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What legal framework for sports, leisure and tourism activities?

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- 1 1950: Annapurna, the first 8,000 metres summit climbed by a national expedition on mountains where only a few handfuls of mountaineers had come to try their luck. 2011: thousands of French climbers leave each year for the Himalayan mountains, mostly in supervised and “marketed” expeditions (Boutroy, 2006, p. 591). If the Himalayas have become a high-end tourist market, the French nature parks have evolved into a playground for millions of practitioners. At first, confidential activities reserved for an elite, mountain sports have experienced like all outdoor sports considerable quantitative but also qualitative changes. Thus, sports’ organizations are undergoing a process of rationalization, and a search for efficiency is at work in contemporary sport. All of which relies heavily on the legal tool, and fits broadly into the evolving social position of law since the late twentieth century. Law has become the indispensable “toolbox” to all entrepreneurs and project-builders, to the extent that it is difficult to consider the organization of any business activity without due regard to its legal aspects.
- 2 Two phenomena explain the increasing legal dimension in the regulation of outdoor sports. On the one hand, mass practices, which give a new dimension to issues of safety, and environmental protection in particular. On the other hand, organization, sales, supervision of these activities and the sale of special sports equipment have become lucrative, thanks to the emergence of a genuine mass market for outdoor sports. This explains these activities being submitted to a process to law, what lawyers call “legalization” of a social field. They “register” the major social changes to which they adapt, like any social activity, and in this sense the legal organization of outdoor sports is frame worked by the rising complexity of legal systems. This results in an increasingly complex and unclear legal framework: the codification of sports law, and therefore of the rules governing outdoor sports, must be understood as an attempt to restore coherence.

## Submission of outdoor sports to law

- 3 “Sports law” and, even more, “Outdoor Sports law” is a recent matter: the first law aiming at the organization of this sector dates back to 1975. The part of the law relating to this area has since been growing continuously, bringing into effect a considerable “legal framework” for this social field. It consisted, firstly, in the application of standard legal concepts and tools to outdoor sports, like to any social activity. But it then became necessary to create legal tools tailored for the specific issues related to these activities.

## Implementation of non-specific rules of law

- 4 Quite naturally, the legal regulation of outdoor sports began increasing, as these activities moved from personal adventure to supervised activity, accompanied and organized. Thus, the practice of outdoor sports has shifted from the pattern of taking individual risks to the one of transferring liability to a third party (the guide, the organizer). In parallel, the adoption risk prevention measures (site development, user information, etc.). By the controlling administrative authorities (mayor, prefect) was made necessary by the proliferation of practices. That is to say, by becoming important economic and social activities, outdoor sports were subjected to the law (Roux, Sontag, 2007). From a sociological point of view, the diversification of sports activities, the multiplication of actors (sports, professional associations, local authorities, etc.), and the increasing number of practitioners have led to a change in the perception of the accident: from fatality to an event that has a cause and of which someone can thus be held liable. Concomitantly, the “zero risk” ideology and the need for compensation have gained in power and given birth to ever more protective legislation.
- 5 Initially, general legal concepts were logically applied to these activities. We can mention civil law (tort law, contract law), administrative law (public liability or public policy) and criminal law (criminal liability). More technical, special rules can concern some aspects of outdoor sports: insurance law, association law, commercial law, labor law, among others. But new branches of law, can also apply to outdoor sports which reveal the new social and economic challenges linked to these activities: environmental law and planning law for example (Prieur, Karaquillo, 2000). Finally, the “legal frameworking” phenomenon of these activities has been such that outdoor sports today are concerned by the most varied legislation, which lies at the intersection of different issues (environmental protection, spatial development, tort law, etc.). In this sense, outdoor sports law is a remarkable expression of overlapping rules from different branches of law. The specificities of these activities have, however, progressively imposed the need to develop beyond the conventional legal frameworks.

