



## Arguments for Promoting the Right to Practise Sports as a Fundamental Right

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**Abstract.** The theme of this article covers the benefits of sport for society in general, but also the provisions of Romanian Law no. 69/2000 on Physical Education and Sport, as subsequently amended, as well as all the relevant Romanian legislation arising from the provisions of European Union (EU) law on the subject, in particular The White Paper on Sport and the Charter of Fundamental Rights of the European Union, documents which entered into force pursuant to the Treaty of Lisbon. Last but not least, the article debates the possibility of enhancing the importance of practising physical education and sport as an inherent human right.

**Keywords:** sport, physical education, fundamental rights and liberties, natural law.

*“Play is a uniquely adaptive act,  
not subordinate to some other adaptive act,  
but with a special function of its  
own in human experience.”*

Johan Huizinga

## **The sporting phenomenon – a significant social phenomenon**

Every individual is keen on developing speculations and debates regarding the causes, consequences and even the content itself of various phenomena and processes that he or she might encounter in daily life. The most probable outcome of such an endeavour would most probably be that of referring to these subjects from different perspectives, that is, ascertaining different points of view – subjectivity owing in this case mainly to conditional experience and common sense. Therefore, one must place oneself in a position that claims a prudent attitude – if not total rejection – towards intuition, speculation, horse-sense (the fundamentals of common sense), and strive for the rigours of the scientific method.

It is thought that human rights are an ideological projection in order to justify certain social actions, a philosophy, a concept of the world and the existence. Human rights are foremost a sociology of contemporary life inasmuch as they encompass facts, phenomena, social processes and relationships alike, mentalities, states of mind, imagery, representations, interests and perceptions. Max Weber spoke of the design of the world and man's place in it. The topic on human rights is often reduced to a legislative concept, and human rights education bears a technical nature – law articles, pros and cons debates in sustaining a certain idea, case analysis etc. In this particular context, one cannot ignore the existence of a sporting phenomenon, which has developed into an important social phenomenon. Its importance is foremost justifiable by humans' dependence on their physiological and social needs to participate in organized or random sporting activities, also used – more recently – with the aim of satisfying a professional vocation (professional sports).

We see it imperative to remind ourselves that a person “is not static, he is profoundly dynamic, he is a living reality in a tireless state of wanting, restless until reaching his goal” (Mărgineanu 1999:78). It is from this psychology-of-the-(dynamic)-person perspective that we will be able to appreciate the three forms of human development: biological, dynamic and psychological, reaching the conclusion that these are the working fundamentals of the motivational theories. Whether one agrees or not – ultimately confident in the social-cultural calling of the human nature – a person is concurrently nature and culture. That is why one can argue that the need to exert physical activity – viewed as a means of physical education and sport, whether professional or amateur – is also a biological need that is integrated in people's various organic necessities, as are those “linked to the assimilation and dissimilation process or anabolism and catabolism, such as hunger, thirst and breathing on one hand, and the necessity to preserve the species, or sexual instinct, on the other.” (Mărgineanu 1999:79).

Every single need-related work motivation theory drawn up by authors such as Maslow, Clayton Alderfer (ERG theory – existence, relatedness, growth), (Gary 1996: 153) McClelland (Necessities theory), Faverge J.M (1976) states that until

elementary necessities, more urgent and pressing, have not been fulfilled, all others remain in the background; as one category of needs is satisfied, another, superior one, is sought after.<sup>1</sup> This justifies our statement that human needs have been revalued in time as being inherent rights of the human being – transposed in generations of fundamental human rights.<sup>2</sup>

Therefore, taking into consideration that *the need to practice sports is an inherent right of the human being*, the European Sports Minister of the Council of Europe has already ascribed a *legal value* to this need appreciating it as a *fundamental right* through the European Sport for all Charters in 1975. The first article stated that *every individual shall have the right to participate in sport*. “From that date on, sport policies in Europe were endowed with a common programme based on the conviction that the values of sport would contribute to the fulfilment of the ideals of the Council of Europe.”<sup>3</sup> Later, in 1992, inspired by the same charter, the European Sport Charter was adopted with the aim of providing a common set of principles for the European countries. The Charter was completed afterwards with the Code of Sport Ethics promoting the principle of fair play<sup>4</sup>.

