EDITORIAL

SPORTS AND UNFAIR COMPETITION VIA NATIONALITY LAW

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§1. INTRODUCTION

In June 2006, hundred of millions of people will watch the World Football Championship in Germany. Many of these will dream of their country winning. In order to increase their chances of lifting the trophy, some States naturalise one or even more talented foreign football player(s) in order to enable these players to be selected for the national team. In the Netherlands, the attempt to acquire Netherlands nationality by Salomon Kalou, originally from the Ivory Coast and for three years one of the star players of Feyenoord has received intensive media attention here in the Netherlands. Kalou's application for nationality was ultimately rejected by the Ministry of Immigration and Integration, in spite of the fact that naturalisation policy rules published by the Ministry itself allows for naturalisation in exceptional cases.\footnote{Handeliding voor de toepassing van de Rijkswet op het Nederlandschap, commentary on article 10 Netherlands Nationality Act (which allows the waiver of naturalisation requirements in exceptional cases) gives detailed rules on the possibility of an exceptional naturalisation of sportsmen and -women. See on this rejection Hans-Ulrich Jesurun d'Oliveira, 'Comment under the decision of the Raad van State, Afdeling technisch', 16 Jurisprudentie vreemdelingencrecht Nr. 114, 15 February 2006.} Internationally, the attempt in Qatar to naturalise three Brazilian football players in 2004 also received considerable attention, and prompted a reaction from the FIFA Emergency Committee. The Committee decided that a player that acquires a new nationality without having a clear connection to the country involved is not entitled to play for the national team of this country.\footnote{Stefaan van den Bogert, Practical regulation of the mobility of sportsmen in the EU post Bosman, (Kluwer Law International, 2005), 358, 359 with further references.} Do so-called exceptional naturalisations result in unfair competition between States in respect of international sporting contests? Would it perhaps be better to create a special 'sporting nationality' for international competitions in order to avoid abuse of national naturalisation rules to ensure a better team? Or are other solutions desirable and feasible? These questions were discussed at a Congress organised by the International Center for
Sports Studies (Neuchatel, Switzerland) at the Olympic Museum in Lausanne on 10 and 11 November 2005.3

This editorial will reflect briefly upon these questions. Firstly, it will be argued that the development of a special 'sporting nationality' is not advisable. It is preferable to continue with the use of the general nationality of a State as a basic requirement for the right to represent a country in international competitions; however, to this should be added, under certain circumstances, a residence requirement in order to ensure that the nationality in question manifests a genuine link between the athlete and the country involved. In determining those cases in which the additional residence requirement should be imposed, one should not concentrate exclusively on the different rules and practices in the field of naturalisation, but should also take into account all differences in the various nationality regulations regarding the grounds for acquisition and loss of nationality.

§2. A GENERAL V. A FUNCTIONAL SPORTING NATIONALITY

The idea of a special 'sporting nationality' refers to the possibility of introducing a so-called 'functional' nationality for sports. When rules refer to nationality, this reference has normally to be read as a reference to the general legal nationality of a State acquired on the basis of a ground for acquisition provided by the nationality act of the State involved. Next to this general legal nationality that indicates the formal legal bond between a person and a State, States or International Organisations may — for special purposes — develop a so-called 'functional nationality' or 'autonomous nationality'.4 If, for certain purposes, a functional nationality is introduced, the grounds for acquisition and loss of this specific functional nationality have to be defined in detail.

Is the development of a functional autonomous sporting nationality desirable? In my opinion, this question needs to be answered in the negative. The regulation of grounds for acquisition and loss of such a functional nationality would be a very complicated task where one does not wish to use simply the place of birth as the only ground for acquisition of the functional nationality without any possibility to change this functional nationality. Even the fiction that one is deemed to have the nationality of the country where one has ordinary residence needs considerable further elaboration, because of the fact that the definition of residence differs from country to country.

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3 'La nationalité dans le sport: Enjeux et problèmes/ Nationality in sports: Issues and problems'. An open conference took place on 10 November 2005. On 11 November 2005, a closed experts-seminar discussed in detail the problems related to the change of nationality by athletes and the relationship between legal nationality and sporting nationality. The papers presented during the open conference will be published by the Centre international d'étude du sport of the Université de Neuchatel in the course of 2006.