## Development of specific rules

- 6 “Legalization” is a phenomenon that has affected virtually all social activities. This extension of the scope of law has been accompanied by a movement that can be called “application” of the rule of law. In other words, the past decades have marked the passing of an abstract law, characterized by its generality and vocation of permanence,

to a localized, applied, and mobile law. This has resulted in the adoption of ever more technical rules (laws, regulations), tailored to specific situations. Consequently, a “sports law” has emerged, in which outdoor sports have gradually asserted their particularity. Thus we can observe a growing number of very technical rules applicable specifically to outdoor sports, or a specific activity.

- 7 General sports law developed in the first place, gradually becoming a specialized field of law. The founding text of this discipline then embryonic, is the law of October 29th 1975 on the development of physical education and sport. Since then it has been the law of July 16th 1984 on the organization and promotion of sport and physical activity, which has laid down the principles of sports management between the State and the sports movement, the foundation of French sports law. There have been numerous modifications to this text since then, but they have not challenged the principles of the 1984 Act. Thus, the July 13th 1992 law that created legal professional clubs and imposed a compulsory conciliation period prior to referral of a matter to the French National Olympic Committee (CNOSF) in case of a dispute between an athlete and a federation. The law of July 6th 2000 is the one that has most deeply reformed the 1984 Act. It has redefined the missions of sports federations, the conditions of the activities of intermediaries and public subsidies to sports groups. Finally, the Act of August 1st 2003 made adjustments to the status of federations and regarding training and fixed the ownership of media rights in professional sports.
- 8 In a second time, rules specific to outdoor sports were adopted, in line with the already described evolution of law. In fact, the multiplication and diversification of sites and practices were accompanied by the emergence of new economic, environmental, social or cultural problem areas, requiring the creation of appropriate legal instruments. This is demonstrated by the fact that there is now a section of the sports law code devoted to outdoor sports. Development of what can appropriately be called sports planning over the last thirty years is another illustration (Bilan de l'enquête, 2007; De Witte, 2001; Février, 2005; Guide pratique, 2008; Mao, Reymbaut, 2004). Sports planning covers several legal tools whose purpose is both to identify natural sports sites and to organize them into coherent networks. Sports planning policy appeared in 1983, and is based on three types of plans, whose implementation is entrusted to the General Council: the departmental (French geo-administrative unit) plan for walking and hiking (PDIPR); and the departmental plan for motorized outdoor activities (PDIRM) and departmental spaces, sites and routes related to outdoor sports (PDESI). We can also mention the experience (short-lived) of a spatial and economic collective planning tool (schémas de services collectifs, SSC). The purpose of these tools was to guide planning practices to a “controlled development of outdoor sports”, by in a single approach taking into account the issues of accessibility to the sites, of conflicts between their different users, of safety and environmental protection. In this sense, planning tools are a response to the new challenges that outdoor sporting activities face, paying particular attention to the new vocation of peri-urban, rural, coastal and mountain areas, and highlighting the role of outdoor sports in territorial planning.
- 9 The counterpart of this evolution is that outdoor sports law has become mobile and evolving. This results in legal instability (due to the permanent adoption of new texts), legal uncertainty (the determination of the applicable rule is made more difficult) and a growing complexity of the applicable law.

## Complexification of outdoor sports law

- 10 The “legalization” of outdoor sports has led to an inflation of rules, causing confusion, contradiction, and finally to a very significant legal uncertainty. It is this insecurity that accounts for the codification effort by legislators of laws and regulations concerning sports law which has resulted in the sports code.