On international level, in 1978 the General Conference of the UNESCO adopted the International Charter of Physical Education and Sport, which expressly states in its first article that the practice of sport is a fundamental right for all.

Similarly, a child’s right to play has been enshrined in article 31 of the Convention on the Rights of the Child, which recognizes “the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child”. “Several other United Nations instruments also acknowledge the importance of access to and participation in sport, such as the Convention on the Elimination of All Forms of Discrimination against Women. Similarly, ILO Conventions Nos. 138 and 182 concerning child labour require Governments to establish policies for the rehabilitation of child labourers. Here, sport is considered an effective policy tool.”<sup>5</sup>

In spite of these international instruments, the right to sport and play is often denied or neglected, often gender and ability based discrimination. It is also

<sup>1</sup> For example, according to Maslow, the needs hierarchy is as follows: 1) physiological needs 2) security needs 3) social needs 4) self-esteem needs 5) self actualisation needs.

<sup>2</sup> Intangible rights (e.g. the right to life, the right to have a personal development), conditional rights (e.g. the right to education, the right to privacy), indirect rights (e.g. foreigner rights) and the so-called third generation rights (Augustin Fuerea, “*Introducere în problematica dreptului internațional al drepturilor omului*” / *An Introduction into the Notion of International Human Rights Law*, Editura Era, 2000).

<sup>3</sup> History of the European Sport Charter [http://www.coe.int/t/dg4/sport/sportineurope/charter\\_en.asp](http://www.coe.int/t/dg4/sport/sportineurope/charter_en.asp), January 15, 012.

<sup>4</sup> See [http://www.coe.int/t/dg4/sport/sportineurope/charter\\_en.asp](http://www.coe.int/t/dg4/sport/sportineurope/charter_en.asp)

<sup>5</sup> Report from the United Nations Inter-Agency Task Force of Sport for Development and Peace, 2003, [http://www.unep.org/sport\\_env/documents/taskforce\\_report.pdf](http://www.unep.org/sport_env/documents/taskforce_report.pdf), p. 4

frequently due to political neglect of the importance of sport in society, exemplified by the decline in spending on physical education and the lack of appropriate spaces and resources necessary for sport.<sup>6</sup>

Human rights are inherent to the human being, “taken individually or as part of a predetermined social group” (Niciu 1997: 196). Human rights are fundamental to our nature. The deprivation or denial of these rights amounts to the inability to exist as human beings and opens the path to political and social disorder. Exercising these rights freely can only be possible in a legal protection system that guarantees and implements human rights. In the preamble of the *Universal Declaration of Human Rights*<sup>7</sup> (par. 1) it is stated that “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”.

### **The functions and values of sports**

It seems that the present day finds us witnessing an overturning of all values. We deny everything, even that which not long ago surrounded us with respect. Still, we must not forget that the struggle of values for pre-eminence is defined by a permanent contradiction. History shows us that the values which are imposed on everyone are only those that “completely satisfy the logical and psychological criteria of the human soul” – the foundation of a value needs to be based on logic and the theory of knowledge. The wideness and validity of value can only be established through logic. Two points of view are to be taken into consideration when discussing the issue of value, as follows: a. *subjective-psychological*, which induces a value-based psychology, and b. *objective-logical*, which determines the most profound and thorough research, *the logic of value*. (Andrei 1997: 15/23)

Numerous functions are attributed to the concept of sport, more significantly: *conative function* (satisfaction of the desire to move, to act), *competition function* (stimulation and satisfaction of the desire to compete), *performance maximising function* (performance capacity development in a biological, psychological and social scheme), *social function* (integration, social assertion, communication, emulation – also comprising the national identity representation, cultural and economic functions).

