doi:10.1017/aju.2020.73

SYMPOSIUM ON THE OLYMPICS AND INTERNATIONAL LAW

PROBLEMATIZING OLYMPIC NATIONALITY

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One can hope that the convening of the Tokyo Olympics will be a cause for global celebration. Tokyo could prove a focal point for international solidarity, a moment of relief and release after all of humanity faced down an insidious, invisible, and largely indiscriminate attacker. Unified as we otherwise may be, athletes will still come to the Games as representatives of nation-states. That may be an unavoidable organizing principle. Less justifiable will be the requirement that athletes be nationals of the states they play for. Under the Olympic Charter and the rules of particular sporting federations, athletes are subject to a non-state nationality regime that restricts the capacity of individuals to compete for countries for whose delegations they would otherwise qualify. This regime looks to maintain the putative integrity of Olympic competition by maintaining the unity of sporting and sociological national identity. But that legacy of the twentieth century no longer works in the twenty first. Nationality and associated criteria for participant eligibility undermine the autonomy of athletes and the quality of participation. The rules can no longer guarantee any affective tie between athlete and nation, instead arbitrarily enabling some, but not all, to compete on the basis of citizenship decoupled from identity. We don't require that athletes playing for our professional sports teams hale from the cities they represent. There's no reason why we need to require more of our Olympic athletes.

The (Non-State) Law of Olympic Nationality

The Olympic Games are, of course, a non-state undertaking, governed by rules set by the International Olympic Committee. Those rules, set forth in the Olympic Charter, set a baseline for the terms of competition, for nationality as with other matters. Rule 41 of the Olympic Charter provides that "Any competitor in the Olympic Games must be a national of the country of the [National Olympic Committee] which is entering such competitor."[1] In this respect, the Olympic regime is parasitic on state nationality rules, which vary considerably.[2] Under the Bye-Law to Rule 41, an individual who has two or more nationalities may elect to represent either of them so long as she has not yet competed at the international level. An athlete who has engaged in international competition for one country may represent another country of nationality on the condition that three years have passed since the

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[1] *See* Int'l Olympic Comm., Olympic Charter, Rule 41 (2019).

[2] *See* Peter J. Spiro, *A New International Law of Citizenship*, 105 AJIL 694 (2013) (describing state sovereign discretion with respect to citizenship practice).

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https://doi.org/10.1017/aju.2020.73 Published online by Cambridge University Press

athlete last competed for another country. That "cooling off period" can be reduced or eliminated by the IOC, contingent on the agreement of the national Olympic committees involved.[3]

Some sporting federations mirror these rules[4] or afford them precedence for purposes of Olympic competition.[5] Other federations impose additional nationality-related requirements. These additional requirements have the ostensible intention of establishing the athlete's sociological ties to the country for which she seeks to compete, a kind of *Nottebohm* "genuine links" test in the sporting world.[6] Several federations make nationality transfers contingent either on a birth connection to the new country of sporting nationality through place of birth or through ancestry, or on a period of residence immediately prior to the transfer. The International Equestrian Federation, for example, will approve nationality transfers where the requesting athlete acquired nationality in the new country of competition through territorial birth or "by virtue of descent or through other means related to family heritage."[7] Otherwise, the transfer applicant must have resided in the new country of nationality for either two uninterrupted years or five years of non-consecutive residence.[8] Other federations impose residency requirements regardless of how the athlete secured nationality, that is, even if the competitor was born in the country or descended from nationals thereof.[9]

Some federations impose additional criteria on athletes even where they have yet to compete at the international level, in cases in which they would be eligible to compete for more than one country by virtue of multiple nationality. Football, for example, requires birth in territory on the part of the athlete, a parent, or a grandparent by way of establishing initial eligibility to compete for a country, failing which the individual must have resided continuously in the country for which she wishes to play for at least two years.[10] Aquatics requires naturalized athletes to satisfy a one-year residency requirement even with respect to the first country of international competition.[11]

In addition to eligibility criteria, some federations limit the number of lifetime nationality transfers. For football, wrestling, hockey, and track and field, an athlete may undertake one nationality transfer only during her career. Cycling allows two such transfers. Basketball allows no nationality transfers except in "exceptional circumstances" where the athlete looks to compete for his "country of origin" and such permission "is in the interest of the development of basketball in this country."[12]

Finally, some sports limit the number of athletes that a country can have on their Olympic rosters through nationality transfers. In gymnastics, national federations can request only three nationality changes per year, only two in any competition category. "In order to prevent any abuse," the rules of United World Wrestling

[3] *See* Int'l Olympic Comm., *supra* note 1, Bye-law to Rule 41. Implicit in the Charter regime is the singularity of Olympic nationality. There is no acceptance of dual sporting nationality parallel to the dual citizenship that has become generally more accepted in other contexts. *See* Peter J. Spiro, At Home in Two Countries: The Past and Future of Dual Citizenship (2016).