However, there is an attractive alternative for the development of a functional nationality, which comes quite close to a sporting nationality, but is in fact not an independent notion and which does not require the regulation of the grounds for acquisition and loss in detail. One could, in determining whether a person qualifies to represent a certain State in international sporting competitions, use possession of the general legal nationality of the country involved as a basic requirement, but add – insofar as desirable – (an) additional requirement(s) which guarantee(s) that the nationality is the manifestation of a genuine link between the person and the State involved. The essential questions are then, of course, what kind of additional requirement(s) should be added and when should these additional requirement(s) be applied? Should the additional requirement(s) in all cases be necessary in which an athlete acquires another nationality by naturalisation, or also in other cases (e.g. acquisition of nationality by registration or by lodging a declaration of option)?

§3. GENUINE LINK

The reason for adding, in certain cases, (an) additional requirement(s) to that of possession of the nationality of the country involved before a person could qualify to represent a country in international competitions is in order to ensure that a genuine link exists between the athlete involved and the country which he or she wishes to represent. However, it is important to note that general legal nationality is already considered to be a manifestation of such a genuine link. In other words, in most cases, legal nationality is only attributed where a genuine link is understood to exist between the person involved and the State in question.

The expression ‘genuine link’ refers implicitly to the 1955 Nottebohm decision of the International Court of Justice. The Court concluded in that case, with respect to the naturalisation of Mr. Nottebohm by the State of Liechtenstein, that:

"... a State cannot claim that the rules it has thus laid down are entitled to recognition by another State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual’s genuine connection with the State which assumes the defence of its citizens by means of protection as against other States."

However, this decision does not deal with the validity of the conferment of nationality in general, nor with the validity of the acquisition of nationality by naturalisation, but exclusively with the right of a State to grant diplomatic protection to a national against another State. Therefore, a conferral of nationality without genuine link as such is valid. As a consequence, it may happen that a person possesses a nationality that is not a manifestation of a genuine link between the individual and the State involved.

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5  International Court of Justice Reports 1955, 4 (23).
6  Randelshofer EPIL, Bd. 8 (1985), 421.
§4. THE AUTONOMY OF STATES IN NATIONALITY MATTERS

Thus far, no general agreement on the rules relating to the acquisition and loss of nationality exist. The determination of such rules belongs to the competence of each individual State. This is made clear in Article 1 of the Hague Convention on certain questions relating to the conflict of nationality laws (1930), which provides explicitly that: 'It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.' This principle of autonomy in nationality matters is repeated in Art. 3 of the European Convention on Nationality (1997) and has also been recognised by the European Court of Justice in the decision in re Micheletti.\(^7\)

Up to this point in time, only a few rules exist which limit the autonomy of States in nationality matters. The most important general restriction is that the grounds for acquisition and loss should not violate human rights (e.g. no discrimination on racial grounds is permitted; see inter alia Art. 5 (d) (iii) International Convention on the elimination of all forms of racial discrimination).\(^8\)

The consequence of State autonomy in this area is that an enormous variety of grounds for acquisition and for loss of nationality exist. An indirect consequence of this fact for sport is an unequal competition for States in respect to excellent sporting (wo)men and shaking inequalities between athletes.

Although some international treaties aim to harmonise certain grounds for the acquisition of nationality, one can still observe a huge variety of grounds for acquisition ex lege. The most currently acceptable manners of acquisition of nationality at birth are acquisition *jure sanguinis* (by birth as a child of a national) and acquisition *jure soli* (by birth on the territory of a State).

Originally, all States which provided for an acquisition of nationality *jure sanguinis* nearly exclusively applied *ius sanguinis a patre* (in the paternal line); only in exceptional circumstances was the *ius sanguinis a matre* (the maternal line) relevant (e.g. in case of a child born out of wedlock and not recognised by a man).\(^9\) Most countries now apply a *ius sanguinis a matre et a patre*: a child acquires the nationality if their father or mother possesses this nationality.\(^10\) However, some countries provide for exceptions.\(^11\) Firstly, some countries exclude children born out of wedlock where the mother is a foreigner and


\(^8\) 669 UNTS 195 (1966).


\(^11\) Ibid., 125-135.
the father a national. Secondly, several countries restrict acquisition of nationality where only one parent possesses the nationality of the country concerned. Thirdly, many countries restrict the transmission of the nationality of a parent to a child born abroad to the first or second generation born outside the country.