The sporting culture is an essential element of economic development and social regeneration and stands as an indicator of the quality of life and individual welfare. The law – seen as a normative phenomenon – is also entrusted to create the legal framework in an ample social phenomenon such as sports. It is

<sup>6</sup> Ibidem.

<sup>7</sup> Universal Declaration of Human Rights of December 10, 1948 – issued by The General Assembly of the United Nations, published in the Brochure of December 10, 1948.

imperative that all participants to sporting activities are guaranteed legal reliability, in the sense that individual behaviour needs to be influenced in the name of value requirements that encompass both legal values and positive values of sports – more so in the current context, marked by the excessive commercial nature of sports and its transformation into an instrument of political manipulation (which can lead to a legitimization of illicit behaviour both in and off ‘the court’).

The sporting phenomenon requires a prior understanding and embracing of meanings attributed to various notions and concept, such as: society and globalisation, social system, state, culture, politics, deontology, law, rights and liberties, social values, interest groups etc. If we accept Warren Weaver’s definition of communication – mainly relevant through its pragmatism – “Communication is *the totality of processes by which one mind can influence another*” (Prutianu 2008: 339) – then we can understand the importance of the functions served by all communicators (Fournier 2010: 198/201) (medics, priests, pedagogues, psychologists, coaches, athletes, managers, science communicators, actors, artists, lawyers, magistrates etc.) – including mass-media which – not seldom – act as a social control tool, a source of social pressure on the individual (Noell-Neumann 2004).

Communication made by sports communicators has a political dimension, but also a cultural conditionality. It is in this respect that cohabitation between systems of different cultures should be promoted – *cultural cohabitation* – truly a unity in diversity, more effective than multiculturalism seen as a prerequisite of a nation-state (Allemand 2010: 294/297). “While sport and play are repeatedly acknowledged as a human right, they are not always seen as a priority and have even been called the ‘forgotten right’. Sport is seen as a by-product of development, not as an engine.”<sup>8</sup>

Human rights should not form an enclosed philosophical, political, religious and social system. They should be kept open to diverse ways of thinking, to diverse beliefs, cultures and social practices. Each person is a subject of law. This is a common feature which establishes the link with society. The human being has inalienable rights, irrespective of the will of the authorities. The concept of fundamental rights makes a direct reference to the natural rights philosophy, inspired from the European humanist movement.

Debates over natural rights are open as a result of new situations that arise in human life, of new claims – both on a national and international level. The international human rights law constitutes a summation of natural rights expressed in the present context of globalisation, to which states must associate in order to transform them in positive rights – rights that establish common principles and can be applied by a concrete international jurisdiction. Contemporary legal papers on

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<sup>8</sup> Report from the United Nations..., p. 2

the protection of human rights provide a large number of philosophical notions that can constitute the basis for a consensus. This international law of human rights texts focus on the link between the individual and the authorities, on the legitimacy of the latter's actions and on the conditions under which individuals with equal rights coexist. Owing to the respect of each individual and the equality in rights and dignity, human rights constitute an open system for the peaceful coexistence of a multitude of cultures, beliefs, practices and social organisations (Voinea, Bulzan 2004).

### **Returning to natural law – starting point for promoting other fundamental rights**

Research on human rights has developed a history of concepts related to them, as well as a history regarding the struggle to validate these rights. The philosophy of rights originates from individualist theories. (Dănişor 2011: 16) According to these theories, the legitimacy of power centres on human individuality. Power is legitimate only if it acknowledges the rights of the individual as an entity. Starting from here, we can question ourselves regarding the historic origins of individualism.

On a long term, human rights encourage self-interest to the prejudice of community spirit because they favour individualism without balancing it with the community. It is a well-known fact that individualism is the fundament of human rights, hence the criticism upon human rights transforms into a criticism upon modernity, which, in turn, is based on individualism. First generation human rights arise from the affirmation of the individual, which has substantially marked the destiny of modernity up to present times.

