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COURT OF ARBITRATION FOR SPORT (CAS), PROCEDURAL JUSTICE, AND ATHLETES' APPEALS IN DEVELOPING COUNTRIES

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Abstract

The kinetic energy that goes into sports competition is healthy and dynamic and should promote goodwill between nations. There is a presumption that sports politics impinges on the judgments of the sports adjudicating body, the Court of Arbitration for Sport (CAS), in determining appeals in their rulings on the validity of results in international sports competitions. The CAS system for arbitration has rules that follow the *lex loci arbitri* and its procedures conform to the Swiss Private International law in appeals to the Swiss Federal Tribunal for athletes. The jurisdiction of CAS has to conform to the principles of natural justice when appeals from athletes who have disputes with international sports federations are brought to its attention. This is of particular concern when the national federations of developing countries are involved in sanctioning or supporting athletes who have encountered discrimination. The research question in this paper is whether the CAS exercised procedural justice when the adjudication process involved athletes who had been banned from competition and if the rulings were in accordance with fairness and impartiality. The recourse to the European Court of Human Rights, Article 6.1, has been in sharp focus and the judgments of the court on public hearings and the role of quasi-tribunals need to be structured in accordance with natural justice. This paper argues that the CAS process should increase the scope of procedural justice by granting a fair hearing and by being seen as bias free.

Key words: Court of Arbitration for Sport (CAS), Procedural Law, Substantive Law, Swiss Law, Swiss Federal Tribunal, International Olympic Committee, Independence of Arbitrators, Jurisdiction, Public Policy, Rule against bias.

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1. INTRODUCTION

The sports federation of a nation is constituted on a model where the international rules of the sport form part of its regulatory framework. The organisation of events, its legal framework, and application of disciplinary codes are governed by the international federation.¹ If an athlete is sanctioned because of a breach of Codes of Practice, then they can exercise the right of appeal to the Court of Arbitration for Sport (CAS), based in Switzerland, which is the adjudicating body for disputes of athletes with their domestic or international federations. Article 27 of the Swiss law empowers CAS under private international law to determine appeals according to the accepted procedures of administrative law. This needs examination because of the athletes' appeals in developing countries who have been discriminated against by the International Olympic Committee (IOC), or an affiliated body with disciplinary powers.

CAS was established in 1984 by the International Olympic Committee (IOC) in order to create a supreme adjudicating forum for the resolution of sports disputes which was separate from the jurisdiction of state courts.² The location of CAS is in Lausanne, and the Swiss legal regime and private international law are part of its substantive and procedural law that govern arbitration in sport.³ Under Article R28 of the CAS Procedural Rules of the Code of Sports-related Arbitration (CAS Code), the proceedings are heard in Switzerland regardless of where the hearings first commenced in the national jurisdiction. The law applicable is the Swiss law of arbitration at any of the CAS proceedings.⁴

IOC, founded CAS in 1984, and there has been a certain level of scholarly criticism referring to a lack of its independence. The organisation of CAS is an autonomous body that is not integrated with the IOC.⁵ The same provision applies to the arbitral tribunals of the CAS Ad Hoc Divisions sitting, for example, at the Olympic Games. The location of the hearing has no consequence on the legal seat of the arbitration, which remains in Lausanne.²⁵ As such, the CAS panel constitutes an international arbitral tribunal seated in Switzerland, and all CAS proceedings are subject to the provisions of Switzerland's Private International Law Act (PILA), which ensures that there is procedural consistency between CAS cases.

The most common cases before the CAS are appeals from decisions of FIFA (Federation of International Football Associations / the Fédération internationale de football association),

1 The International Sports Federations are international non-governmental organisations recognised by the International Olympic Committee (IOC) as administering one or more sports at world level, <https://www.olympic.org/ioc-governance-international-sports-federations>.

2 See Despina Mavromati and Matthieu Reeb, *The Code of the Court of Arbitration for Sport: Commentary, Cases & Materials* (Alphen aan den Rijn: Kluwer Law International 2015), 1-15

3 This was affirmed by the subsequent ruling at the Swiss Federal Tribunal where the dispute includes the regulations of sports governing bodies framed by a set of rules that contain the arbitration clause SFT 4P.267-270/2002, Judgment of 27 May 2003 (Lazutina / Danilova).

4 See e.g. cases where the CAS hearing was held in another country (see e.g. the Essendon CAS Award which is further analysed below, CAS 2015/A/4059, WADA v. Thomas Bellchambers et al., AFL & ASADA, award of 11 January 2016).

