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Fundamental Guarantees with Respect to Disciplinary Process - Some Reflections

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FUNDAMENTAL GUARANTEES WITH RESPECT TO DISCIPLINARY PROCESS - SOME REFLECTIONS

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I. INTRODUCTION

I do not know what your feeling is when receiving clients for a disciplinary case, explaining the disciplinary process, preparing the file, arguing in front of the disciplinary commission, and then explaining - no matter if you won or lost the case - the possible recourses, and the direct and indirect consequences of the decision.

My feeling is divided between a qualification of a "judicial" process and a "paternalistic" process. Reality is always balanced between the two and depends on the delegation of power governments give or do not give them.

Of course, the disciplinary commission of your federation has a little more of a "paternalistic" approach, with the pursued and the suing party sharing interests beyond the injury. In fact, the two of them, obviously, have been involved by the time you meet them.

During judicial or arbitration proceedings, the situation is pretty much different, but it is always painted in paternalistic colors because the interests of one party (the federation) often join the interests of the other (the sportsman); their common interest being the sport overall.

Why shouldn't we apply fundamental guarantees just because it is "only" a disciplinary process?

I would say that each mechanism of sanction must, no matter what field it concerns, respect the individual recipient and be respected by this individual. The European Court of Human Rights (ECHR) has already reminded us that the guarantees of Convention for the Protection of Human Rights and Fundamental Freedoms, Article 6 (especially Article 6-1)[1] does not apply

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1. Convention for the Protection of Human Rights and Fundamental Freedoms (CPHRFF), Article 6-1 (2003) provides:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is

systematically to the first steps of the disciplinary process, but must be applied to at least one degree of the proceedings.[2]

We also have to consider that, even if the paternalistic aspect of a disciplinary process, which is different from the sports sanction, is pretty well developed, the matter often concerns an individual carrier, which is an important area. Thus, mutual respect is the basis. Without this respect, the process cannot be considered a credible one. And from a non-credible system to a non-legitimate system, there is only one step.

This is the stake of the fundamental guarantees with respect to disciplinary process.

This stake must be fulfilled from the moment of defining the rules and defining the sanctions to avoid any risk of a further breakdown during the exercise of recourses or simply by observations made by the media, which can ruin a sportsman as an institution.

The World Anti-Doping Agency (WADA) has understood well the interest in anchoring the legitimacy of its action for the World Antidoping Code into fundamental guarantees, giving to the participants of the Copenhagen Conference last March a document named "Synthesis of Law Advice Related to Conformity of Certain Provisions of the World Antidoping Code to the General Principals Recognized of International Law."[3]

I do not know what this advice really contained, because the paper we were given was too short to know, but the idea of doing it is significant of the recognition of the role of fundamental rights nowadays.

I will not go into detail, but we can focus on the main elements, especially during the procedural phases of the disciplinary process.

II. THE LEGALITY OF DISCIPLINARY PROVISIONS

An offense that had not been defined before the commission of the offense would be considered without any legal provision, even if the sanction has a criminal or a civil character, the distinction between the two of them being

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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 but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Albert & Le compte v. France, Eur. Ct. H.R. (ser. A) at 58 (1983).

3. *See,* Nathalie Korchia, *Le Code Mondial Antidopage a été adopté à Copenhague*, Mar. 5, 2003, *at* http://www.bioracoones.com (last visited Oct. 24, 2004).

nevertheless very relative according to the legal system.[4] To this day, the ECHR is the only one to have effective rights with judicial control of their effectiveness, with a pretty large jurisdiction (forty-four states).[5] So, it supports my reflections.

According to Article 7-1,[6] a person must have been informed of the existence of an offense at the time she committed it (legality), and no more severe a penalty can be applied to facts already committed at the time it was enforced (non-retroactivity). It means, for example, that you cannot apply a two-year ban if it would have been a one-year ban at the time the fault was committed.

This means also that rules must be clear, preferably not subjected to interpretation, effective, applied at the time of the infringement, and not contrary to other rules, which could be superior according to the hierarchy of norms. This is the case of international conventions that, in the internal standard order, when they have a constrained characteristic, have a priority on internal laws even if the latter were enforced after the international convention.

This partly explains why an international body like WADA[7] was in charge of producing a World Antidoping Code and also why governments began negotiations on an international convention under the United Nations Educational, Scientific and Cultural Organization (UNESCO),[8] with the intermediation of the Council of Europe, which is the most experienced in this field; its first action having begun in 1963.[9] This convention could answer WADA's wishes and thus be signed by the 2006 Olympic Games, but no guarantee is given today on such a calendar. Former debates have given you more details on this particular point.

