

Freedom of expression of athletes before the ECtHR, including procedural safeguards

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**30 November 2022
Strasbourg**

Article 10 ECHR

- The principle:
- 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
- (...)

Article 10 (cont.)

- The restrictions:
- 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are **prescribed by law and are necessary in a democratic society, in the interests of** national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary **[3 conditions for a lawful interference in freedom of speech: legal basis, legitimate aim and necessity in a democratic society].**

General principles elaborated by the ECtHR

- Freedom of speech is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, **but also to those that offend, shock or disturb.**
- A particularly high level of protection is granted to **political speech and matters of public interest** (very narrow margin of appreciation conceived to states).
- Freedom of speech is however **not unlimited** (limits are, in particular, incitement to hatred or discrimination).

ECtHR case law

- Three judgments delivered on the same day (18 May 2021):
 - *Sedat Doğan v. Türkiye* (no. 48909/14)
 - *Naki et AMED Sportif Faaliyetler Kulübü Derneği v. Türkiye* (no. 48924/16)
 - *İbrahim Tokmak v. Türkiye* (no. 54540/16).

Facts

- Similar facts in all three cases:
 - Disciplinary sanctions (suspension) imposed by Turkish Football Federation (TFF) on players, clubs, directors or referees, based on certain comments made on Twitter, Facebook or during a TV interview.
 - Sanction confirmed by the Arbitration Committee of the TFF in last instance (no appeal open to ordinary courts); see also *Ali Rıza and Others v. Turkey*, 28 January 2020.

One example: *Sedat Doğan v. Türkiye*

■ Facts:

- Applicant was member of the board of directors of the football club Galatasaray.
- During a TV interview, he criticized a decision of the Turkish Football Federation (TFF) disciplinary commission to start investigations against two of his players for having shown a message in tribute for Nelson Mandela, who had died the night before.

Facts

- By decision of disciplinary commission, he was suspended in his rights as a board member and had to pay a fine.
- In December 2013, the arbitration committee considered the comments as insulting and negative value judgments and confirmed (but reduced) the sanctions.
- In a second set of proceedings, he was sanctioned by the disciplinary bodies of the TFF for having criticized the first sanctions via twitter.

ECtHR's reasoning and conclusions

■ Common flaws identified by the Court in all three cases:

- The domestic courts' reasoning indicates a **lack of appropriate balance** between, on the one hand, the applicants' freedom of expression and, on the other hand, the private or public interests invoked by the TFF, such as the maintenance of the public order or the peace in the football community.
- In conclusion, there had been a violation of Article 10 in all three cases.

The limits of freedom of expression

- *Šimunić v. Croatia*, no. 20373/17, 22 January 2019:
 - **Facts:**
 - Šimunić was convicted by the Croatian authorities of a minor criminal offence for addressing messages expressing or inciting hatred. In fact, he used an official greeting of the Ustash movement, the totalitarian fascist regime of the Independent State of Croatia.
 - Before the ECtHR, he claimed that there had been a violation of Art. 10 ECHR.

The limits of freedom of expression (contin.)

■ Court's conclusion:

- Croatian authorities had **struck a fair balance between** the right to freedom of expression and the society's interest in promoting tolerance and mutual respect at sports events as well as combatting discrimination in sport.
- The applicant, as a famous football player and a **role-model for many young fans and players**, should have been aware of the possible negative impact of his behaviour and should have abstained from it.
- As a result, his complaint was inadmissible.

Procedural guarantees (in particular Article 6 § 1 ECHR)

- **Article 6 § 1:**
- 1. In the determination of his **civil rights and obligations or of any criminal charge** against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly (...)

Mutu and Pechstein (contin.)

- Ground-breaking cases decided on 2 Oct. 2018.
- Facts:
 - **Mutu** was a professional football player who had been ordered to pay a very high sum to his club (Chelsea F.C.) for a unilateral breach of contract.
 - **Pechstein** was a speed skater on whom sanctions had been imposed for doping.
 - They both appealed to the CAS, then to the Swiss Federal Tribunal.
- Complaints: Fairness of procedure before the CAS (Article 6 § 1 ECHR).

Mutu und Pechstein (cont.)

- Main findings of the Court:
 - The Court had jurisdiction!
 - Nature of sports arbitration:
 - **Pechstein**: She had no choice: compulsory arbitration in her case!
 - **Mutu**: He had a choice, but there was no unequivocal waiver of his Article 6 rights.
 - This meant that the applicants enjoyed all the guarantees enshrined in Article 6 § 1!
 - Court held that the CAS was an independent and impartial tribunal.
 - But **Pechstein** did not benefit from a public hearing before the CAS: violation of Art. 6.

Procedural guarantees in the 3 cases against Türkiye:

- Article 6 ECHR (independance and impartiality of **domestic** arbitration body)
 - In particular due to its structural flaws and the lack of mechanisms protecting its members against pressure from outside, the arbitration committee of the TFF could neither be considered **independant nor impartial** (see also *Ali Riza v. Turkey*).
 - Regarding independence of the courts, even appearances may be of a certain importance: **"justice must not only be done, it must also be seen to be done"**.

Conclusions

- **Conclusions from the cases already decided by the Court:**
 - Article 10 ECHR applies to the field of sport, in spite of the private nature of sports federations and CAS.
 - The Court applies the usual standards and limits.
 - Procedural guarantees (Article 6 ECHR) are crucial in the field of sport due to the particular (compulsory) arbitration proceedings.
- **Issues not yet decided by the ECtHR:**
 - Hate speech in sport, in particular online!
 - Principle of political neutrality of the sport movement:
 - Under Article 10 ECHR, the principle is free speech!
 - In sport, the principle is no (political) speech!
 - **Is this contradiction sustainable in the long run?**

DEFENDING ATHLETES, PLAYERS, CLUBS AND FANS



Daniel Rietiker

Manual for human rights education
and litigation in sport,
in particular before the
European Court of Human Rights