7 Disability, Handicaps, and the Nature of Sports

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1 Introduction

Although organized sport, as we know it today, is a relatively recent social practice, it has acquired a central place in modern societies. Indeed, for some critics, the attention paid to sports is disproportionate and has become more of a moral problem than an asset. The neutral starting-point taken in the present chapter is that the fascination with sports has to be explained in terms of how the nature of sports, its competitive logic, and the emotional resources it engages capture something that is typical of modern societies. Of particular interest to the subject of this chapter: the rights of the disabled in the context of sports, is the dynamic and dialectical relationship between equality and difference. Arguably, the tension between equality and differences or "inequality", is central to the self-reflexive societal structure of modern western liberal societies. In sports practices this tension between equality and difference is premised on its competitive or agonistic nature. Sports practice is also characterized by striving for perfection. This originally stems from the classical, especially Greek culture, and it takes on new proportions and means in the modern scientific and technological era.[1]

A complication that in some sense lies at the heart of the issues of this chapter, is that the United Nations Convention on the Rights of

[1] Much could be learned about the interpretation of equality and difference by studying the history of a sport such as cycling, especially in response to scientific and technological advances. At the start of the 20th century, when the first Tour de France was organized by a French newspaper, the cyclists were each day sent on their way without any support, carrying a reserve tyre around their own neck. Nobody bothered about performance-enhancing substances, many a cyclist dropped into a local pub and drank a few beers. After 25 stages, the time gaps between the first-place and second-place participant regularly amounted to several hours. In 1988, the difference between the winner (Lemond) and second-placed (Fignon) was eight seconds, and this helps explain why debates about doping were mounting and dietary rules for the cyclists were strictly observed.

Persons with Disabilities (CRPD), which is central to this book, is addressed to state or public authorities. Civil society authorities such as the authorities of sports organizations have to move within the legal framework of nation states. However, they have a lot of leeway to issue their own rules and considerable discretion as how to interpret these rules and how to organize competition on the basis of particular criteria. The way this organization materializes is closely connected to the essentials of sport. Sport is a physical and competitive endeavour that builds on biological differences in capacities and talents. Sport aims also to bring out several other differences between individuals, in such respects as training and effort, in realizing these capacities in functionings and performances. I mention just one example of the way these differences set limits to general moral ideals and principles of equality. Article 3(g) of the CRPD includes under "general principles" the "equality between men and women", but this is at odds with separation of men and women in competition, which is almost universal in sport.[2] I cannot go into the complex relation between the authority of the state and the autonomy of civil society organizations such as sports clubs. This matter will, of course, turn up in the cases that I discuss in this chapter, but my aim here is not to provide an interpretation, let alone application, of the rules and rights of the CRPD. Rather, my aim is to call attention to the difficulties involved in applying the general rules and rights mentioned in the CRPD in the context of social practices that have a meaning and dynamics of their own. My aim in this chapter is, accordingly, to inspire some interest in the prospect of furthering our insights into disability by discussing some of the conceptual and normative themes that surface in sport, especially when persons with disabilities and those without disabilities do not strive for excellence in separate contexts (such as the Olympics and the Paralympics) but compete with each other in the same

[2] There are, however, philosophers of sport who argue for an abolition of this "sexist" categorization, which in their view we can remedy thanks to genetic technology and the possibilities of "equality" that it promises for "future mankind", see *Genetic Technology and Sport*, edited by T. Tännsjö and C.M. Tamburrini, (London and New York: Routledge, 2005).

race or match, something made increasingly possible by advanced technologies such as prostheses.

The structure of this chapter is straightforward. I will first describe (and sparingly comment on) two legal cases that illustrate the kind of issues at stake in the application of rights theory to the social practice of sports in the case of persons with disability. Both cases involved the position of disabled athletes in professional or elite sport.[3] The two cases are ten years apart and situated in different institutional and legal frameworks. They elicited much interesting and heated debate as well as diverging legal judgments. In the discussion section I will expand on some underlying themes, without trying to solve any problems in any deeper ethical sense.

2 The Case of PGA Tour, Inc. vs. Martin

In 1998, golfer Casey Martin qualified for the Professional Golf Association (PGA) Tour of the USA. Because of a leg-related syndrome he was unable to walk the golf court and he requested to round the golf circuit by golf cart. However, PGA rules stipulate that competitors *walk* the course, so his request was rejected. Martin filed a lawsuit against PGA. The 9th US Circuit Court of Appeals ruled in his favour, basing its judgment on the Americans with Disabilities Act (ADA) which became federal law in the USA in 1990. "All the cart does is permit Martin access to a type of competition in which he otherwise could not engage because of his disability."[4] The Supreme Court upheld this ruling, arguing that "the use of carts is not inconsistent with the fundamental character of golf, the essence of which has always been shot-making".[5] Many stakeholders in golf, however, did not agree. The fact that shot-making is the essence of golf (as

[3] In bracketing cases of amateur sport, I am unfortunately setting aside important issues regarding rights of social inclusion. But the case of amateur sport is distinct in many ways, since many of the legal and procedural matters that, as we will see, play an important role in the dealings with athletes with professional ambitions, are generally not available and/or followed by people in amateur or recreational sports.