Nowadays, most countries do not apply either *ius sanguinis* or *ius soli*, but a combination of both principles. Classical *ius soli*-countries make provisions in case of birth abroad of a child of a national for acquisition *ius sanguinis*, but often limit the transmission of nationality in this way to the first or second generation. Conversely, classical *ius sanguinis*-countries have in the recent past introduced some elements of *ius soli* in order to reduce cases of statelessness or to stimulate the integration of the descendants of foreign families residing permanently on their territory. Children born in wedlock have in principle at the moment of birth a family relationship with both father and mother: this family relationship is frequently the legal basis for the acquisition of nationality *ius sanguinis*. If a child is born out of wedlock, the family relationship with the father can be established later on by, e.g., recognition, legitimation or juridical establishment of paternity. Many legal systems provide that in such cases, the child acquires the nationality of the father, although several countries put in place additional requirements.

Many countries mention adoption as a ground for acquisition of nationality *ex lege*. Most of these countries require that the adoption took place during the minority of the child. However, in some countries the age limit is lower. Most countries provide that, under certain conditions, children of a person who acquires the nationality of the country also acquire this nationality if they are still minors, but a large variety of conditions for such an extension of acquisition exist.

In addition to these frequently occurring grounds for acquisition of nationality *ex lege*, some States provide for other grounds for automatic acquisition of nationality. A remarkable example is the French rule that children born in France to non-national parents acquire French nationality *ex lege* when they reach the age of majority. In several countries, certain persons can acquire, under certain conditions, the nationality of the country involved by lodging a declaration of option. All countries provide for the possibility of acquisition of nationality by naturalisation, i.e. by a discretionary decision of competent authorities. A number of comparative studies have concluded that the

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12 Ibid., 137-139.
13 Ibid., 131-133.
variety of requirements for naturalisation is huge. Walmsley, for example, has correctly concluded, that 'few countries have the same requirements for naturalisation or refer to them in the same terms as other States.\footnote{Less frequent are, e.g., the following requirements: health certificate (France); no intensive relation to another State (Austria); benefit to the country.}


- Age of majority: in most countries, this implies having reached the age of 18 years.
- Residence, but the required length varies considerably. The period of residence required for naturalisation is, for example, only 3 years in Belgium; 4 years in Ireland; 5 years in the Czech Republic, Estonia, France, Netherlands, Slovakia, Sweden, and the UK; 6 years in Finland; 7 years in Norway; 8 years in Cyprus, Germany, and Hungary; 9 years in Denmark; 10 years in Austria, Greece, Italy, Luxembourg, Portugal, and Spain; 12 years in Switzerland; and 15 years in the Former Yugoslav Republic of Macedonia.
- Moreover, many countries do not require simple residence, but legal residence or even entitlement to reside permanently. In a number of countries, the required period of residence must be uninterrupted. Thus, the means of calculation of this condition for naturalisation also varies considerably from country to country.
- Immigration status: nearly all countries require that the applicant resides legally in the country at the moment of application for naturalisation. Several countries prescribe that the whole required period of residence must be legal.
- Integration or even assimilation: in several countries the applicant must successfully complete an integration test.
- Command of (one of) the national language(s): the required degree of knowledge of a State’s language again varies. In some States, basic oral command is sufficient; in others, a written command of the language is also required.
- That the applicant poses no danger to the security of the State: the concrete application of this requirement varies again from country to country. Several States, influenced by the United Kingdom, refer to this requirement by the condition that the applicant must be of 'good character'.
- Ability to support oneself.
• Renunciation of a previous nationality: whether this condition is required depends on the general attitude of a State towards dual or multiple nationality.
• Oath of fidelity.
• Payment of a naturalisation fee: in some countries naturalisation is free of charge (Belgium, Luxembourg); other countries demand a fee in order to cover the cost of the naturalisation authorities. Some countries require enormously high fees (some cantons in Switzerland).

However, all States allow for a waiver of (most/all) requirements for regular naturalisation. Situations in which such exceptions are granted to sports(wo)men differ considerably.

All countries reduce the requirements for naturalisation for some specific groups of applicants, e.g. spouses of nationals, former nationals, refugees, stateless persons and sometimes also for nationals of certain specified States. Spain, for example, requires only a residence of 2 years for nationals of Latin American countries, the Philippines, Andorra, Portugal or Equatorial Guinea and for Sephardic Jews. Denmark and Sweden allow the naturalisation of nationals of other Nordic countries after a residence of only 2 years. Italy facilitates the naturalisation of nationals of other Member States of the European Union after a residence of only 4 years.