5 The decision in *USOC v IOC* (CAS 2011/O/2422) provides possibly the most eloquent example of the independence of CAS in relation to the IOC. In this case, the CAS held as invalid and unenforceable an IOC decision, which prohibited athletes who had been suspended for more than six months for an anti-doping rule violation from participating in the next Olympic Games following the expiry of their suspension.

the world governing body for football, which has its own internal judicial system.⁶ This type of dispute typically arises from the termination of the employment contracts of players or coaches or the movement of players between clubs. As a consequence of such movement, remuneration is generally payable to the player's previous clubs, either pursuant to contractual agreements between the parties, or according to the complex series of regulations that apply to football transfers, both in a national and international context.⁷

The second most represented type of disputes before the CAS are appeals against disciplinary sanctions, with the largest subsection being appeals against sanctions for anti-doping rule violations.⁸ Since CAS was designated as the exclusive appeals body for all international anti-doping cases, it has received a constant stream of appeals against decisions based on anti-doping rules. In many cases, the appellant in an anti-doping case is a sportsperson who is appealing against a suspension imposed upon him or her, but the CAS also regularly receives appeals from the World Anti-Doping Agency and international sports federations, which, after its inception in 2004 at the Athens Olympics, has imposed sanction against a sportsperson on grounds of "strict liability".⁹

The disputes regarding match fixing and corruption have emerged in recent years and have brought the focus of CAS on this issue after an initial "general interest" without coercive investigatory powers in gathering sufficient evidence.¹⁰ This has changed in recent times when the CAS has become more proactive and adopted a policy of disciplining sportsmen as "a crucial aspect of addressing the threats to integrity in sports as an effective education" for all concerned with sports as a vocation.¹¹ The sports arbitration procedure is the most frequently used within the CAS, and it provides a distinctive framework for sports arbitration. It is a *de novo* procedure, the arbitral tribunal having 'full power to review the facts and the law.'¹²

There have been several books published in international arbitration on sports in the last ten

6 Pursuant to Article 66 of FIFA Statutes, FIFA explicitly recognizes CAS to resolve disputes between FIFA, members, confederations, leagues, clubs, players, officials, and licensed match agents and players' agents. Further, Article 67(1) of the FIFA Statutes provides that appeals against final decisions passed by FIFA's legal bodies and against decisions passed by confederations, members, or leagues shall be lodged with the CAS within 21 days of notification of the decision in question.

7 CAS policy is based "*in relation to the substance of the unilateral option clause, parity of termination rights is no longer to be taken as a benchmark for public policy, since (as shown) a disparity of termination rights has to be accepted as such; instead, the question to be answered here is how great the disparity may be.*" Wolfgang Portman, "Unilateral option clauses in Footballer's contracts of employment: An assessment from the perspective of International Sports Arbitration", *ISLR* 7, no. 1 (2007): 6-16.

8 According to Article 13.2.1. of World Anti-Doping Code "cases concerning participants in international events or cases involving international level athletes, the decisions concerning anti-doping rule infraction may only be appealed exclusively before CAS in accordance with the rules of the court."

9 Richard McLaren, "CAS doping jurisprudence. What can we learn?" *ISLR* 1, (2006):4.

10 Efraim Barak and Dennis Koolard, "Match fixing. The aftermath of Pobeda - what have the past four years brought us". *Bulletin TAS, CAS* 1, (2014): 7.

11 Barak and Koolard, "Match fixing. The aftermath of Pobeda - what have the past four years brought us", 78.

12 In CAS 2009/A/1920 FK Pobeda, Aleksandar Zabrcanec, Nikolce Zdraveski v. UEFA, para. 78. CAS panel in Pobeda came to the conclusion that match-fixing could be sanctioned on the basis of this general provision as it "*touches at the very essence of the principle of loyalty, integrity and sportsmanship because it has an unsporting impact on the result of the game by inducing players not to perform according to their real sporting capacities and because they get rewarded for their misconduct...*".

years. These focus on sports law as an international legal system and established norms of sports arbitration as equivalent to arbitration in investment. The authors include Despina Mavromati, Mathieu Reeb;¹³ Antoine Duval and Antonio Rigozzi;¹⁴ James Nafziger and Ryan Gauthier;¹⁵ Johan Lindholm;¹⁶ David McArdle;¹⁷ and Adam Lewis and Jonathon Taylor.¹⁸

My article differs in a way that it is concerned with the substantive and procedural aspects of natural justice which relate to the right to a fair hearing and the rule against bias. The subject of the thesis are the pro novo appeals which have not been adjudged fairly or expeditiously by the sports federations of athletes in their home countries and have had to be raised at the CAS level. The gap in the existing literature is to do with the lack of attention paid to athletes from developing countries and the obstacles faced by these athletes in appealing to the higher arbitration forum of CAS and the appeals procedure. This has been identified by this paper, and it is intended to create conditions for a fair system of arbitration in sport for athletes from the southern hemisphere.