[4] Boxing, for instance. *See* Int'l Boxing Ass'n, AIBA Technical & Competition Rules, Rule 4 (2019).

[5] *See, e.g.*, Int'l Canoe Fed'n, Canoe Sprint Competition Rules 2019, Rule 1.5(2019); Fédération Internationale d'Escrime [Fencing], Statutes, ch. 9.2 (2019).

[6] Nottebohm (Liech. v. Guat.), 1955 ICJ Rep. 4 (Apr. 6).

[7] Fédération Equestre Internationale, General Regulations, art. 119.2.2.3 (2020).

[8] *Id.* art. 119.2.2.2. The periods are reduced to one and three years, respectively, where the athlete is married to a national of the new country of nationality.

[9] Fédération Internationale de Natation, FINA General Rules, GR 2.6 (twelve months residency required in new country of representation) [hereinafter FINA General Rules].

[10] Fédération Internationale de Football Association, FIFA Statutes, 6.1 (2019).

[11] FINA General Rules, *supra* note 9, GR 2.6.

[12] Int'l Basketball Fed'n, FIBA Internal Regulations, ch. 3-22 (2020).

https://doi.org/10.1017/aju.2020.73 Published online by Cambridge University Press

limit countries to one nationality change per age category.[13] Handball allows only two players per team who have undertaken a change of nationality.[14] Basketball restricts national teams to only one player who acquired nationality of the country after the age of sixteen, a broader limitation covering competitors who have not competed internationally for any other country.

The Lost Nostalgia of Olympic Nationality

The Olympic nationality regime is rooted in a putative ideal of integrity in which competitor nationality reflects identity on the ground. The requirement that an athlete hold the nationality of the country for which he competes dates to early Olympic statutes,[15] when nationality would typically have coincided with a discernible identity. Supplemental rules departing upward on the part of sporting federations go further, insofar as they do not trust state citizenship conferrals to reflect actual connections between the would-be competitor and the new state of sporting nationality.[16] These federations are saying, in effect, that citizenship is necessary but not sufficient to evidence that one is really "of" the country for which one is seeking to compete. To use the language of *Nottebohm*, these federations are demanding that nationality reflect "a social fact of attachment, a genuine connection of existence, interests and sentiments."[17]

The difficulty is that citizenship, even with supplementary requirements, can now be gamed in many circumstances. Key to the picture is the growing acceptance of dual citizenship outside of the sporting world. In the past, citizenship more often coincided with an individual's national center of gravity (practical and affective) precisely because the individual had to choose. Now that nationalities can be accumulated in many contexts, that choice is not forced, and individuals can maintain additional citizenships at no cost. To the extent any benefit attaches to an additional citizenship for which one is eligible, there is little to deter securing that citizenship (or retaining citizenship extended at birth). Olympic eligibility would count among those benefits. As a result, many individuals, including a growing number of Olympians, hold a secondary citizenship in countries to which they have little connection.

It is not just individuals who are doing the gaming. Many states have mechanisms for more or less instant naturalization, catch-all provisions under which individuals can bypass otherwise applicable naturalization requirements (residence and language facility requirements, for example) in cases in which an individual promises "exceptional benefits" or equivalent to the state.[18] Russia has put such a naturalization fast-track to work in many cases. Belarus naturalized two U.S. gymnasts in the run-up to the Rio Games who had never even visited the country prior to acquiring citizenship, necessitated by the eligibility bar under Rule 41.[19]

[13] United World Wrestling, International Rules for the Change of Nationality, art. 3(2019).

[14] Int'l Handball Fed'n, Player Eligibility Code, art. 6.3.2 (2019).

[15] *See* Règlements et Protocole de la Célébration des Olympiades Modernes et des Jeux Olympiques Quadriennaux 13 (1924).