### Difficulties arising from the diversity of applicable legal rules

- 11 The complexity of the rules applicable to outdoor sports and their combination with other legal rules raise inevitable theoretical and practical difficulties. First is the problem of determining the applicable rule and its clarity. The law is, in principle, a predictable tool, it has become essential for the strategic development of organizations operating in the field of outdoor sports (associations, federations, companies and local authorities), as it is in the daily use management tools. However, instability and predictability are hardly compatible, this is demonstrated in a few examples:
- 12 The determination of applicable legal rules to the use of sports practice sites is a first illustration. In fact, practitioners use indifferently, with or without the legal right, the public domain (land, sea, river, air) and the private domain (including forests) of public persons, as well as private property, to carry out their activities. The question concerning their right to use these different areas must however be addressed (Le Louarn, 2004, p. 195; Von Plauen, 2005, p. 1984).
- 13 These activities are carried out in different natural areas (land, underground, rivers, cliffs, etc.), that are mostly subject to private appropriation. These sites are thus governed by private property law, and contrary to the popular belief that nature belongs to all, these private spaces can not be freely used by practitioners. Only express permission from the owner (contractual allowance for the use of the site) can confer such a right. It is true that a certain tolerance to wayfarers has always existed. But it raises the question of the owner’s responsibility, which, if it has not been diminished by the applicable law, can be quite heavy. Relief can however come in the form of a contractual transfer of this liability from the owner to the other party (contractual transfer of custody).
- 14 Practitioners also use the domain of public persons (State or local authorities), their public or their private domain. The public domain, in particular, follows different rules from private property, since its free use by all is the operating principle (Blin, 1965; Brovelli, 2007, p. 189; Drobenko, 2006, p. 125; Genevois, 1978, p. 628; Le Louarn, 2002, p. 246; Plouvin, 1977; Tanguy, 1991, p. 7). However for security reasons in particular, specific rules may apply to the use of public domains. Supervision of outdoor sports on the domain of public persons is made difficult by the inadequacy of traditional categories specific to the administrative law (public domain versus private domain of public persons) which can not account for atypical sites used for outdoor sports (skiing domains, airspace volumes, subterranean aquatic environments).
- 15 The question of the law applicable to the equipment of practice sites is another illustration of the increasing complexity of outdoor sports law. Indeed, the exercise of outdoor sports can not be conceived without a minimum of space planning, sites and routes which constitute the support for practices, whether it be the maintenance and

the marking of hiking trails, the development of areas for the takeoff of paragliders, the climbing equipment of cliffs, the grooming of ski paths or the construction of canoe passes. It is the “facilitation” of these activities, but also the security of practitioners that is at stake. However, the great diversity of actors in outdoor sports, whether private individuals (sports federations, associations or private individuals) or public entities (local entities, essentially), results in the variability of rules applicable to these facilities, which may be governed by administrative law or private law, as appropriate.

- 16 Thus, facilities that are initiated by individuals are submitted to private law. It is private work, which is in some cases subject to the compulsory insurance of construction operations. Any faulty construction work is likely to incur the responsibility of the manufacturer. But, facilities that are initiated by a public person are submitted to administrative law. The work necessary for their implementation is considered as public work. If the conditions are met, this work results in public constructions. Thus, derived from public responsibility, and being in the domain of public works, particularly favorable rules for the practitioners apply.
- 17 Another example can be drawn from the status of access roads to the practice sites and roads used for practice (hiking paths, for example) (Le Louarn, 2002). Indeed, French territory is full of rural ways which correspond essentially to ancient land uses, especially for agriculture. Having lost much of their original purpose, these ways are currently being used for sporting purposes, posing the question of balance between their legal and material use. It thus is necessary to identify the different categories of routes and paths and that can be used for outdoor sports: they can be public roads (local roads) and private roads (rural roads, forest trails, etc.), hiking paths, “green” paths, etc. Their juridical nature must then be determined, so as to identify the conditions of use of these ways for outdoor sports. This may involve finding the conditions of the articulation of contradictory principles. Thus the principle of free use of water for all contradicts private property law, which opposes, for example, free access to streams set on private land.
- 18 The adoption of policy measures by the administrative authority (mayor, governor), that accompany the exercise of outdoor sports can have multiple legal bases and can lead, where appropriate, to an accumulation of public policy rules. Those rules may be adopted on general police grounds (protection of public safety, health and tranquility). They can also be taken on the basis of specific texts giving the public authority special public policy powers (aquatic, environmental, etc.). This involves reconciling the principle of free exercise of these activities with other rights and freedoms such as private property law, respect of public safety, health and tranquility, environmental protection, etc. However, the diversity of public policy, and the variety of outdoor sports, results in grounds to intervene. Though not directly aimed at regulating outdoor sports, some public policy grounds nevertheless allow the regulation of some outdoor sports. For example, outdoor sports practiced at sea have boomed and their development called for the intervention of public authorities (public policy powers) and the application of specific rules to maritime and nautical activities. Air sports that are hazardous and cause nuisances, provide another example. These activities may be regulated by various authorities (minister of civil aviation, prefect or mayor), and on various grounds: general public policy powers (security, safety, public tranquility) or special public policy powers (policing air traffic and aerodromes).