[4] Cited in J. Bowen, "The Americans With Disabilities Act and Its Application to Sport," *Journal of the Philosophy of Sport* 29(2002): 66–74.

[5] PGA Tour, Inc. vs Casey Martin. 121 Ct. 1879. May 29, 2001.

scoring goals is for football) does not mean that all other demands, factors and abilities are insignificant. The resulting debate raised empirical, conceptual-normative and principled issues. According to some experts, a professional golfer uses 25% of his energy in walking a regulation tour. Others claimed that riding in a cart was actually a disadvantage for Martin, because he would not have the "feel" of the course, and the relaxing effect on muscles of walking. Both claims are based on the, perhaps trivial, suspicion of an unfair difference between Martin and his opponents, which conflicts with a general principle of a "level playing-field" that informs sports practices. Several principled solutions to this problem were considered, such as allowing or requiring all golfers in the tournament to ride in a cart from hole to hole. It was even claimed that riding the players in a cart, would enable the competition to be more focused on "shot-making", according to the Supreme Court "the essence of golf".

Martin's request did elicit some philosophical reflection on the essence of sport, particularly golf. It forced some of the stakeholders to reconsider their intuitions and face the fact that the legal judgments seemed to enforce a break with the traditional way of playing golf. We will return to this friction between principled ruling and the tradition of a sport in the discussion. Another procedural aspect that surfaced in the debate is whether judges may determine authoritatively the essential features of a sporting practice and rule on the implications of this determination. Should this authority not belong to the governing bodies of sport? Isn't it the case that the unique history, conventions and disputes within a particular sport are or should in some sense be "impervious" to the "outsider", even if this is a legally appointed judge?[6] And, indeed, in a case quite similar to that of Martin, the 7th U.S. Circuit Court ruled differently from the 9th, declaring that "[t]he decision on whether the rules of the game should be adjusted to accommodate him (i.e. the suitor) is best left to those who hold the future of golf in trust".[7]

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[6] Bowen, "The Americans With Disabilities Act and Its Application to Sport," 69.

[7] R.S. Brown and D.J. O'Rourke, editors, *Case Studies in Sport Communication*, (Westport Conn.: Praeger, 2000).

3 The case of IAAF vs. Pistorius

Anita Silvers notes with respect to the case of Martin that the Americans with Disabilities Act must be interpreted as "requiring evidence that skill or talent in distance walking either is a criterion of excellence in tournament golf or directly affects satisfying such a criterion".[8] Particularly important in this regard is the *kind* of evidence that is relevant to these matters. The judges of 9th U.S. Circuit Court in the case of Martin, did not make use of any scientific evidence, for instance as brought forward by some in the resulting debate, while those of the 7th U.S. Circuit Court took the stakeholders in sports to be authoritative. But the appeal to scientific evidence *did* figure prominently in the second case that I have selected for discussion: the case of the International Association of Athletics Federations (authorized by the International Olympic Committee) against the South-African runner Oscar Pistorius who requested to be admitted to the 400 meter sprint in the 2008 Olympic Games. Pistorius was born with both of his legs missing the fibula – the long, thin outer bone between the knee and ankle. At eleven months old, his legs were amputated below the knee and he was fitted with two artificial prosthetic blades. He turned to athletics as a teenager, and thanks to his talents, passion and tenacity, he succeeded in running the 400 metres faster and faster, eventually having no other disabled athletes who were a serious match for him in competitions such as the Paralympics. As his times approached the qualifying times that IAAF had set for admittance to the 400 metre sprint in the regular Olympic Games, he submitted an official request to be allowed to compete. The IAAF, which amended its rules in 2007 to ban the use of "any technical device that incorporates springs, wheels or any other element that provides a user with an advantage over another athlete not using such a device", rejected the request. But Pistorius went to the Court of Appeal of the Games, which ruled against the

[8] A. Silvers, "Formal Justice," in *Disability, Difference, Discrimination: Perspectives on Justice in Bioethics and Public Policy*, edited by A. Silvers, D. Wasserman and M. Mahowald, (Lanham MD/Oxford: Rowman, 1998), 131-146, at 124.

IAAF in May 2008, saying the sprinter's carbon-fiber blades did not provide unfair advantage against athletes with intact legs.