The term 'human rights' remained unknown until the French Revolution of 1789. That is why it has been said that it represents a construct meant to create a new authority, to replace the divine authority. The cause of this authority was found in *man* and his will power. It is extremely difficult now to renounce rights, if not impossible without creating insurmountable difficulties. What can and should be done is to bring individual rights in balance with the community spirit, considering the fact that individual rights cannot exist unless the *relationships* between humans change substantially – that is to say liberty, for example, cannot manifest without the background of a well organised society. Only a person with optimal relations with others can benefit from freedom. From here, a come-back to natural law is inherently necessary, more so in order to promote the right to practice sporting activities as a fundamental human right.

## **The actuality, utility and definition of the legal grounds for the existence of acquired rights**

First generation fundamental rights and liberties cannot be extended to all citizens without a proper protection of second generation rights. In this case, the two generations of rights are not only non-contradictive, but complementary. One cannot talk about the right to life, to freedom if these comprise only a part of society, the rest being eluded through various means. In fact, there is considerable controversy about what should constitute ‘human rights’ and what rights are most important, including topics such as the excessive promotion of individual rights over collective rights, civil and political rights while neglecting economic and social rights (Kidd–Donnelly 2000: 5-6). Another set of debates covers the tension between the rights and the corresponding responsibilities (Kidd–Donnelly 2000: 4). However, state intervention can assure a certain degree of social equilibrium. Profound social movements have changed the balance between social forces and have required the state to intervene in order to grant first generation rights to everybody.

One of the causes for the decline of human rights is their unjustified multiplication and extension to various fields that often seem utterly fanciful. Their multiplication leads to a decrease in their importance, which in turn can provoke an increase in the state’s power stance. This ambiguity of human rights derives from the paradoxical nature of the human being, which strives for being free of constraints while concurrently stating the necessity of order. What should be considered is that the two concepts should be balanced and mutually dependable. We agree with the statement that “individual freedom cannot be limitless, but the same forces that determine the necessity for limitations can, if permitted, unbearably restrain the scope of human freedom” (Dănişor 2011: 17). The multiplication of human rights cannot be measured only from a quantitative and qualitative perspective. If in the field of quantity the essential aspect is measurement, we ask ourselves if the right to life and freedom can be measured.

Considering the social importance of the sporting phenomenon, it is necessary to promote the right to practice sports as a fundamental right of the human being because this right identifies itself with many civil, political, economic and social rights (the right to work, the right to health welfare), cultural ones (the right to benefit from education, the right to participate in cultural life, the right to have a protection of the moral and material interests deriving from one’s work – with emphasis on sporting creations), a person’s right to fulfil their economic, social and cultural rights in order to maintain dignity – laid down as fundamental rights in national and international legislations. Along the history of the last half century it has been held that along other international conventions such as the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the

Elimination of Discrimination Against Women, the Convention on the Rights of the Child, etc, the Charter on Physical Education and Sport proclaimed by UNESCO has “contributed to a much broader commitment to human dignity throughout the world, in both in the abstract and in the concrete” (Kidd–Donnelly 2000: 6).

The updating methods are conceived differently by the theorists that have pondered in this field. A concern for updating the concept of freedom has always been present, and it focuses on the relationship between individual freedom and power, a relationship which leads to a conception of human rights. As latency is updated, history unfolds itself and human rights tend to impose themselves. We feel that the multitude of acquired rights – comprised of the third generation fundamental human rights – are in decline also because they are not justified to form a legal point of view. These have to be defined by bringing together four essential conditions without which no right can exist, both in the positive and natural law: 1. a *bearer* who can exert a right; 2. a *scope* that can give meaning to that right; 3. *opposability* which allows the bearer to exert his right in court; 4. an organised *sanction* (as to realise the right). (Dănişor 2011: 12,42).

### **The right to practice sports and its role, as prescribed by the law**

In Romania, according to Article 2, par. (5) of law no. 69/2000 on Physical Education and Sport, “the practice of physical education and sport is a human right, without any discrimination, guaranteed by the state. Exercising this right is free and voluntary and independently undertaken or as part of associated sports structures.” Physical education and sport stand for “all forms of physical activities aimed through an organised or independent participation to express or improve physical fitness and mental well-being, to establish civilised social relations and lead to results in competitions at any level” – art. 1 par. (2). As prescribed by the law, physical education and sports activities include physical education, school and university sports, sports for all persons, high-level sports performance, exercise carried out for maintenance, physical development or therapeutic purposes – art. 2 par. (3).

