with connotations to certain historical regimes, particularly Nazi Germany, are perceived as evil to be purged from football venues although they are part of the history of the state(s). The sources of the calls for hate speech prohibitions, namely the protection of minorities and the preservation of democracy, are relevant with regards to the fears of football associations. That is, in the context of football, 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', fears of their rise in football venues are strived to be curbed through restriction. Furthermore, just like the European countries' stance in the case of Holocaust denial laws, football associations are eager—maybe too eager—to demonstrate the 'abhorrence of anything linked to Nazism' (Bleich 2011, 48, 51).

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 Osmanlıspor Futbol Kulübü, they were approved by sport associations even though the chant and the club name have connotations to armed conflict, brutality, atrocity and a general lack of respect for human life. Following Stone (1987), one can assert that the practices of the football associations 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”’ (56). In essence, the public feeling, which is contended to set the tone for these practices, comes to the forefront. Domestically and on the international stage, these expressions were not feared. Bombing raids were thought to be things of the past until the Russian Invasion of Ukraine in 2022, 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 and public feeling, rendered Osmanlıspor Futbol Kulübü immune to sanction.

Notes

- 1 According to the pre-COVID 19 statistics by *Kick It Out*, an English organisation promoting equality and inclusion in football, there was an increase of 32.3% in reported discrimination incidents between the 2017–2018 Season and 2018–2019 Season in all categories in English football (*Kick It Out 2022*).
- 2 There is an ongoing debate on the suitability of the term hate in hate speech and hate crime. To provide a sample, one group posits that most of the time hate, as a feeling, is irrelevant. They do not motivate ‘hate crimes’ and ‘hate speech’. The way out of the rhetoric is seen as replacing it with prejudice (Wickes et al. 2016, 240). On the other hand, Langton (2018) has argued 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) (137–38).
- 3 Post (1991) defined public discourse as ‘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’ (288).
- 4 These cases appear in UEFA’s compendium ‘Case Law: Control and Disciplinary Body & Appeals Body’, which covers the cases decided between January 2013 and June 2013.
- 5 See FA Regulatory Commission decisions, *The FA (ex parte Lancashire FA) v. David Worthington*; *The FA (ex parte Hampshire FA) v. Bradley Fairweather*, and *The FA v. Stevenage FC*.
- 6 The author would like to list the relevant cases without reproducing the violence the expressions have caused or constituted. *The FA (ex parte Cheshire FA) v. Anthony Harvey*; *The FA (ex parte Kent FA) v. Antony Whitaker*; *The FA (ex parte Essex FA) v. Dean West*; *The FA v. Elliot Whitehouse*; *The FA (ex parte Berks & Bucks Football Association) v. Geoff Dixon, Britwell FC*; *The FA (ex parte Lancashire FA) v. Jordan Caslin*; *The FA (ex parte Norfolk FA) v. Mattishall FC*; *The FA (ex parte Birmingham FA) v. Richard Learnihan*.

- 7 The focus on the rules and values of sport does not mean that solidarity between the targets and their colleagues, that is, other athletes, should be downplayed. The exact opposite is the ideal path, in that, athletes allying with the targets would present a more wholesome and effective response to the problem at hand. Athletes and ex-athletes are aware of the situation (Burdsey 2021, 29–33).
- 8 Also, because of anti-sport violence legislation, there might be personal consequences.
- 9 Interestingly, the author who watched the match from the Turkish stand did not hear the chant but later read it in the newspaper.
- 10 The removal of the Battle of Liberty Place Monument in New Orleans can be seen as a precursor of this trend. The monument was erected in honour of the White League's engaging in the violent overthrow of a multiracial Louisiana Government following contested elections.
- 11 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*, paras 33 and 39).

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Conclusion

Sport associations insist that on the road to reaching the goal of bringing out the best in humanity through sport, one of the necessary steps is to render sport politics-free and politically neutral. Up to a certain point and depending on the subject, (globalised) society embraces this approach. Nevertheless, the situation is more nuanced than it first seems to be. Sport associations restrict certain political expression through their norms; however, they allow and condone nationalistic symbols like flags, banners and anthems as well as political expression pertaining to history. The restrictions in sport go hand in hand with ‘political logic’ and ‘economic logic’ that present a sanitised and skewed version of the world through sport—guided by the two logics, sport, the state and the market work together to reach an ideal state of affairs. From one perspective, sport is a globally consumed activity that glorifies state-sanctioned versions of the nations.