This last consideration concerning "unfair advantage" is one of the differences with the first case, in which the judges confined themselves to the argument from the essence of sport. In contrast to the case of PGA Tour, Inc. vs. Martin, there seems less room for doubt what the essence of running 400 metres is: it is running the 400 metres faster than your rivals in the race. There are few circumstantial or additional aspects that define the sport. But whether there is an advantage for one of the competing athletes in running it, and what it is, is a question which led to a vigorous debate about the problem whether the prostheses of Pistorius and the way they enable him to propel himself forward, can be shown to give him an edge over athletes who run the distance with their normal legs. Below, I will set out the particularities and debates about the role of scientific evidence in sport. To complete the description of the case: Pistorius participated in the pre-Olympic South-African run-offs to be part of the South-African relay team (4 x 400) and only missed qualification for the team by 0,75 seconds. In this national competition, he was treated no differently from his rivals. After a renewed effort, he eventually succeeded in qualifying for the London Games in 2012, running in both the semi-finals of the 400 metre race and the finals of the 4 X 400 relay race.[9]

4 Discussion

I will now draw out of these two cases a series of principled and conceptual issues that are of larger interest to the disability debate as it is canvassed by the relevant Declarations such as the CRPD. Specifically, I will comment on:

[9] There was also a debate about the safety of other athletes in a relay race, in case Pistorius should have a fall, because the relay race is not run in separate lanes, but I will not go into this issue.

1 The nature of justice, and the role of a theory of justice;
2 The concept of a handicap;
3 The essential-accidental distinction as it applies to sports and is used by judges to decide on discriminatory treatment;
4 The role of science in decision-making on unfairness in sport;
5 The problem of who is in charge to decide on rule changes in sports competitions;
6 The relation between social practices and rights theory.

4.1 Distributive Justice, Formal Justice and Stigmatization

Anita Silvers protests against what she calls a "distributive" approach to the unequal treatment of disabled persons.[10] The distributive approach allocates resources towards disabled individuals so as to provide them with the financial or other means to compensate for their disadvantages. According to Silvers, this approach perpetuates the stigma associated with disability. One of the reasons why this happens is that there has to be an objective criterion to identify the rights-holders. According to Silvers, this effect augments the problems of the disabled. She proposes as an alternative a "formal justice" approach that targets not the individual but the obstacles in the environment that disadvantage individuals with specific impairments. The Americans with Disabilities Act and the CRPD is informed by this "social model" approach.[11] I am not convinced by Silver's arguments, which I cannot treat here at any length.[12] I only will comment on the argument of stigmatization as it works out in the particular context of the case of golfer Martin.

I want to generalize this conceptual issue a bit and point out the following. First, the notion of "formal justice" is an unfortunate misnomer, especially when it is understood as opposed to "distributive justice", which is certainly not equivalent to "material justice". As Rawls has pointed out, formal rights belong to the most im-

[10] Ibidem.
[11] On the "social model", see the chapter in this volume by C. Harnacke and S. Graumann.
[12] For a discussion see Bowen, "The Americans With Disabilities Act and Its Application to Sport".

portant "primary goods" that are distributed equally by a just society. Second, the argument of stigma does not seem to be particularly linked to the individual-environment distinction, even if one concedes that this distinction is tenable, which is by no means evident. As a matter of fact, the assignment of formal means such as a personal budget to disabled persons often stigmatizes them far less (as it remains in the background of the bureaucracy) than changing the rules, such as golf rules, which precisely singles out a particular individual as the person for whom the entire environment has to be altered. This singling-out threatens to lay the blame of having to change a presumably smooth practice of sport on the particular individual.

Silvers, who, to be sure, points out some real problems with distributive models and stigmatization, underestimates the extent to which doing justice to persons with disabilities is bound up with the manifold of injustices and inequalities that variously relate to primary goods, concrete goods, public environments and specific concrete contexts such as those created by sports practices. We had better start any analysis of a specific problem of justice with the question(s): who is to act regarding to which goods or environments, with respect to which reference group and on what grounds? If the state is the agent, as it will be in many disability cases, it is hard to see how Silvers could avoid establishing a criterion for eligibility, which she thinks dispensable in the case of environmental changes. The next golfer with difficulty walking may still have to prove that the rule that Martin's case elicited, applies to his or her case. Nobody will be allowed to travel the golf course in a cart who hasn't given proof of being unable to do this on foot.[13]

[13] Martha Walters, former attorney for Martin, acknowledged the legal arguments on both sides, but said the tour's conclusions were specious. "You don't change the rules," Walters said, "you write down Casey's condition and limitations and agree to accommodate his limitations. The [ADA-mandated] individual assessment [of a disability] is only to enable that person to participate". (cited on: http://www.ada.gov/fmartin.htm, accessed June 10, 2012). In the 10 years since the Supreme Court decision, however, the tour has reviewed only a few applications for golf carts, almost exclusively in qualifying competitions. Other than Casey Martin, only Erik Compton – twice a heart transplant recipient – has used a cart in an actual PGA Tour or Nationwide Tour event. He was granted the use