[16] A recent revision of eligibility rules for the International Amateur Athletic Federation (now "World Athletics," the sport federation for track and field competitions) provides an unusually explicit elaboration of these motivations. *See* IAAF Regulations on Eligibility to Represent a Member in National Representative Competitions. The federation's executive council deemed it "imperative" that athletes have a "genuine connection" to the countries they represent by way of "protect[ing] the credibility and regularity" of competition. Olympic eligibility was, however, explicitly carved out from application of tightened rules. *Id.* at para. 1.7.

[17] *Nottebohm*, 1955 ICJ Rep. at 23.

[18] For a database of countries with such naturalization provisions, see European Univ. Inst., Globalcit, Global Database on Modes of Acquisition of Citizenship (2016) (including acquisition of citizenship on the basis of "special achievement").

[19] *See* Will Graves, *American Gymnasts Create Unlikely Alliance with Belarus*, Associated Press (Oct. 24, 2015).

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Though supplemental requirements imposed by the sporting federations limit the use of fast-track naturalization, that doesn't stop the gaming. In an increasing number of cases, individuals in effect offer to self-sponsor their Olympic participation for a country whose citizenship they hold, typically by ancestry. Hence the spate of Winter Olympians from countries that have no snow. In one fully instrumental case, a pair of Americans from Staten Island bought citizenship in Dominica by way of securing a ticket to Sochi as cross-country skiers.[20] Residency requirements, meanwhile, are a question of counting days. Olympic athletes in rigorous training are unlikely to be rubbing shoulders with their would-be compatriots; it isn't residency in the ordinary sense. The *Nottebohm* approach, while appealing from the perspective of twentieth-century liberal nationalism, may not supply a workable standard.[21]

Of course, some dual citizens who satisfy supplementary requirements will have at least a sentimental attachment to the state of secondary citizenship. The problem is that the sporting federations are unlikely to be able to sort citizenship held on an affective basis from citizenship that is purely instrumental. Leaving aside the fast-track naturalizations in which there isn't even a pretense of a preexisting connection, many athletes hold sporting nationalities that are decoupled from their actual national identities. The result is arbitrary. Some are fortunate enough to have parents or grandparents born in countries for whom Olympic qualification presents a low bar. Others are not so lucky.

Constraining Mobility, Compromising Competition

Arbitrariness is a facet of citizenship in all its instantiations.[22] Some of us are born in rich countries, some of us are not. Beyond the realm of sporting nationality, there is at least the formal possibility of mobility through migration. If a state will have you, no global mechanism obstructs your moving and working there.[23] In the Olympic context, mobility is constrained and in some sports is not possible at all. The regime leaves some individuals subject to a kind of athletic peonage, a status that harkens back to the feudal regime under which subjects owed "perpetual allegiance" to their sovereigns.

Mobility is constrained in the first instance by the citizenship requirement. Some states do not have fast-track naturalization on the basis of "special achievement," and in others it is cumbersome. In those cases, an athlete must satisfy ordinary conditions for naturalization, including residency and (in many cases) language requirements. The Charter's three-year "cooling off" period imposes a further obstacle to Olympic mobility. Although the national Olympic committees involved are often able to agree to its elimination, in other cases the state of current Olympic nationality will refuse to waive the requirement.[24] Three years is a very long time in the career of an athlete who will be lucky to have a single shot at the Games.

[20] In the end, neither competed. *See* Mark Ziegler, *Did Dominica Couple Game the Games?*, San Diego Union-Tribune (Feb. 22, 2014).

[21] It is no coincidence that *Nottebohm* itself has come under increasing scholarly fire. *See, e.g.*, Audrey Macklin, *Is It Time to Retire Nottebohm?*, 111 AJIL Unbound 492 (2018); Rayner Thwaites, *The Life and Times of the Genuine Link*, 49 Victoria Univ. Wellington L. Rev. 645, 657 (2018).

[22] *See, e.g.*, Ayelet Shachar, The Birthright Lottery: Citizenship and Global Inequality (2009); Branko Milanovic, Capitalism, Alone: The Future of the System That Rules the World 131-36 (2019).

[23] The International Covenant on Civil and Political Rights art. 13(2), Dec. 16, 1966, 999 UNTS 171, provides that "[e]veryone has a right to leave any country, including his own." The Universal Declaration of Human Rights art. 15, Dec. 10, 1948, G.A. Res. 217 (A) (III) meanwhile, supposes that "[n]o one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality." *See generally*, Hurst Hannum, The Right to Leave and Return in International Law and Practice (1987).