This paper considers the substantive and procedural jurisdiction of CAS in considering appeals and examines Swiss Private International Law in its framework. The focus of the article is on the arbitration process and procedural justice, which is the essence of the natural justice principles that are adopted by CAS. The explored issues are the appeals of athletes and the possibility of bias in the manner in which those appeals have been considered. It will examine the Swiss procedural law to doping-related procedures before CAS, including the admissibility of evidence; CAS proceedings; the appeals from there to the Swiss Federal Tribunal (SFT); and appeals of athletes from the developing world countries and the possibility of bias in the hearings of CAS. The rules of breach of natural justice will be considered and the discrimination in appeals where athletes from the developing countries have not received a fair hearing at CAS and have appealed to the higher appeals tribunal or at the European Court of Human Rights (ECtHR). The argument in this paper is that justice must be done and that the arbitration process should incorporate both substantive and procedural justice and decisions. Where there is lack of either of the two principles should be vitiated for bias.

2. LEGAL FRAMEWORK OF SWISS LEX ARBITRI

The process of arbitration in CAS is governed by arbitral procedure under Chapter 12, Article 182 PILA, with the heading "Principle," which states that "the parties may, directly or by reference to rules of arbitration, determine the arbitral procedure" (first paragraph) and that, "[i]f the parties have not determined the procedure, the arbitral tribunal shall determine it to the extent necessary, either directly or by reference to a statute or to rules of arbitration" (second paragraph), keeping in mind that "[r]egardless of the procedure chosen, the Arbitral tribunal shall ensure equal treatment of the parties and the right of both parties to be heard in adversarial

13 Mavromati and Reeb, *The Code of the Court of Arbitration for Sport: Commentary, Cases & Materials*.

14 Antoine Duval and Antonio Rigozzi, *Yearbook of International Sports Arbitration* (The Hague: T.M.C. Asser Press & Springer, 2017). <https://doi.org/10.1007/978-94-6265-319-1>.

15 James Nafziger and Ryan Gauthier, *Handbook on International Sports Law, 2nd edition* (Glos: Edward Elgar, 2022). <https://doi.org/10.4337/9781839108617>.

16 Johan Lindholm, *The Court of Arbitration for Sport and its Jurisprudence: An Empirical Inquiry into Lex Sportiva*, (The Hague: T.M.C. Asser Press & Springer, 2019). <https://doi.org/10.1007/978-94-6265-285-9>.

17 David McArdle, *Dispute Resolution in Sport, Athletes, Law and Arbitration, 1st edition* (Oxon: Routledge, 2015).

18 Jonathon Taylor and Adam Lewis, *Sports: Law and Practice, 4th edition* (London: Bloomsbury Publishing, 2021).

proceedings" (third paragraph).

The CAS arbitration hearings are conducted according to *lex loci arbitri*,¹⁹ which regulates the hearing process. This applies to all parties except those domiciled in Switzerland. These are overriding principles that exist under the international law of the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards (UNITRAL).²⁰ The PILA framework sets out the main rules applicable to international arbitrations in Switzerland, including: the requirements for the validity of the arbitration agreement, including arbitrability; the fundamental rules of procedure; the authority to order provisional and conservatory measures; the law applicable to the merits of the dispute; and the annulment of awards.²¹

The parties are implied to have indirectly determined the arbitral procedure by reference to the CAS Code, which then assumes the binding "rules of arbitration" within the meaning of Article 182(1) PILA). The specific agreement agreed upon should always prevail, even if the parties could still enter into a separate agreement on the procedure to be adopted unless it does not conform to the 'mandatory procedural rules' and the arbitration has to be conducted by an arbitrator who is registered on the CAS arbitrator list.²²

Pursuant to article 190 of the PILA, CAS awards are final upon communication to the parties and can only be challenged on very limited grounds before the SFT. The application of Swiss law to the CAS arbitration ensures the uniform application of procedural rules notwithstanding the venue of the sporting event or the nationality of athletes.²³ The process to challenge a decision is before the SFT and that all motions to set aside CAS awards are by filing before the SFT, according to Article 190 para. 2 PILA.