- 19 These examples show that the field of sports law is broad and difficult to define. But the diversity and complexity of these rules raises a theoretical question: is sports law an autonomous branch of law that includes outdoor sports law? In principle a branch of law is a set of laws (laws, regulations) which cover the same field (for example, environmental), which are sufficiently consistent and are based on common categories (for example, sustainable development) or on common values (for example, the right to live in a healthy environment). Otherwise put, the problem is to determine whether sports law is dependent on classic legal concepts and regulation or if its specificity requires new concepts specifically forged for sports law (for example, the question arose about the notion of fair play and its place in the implementation of civil liability in sports).
- 20 Doctrinal opinions are shared. Some legal experts believe that sports law is a superposition of rules from different branches of private and of public law, applied to sport. Others, however, defend the idea that it is an autonomous branch of law, with its proper legislation and jurisdiction, a form of private justice that is responsible for sports related disputes (the court of arbitration for sports, CAS). However one must not be mistaken: the CAS's jurisdiction does not extend to outdoor sports, except for the few Olympic disciplines. But whether one supports or not the recognition of a new branch of law, it is indisputable that sports law is now self-sufficient enough to justify by way of a ruling, the creation of a sports code.

### **Codification: advantages and limits**

- 21 The described evolution (legalization, implementation, complexity), which goes beyond outdoor sports law to concern the whole of law, challenges legal certainty, which is an essential and legitimizing condition for the legal system. As noted by the Section for report and studies of the State Council [Conseil d'État], "the principle of legal certainty is not listed in our administrative law, or in our constitutional corpus. Some authors even go so far as to describe the concept as 'clandestine'. Yet it has many essential applications in our law: foreseeability of the law, clarity and accessibility to the norm, stability of legal situations, requirements that have most recently been recalled by the decisions of the Constitutional Council (conseil constitutionnel) and of the Council of State [...]. At the same time, the increasing complexity of our law is a constant concern for the citizens, local elected officials, businesses, particularly in small and medium enterprises, and lawyers" (Conseil d'État, 2006, p. 229).
- 22 This has led the legislature to attempt a reordering of the proliferation of rules by the conventional technique of codification. Thus, the 21st century has so far been a period during which many codes were adopted (there are no less than 70 codes today!). In the particular case of sports law, codification has been based on the findings and recommendations of an ad hoc committee that proposed the draft sports code that was finally adopted for its legislative provisions, by regulatory way on May 23rd 2006. According to the commission, "the codification of sports law came after a period of strong normative growth in the matter, whether it be by the application of texts dedicated to sports or by the application of rules belonging to other areas of law (competition, communication, construction, environment, security, etc.)" (De Silva, 2007, p. 1623; Lo Re, 2006, p. 1; Rapport au Président de la République, relatif à l'ordonnance du 23 mai 2006).