Sport associations restrict political expression that may challenge the interests of the state, the market and sport. Economic and political interests drive sport associations to avert situations where they might be associated with ‘undesirable’ expressions. Consumers make up the public; therefore, any association with an expression that might be deemed undesirable by the target public (consumers) is risky. Such association may bring about the loss of goodwill and brand value, which has adverse effects on the product’s marketability. Consequently, Nino’s (1996) words indicating that ‘the market is not often neutral concerning preferences that are incompatible with the expansion of the market itself’ are highly relevant in this context (163). However, possible discord between the state, the market and sport should not be understated. As in the case of the failed European Super League, the former two forces could pressure sport stakeholders into giving up profitable enterprises.

This book has posited that the sport associations’ *nomoi* and *narratives*, that is, their norms and their justifications, enable the interpretation, adjudication and enforcement of non-state norms. With the help of various *narratives*, sport associations also aim to minimise the effects of state courts and the criticisms of society (consumers) towards the sport associations’ policies, norms and practices. Sport associations must survive in the states where they are founded and the ones where they conduct their activities. They also have to survive in the market. Sport

associations fight for the time and money of present and future consumers (individuals); they fend off challengers in the shape of other modes of entertainment, and especially other sports or sport associations. Put differently, sport associations enjoy globalised production and consumption processes, but they need the necessary tools to reach their associational, political and economic goals. Their regulatory, adjudicatory and enforcement ('RAE') powers provide substantial leeway for sport associations in their activities and their relationship to the state and the market. Through the strategic deployment of the narratives, RAE powers (re)interpret freedom of expression. These powers can even override municipal law. Crucially, these powers undergird the position of the athletes, spectators and audiences before the sport associations. The idea that a private entity whose primary goals are to draw up the norms of a certain sport, organise competitions related to it and generally secure operating profits could curtail freedom of expression is jarring. In the last instance, domestic or transnational private entities negate the fundamental rights enshrined in the constitutions of states, as well as human rights documents.

This book has argued that the defence of the freedom of expression of the athletes, spectators and audiences should be shaped according to the individual's characteristics as a moral agent and the sport as a political and economic force. The misleading *narratives* of politics-free sport and political neutrality, sport's self-interested nature and the cynical use of RAE powers and the virtual monopoly of sport associations have moved the defence to a moral and universalistic plane. With the help of a moral understanding of freedom of expression, this book has defended the individual in their political struggle. The individual enjoys moral powers in order to express themselves and receive information from other individuals. As a moral being, the individual has inherent rights, especially the right to be treated as an equal. Thus, the athlete and others do not completely shed their rights when they become a part of the production and consumption processes of sport. Under this conception, sport associations and their RAE powers do not have free rein in shaping the moral worlds of those who participate in these processes. Due to the individual's moral powers and their right to be treated as an equal, sport associations must base their practices concerning political expression on 'articulate consistency'. Since sport associations allow political symbols such as the states' flags, national anthems and other related expressions, the same institutions must allow those expressions that do not conform to the idealised versions of the state, market, society and sport. Contrary norms and practices do and would infringe upon the moral personhood of individuals in their capacity as both speakers and recipients.

An approach to rights that positions itself closer to naturalism due to governance structures, as well as the failure of positive law to mitigate the impact of certain practices, is not novel. The same desire to appeal to something 'higher' is also apparent in the American Revolution (Ely 1980, 49). 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 (Kao 2011, 158). 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 the Third Reich due to invasions, annexations and the coercive power over its allies became the foundations of change. Accordingly, the novel aspect of this book was to transpose and test arguments for freedom of expression and its limits to sport. Primarily, the impossibility of directly applying certain arguments to transnational sport resulted in creating sport-specific defences of freedom of expression and its limits.

This book has also emphasised that freedom of expression cannot and should not be without limits. In parallel with the rejection of absolutism in all jurisdictions and the literature on law and philosophy, limitations as to when and how athletes and spectators can convey an expression were matters of concern. Arguments for limitations in this book took into account the characteristics of sport and its production and consumption processes. If the athlete, the spectators and the audience members are moral beings, their well-being must be protected. Sport associations, therefore, must introduce and implement the necessary norms to dissuade expressions that may lead to immediate bodily harm. The relevant decision-making bodies must also bear in mind the specific circumstances of the political expression. Consequently, they must conduct case-by-case analysis.