The grounds are the following:

"a. where the sole arbitrator has been improperly appointed or where the arbitral tribunal has been improperly constituted; b. where the arbitral tribunal has wrongly accepted or denied jurisdiction; c. where the arbitral tribunal has ruled beyond the claims submitted to it, or failed to decide one of the claims; d. where the principle of equal treatment of the parties or their right to be heard in an adversary procedure has not been observed; e. where the award is incompatible with public policy".

The SFT has held that advance waivers of any right to challenge the award pursuant to Article 192(1) of the PILA are in principle unenforceable in sports arbitrations, given that the athletes' purported consent to such exclusion agreements 'obviously [does] not rest on a free will' and is therefore *'tainted ab novo'*.²⁴ The procedure before the Appeals Arbitration

19 Swiss law applies as the fundamental rule that is the law of the place where the arbitration takes place.

20 See in particular Article V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958, <https://www.newyorkconvention.org/>.

21 See for instance CAS 2010/A/2083, UCI v. Jan Ullrich & Swiss Olympic, para. 27.

22 In CAS 2011/O/2574, UEFA v. Olympique des Alpes SA / FC Sion, para. 73, the Respondent criticised the closed list of CAS arbitrators and informed the tribunal that they wished to appoint Mr Niels Sørensen (judge at the State Court of the Canton of Neuchâtel).

23 Provided in Article R58 CAS Code. See e.g. CAS 2014/A/3639 Amar Muralidharan v. Indian National Anti-Doping Agency (NADA), Indian National Dope Testing Laboratory, Ministry of Youth Affairs & Sports, award of 8 April 2015.

24 See decision by the Swiss Supreme Court X [Guillermo Canas] v ATP Tour [& TAS], 4P. 172/2006 of 22 March

Division is governed by the General Provisions of the CAS Code (articles R27 to R37) and by the Special Provisions Applicable to the Appeals Arbitration Proceedings (articles R47 to R59 of the CAS Code). The rules of law applicable to the merits of the dispute are governed in CAS under the substantive law according to Article R58 of the CAS Code which provides that the arbitral tribunal:

"shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

Article R33 of the CAS Code provides that 'Every arbitrator shall appear on the list drawn up by the ICAS' (i.e. the CAS List of Arbitrators). Having originally comprised 60 members, the CAS list now consists of approximately 325 arbitrators, each appointed for a renewable period of four years. This is a closed list and in CAS arbitrations, all arbitrators must be appointed from this list. The practice of maintaining a closed list has been criticised,³² although the Swiss Supreme Court upheld the system in the case of *Larissa Lazutina*.³³ The arbitral process was not independent and the procedural right to a fair hearing and that a party must not be a judge in its own case were not respected. This led to its jurisdiction being challenged in the SFT.

In *Gundel v. FEI* case,²⁵ the SFT acknowledged "(i) that the decisions of an international federation incorporated in Switzerland could be validly made subject to arbitration (in lieu of being submitted to the courts at the seat of the relevant federation, as provided in Art. 75 CC) by the inclusion of a clause to that effect in the federation's statutes, and (albeit with some reservations) (ii) that CAS arbitration under the then applicable CAS arbitration rules was, as a matter of principle, sufficiently independent from the sports federations to qualify as "true arbitration" under Swiss law.²⁶

The ruling also stated that Chapter 12 of the PILA is widely regarded as being 'arbitration friendly'.²⁶ In accordance with this ruling, the administration of CAS was reformed in order to create an independent arbitral process and this increased the number of CAS proceedings (due to the fact that many other important sports-governing bodies had in the meantime followed the FEI's example by including a CAS arbitration clause in their regulations). This induced the IOC to launch a revision of the CAS arbitration rules. The so-called "1994 reform," which resulted in the enactment of the CAS Code, addressed concerns raised by the Swiss Federal Tribunal in *Gundel*, but also led to the enactment of a specific set of rules to govern arbitrations arising from appeals against the decisions issued by sports-governing bodies, i.e., Arts. R47-R70 of the CAS Code. This set of rules, which is also commonly referred to as the "appeal arbitration rules," or "CAS appeals proceedings," has augmented the CAS's process and as a consequence more than 80% of CAS cases are conducted as appeals proceedings pursuant to Art. R47 et seqq. of the Code.²⁷

2007, reported in the Official Collection of the Supreme Court's Decisions (ATF) ATF 133 III 235, 243; also reported in ASA Bull, 2007, p. 592 and translated in Swiss Int'l Arb.L.Rep 2007, 65-99.