4.2 The Concept of a Handicap and the Constitutive Role of Obstacles in Sports Practices

The cases of Martin and Pistorius are interesting because the context of sports suggests an intriguing dialectic with regard to the conceptualization of what a handicap is. It is a commonplace of disability studies that the concept of a handicap is a social construct. This general idea finds an interesting confirmation in the concept being used in golf for indicating the playing level of a golfer, namely, his or her "handicap". The lower the handicap – that is the number of shots beyond "par", the average number of shots needed to complete the circuit – the better the player.[14] It is clear that the rules of golf are a contingent historical-social construct, as are the rules of every sports practice which regularly are changed in response to changing circumstances such as technological innovations and other factors. The notion of a handicap in golf is also a construct that is premised on the relation with the particular sport as a much more complex construct – a bad golfer with a large handicap might well be an excellent football player.[15] Of course, handicaps in golf can be overcome, as golfer Martin showed, and this is not the case with all disabilities that strike persons. But nevertheless, it puts the concept of a handicap into a particular perspective, to wit, the dependency of handicaps on social context. For in these cases, one of the issues is some kind of reversal of handicaps: the "normal" athletes (actually they are not "normal" golfers, they are professionals) claim that *they* are disadvantaged in the competition relative to the conditions un-

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of a cart for a six-month period during his recovery phase. He now plays without one. (http://sports.espn.go.com/espn/otl/news/story?id=6561119, accessed June 10, 2012). Which does not make Martin's case less interesting from a theoretical point of view.

[14] The actual system to determine the exact handicap of a golfer, is a bit too complex to explain here, and it differs per country. For purposes of this chapter, a golfer's "handicap" can be said to indicate his or her *potential* not average score. In this sense, Casey Martin had the potential to play golf at a professional level, if allowed the use of a cart.

[15] This point is particularly clear in the Pistorius case, since even those who argue that his prostheses give him an unfair advantage in running the 400 metre readily agree that he is exceptionally skilled in handling them, in much the way a tennis player such as Roger Federer is skilful in handling his tennis racquet.

der which Martin or Pistorius compete. This dialectic is predicated on the specific character of a sports contest which presupposes *both* equality of conditions (or chances to win), to make it fair, *and* diversity – of style, of tactics, of luck, of competence, and of course of results – to make it interesting. The essence of many debates in sports is actually to strike the balance between these two dimensions – by argument, evidence, negotiation, and so on. The concepts of "obstacle", "handicap" or "disadvantage", "fairness", and "the point of the game" have to be interpreted within the specific rule-governed context of each particular sport. Both the morality of equality and the interest in and importance of diversity, excitement and meaning have to be taken into account in developing this interpretation.

This is just the general background of an intriguing problem that Bowen puts up for discussion.[16] In general, the justified complaint of the movement for rights of disabled persons is that society historically has either intentionally or by dint of neglect caused obstacles for their functionings. Buildings that are not accessible for wheelchairs are an example. These situations should be redressed on grounds of justice. But in the area of sports, obstacles are actually and intentionally *created* for potential competitors. In this, Bowen claims, sports practice is perhaps unique: in sport, the rules make action possible and meaningful in the first place, they not just regulate actions, but *define* them. High jumping *is* only high jumping in sports when the bar is crossed in the way the rules describe. These rules define the specific capacities that the sport puts to the test. This testing is reinforced by the competitive nature of the game. So elite sport does not discriminate specifically against persons with disabilities, it "discriminates" against *all* people who lack the talent, discipline or whatever else is needed to compete for the prizes. We will see in the next section that this truth does not solve the problems at hand. Here I want to round off this point with an argument that puts Bowen's claim that sport is unique, into perspective.

Perhaps sports and games are the only practices that deliberately introduce relatively arbitrary obstacles such as hurdles and rules

[16] Ibid.

such as a particular distance to cross these hurdles, to create a human practice. But perfectionism, excellence and competition are by no means unique to sport. In fact, they are an important element of many other practices. In many important social domains, the differences in ranking order between below-average and above-average ability or those with and without impairments cannot be eliminated by any structure of individual rights. The different groups will have to put up with it and mostly they succeed in doing that by adapting their choices to their possibilities. However, the question remains: ought they? Or perhaps: when, at what point, ought they to resign themselves to their limited natural capacities or context-bound opportunities, and on what points are they permitted (or even obliged) to dispute these limits, on grounds of discrimination? And ought the political or human community as a whole to stand *with* them in those cases? Bowen ends his discussion with the remark: "if one (i.e. Martin) cannot successfully accept the challenges prescribed by the sport, then, like many others, they simply cannot compete".[17] This "simply", however, seems to me too simple, and also too hasty.