The conditions for a facilitated acquisition of nationality for foreign spouses of nationals again differs enormously. In the past, most States provided for an automatic acquisition of nationality by a foreign wife of a national Incidentally, this ground for acquisition still exists. These days, most States give married women independent nationality status. However, in some countries the foreign wife of a national can acquire nationality without any residence requirement by lodging a declaration of option. The great majority of States facilitate the naturalisation of foreign spouses independent of their gender, but the precise requirements vary hugely. For example, Italy allows the acquisition of Italian nationality by a foreign spouse after 6 month residence or 3 years marriage. The Netherlands allows an application for naturalisation after 3 years marriage (no residence required). Spain allows for the naturalisation of a foreign spouse after 1 year of residence.

23 De Groot, Staatsangehörigkeitsrecht im Wandel, 311, 312.
§5. COMPARISON OF GROUNDS FOR ACQUISITION AND THE RELEVANCY OF COMPENSATION MECHANISMS

If one wants to compare the grounds of acquisition of nationality of several countries in order to get an impression of the unequal competition of the States involved regarding excellent athletes, one should not compare isolated grounds for acquisition, but should take into account all grounds for acquisition and all grounds for loss. For example, differences regarding naturalisation have to be evaluated and assessed in terms of the differences regarding other ways of acquisition of nationality. The same is true for differences regarding possibilities of acquisition by a declaration of option or by registration as a national.

It is important to realise that the choice of application of *ius soli* *ius sanguinis* implies in itself an unequal competition of States in respect of sports(wo)men and unequal opportunities for athletes. A country that applies a cumulative *ius soli* with an unlimited *ius sanguinis a mater et patre* will extend the pool of nationals from which it can pluck excellent athletes able to compete for it. Countries which apply an exclusive *ius sanguinis a patre* with limitations to acquisition of nationality for births abroad limit the number of their nationals, and thereby reduce the pool of athletes available to them. However, where States do not apply *ius soli* or where they make exceptions to the rules of *ius sanguinis*, this is often largely compensated by facilitated access to nationality. A country which does not apply *ius soli* may provide for the automatic acquisition of the nationality upon reaching the age of majority by persons born on the territory of the State (e.g. France)\(^\text{24}\) or by acquisition of nationality by a person born on the territory of the State by lodging a declaration of option (e.g. Netherlands, Portugal)\(^\text{25}\).

A country which provides for a limitation of the acquisition of nationality *jure sanguinis* in case of birth may compensate for this by creating the possibility of registration as a national for children of nationals born abroad (Belgium, Germany, Portugal, United Kingdom)\(^\text{26}\). Further, a failure to acquire nationality *jure sanguinis a patre* by children born out of wedlock may also be compensated by the possibility of registration as a national, where certain conditions are met.\(^\text{27}\) These compensation mechanisms have meant that the competition between States regarding excellent sports(wo)men is becoming more equal again. The introduction of an additional requirement for sports(wo)men after the acquisition of a nationality by one of these compensation mechanisms would therefore not be acceptable, because it would create new inequalities.

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\(^\text{24}\) De Groot, 'Conditions for acquisition of nationality', 141.


\(^\text{26}\) *Ibid.*, 148, 149.

\(^\text{27}\) *Ibid.*, 148, 149.
Some specific rules of international sport federations are problematic in this comparative perspective. For example, Art. 3.3.3 FIBA 2002\(^{28}\) regulation states that a basketball team ‘may only have one player who has acquired the legal nationality of that country by naturalisation or by any other means after the age of 16’.\(^{29}\) This rule tries to avoid unfair competition via nationality law, but in fact causes new inequalities. A person born on the territory of a \\textit{ius soli}-country will always possess the nationality of the country of birth, often next to a nationality acquired \\textit{jure sanguinis}. A person born on the territory of the Netherlands as a child of non-national parents does not acquire Netherlands nationality by \\textit{ius soli}, but will – in principle – only be able to acquire Netherlands nationality by declaration of option after their 18th birthday. It is essential to take into account this compensation mechanism for not applying \\textit{ius soli} if a international sport federation wants to formulate nationality restrictions.

\section*{6. AN ADDITIONAL RESIDENCE REQUIREMENT}

The most obvious unequal competition in respect to athletes can be observed in the different attitude and practices of States regarding the quick naturalisation of athletes. The question has to be raised whether these differences regarding naturalisation should be compensated by the introduction of an additional requirement to be fulfilled before the naturalised athletes may represent their new country in international competitions. The content of the additional requirement should guarantee that the new nationality is a manifestation of an appropriate, genuine link with the State involved. From such a perspective, an additional residence requirement could prove to be useful: a naturalised athlete should – in principle – only be entitled to represent his new country in international competitions if he or she had his habitual residence for a certain uninterrupted period – \textit{before or after the naturalisation} – in the new country.