25 SFT 4P.217/1992. Judgment of 15 March 1993 (*Gundel*).

26 ASA Bull. 1993, p. 398; translated in: Mealey's I.A.R., 10 (October 1993): 12, with a comment by Jan Paulsson.

27 Manuel Arroyo, *Arbitration in Switzerland the Practitioner's Guide*, 2nd edition (Alphen aan den Rijn: Walter Kluwer, 2018), 392-393.

The original wording of Art. R47 remained unchanged until 2004, when the scope of application of the appeals procedure was clarified by substituting the words “decision of a disciplinary tribunal or similar body of a federation, association or sports body” with the terms “decision of a federation, association or sports-related body.” This definition is concise and objective as to its purpose relating to the CAS appeals proceedings and is effective in challenging rulings issued by all sports-governing bodies, and relates to decisions that are on different matters which are not solely disciplinary.

The only provision of Chapter 12 that specifically deals with evidentiary issues that could have a bearing on natural justice is Article 184. Under the heading “[t]aking of evidence,” this provision states that “[t]he Arbitral tribunal shall itself conduct the taking of evidence” (first paragraph) and that, “[i]f the assistance of state judiciary authorities is necessary for the taking of evidence, the Arbitral tribunal or a party with the consent of the Arbitral tribunal, may request the assistance of the state judge at the seat of the Arbitral tribunal; the judge shall apply his own law” (second paragraph). Despite this, PILA and the SFT have established its own jurisprudence in interpreting Swiss law.

According to the CAS Code (Article R27 & Article R47) and the general rules on jurisdiction provided in Articles 177 ff. of the PILA, the important condition for an appeal is the existence of a valid arbitration clause. The PILA provides arbitration for a range of cases including any “*dispute involving financial interest may be the subject of an arbitration,*” meaning that all sports disputes involving a professional athlete are arbitrable. The disciplinary character of doping disputes is not a restriction to their arbitrability under Swiss law.²⁸

The determination by the SFT in the Gundel judgment was that the doping-related sanctions arise from a private law relationship between an association and its members and can therefore be subject to arbitration, on condition that the financial interest requirement of Article 177 para. 1 PILA is met.²⁹ The majority of doping-related appeals emanating from the World Anti-Doping Agency (WADA) to the CAS are based on arbitration clauses contained in the rules and regulations of the sports governing bodies that have ratified the World Anti-Doping Code. (WADC)³⁰

3. OBJECTIVITY OF ARBITRATORS IN DOPING CASES

In doping cases, when determining the arbitrability of a dispute and the jurisdiction of CAS, the SFT has been following a liberal approach when it comes to the validity of an arbitration agreement in favour of CAS, in order to have international rulings with the object of terminating doping.³¹ Accordingly, global references are valid if they can be understood as the acceptance of the arbitration clause included in the agreement.³² The SFT also held that the

28 See SFT 4P.217/1992, Judgment of 15 March 1993 (Gundel). See also. Antonio Rigozzi, Dominique Sprumont, Yann Hafner (Basel: Helbing Lichtenhahn Verlag, 2012): 439

29 See SFT 4P.172/2006, Judgment of 22 March 2007 (Cañas) & SFT 4A_460/2008, Judgment of 12 January 2009 (Dodô), para. 6.2.

30 On the Player Entry Forms as valid arbitration agreements see also, generally SFT 4A_358/2009, Judgment of 06 November 2009 (Busch).

31 See also SFT 4P.230/2000, Judgment of 7 February 2001 (Stanley Roberts).

32 SFT 4A_428/2011, Judgment of 13 February 2012 (Wickmayer).

CAS arbitration clause is "*branchentypisch*" in professional sports, meaning that professional athletes could not validly argue that they ignored the existence of a CAS arbitration clause in order to challenge its validity.³³

The SFT has interpreted the scope of CAS arbitration clauses in numerous judgments related to doping.³⁴ According to the principle of trust ("*principe de la confiance*" in French, "*Vertrauensprinzip*" in German), an arbitration clause through a global reference is binding on a party that is aware of its existence and does not raise any objections e.g., if an athlete validly consents through their signature of the specimen agreement / of the entry form to the major competition, whose regulations expressly contained the arbitration clause.³⁵ However, when an athlete signs a player entry form for a specific championship, this does not constitute a broader arbitration agreement (or a general consent / blanket consent) outside the scope of the event.³⁶