4.3 The Essential-Accidental Distinction in Sports

In the rulings of the courts we can see that the fundamental axis that informs the judges' judgments is that between essential and accidental elements of the game. This raises issues of demarcating and defining sports, as well as ontological problems. There is no space to treat these problems at any length here.[18] I will only make two remarks that may be relevant for the purposes of this chapter. First, it

[17] Although Bowen qualifies this conclusion by admitting "that from a utilitarian stance that relativizes the sport activity to the greater good of other systems and the morality of the encompassing society, it may be more profitable to argue for the feasibility or the necessity of allowing Martin to play". But I am not so sure about that claim. It depends on the kind of utilitarian (value-)theory that one invokes to decide on the issue of rule-changes.

[18] See for an introduction: J.W. Morgan and K.V. Meier, editors, *Philosophic Inquiry in Sport*, (Champaign: Human Kinetics, 1988), esp. the article by B. Suits, "The Elements of Sport," 39-48.

is clear that the distinction between the conditions for participating in a sporting event and the conditions for gaining *access* to the event, may help to deal with some problems that clearly and correctly count as discrimination.[19] To mention just one: in order to create equal access, a court ordered a redesign of the available restroom space in a proposed athletic complex that would prevent wheelchair owners from accessing the restrooms.[20] The new situation evidently decreased the social isolation of individuals with disabilities. Analogously, if talented chess-players in a wheelchair would have severe problems with access to the place where matches are played, then this would be discriminatory and ought in principle to be redressed.[21]

Second, taking the match as the unity of action and meaning of sport, we could try to take leave of the rather rough scheme of essential and accidental or peripheral, by switching to a conceptual (or rather phenomenological – I will explain shortly the meaning of this term) approach in terms of foreground and background. There are, first, clearly elements that can be put in the background and that give no good reason to discriminate. There are, second, elements

[19] See CRPD, Article 9: Accessibility.

[20] See Chris McKinny, Sports Facilities and the American Disabilities Act, https://law.marquette.edu/national-sports-law-institute/sports-facilities-and-ada. However, McKinny concludes on the basis of an overview of application of accessibility rules in the ADA: "If any one principle can be deduced from the aforementioned case summaries, it is that ADA law is quite unpredictable. Determinations of compliance are quite subjective due to their fact intensive nature, thus, case outcomes are difficult to predict".

[21] "In principle", because I am not sure whether the principled moral justification in terms of rights and equality can by itself shoulder the political and legal argument that in every and any case things should be redressed. That it would hold good in any case, seems uncertain in view of the budgetary constraints and general principles of justice that actual policies in a polity have to deal with. Rawls gives this uncertainty as a reason to shrink back from treating the problem of redress at any length in *A Theory of Justice*, (Cambridge, MA: Harvard University Press, 1971), and even then, he restricts redress to the social lottery. Nor will an appeal to the distinction between negative and positive rights resolve issues of cost. As Holmes and Sunstein convincingly argue, negative rights are by no means without costs and their protection sometimes demand extensive and costly state action. See S. Holmes and C. Sunstein, *The Costs of Rights: Why Liberty Depends on Taxes*, (New York: Norton, 1999). In any case, taking budgetary constraints into account might alter the normative issues and, in any case, force the relevant agents to set priorities in a principled manner.

that are central to the principle of fairness and equal chances. And then there are, third, contested elements in the game, such as traversing the golf course on foot. This conceptual ordering is just a start, because in many cases there is an interplay between different elements, even in the foreground. This might require a holistic approach to the matter. I will come back to this holistic nature in section 4.4 below. Here I confine myself to the following suggestion. The case for the non-essential character of a specific feature of a sport, and the case for the applicability to rules in sports of the principle of social inclusion as stated by the CRPD, could be framed in terms of the relatively background (or foreground) character of the capacity, property or rule in the specific case of a sport. Take again chess as an example. The fact that nowadays female chess players are joining their male colleagues in tournaments, shows that gender is a background element in chess; or – perhaps a better example for this occasion – in many sports, such as running the hundred meter, impaired vision ought not to be a barrier to competing on equal footing with seeing athletes, just as hearing impairments need not represent a ground for competing in athletics with hearing athletes, since alternatives to a starting gunshot are easy to arrange.[22]

4.4 The Role of Science in the Debate on Fairness in Sports

This conceptual differentiation between essential and accidental will, however, take us only so far. It will serve to justify only those disability accommodations that are relatively uncontroversial in affecting capacities that are not seen as essential or central to what the sport is about. Although distinctions solve no problems by themselves, they do help to articulate what the problem is and to direct the debate to the real issues.

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[22] To illustrate once again the particularities and surprising inversions in the area of handicaps and sport: blind chess and chequers are considered to constitute extra challenges for non-blind players!