This book has highlighted the importance of justifying the limits. Sport associations claim that the harm to persons and balancing the rights and interests of natural and legal persons justify the limits. As in other subjects, this book has had a sceptical and critical view of these claims. Although protecting individuals from undue physical harm is a legitimate aim, sport associations abuse the desire to protect individuals and groups from possible psychological harm due to political expression. With the help of the *nomoi* and *narratives*, the harm becomes the deciding factor, unduly limiting the freedom of expression of all involved. Possible harms to sport, the sport associations or their brands pose similar dangers. Furthermore, the balancing and weighing of rights and interests lead to ambiguous and poorly constructed processes on the part of decision-making bodies. Sport associations and decision-making bodies argue that the interests of sport associations override those of the individuals or smaller groups because any harm to the sport association or its brands would be detrimental to sport itself. Nevertheless, weighing rights and interests and balancing them according to the policies of sport associations create more problems than they solve. Crucially, they weaken the individual's status because the individual cannot expect to be victorious when their rights and interests clash with those of the many.

The fact that the discourse on discrimination and 'hate speech' has been at the forefront of society in general and sport in particular, required a more detailed look into the subject. Without commenting on the legal, philosophical and societal discussions on hate speech in states and society, the book acknowledged that sport associations could limit hate speech. Provided that they pay regard to articulate consistency and ensure the well-being as well as the equal moral status

of the individuals concerned, sport associations could pass and enforce anti-hate speech norms. The crux of the matter is that sport associations must expand hate speech's scope to cover most types of othering and discrimination. Yet the situation is not clear-cut. Certain expressions may have roots in history, especially controversial eras, ideologies, institutions, persons and symbols. The emphasis on the global production and consumption processes of sport and articulate consistency throughout the book undergirded this discussion. Concordantly, subject to the proper application of the notion of articulate consistency, the relevant section has argued that the historical connotations an expression might have would require an evaluation that considers the expression's root, source and impact. After all, sport associations tend to restrict discriminatory expression referring to historical events and symbols with 'unappealing' connotations; however, the same institutions allow symbols and hallmarks of other historical events and regimes which have had massacres in their past.

On the one hand, this work is of a normative nature. It should be perceived as a case of 'legitimate utopianism', meaning it is 'an ideal model of society that is perhaps unattainable but does not treat as equivalent all situations which do not fulfill the model. It orders those situations according to how far they are from satisfying the elements of that ideal model' (Nino 1996, 145). On the other hand, the author is well aware of the stark reality where inequalities could prevail with the help of economic logic and political logic. The book is anchored in the realities of sport. In view of the two points, writing a work on the philosophy of sport that foregrounds legal concerns challenges the methodology of the literature of various disciplines and the claims and justifications of sport associations. This book has used an interdisciplinary method. It has combined theoretical tools from various sub-disciplines of philosophy, law, sociology, and, at times, management. Ethics, philosophy of sport, political philosophy, sports law, sport governance, sociology of law, philosophy of law and sociology of sport have all helped present the problems and possible solutions. The main aim was to present a conceptual analysis (broadly conceived) of key terms and processes in sport. The explication and dissection of the terms (such as autonomy, politics-free sport, political expression and the individual) related to freedom of expression's place within sport required an approach that would go beyond the confines of separate analyses of the relevant disciplines. These disciplines and sub-disciplines, working in tandem or separately, offered diagnostic tools for identifying the outstanding issues regarding freedom of expression in sport. They helped locate the issues and, in the second instance, go to their roots if the tools allowed. Nevertheless, this work does not purport to have reached the roots of every discussion. The explanatory chains that started from relevant cases and explained their causes had to break due to the book's limited scope. Likewise, different tools from other disciplines, sub-disciplines, ideologies and theories would surely result in various diagnoses and cures.

There are three underlying reasons for an interdisciplinary approach. First, the 'juridification of sport' since the final decade of the 20th century invariably linked the associational goals of sport associations and legal processes (Parrish 2003,

6, 9). Sport associations use their RAE powers to guide the production and consumption processes. The norms and their interpretation have the potential to curb the rights of everyone involved. The relative autonomy of sport associations and their normative orders have to undergird the discourse on the rights of those who take part in sport. Second, as an activity that is linked to the 'good' and the 'right', sport partakes of ethics. Sport associations and states (as in the case of 'anti-hooligan' measures) determine the conduct of those who take part in sport as athletes and spectators. The notions of fair play, role model, sporting conduct and level playing field have time and again appeared as justifications for such guidance. In the case of freedom of expression, such determination affects the individuals' ability to receive and impart political expression. Taken together with the first point, the ethical and philosophical reasonings behind the limiting of freedom of expression undergird the sanctions against athletes, spectators or legal persons such as clubs and associations. Third, although the individual's status vis-à-vis sport association is the primary concern of this book, it has to be appreciated that sport is produced and consumed (unless one watches sport alone in their home) in groups. Athletes come together to produce sport, and spectators, as well as audiences, come together to consume sport. Furthermore, the fact that sport is a vessel for competition between nations highlights the importance of groups. Therefore, any argument that ignores group dynamics and the importance of nations and their symbols sport would be telling only one side of the story.