The determination in the case of *Essendon*³⁷ (a professional Australian football club) which was under Swiss law ipso facto in which CAS imposed a two-year suspension upon thirty-two Essendon's players for the use of the prohibited substance Thymosin Beta 4. This was within the framework of the players' supplements program banning the drug in 2012.³⁸ The players subsequently filed a motion to set aside the CAS award before the SFT holding that CAS had exceeded its jurisdiction (Article 190 para. 2 b PILA) by deciding the case de novo. Although the players had filed their objections as to the full power of the Panel's review (which, according to the applicable version of the AFL Anti-Doping Code 2010 would be a limited review), they subsequently signed the Order of Procedure (which included the Panel's decision to rule de novo) without reservations. The SFT therefore rejected the athletes' motion, in essence holding that they had lost their right to challenge the jurisdiction due to their conduct during the proceedings.³⁹

Notwithstanding its finding, the SFT did consider the issue of jurisdiction and held (as an obiter dictum) that the jurisdictional issue (and in particular the validity of the arbitration agreement) is determined according to Swiss law. Under Swiss law, and according to the binding CAS Rules (Article R57 of the CAS Code), it is not possible to reduce the full scrutiny of the appeal through a different arbitration agreement. When such an agreement is made, it constitutes an agreement with "*partially impossible content*" ("*defective*" arbitration clause),

33 The SFT has admitted two motions to set aside a doping-related CAS award based on jurisdictional grounds: SFT 4A_358/2009, Judgment of 06 November 2009 (Busch); SFT 4A_456/2009, Judgment of 03 May 2010 (Athletics South Africa).

34 SFT 4C_44/1996, Judgment of 31 October 1996 (Nagel); SFT 4P.230/2000, Judgment of 7 February 2001 (Stanley Roberts); SFT 4A_460/2008, Judgment of 9 January 2009 (Dodò).

35 SFT 4A_358/2009, Judgment of 6 November 2009 (Busch), para. 3.2.3.

36 CAS 2015/A/4059 WADA v. Thomas Bell chambers et al., AFL & ASADA, award of 11 January 2016.

37 Decision 4A_102/2016 of 27 September 2016, ASA Bull. 1/2017, 115.

38 4A_102/2016, Judgment of 27 September 2016. See also Katherine Voser, and Nathalie Bell, "Swiss Supreme Court confirms requirement under Swiss law to timely and expressly file objection to jurisdiction", November 16, 2016, [https://uk.practicallaw.thomsonreuters.com/w-004-5554?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/w-004-5554?transitionType=Default&contextData=(sc.Default)&firstPage=true).

39 See BGE 138 III 29 E.2.3.2, p. 37; SFT 4A_102/2016, Judgment of 27 September 2016, (*Essendon*), para. 3.4. Also, the players did not claim that they would not have opted for CAS had they known that it was not possible to restrict CAS' power of review.

which is not invalid as such (under Swiss law):⁴⁰ in these cases, it is important to determine, whether the parties would still have opted for CAS had they been aware of such “*impossible content*” of the agreement.⁴¹

The representatives of athletes can validly challenge the appointment of one of the arbitrators before CAS can subsequently file a motion to set aside its award based on the first ground for annulment of an arbitral award (Article 190 para. 2 a PILA). Although, according to the jurisprudence of the Swiss Federal Tribunal, arbitrators are presumed to perform their tasks in an independent and impartial way, the SFT will review the independence of the challenged arbitrators and the validity of the ICAS decision in this respect. The parties who wish to challenge a CAS arbitrator have to do so as soon as they know about it.⁴² An issue of particular relevance in this respect is the one of “recurring appointments” of arbitrators, in particular by sports governing bodies.⁴³

The IBA Guidelines regarding conflicts of interests provide that the practice of recurring appointments might be justified in specialized forms of arbitration.⁴⁴ According to the jurisprudence of the SFT, an arbitrator who accepted specific assignments several years prior to the CAS proceedings in question was “*a university professor who merely put his expertise at the service of the sport community in the general interest (i.e. codifying Anti-Doping Rules and reviewing their application)*” does not violate Article 190 para. 2 a PILA.⁴⁵

The right to be heard and the equality of the parties (in adversarial proceedings PILA) is an internationally recognized legal principle and is also provided in Article 182 (3) PILA. A violation of these rights constitutes a ground for appeal. Under the jurisprudence of the SFT, the parties have to raise all procedural objections /concerns in a timely manner, failing which they lose their right to validly argue a violation of their procedural rights. The Panel must take into consideration all the parties’ legal and factual submissions which are relevant for rendering its decision.⁴⁶ There have been four appeals to overrule. CAS awards have so far been (partly or totally) accepted on this ground by the SFT and only one case relates to a doping suspension. In these cases, the CAS Panel will re-hear the case and remedy the elements violated through the previous award.⁴⁷