- 23 Codification of the rules relating to sport aimed at “facilitating access to the law and simplifying the applicable law” [Rapport au Président de la République, relatif à l’ordonnance du 23 mai 2006]. It was initiated by the December 9th 2004 Act on the simplification of law, which empowered the government to proceed by regulatory way to the adoption of the legislative part of the sports code. The latter was adopted by an order of May 23rd 2006 [Ord. n°2006-596 du 23 mai 2006]. The legislative part of the code was completed by two decrees of July 24th 2007 [Décr. n°2007-1133 du 24 juill. 2007] and an order of February 28th 2008 [Arr. 28 févr. 2008], relating to the regulatory part of the code. The speed of the process is certainly much due to the approach adopted: the sports law code is constituted, for the most part, by the provisions of the July 16th 1984 Act, which is abrogated, and by a number of texts previously codified elsewhere and also many non-codified regulations. The innovations of the code have been very limited, conceding to the codifying method principle of juridical constancy [à droit constant], only compiling and reorganizing existing law, without making formal changes. It should be noted that for the first time the legislator, dedicated a special chapter of the code to the regulation of outdoor sports. However, it is difficult to distinguish between the rules that are specific to sport and that should be included in the sports code, and rules regarding sports but having their place in another code (public health or environmental codes, for example). This problem was considered by the commission in charge of the draft code. According to the commission: “the sports code gathers in one document all the provisions most directly related to the practice of physical and sporting activities. It mainly includes the provisions of the July 16th 1984 Act n° 84-610 on the organization and promotion of sport and physical activity, texts previously codified in the code of public health and in the code of education. From the public health code are transferred the provisions to protect the health of athletes and the fight against doping; and from the code of education those concerning paid teaching and establishments where sports activities are practiced. Public health codes and education codes, relate henceforth to clauses in the sports code. Additional clauses applicable to sport were maintained in other codes when they exceeded the single frame-work of sports. Thus when it has been considered necessary to establish a link between the sports code and the relevant clause, the use of referral to codified texts has been privileged, rather than reproducing the whole text (“tracking code” technique), in accordance with the opinion adopted by the High Commission for Codification on March 3rd 2006. Indeed, it has seemed preferable to invite the reader to consult the articles to which the sports code refers in their specific legal environment (in their own code), so often necessary for the proper interpretation of the text. This would when necessary also facilitate the updating of the code. However, the “tracking code” technique was exceptionally used, when it seemed necessary to have access to the whole, codified text, so as to understand the clause in consideration [Rapport au Président de la République, relatif à l’ordonnance du 23 mai 2006].
- 24 A quick review shows, that in thirty or so years, a considerable inflation of the rules applicable to outdoor sports, both general rules and specific rules, has occurred. A new juridical field was emerging along with an outdoor sports law, consisting of many scattered rules. Following in the wake of sports law, outdoor sports law became more uncertain and more complex. An overhaul was required which took the form of the adoption of a sports code with a chapter dedicated to outdoor sports (articles L. 311-1 et seq. of the sports code). However, although a tool of considerable use for



practitioners, the sports code does not for all that exhaust the question as to the regulatory and legal conditions of these activities, whose byword is freedom...

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## ABSTRACTS

The outdoors has become, in a few decades, the playground of millions of practitioners. This evolution has been accompanied by the increasingly pronounced presence of law in the organisation and practice of outdoor sports. There has consequently been a significant “law-making process” in relation to these activities. This latter, in the first instance, has consisted in the application of classic legal tools (contract law, tort, administrative authority).

But rapidly it became necessary to adopt regulations relating to these activities. “Sports law” was the first to emerge. We observe today an increasing number of technical rules specific to outdoor sports, and to specific activities. As such these activities have been submitted to the growing complexity of the legal system and applicable law, which, difficult to interpret, has become a source that is confusing, contradictory and of very considerable legal insecurity. The adoption of the sports code is an attempt to restore this situation to order.

## INDEX

**Keywords:** law, outdoor sports, the sports code, sports planning, site, site development

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