By guaranteeing the promotion of this right, its social importance arises from the content of art. 2 and 3 of the law: “Art. 2 – (1) physical education and sports are activities of national interest supported by the state, (2) In accordance to the applicable legislation, the state recognises and stimulates organisational actions to promote physical education and sports, held by public authorities and, where appropriate, non-governmental organisations focusing on education, the national defence institutions, public order, national security, health, in companies and other sectors of social life, (4) The State guarantees the performance of specific functions in the public and private sector in physical education and sport, in accordance with the principles of collaboration and responsibility of all interested parties, (5) The



practice of physical education and sport is a human right, without discrimination and guaranteed by the state. Exercising this right is free and voluntary and undertaken independently or as part of associated sports structures, (6) The State recognises and guarantees the natural and legal right to free association for the establishment of sports entities. Art. 3 par. (1) The government units and educational institutions, sports institutions and nongovernmental organizations have the obligation to support sports for all persons and high-level sport performance and to ensure organisational and material conditions for practising physical education and sport in local communities, (2) The public government authorities and institutions referred to in paragraph (1) shall foremost ensure proper conditions for practicing physical exercises with respect to preschool children, young persons and the elderly, for purposes of social integration, (3) The public administration authorities must offer the necessary conditions for practising physical education and sport to persons with physical, sensory, mental and other handicaps in order to sustain their personal development and integration within society and the resources to allow disabled athletes to participate in national and international competitions organised for such persons”.

It is necessary to make a clarification of terminology, to distinguish between the definition provided by the Romanian legislature in year 2000 with respect to ‘physical education and sport activities’, with that established and enshrined in the European Union’s White Paper on Sport. For reasons of clarity and simplicity, the White Paper on Sport uses the definition of ‘sport’ which was established by the Council of Europe in its European Sports Charter<sup>9</sup>: “*Sport* means all forms of physical activity, which, through casual or organized participation, aims at expressing or improving physical fitness and mental well-being, forming social relationships or obtaining results in competition at all levels.”

In consistency with one of its objectives – the welfare of its citizens, in all forms – the E.U. declared 2004 as the ‘European Year of Education through Sports’ (Fuerea 2011). The aims of this initiative were established as follows: to make educational institutions and sports organisations aware of the need for cooperation in order to develop education through sport and its European dimension, given the great interest that young people take in all kinds of sports; to take advantage of the values conveyed through sport to develop knowledge and skills whereby young people in particular can develop their physical prowess and readiness for personal effort and also social abilities such as teamwork, solidarity, tolerance and fair play in a multicultural framework; to promote the educational value of student mobility and exchanges, particularly in a multicultural environment, through the organisation of sporting and cultural contacts as part of

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<sup>9</sup> The European Union’s White Paper on Sport, Introduction, footnote no. 2

school activity; to create a better balance between intellectual and physical activity in school life by encouraging sport in school activities etc.<sup>10</sup>

In 2007, the Lisbon Treaty introduced sports within the categories and fields of competence of the EU. Therefore, according to art. 6 of the Treaty on The Functioning of the European Union<sup>11</sup> (TFUE), the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States. The areas of such action shall, at European level, be:

- (a) protection and improvement of human health;
- (b) industry;
- (c) culture;
- (d) tourism;
- (e) education, vocational training, youth and *sport*<sup>12</sup>;
- (f) civil protection;
- (g) administrative cooperation.

Title XII - Education, Vocational Training, Youth and *Sport*<sup>13</sup> provides in article 165 TFUE that *the Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function.*<sup>14</sup> Union action shall be aimed at developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen.

The importance of sports in achieving the objectives set forth at EU level among which resides the free movement of persons (Fuerea 2006: 104), is obvious, furthermore taking into consideration that according to the European Court of Justice in Luxemburg<sup>15</sup> professional athletes are considered workers in terms of EU law and are therefore provided with all rights that occur from this quality.