The CAS award can be annulled if it violates (procedural or substantive) public policy (Article 190 (2) (e) PILA). The Swiss Federal Tribunal has offered a wide variety of what constitutes

40 See BGE 138 III 29, E.2.3 and BGE 131 III 467 E. 1.2.

41 SFT 4A_234/2010, Judgment of 29 October 2010 (Valverde II) para. 3.2.2.

42 Notwithstanding the so-called “duty of curiosity” of the parties’ counsel, arbitrators should systematically disclose a maximum information before their appointment. See also SFT 4A_110/2012, Judgment of 9 October 2012 (Paulissen).

43 Notwithstanding the so-called “duty of curiosity” of the parties’ counsel, arbitrators should systematically disclose a maximum information before their appointment. See also SFT 4A_110/2012, Judgment of 9 October 2012 (Paulissen).

44 In this case, the university professor who was challenged (Prof. Ulrich Haas) was a Chair of the Group of Independent Observers at the 2004 Olympic Games and Member of the Expert Group for the 2009 WADC.

45 SFT 4A_234/2010, Judgment of 29 October 2010 (Valverde II).

46 Knoll, ad Art.182 PILA, in *Arbitration in Switzerland – The Practitioner’s Guide* para 111.

47 E.g., CAS 2005/A/951 Guillermo Cañas v. ATP Tour, revised award of 23 May 2007; SFT 4P.172/2006, Judgment of 22 March 2007 (Cañas). This is the only doping-related CAS award that was admitted by the SFT based on Article 190 para. 2 d PILA.

(and what falls outside the scope of) public policy, also within the context of doping cases. An award can only be annulled for substantive reasons if it violates substantive public policy. The Federal Tribunal has reiterated in many cases its view that such a notion is to be interpreted very narrowly and covers only “*fundamental principles that are widely recognized and should underlie any system of law according to the prevailing conceptions in Switzerland*”⁴⁸ The SFT has acknowledged that the principles of strict liability and sanctions do not violate substantive public policy.⁴⁹ With specific regard to anti-doping rules, the Federal Tribunal found that awards that excessively restrict athletes’ personality rights may, under specific circumstances, violate substantive public policy.⁵⁰ The issue of personality rights under Swiss law is also relevant in doping cases and is further examined below.

The evidentiary rules do not make it binding for the CAS arbitrators to apply the procedural rules that would be applicable in a Swiss Court. This is unless the applicable sports regulations contain specific evidentiary rules. The obligation arises from the procedural rule that needs compliance with equal treatment of the parties and the right of both parties to be heard under the “procedural public policy” governed by Article 182(3) PILA). The procedural rules are infringed when due process is violated and the decision appears to be a breach of the rules of natural justice.

The CAS proceedings have to be in accordance with transnational sets of rules specifically drafted for arbitration proceedings rather than in national litigation in court proceedings. This is an important consideration for CAS which insists on professional arbitrators who are selected from their list.⁵¹ The International Bar Association Rules (IBA Rules) on the Taking of Evidence in International Arbitration⁵² have been sourced in CAS proceedings to codify the state of the law regarding evidence and are considered to operate as guidance for arbitrators when they have to decide procedural questions for which the applicable arbitration rules do not contain any provision.⁵³ There are also supplementary rules of evidence in the form of requirements that are contained in the CAS Code which holds some basic provisions such as arbitration exhibits, witness statements, and expert reports.⁵⁴ This creates a framework that can assist in the evidentiary measures that can be supplemented by the IBA Rules in order for it to form an agreement in a CAS arbitration.

48 ATF 132 III 389, para. 2.2.3 (X v. Y), Judgment of 3 August 2006.

49 SFT 4A_148/2006, Judgment of 10 January 2007, para. 7.3.2.

50 Although the first - and only - case where the Federal Tribunal annulled a CAS award based on this ground was a non-doping case (SFT 4A_558/2011, Judgment of 27 March 2012 (Matuzalem), para. 4.3.2), the protection of personality rights is also a major issue that is taken into consideration by the Federal Tribunal within the context of doping-related cases.