[24] *See, e.g.*, Jere Longman, *A Polish Olympian Aimed to Join Team U.S.A. Things Got Ugly*, N.Y. Times (Feb. 22, 2020) (dual U.S.-Polish fencer who accused Polish Olympic committee of discrimination based on pregnancy denied waiver by Polish committee).

https://doi.org/10.1017/aju.2020.73 Published online by Cambridge University Press

In sports in which the number of transfers is lifetime limited, the obstacles to mobility can be absolute. In these sports once the athlete has reached the transfer limit her Olympic nationality is set for life. That is true even if she transfers other aspects of her life and identity composite to a new country; in other words, even if the athlete undertakes naturalization in a conventional sense (marrying a national of that country, for example, in addition to habitual residence), the rules of some federations might not allow her to compete under her new flag. As a practical matter, the same result may ensue in sports that set a quota for naturalized team members. Although it does not target individuals, once the quota is filled, naturalizing citizens need not apply. Whether or not one takes the Charter's assertion, by way of a "fundamental principle," that the "[t]he practice of sport is a human right" as a statement of international law, the nationality regime problematically constrains athlete autonomy.

Spectators are collateral losers. Because athletes are disabled from competing with teams that would have them, Olympic rosters will be filled with less qualified athletes. This is compounded by per-country competition quotas under which national committees are given a limited number of slots in individual competitions. China can send only two table tennis players to the Games even though five of the top ten players compete for China. The world's third-ranked singles player does not go to the Games because only the top two will represent China. Olympic basketball teams, meanwhile, are disabled from populating their teams with Americans who can't make the U.S. team. The result is a perennially lopsided Olympic tournament. Competition in all sports would improve if athletes enjoyed free mobility, that is, they could play for any national team that would have them, regardless of citizenship status.

Towards Olympic Free Agency

To many, free agency is anathema to the spirit of the Games. Nationality transfers have been derided as "country swapping,"[25] an exercise in flying "flags of convenience,"[26] "quickie citizenship,"[27] "passport bartering,"[28] and as an "athletic mercantilism."[29] This derision is consistent with a kind of sporting nationalism, a surrogate warfare in which athletes who don't genuinely identify with the nations they compete for look like playing-field mercenaries. That fit the twentieth century version of the Games, in which Cold War rivalries played themselves out on hockey rinks and other Olympic venues. But it seems outdated in a world in which identities are more fluid along various dimensions. Olympic nationality transfers are increasing.[30] In recent Games, they seem to have been taken more in stride.

To the extent that Olympic free agency seems incompatible with the Olympic spirit, consider professional sports, which serve important community-building functions at the local level. In any case, Olympic free agency will hardly result in either a random distribution of players by nationality or a greater concentration of Olympic power. All things being equal, most athletes will want to play for the country they call home. Sentimental national attachments still count in sports as they do in other contexts. For prominent athletes in the marquee competitions, competing for country is important to brand-building. No amount of money is going to get Katie Ledecky to swim for Qatar. At the same time, a free-agent Olympics would expand opportunities for lesser-known athletes and those in the lower-profile sports, who often struggle even as members of major-country delegations. The threat

[25] Dana Mulhauser, *On Your Marks. Set. Go Home*, Legal Aff. (July-Aug. 2004).

[26] *Big Dreams Under Flags of Convenience*, Agence France-Presse, Feb. 16, 2010.

[27] James A.R. Nafziger, International Sports Law 133 (2d ed. 2004).

[28] Ayelet Shachar, *Picking Winners: Olympic Citizenship and the Global Race for Talent*, 120 Yale L.J. 2088, 2107 (2011).

[29] Lauri Tarasti, *Citizenship Issues a Problem for Professional and Top-Class Sport*, Motion – Sports in Finland 39 (Jan. 2007).

[30] Joost Jansen et al., *Nationality Swapping in the Olympic Field: Towards the Marketization of Citizenship?*, 22 Citizenship Stud. 1 (2018) (documenting rise of Olympic athletes with nationality transfers).

https://doi.org/10.1017/aju.2020.73 Published online by Cambridge University Press

of player-raiding at that level could spur national Olympic committees and home-country corporations to higher levels of sponsorship. To the extent that athletes want to compete for other countries—in many cases, because they can't make the "home" team—and those other countries will have them, Olympic rules shouldn't stand in the way.

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