The Olympic Charter in force as from July 8, 2011 provides the Fundamental Principles of Olympics:

1. Olympics is a philosophy of life, exalting and combining in a balanced whole the qualities of body, will and mind. Blending sport with culture and education, Olympism seeks to create a way of life based on the joy

<sup>10</sup> Decision no. 291/2003/EC of the European Parliament and of the Council, of 6 February 2003, establishing the European Year of Education through Sport 2004.

<sup>11</sup> Consolidated version (JOUE C 83/120, March 30, 2010).

<sup>12</sup> Authors' emphasis.

<sup>13</sup> Idem.

<sup>14</sup> Idem.

<sup>15</sup> Bosman Case (CJE Decision of December 15, 1995, Case no. C-415/1993, Royal Belgian Football Association (ASBL), Royal Club Liégeois SA and European Football Association Union (UEFA) c. Jean-Marc Bosman).

of effort, the educational value of good example, social responsibility and respect for universal fundamental ethical principles.

2. The goal of Olympics is to place sport at the service of the harmonious development of humankind, with a view to promoting a peaceful society concerned with the preservation of human dignity.
3. The Olympic Movement is the concerted, organised, universal and permanent action, carried out under the supreme authority of the IOC, of all individuals and entities who are inspired by the values of Olympics. It covers the five continents. It reaches its peak with the bringing together of the world's athletes at the great sports festival, the Olympic Games. Its symbol is five interlaced rings.
4. **The practice of sport is a fundamental right.** Every individual must have the possibility of practising sport, without discrimination of any kind and in the Olympic spirit, which requires mutual understanding with a spirit of friendship, solidarity and fair play.
5. Recognising that sport occurs within the framework of society, sports organisations within the Olympic Movement shall have the rights and obligations of autonomy, which include freely establishing and controlling the rules of sport, determining the structure and governance of their organisations, enjoying the right of elections free from any outside influence and the responsibility for ensuring that principles of good governance be applied.
6. Any form of discrimination with regard to a country or a person on grounds of race, religion, politics, gender or otherwise is incompatible with belonging to the Olympic Movement.
7. Belonging to the Olympic Movement requires compliance with the Olympic Charter and recognition by the IOC.

### **Closing statements**

The purpose of this article was to describe the importance of the role attributed to sports in contemporary society. Our initiative can contribute to a more concrete and circumstantial legalisation of the sporting domain by using the protection and guarantee instruments that are particular to fundamental rights.

Sport is a growing social and economic phenomenon which makes an important contribution to the European Union's strategic objectives of solidarity and prosperity. The Olympic ideal of developing sport to promote peace and understanding among nations and cultures as well as the education of young people was born in Europe and has been fostered by the International and the European Olympic Committees. Sport attracts European citizens, with a majority of people taking part in sporting activities on a regular basis. It generates important values

such as team spirit, solidarity, tolerance and fair play, contributing to personal development and fulfilment. It promotes the active contribution of EU citizens to society and thereby helps to foster active citizenship. The Commission acknowledges the essential role of sport in European society, in particular when it needs to bring itself closer to citizens and to tackle issues that matter directly to them. In addition, the United Nations holds that “sport is about participation. It is about inclusion and citizenship. Sport brings individuals and communities together, highlighting commonalities and bridging cultural and ethnic divide”.<sup>16</sup> However, sport is also confronted with new threats and challenges which have emerged in European society, such as commercial pressure, exploitation of young players, doping, racism, violence, corruption and money laundering. (White Paper on Sport, Introduction, par. 1-3.)

In this context we find it necessary to underline the following: “*The case law of the European courts and decisions of the European Commission show that the specificity of sport has been recognised and taken into account. They also provide guidance on how EU law applies to sport. In line with established case law, the specificity of sport will continue to be recognised, but it cannot be construed so as to justify a general exemption from the application of EU law.*”<sup>17</sup>

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