However, such an additional residence requirement is not reasonable if already, for other reasons, a genuine link exists between the naturalised person and the State involved, but where the person involved was not previously able to acquire nationality due to the terms of the nationality law. Sports(wo)men should not suffer disadvantages because of technical choices of States in respect of nationality law. I would like to submit, that a relevant genuine link between a person and a State always exists:

- in case of birth on the territory of the State
- for children of a national, both natural and adopted\(^{30}\) children
- in case of the naturalisation of former nationals


\footnote{Van den Bogaert, \textit{Practical regulation of the mobility of sportsmen in the EU post Baman}, 350, 351.}

\footnote{Therefore, I have difficulties with the decision taken by the FIFA Emergency Committee in 2004 in their reaction to the plans of Qatar to naturalise Brazilian football players, which i.a. uses as a criterion that the \textit{biological} father or mother was born in the territory of the relevant association.}
If persons born on the territory of a State or children of a national of the State are naturalised by the State involved or acquire the nationality involved by registration, declaration of option or even by operation of law when they reach a certain age, these acquisitions of nationality have to be considered as compensation for the non (or partial) application of *ius soli* or *ius sanguinis*. In such cases, an additional residence requirement would not be fair. It is also particularly unfair in cases of re-naturalisation.

The naturalisation of former nationals (also called reintegration) should always be considered as a compensation for differences between the States concerned regarding provisions on the loss of nationality. Some States follow the principle of perpetual allegiance and do not provide for any possibility to renounce nationality, whereas other States provide for a wide range of grounds for loss. These huge differences have to be taken into account in cases of re-naturalisation of former nationals. The outcome should be that in cases of naturalisation of a former national, an additional requirement should never be imposed.

A further, and difficult, question is whether an additional residence requirement should also apply in cases in which nationality is acquired after marriage (automatically/ by declaration of option/ after a very short period of marriage). On one hand, comparative law shows that many States facilitate the access to nationality for the foreign spouse of a national immediately after the marriage or after only a short period. These States obviously consider the marriage as a manifestation of a genuine link with the State involved. On the other hand, not to require an additional residence requirement may allow for sham marriages by athletes. A possible compromise might be to require — in principle — an additional residence of two years, but to provide also that the duration of marriage is reduced from the required two years. Such an reduction of the duration of marriage from the required period of residence happens already, for example, in Austria and Denmark in determination of whether the foreign spouse qualifies for facilitated naturalisation.\(^\text{31}\)

In all cases where a genuine link is lacking, an additional residence requirement is reasonable if an athlete acquires a new nationality by naturalisation, registration or declaration of option. The next question is, of course, how long the additional residence requirement should be. I submit that the required period of habitual residence should be shorter than the lowest residence requirement for regular naturalisation. The lowest residence requirement exists — as mentioned above — in Belgium, where only a 3 years residence is required. It is therefore — in my opinion — attractive to require in cases in which there are a lack of a genuine link for other reasons a habitual residence of two years of continuous residence immediately before naturalisation, registration or declaration of

\(^\text{31}\) See on that decision Van den Bogaert, *Practical regulation of the mobility of sportsmen in the EU post Bauman*, 359.
option.\textsuperscript{32} If this additional condition is not fulfilled at the moment of the acquisition of the new nationality, the athlete involved should only be eligible to represent his new country after he or she has fulfilled the two years requirement (the period of residence directly before the acquisition of the new nationality and after the acquisition being counted together). A residence period of two years immediately before acquisition should not be required, however, where the person had in the past a continuous and uninterrupted residence of five years in the country involved. Such an uninterrupted period of residence in the past also guarantees the existence of a genuine link of the athlete involved and the country of the new acquired nationality. In such a case, to require an uninterrupted habitual residence of two years immediately preceding the acquisition of nationality is superfluous. Furthermore, this additional rule is fair in view of the fact that young athletes sometimes gain a part of their sporting education and make a part of their career in a country other than that in which they grew up.

\textsuperscript{32} To require a residence period of two years fits also with the facilitated naturalisation for special groups of foreign nationals in Spain and Scandinavian countries.