In the end, there is no alternative for taking the bull by the horns and confronting the question by whom and on what principles the appropriate form of participation, in regular competitions, by disabled athletes, should be decided, whether the compensatory devices are acceptable or they are allowed to operate under modified rules. We already saw that procedural and substantial answers have been offered to these questions. Procedurally – regarding the question of who has the authority to decide – the alternative answers seem to be: either the impartial judge in a democratically established system of law, or the authorities and/or stakeholders in the relevant sport. But we also saw that the judges differ in opinion, with some making an authoritative and substantial judgment of their own regarding the issue of what is essential and what is peripheral in a particular sport, and others deferring to the decisional authority of the stakeholders ("those who hold the future of the sport in trust"). Moreover, the substantial judgment what is essential to the sport is contested and there is controversy whether the rights of individuals such as Martin and Pistorius should override the equality of conditions or chances between competitors that seems central to the idea of sports. Both cases turned out, on closer examination, to involve a principled question concerning fairness, although Martin's case is complicated by the fact that issues surrounding the "essence of golf" are involved. In Martin's case both the fundamental issue of the essence of golf, or which challenges are central to golf, and the question of application played a role. The question of application is whether in Martin's case he really did derive an advantage from not having to walk the course, or, alternatively, was handicapped by the fact that there are also disadvantages in not having to be able to walk, such as the inability to warm your leg muscles. It is the question of application which is central to the fairness argument. In the Pistorius case the second issue was central.

Once we agree on the essential physical and mental challenges that must be confronted as a constitutive aspect of excelling in a sport – challenges that ground and inform the sport as a meaningful meritocratic practice – we have to ensure that the conditions under which rivals compete for winning the game, are fair. These conditions must conform to a principle of equality of conditions that are

relevant for winning the competition. Any major external asset – such as a technological device or a performance-enhancing substance – that some rivals (may) use, but others, for various reasons, may not or won't, will violate this principle. Both the question whether something is "major" or "substantial" asset, and the question whether an asset is "external" or alien to the game as such have been the subject of long-standing debate and controversy in sport in all kinds of cases.

The question whether a particular technique or preparation constitutes an unfair advantage has largely been taken to be resolvable by only taking recourse to an evidence-based, scientific approach, assuming that science would come up with consensual, authoritative answers. Let's see what evidence this scientific approach has brought in the case of Pistorius, which arguably will be the more influential, precedent-provoking case, and which involves scientifically complex questions.

An important article to broach this debate, was written by two South-African scientists on a Sports and Science Internet site.[23] The authors identify three key issues in the debate.

First, they point out that the case is in need of some "incentive clarification" because a number of opinions and interpretations on scientific issues are closely connected to vested interests of a commercial nature. This holds for instance for the company that developed the Cheetahs (the prostheses used by Pistorius). This company is still working on the perfection of the device, a point I will come back to below. The authors do not mention the "ideological interest" on the part of disabled athletes that is invested in the case. However, this interest is clear in the opinion of Troy Engle, coach of the US Paralympic track and field team, who said in response to the fact that Pistorius was not initially selected for the Games: "There's not another story that has brought more attention to the Paralympic movement than Oscar Pistorius. He's been a wonderful ambassador

[23] R. Tucker & J. Dugas, "Oscar Pistorius – Science and Engineering vs. Training: An Evaluation of All the Evidence," to be found on the Internet site "The Science of Sport" http://www.sportsscientists.com/2007/07/oscar-pistorius-science-and-engineering.html, accessed April 27, 2012.

for our movement, and I'm obviously disappointed for him." Of course, this interest as such is completely justified. However, it should not bias the collection, assessment or acceptance of the evidence concerning the question of whether Pistorius' prostheses given him a relative advantage in track events.

Second, Tucker and Dugas describe the delicate position of the IAAF. This Federation is responsible for the fairness of rules in international athletics, taking into account the possible precedence-effect that the Pistorius case may have for the future of sports. In these days of technology, there is a considerable risk of opening a Pandora's Box by allowing technological devices to be introduced in sports competition. Control of the criteria by which to discriminate between acceptable and unacceptable devices is easily lost, and the means, for instance the financial means to evaluate the differences caused by using performance-enhancing substances scientifically, and establish controls, are limited. The IAAF will have to face the implications for the future of sports of allowing this particular technology. One of the problems is that allowing the technology will make it more difficult to determine by what means and in which proportions improvements in sports are achieved. Pistorius's equipment is something that can be worked on by engineers. The contribution of training (or of talent, or of mentality, I would add) will increasingly be more difficult to determine in relation to the added value of the improved prostheses. As a matter of fact, the only way to control these differences will be either to force Pistorius to keep running on the same prostheses and not to use a new "generation" of Cheetahs, or to test thoroughly whether each alteration to their design changes the situation in a relevant way.[24]

The authors also indicate that Pistorius is a rather unique case, not only as far as his impairment is concerned but also in so far as his financial means are concerned. Each of the prostheses costs 18,000

[24] It should be said that Pistorius has claimed that he did not change his prosthetics for the last seven years, but this claim also is disputed by Tucker in his extensive latest contribution to the debate: Revealing the Pistorius Science part 3, dated August 25, 2011. See http://www.sportsscientists.com/2011/08/pistorius-12-sec-advantage-and.html, accessed on June 13, 2012)

US dollars. From a principled point of view this financial element seems irrelevant, but the importance of money again shows that physical disability is only one dimension of relevance that cannot as such be abstracted from a complex pattern of practical, axiological and moral differences and considerations that may count in establishing a theory of fairness for sports practices.