As we see with this example, private sources (sports' movement) cannot

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4. Bendenoun v. France, Eur. Ct. H.R. (ser. A) at 284 (1994); *see also* KORCHIA & PETTITI, SPORTS AND FUNDAMENTAL GUARANTEES- ASSAULT-DOPING, 523, 547 (co-publication of I.A.S.L. and I.D.H.B.P. 2003).

5. *See generally*, European Court of Civil Rights, *at* http://www.echr.coe.int (last visited Oct. 24, 2004).

6. CPHRFF, Article 7 provides "No punishment without law" in the following terms under Article 7-1:

> No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offense was committed.

7. Word Anti-Doping Agency, *at* http://www.wada-ama.org (last visited Oct. 24, 2004).

8. United Nations Educational, Scientific and Cultural Organization (UNESCO), *at* http://www.unesco.org (last visited Oct. 24, 2004).

9. Council of Europe, *at* http://www.coe.int (last visited Oct. 24, 2004).

act without public sources (States) to ensure the legitimacy and the cohesion of the system.

III. THE DISCIPLINARY PROCEDURE SUBMITTED TO FUNDAMENTAL GUARANTEES

Here, it is by virtue of Article 6 that we can understand the components of a fair trial, reminding us that the jurisprudence of the ECHR is evolving constantly with it with respect to the case to case consideration principle:

6-1 for disputes relating to civil rights and obligations[10]

6-3 on disputes related to criminal matters[11]

6-2 in the center on the presumption of innocence.[12]

As far as I know about the American system, so hard to understand for a non "federal" citizen, the Bill of Rights (1791) contains certain elements to determine what should be a fair trial and due process of law (Amendments V and VI).[13]

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10. CPHRFF, Article 6-1.

11. CPHRFF, Article 6-3 provides:

Everyone charged with a criminal offense has the following minimum rights:

a. To be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

b. To have adequate time and facilities for the preparation of his defense;

c. To defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

d. To examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

e. To have the free assistance of an interpreter if he cannot understand or speak the language used in court.

12. CPHRFF, Article 6-2 provides: "Everyone charged with a criminal offence shall be presumed innocent untill proved guilty according to law."

13. U.S. CONST. amend. V provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. VI provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and the cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his

Anyway, more or less, we can find the following components in a majority of systems, whatever civil law or common law they are.

In the sports arena, Article 7.2 of the Convention Against Doping of the Council of Europe[14] also contains provisions on "international principals of natural justice" and "[ensuring] the respect of fundamental rights:"[15]

1. To be informed of the cause and the nature of the accusation in the language of the "accused:" this is the question of notification of the violation of a rule, the knowledge of which allows an accused person to organize and reply to such assertions, among others.

2. To have enough time to organize a reply/defense.

3. To have the right to discuss the case (adversarial principle included in a larger principle: equality of arms) which means:

3.1. To have the right to contest the file of the case: access to the file:

Here, a special issue on doping cases and generally on cases involving medical elements: medical confidentiality usually does not allow a doctor to give information on the health of a patient, so the transmission of the file is usually submitted and exclusively authorized to a doctor or to the patient himself. It means the commission itself cannot get the information except for analytical results, like the evidence of a detected substance.

Another point to be noticed: in a case named *Mantovanelli,* the ECHR in 1997[16] held there was a violation of Article 6 when persons suing a hospital for a criminal offense were not informed of the dates of the steps taken by the expert. Thus, they did not have the opportunity to comment effectively on the doctor's assertions and some of the documents taken into account in the expert

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favor, and to have the assistance of counsel for his defence.

14. This convention (CETS n° 135) was adopted by forty-four States. Even adopted under the European Council auspices it is still open to third parties. To this extent for example, Australia and Canada ratified the Convention respectivly in 1994 and in 1996. The convention entered into force on March 1, 1990.

15. Convention Against Doping of the Council of Europe, Article 7-2 provides:

To this end, they [the States] shall encourage their sports organisations to clarify and harmonise their respective rights, obligations and duties, in particular by harmonising their:

...

d. disciplinary procedures, applying agreed international principles of natural justice and ensuring respect for the fundamental rights of suspected sportsmen and sportswomen; these principles will include:

i. the reporting and disciplinary bodies to be distinct from one another;

ii. the right of such persons to a fair hearing and to be assisted or represented;

iii. clear and enforceable provisions for appealing against any judgement made;

...