One objection to the method employed in this book would emphasise its focus on the individual. The final point in the previous paragraph does not obscure the fact that methodological individualism constitutes the basis of the claim that all political expression should be allowed in sport, except the ones indicated in Part III. On the contrary, the book acknowledges that the individual is a part of various communities. They are citizens and they become a part of sport associations when they compete. They also create contractual relationships with the same associations through tickets and they attend or watch the competitions together. Ultimately, they consider themselves as members of a group, and as consumers, they conduct their economic activities in the market. At its core, this book has posited that the defence of freedom of expression of the individual must start with locating the individual within various groups of natural and legal persons. The reason is that through norms and the use of public feeling, these groups have the power to apply pressure on the individual and guide their conduct. Hence, if expressing oneself or receiving information are the foundation stones of being human, that is, being a moral agent, their limiting at the hands of various groups with misleading justifications must be met with more robust, more fundamental and universalistic arguments.

Recent developments in sport and sports law may be glimmers of hope in protecting human rights in sport. As indicated in Section 6.3.2, human rights abuses in host countries and cities and the flaws of the legitimisation practices and the structures of international sport associations have resulted in a course

change (Næss 2019, 131). In general, sport can no longer ignore the calls for a safer and more just environment. The IOC adopted norms that have softened the previously stringent regime concerning freedom of expression. Likewise, the IOC, FIFA and UEFA introduced special processes to uphold human rights in their tournaments (Grell 2018; Kirschner 2019). The CAS published a special report on the intersection of CAS and human rights (CAS 2021). The US and the sport associations that reside there aim to eradicate the abuses against individuals (especially against girls and women, including the partners of athletes) through purpose-built processes (NBA CBA 2017, Exhibit F, Joint NBA/NBPA Policy on Domestic Violence, Sexual Assault, and Child Abuse; Protecting Young Victims from Sexual Abuse and Safe Sport Authorization Act of 2017) Crucially, in parallel to the public feeling, the market is aware of the possibilities and consequences of taking sides in political debates. The market, which sets the tone for the policies of the sport associations, might turn out to be an unlikely ally for the defence of freedom of expression. In this regard, Nike's advertisement campaign featuring Colin Kaepernick with the slogan 'Believe in something. Even if it means sacrificing everything' showed that defence of freedom of expression and dissent could be profitable (Mosbergen 2018). In cadence with these developments, the literature on the preceding is expanding.

Nevertheless, one must gather more evidence on the deterring power and effectiveness of these new measures and practices. Likewise, the inevitable backlash from those who do not agree with the 'mixing of politics and sport' or the direction that the market and sport have taken (for now) has to be made an issue. The evidence from the positive steps mentioned previously must be analysed through the lens of articulate consistency because sport associations and the market might be indifferent to less well-known, less-publicised or controversial struggles for rights and equality. The economic logic and political logic may yet negatively affect these endeavours.

Regarding the roads not taken, this book dealt with only a small portion of the current or possible issues arising from sport. It did not analyse the expressions directed against the sport associations or their agents. Neither did it aim to present a framework for the clubs' and teams' expressions or the athletes' and the spectators' legal and moral relationships with the clubs. That there is an employment contract between the former and the club would require a different approach to the matter at hand. The online political expression of athletes did not find a place in this book either. Finally, an investigation into the restrictions on commercial speech at mega-events and the role of intellectual property regimes that are forced by sport associations could shed light on other dimensions of the interdependence of the state, the market and sport. Different variables come into play depending on the subject and the legal or natural person who conveys the message. 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 sport associations and their agents might be enlightened by this work's arguments regarding the preassigned roles of athletes and the spectators.

Consequently, as long as there are restrictions on freedom of expression in support of the interests of sport associations, and as long as their interests and the market's and the states' interests become the prime movers of these restrictions, there will always be plenty of subjects to analyse. Even where there may be victories for freedom of expression, as Harry Edwards (2016) has rightly pointed out, they are not final as the only enduring things are the struggle and the people (4).

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