Third, the authors examine exhaustively the scientific evidence as to whether the Cheetahs give Pistorius a major advantage. There is no space to treat these arguments at any length here. They are rather technical and relate for instance to the spring mechanism of the prostheses, the reduced limb mass that Pistorius has to transport and the length and frequency of Pistorius' strides. But the conclusion of these authors is clear: the prostheses definitely confer an advantage. The authors admit that Pistorius has a disadvantage too, which has to do with the coming off of the starting blocks due to the fact that his balance in this position is compromised, but the longer the distance, the less relevant this disadvantage becomes.[25]

4.5 The Relation between Social Practices and the Theory of Rights

In many concrete cases, there is an intricate and complex relation between rights theory and its translation into practice on the one hand, and the issues relating to scientific evidence that I just surveyed on the other hand. To begin with, the correctness of an appeal to a right has to be established, for instance by making sure that the individual making the appeal in fact meets the conditions for belonging to the legally protected group in question. Often, this correctness has to be established by an objective test that is informed by politically negotiated criteria and effectuated by science and ex-

[25] Tucker recently reviewed new evidence from tests carried out at Pistorius's request (evidence which, much to Tucker's dissatisfaction, was not peer-reviewed) and also examined the heated debate on the issue between the leading physiologists on sprint mechanics. He sees his early conclusion confirmed, stating that, with regard to Pistorius, "every line of evidence – the metabolic, the mechanical, the physiological, the pacing – points to one thing – substantial advantage". Ibid., see note 24.

perts. Whether science is up to this task, is not the issue here. But it might be that the stigmatization that Silvers mentioned in her article as an implication of formal justice, derives to a considerable extent from this process of applying abstract rights to concrete situations of individuals. When invoking a rule, a person with a disability will first have to justify the claim of a right to being accommodated, relative to "the normal cases" for whom the conditions of admittance and functioning are taken for granted and where no accommodation is necessary. Second, this individual will have to prove that he or she really belongs to the class circumscribed by that rule. In the case of Pistorius it is also clear that this dialectical process of rule and application will be particularly difficult, because "science likes numbers" and Pistorius is a single case until now. In his case it might be very difficult to interpret the available physiological parameters in view of the necessary comparisons between Pistorius and his rivals.

It seems to me that this interplay between science and rights, illustrated here by the relation between science and sports, directs us also to a general and deeper problem that specifically concerns the relation between abstract or formal rights and equality and social practices of which sport is an interesting example. The competitive, public, tradition-bound, meritocratic and perfectionist nature of sport – articulating each of these adjectives would require a separate article[26] – is largely based on quite different schemes and assumptions than the theory of general rights on which a legal and moral system of law and rights is based. Rights discourse is applicable to a certain extent insofar as issues of access and opportunities are relevant. There should be no discrimination on non-relevant grounds. But the class of relevant grounds for exclusion in sports is broad, prominent and obvious. Few individuals shorter than 185cm are found in sports such as basketball and volleyball, except when they have special talents that are useful for the game. The cases of Martin and Pistorius are unsettling for the practices of golf and athletics because they challenge received opinions about the essence of the

[26] See S. Loland, "Normative Theories of Sport: A Critical Review," *Journal of the Philosophy of Sport*, 31(2004): 111-121.

game and the way it should be played. They force the parties involved to explicate the underlying assumptions of the actual sports practices and to think through its foundations. There is a tension or conflict between the postulates of modernity, such as equality of rights and the historical and tradition-based rule-systems of sports. It is revealing that tradition is often precisely what the disability rights advocates aim to overcome. Whether intended or unintended, many societal barriers to access and participation of persons with disabilities are unjustified and ought to be eliminated. But the core of traditional, relatively stable rules by which many sports practices are defined and constituted, seem essential to their existence as a recognizable phenomenon that people can identify with. Even if according to scientific measures the prostheses of Pistorius would not give him an unfair advantage, the fact that the race is run by people who have a very different appearance, might be relevant for the trust and interest that the spectators (can bring themselves to) have in the game. If, under the influence of developments driven by the tandem of law/morality and technology, this stable and recognizable base of rules is challenged, the future of many sports might be jeopardized.[27] Technological accommodations for people with disabilities are sure to continue, as long as technology advances and individuals using assistive technologies claim access to sports practices on grounds of disability. This claim to access in sports might be supported by a moral principle based on equality of rights, but also be further strengthened by increasing doubts of the possibility and legitimacy of *any* demarcation between natural and artificial in a technological age. For applied and philosophical ethics, as well as for the philosophy of sport, cases such as Martin's and Pistorius', however incidental they might be, will retain their value as important references for debates that will be with us for a long time.