16. Mantovanelli v. France, 1997-II Eur. Ct. H.R. 140 (1997).

report were not transmitted to them. According to a dissenting opinion of one of the judges,[17] this was a confusion between the adversarial principle within the meaning of Article 6, of a fair trial, and the evidence system which would not be included as far as it is related to the law of the "for" that is the law the tribunal (it can be a commission) asked to judge.[18]

3.2. To have the opportunity to present evidence by oral or written testimony, ask for another expertise,

3.3. To be assisted or represented by a council (even if not a lawyer),

3.4. To have the right to get to an independent and impartial tribunal, which means among others:

a) *To distinguish the suing authority from the instruction authority and from the judgment authority:*

It is really unfair to mix, for example, the federation, which is often the suing party, with the members in charge of completing the file and/or with the persons sitting on the disciplinary commission who have to make a decision with all the information given by the two parties, not only by the federation or by the sportsman.

b) *To express your point of view orally and enter into a debate*:

That is, to have a hearing if an oral presentation seems to be necessary, but when there is a written possibility of expressing one's point of view, and evidence, it can be enough because the stake is to discuss the case and bring counter arguments or different arguments to be heard by the commission.

c) *To have the right to ask for a public or a private hearing*:

Disciplinary hearings are generally private.

d) *To have the knowledge and the right to contest the presence of some members of the disciplinary commission when not having the guarantees of independence and impartiality*:

It means not to be submitted to a relationship - contractual or any other kind of relationship - with the authority of suit and the authority of judgement. It also means the authority of payment of your fees or salary as a member of the commission and the authority of appointment - if the two of them are separated – is not allowed to, in any case, pursue you for your functions. This is the right to be "judged" by an independent commission/council/ tribunal/court (whatever the name of your judge is).

4. To have a judgment within a reasonable time.

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17. *Id.*

18. Shenk v. Switzerland, Eur. Ct. H.R. (ser. A) at 140 (1988), [1988] ECHR 140, Jul. 12, 1998.

5. To have a judgment with an appropriate motivation (to know the legality and the factual basis of the decision) in order to let you contest it if needed; this means a written decision is required even if you give it orally after the commission session for example, or at the beginning of a new session.

6. To have the right to an appeal (to be mentioned upon notification of the decision). Usually the delays are very short so this information is even more important to give to the recipient when notifying of the decision with the same guarantees as mentioned before (Article 2).[19]

This means to have different judges to get access to a fair, new trial at this second step (appeal) with the same guarantees as before.

7. To get to a jurisdiction controlling the application and thus, the effectiveness of fundamental guarantees by the former steps (Article 13 ECHR).[20]

IV. CONCLUSION

A lot of things were not said in this communication and obviously need further development like:

1. The right to get remedy when condemned for a criminal offense never committed (judicial error).[21]

2. The right not to be punished twice.[22] This issue could be another

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19. Protocal No.7 to CPHRFF, Article 2 provides the "Right of appeal in criminal matters" in the following terms:

> 1. Everyone convicted of a criminal offense by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.
>
> 2. This right may be subject to exceptions in regard to offenses of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.

20. CPHRFF, Article 13 provides the "Right to an effective remedy" as follows: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

21. Protocal No.7 to CPHRFF, Article 3, provides "Compensation for wrongful conviction" in the following terms:

> When a person has by a final decision been convicted of a criminal offense and when subsequently his conviction has been reversed, or he has been pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to the law or the practice of the State concerned, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

22. Protocal No.7 to CPHRFF, Article 4, provides the "Right not to be tried or punished twice" in

speech by itself (the non bis in idem principle).

3. The increasing guarantees and specifications for the protection of minors.

4. The mutual acknowledgment and recognition of disciplinary process, decisions, sanctions and execution between federations, between national and international federations, and between States. It involves the issue of cooperation - exchange ofinformation - among others -between States and judicial authorities.

Finally, you may think that you cannot ensure the existence and the effectiveness of such guarantees. But in my point of view, these fundamental guarantees are what can be considered as the price of the security, of the credibility, of the legitimacy and somehow, the price of the right to make decisions. Why should private commissions be entitled to judge and sometimes cause very important injuries to individuals if they do not have any legitimacy or are not recognized by the recipients for such a policy as a legitimate authority?

The disciplinary field is one of those which needs to be accepted to let the parties work together after it and work better together. An accepted decision, whatever it is, has better chances to be a good one.

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the following terms:

1 No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offense for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

3. No derogation from this Article shall be made under Article 15 of the Convention.