[27] A far more influential issue in the rights-practices-conflict is the fact that the policy against doping, which for many is central to the future of sports, is in danger of conflicting with privacy and liberty rights, as 24-hour controls are at the order of the day. If a court would uphold these rights in a case against a doping authority, it would be very hard to sustain the credibility of many sports.

5 Conclusion

This chapter has mainly raised questions and doubts and does not allow for a definite conclusion concerning the cases from which it started. I only want to add three methodological points that it may be worthwhile to pursue further.

First, the arguments mounted by Tucker and Dugas in their articles on Pistorius' use of prostheses in competition, consist largely of science-based, physiological data. The debate might get an interesting turn if a phenomenological, "holistic" account of the functioning of the body, for instance along the lines of Merleau-Ponty's work, is (also) taken into account.[28] This might give an interesting new take on the issue of sports and disabilities. Interestingly, Merleau-Ponty suggests that the functioning of the "abnormal" body often gives us a better understanding of the human body than the conduct of the "normally" abled. He was not referring to "excellence", which basically is equal to reaching a higher standard on the same measure, but about people who really seem "wired" in a different way. But whether this theoretical understanding translates on the practical level into the idea that the 'abnormal' bodied competing with the help of technology would heighten our appreciation of athletic competition, seems doubtful.[29]

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[28] M. Merleau-Ponty, *Phenomenology of Perception*, (London: Routledge, 2002, originally 1945); M. Merleau-Ponty, *The Structure of Behaviour*, (Boston, MA: Beacon Press, 1967, originally 1942).

[29] The phenomenological approach might also have some new arguments in store for the discussion about whether certain changes in sport are for the better. It seems plausible that sport, certainly elite sport, is essentially a public event played out in the open and visibly. The public arguably has an important role to play in rule-changes and the future of sport. The normative and moral implications of this role are as yet not very well articulated (has "the public" a moral right not to be deceived by athletes, and if so, on what grounds?), although elite sport presupposes massive public attention for its economic conditions of existence. But if the events and processes in sport can no longer be followed or shared by the public and one can no longer identify with what is happening, because the participating athletes have a quite different bodily make-up than they themselves, then the public might lose its interest. The public might get interested in the carnivalesque attraction of exposing unusual bodily figures and movements – but that would be a different thing from sport, and it would raise different moral questions.

Second, I have tried to argue for the thesis that there is a deep tension and possibly a deep conflict between politically generated general rights and the rules of a social practice such as sport. This debate will be with us for many years to come. Philosophers will have a significant role to play in articulating the concepts, evaluating the arguments and suggesting "best practices" taking into account substantial as well as procedural considerations. It might be worthwhile to start a comparative debate about how and to what extent this same conflict between rights and practices occurs in other practices, for example in the professions or science, and how persons with disability are accommodated in those contexts.

Third, the importance of technological advances for the functioning and emancipation of the (physically) disabled is generally obvious, well-documented and widely acclaimed.[30] But there may be a downside to this acceptance, although this downside is very difficult and delicate to articulate and discuss. The opportunities and facilities that advanced technology affords those with impairments are often considered to be an unmixed blessing, further strengthening the case for the benefits that technology brings to humankind. It is also used to justify research and development of technologies which in the longer run might have far-reaching consequences for society in general, because they open up new, controversial and problematic opportunities for the "abled" as well. There is a commercial, rhetorical and ideological side to the role of this "for the benefit of the disabled"-argument because it is hard to challenge, given the historical social morality in many countries that cherish the rights and care for the "least advantaged" as an important principle. It is very hard to spell out how to deal with the Janus-faced character of the argument; it may even be impossible to deal with in any rational way given the dynamics of general and applied scientific and technological developments. But the fact that many sports practices have refused to allow advanced technological devices for the sake of other

[30] "Generally", because cases such as the use of cochlear implants for those with hearing impairments suggests that assistive technology is often controversial, even among those with disabilities.

values and meanings that are inherent to sports, may be an interesting, although perhaps exceptional, case of canvassing this intriguing connection between the future of people with disabilities and the general future of humankind in the technological era. Perhaps the very idea of normalcy will eventually die out, once technology, which was initially developed to help people with disabilities to function better, comes to be upgraded and used to enable people in general to choose their own bodily and perhaps mental make-up for purposes that they have set themselves. But for the moment we are stuck with the problems of defining or re-defining the meanings and limits of sports, two examples of which I have presented and discussed in this chapter.