51 See for instance CAS 2009/A/1752 Vadim Devyatovskiy v. International Olympic Committee (IOC) & CAS 2009/A/1753 Ivan Tsikhan v. IOC, award of 10 June 2010, 8. See SFT 4P.267-270/2002, para. 4.2.1.

52 International Bar Association Rules (IBA Rules) on the Taking of Evidence in International Arbitration, 17 December 2021. <https://www.ibanet.org/MediaHandler?id=def0807b-9fec-43ef-b624-f2cb2af7cf7b>

53 Bernhard Berger and Franz Kellerhals, *International and Domestic Arbitration in Switzerland, 2nd edition* (Bern: Stämpfli Publishers, 2021), 1200.

54 Exhibits Pursuant to Articles R51(1) and R55(1), the parties’ submissions must be accompanied by all “exhibits and specification of other evidence upon which [the relevant party].

4. PROCEDURAL FAIRNESS FOR ATHLETES AND DE NOVO HEARINGS

It is necessary to evaluate the existence of natural justice and its two fundamental requirements (i) the right to a fair hearing and (ii) the rule against bias. This is necessary because of the perception in developing countries that the decisions of CAS may be tainted by bias, and if they are prejudicial, then they should be vitiated on account of the principle that one should not be a judge in its own cause. The issues that need to be considered are the appeals by athletes from the southern hemisphere who have come up against the rules that have led to the probability of bias.⁵⁵

There are some legal experts who have argued that athletes from less developed countries are worse off under the current system of arbitration in sports.⁵⁶ The academics who have observed the procedures adopted by CAS have stated that those at the centre of the judicial system are motivated by "... the values set out by middle-class Western men in developed countries with a history of amateur sports ideologies that can be transferred to the rest of the world."⁵⁷ It is also a documented fact that there are fewer CAS arbitrators from Asian countries and other parts of the developing world.⁵⁸

Efverström and Bäckström state that in the anti-doping framework "inequities and structural injustice emerge on an individual level because of the varying contexts and conditions."⁵⁹ The dispute resolution procedures in developing countries are often criticized for "their lengthy delays and access to justice issues, and the doping control process is no different."⁶⁰ The applicable law, CAS jurisprudence, WADA Code, and juristic opinion all maintain that the attributes of procedural fairness in anti-doping disputes should be upheld.

This has been reinforced given the minimum mandatory standards formulated in the

55 Ian Blackshaw, "The rules of natural justice: what are they and why are they important in sports disciplinary cases?" *International Sports Law Journal* 9, no: 1-2 (2009):134-135.

56 See e.g., Bengt Kayser, Alexandre Mauro and Andy Miah, "Current anti-doping policy: a critical appraisal", *BMC Medical Ethics* 8, no. 2 (2007):3. <https://doi.org/10.1186/1472-6939-8-2>.

57 Paul Dimeo and Verener Møller, *The anti-doping crisis in sport: causes, consequences, solutions* (New York: Routledge, 2008), 56.

58 Lindholm, *The court of arbitration for sport and its jurisprudence*, 270-274. Also see, Rustam Sethna, "A data analysis of the arbitrators, cases, and sports at the court of arbitration for sport", *Law in Sport*, 2019, accessed May 16, 2020, www.lawinsport.com/topics/sports/esports/item/a-data-analysis-of-the-arbitrators-sports-and-cases-at-the-court-of-arbitration-for-sport?category_id=672.

59 Anna Efverström and Asa Bäckström, Different societies, different conditions: Lessons from anti-doping in elite-sport on a global level. In: *Doping in sport, doping in society - Lessons, themes and connections: Book of abstracts*. Paper presented at International Network for Doping Research (INDR), 24th and 25th of August, (2017), Aarhus, Denmark (pp. 7-8). Aarhus University, Department of Public Health.

60 See cases involving Indian athletes, including *World Anti-Doping Agency v. Amit and National Anti-Doping Agency of India* (CAS 2014/A/3869), award of 23 November 2015, para 63; *World Anti-Doping Agency v. Nirupama Devi Laishram and National Anti-Doping Agency of India* (CAS 2012/A/2979), award of 8 November 2013, paras 119-120. See also, Venezuela: *International Paralympic Committee (IPC) v. I., Venezuelan National Paralympic Committee (COPAVEN), Venezuelan National Anti-Doping Organization (VNADO) and Sport Federation for Visually Impaired Athletes in Venezuela (FEPOCIVE)* (CAS 2012/A/2789), award of 17 December 2012; South Africa: *WADA v. Gert Thys, Athletics South Africa and South African Institute for Drug-Free Sport* (CAS 2011/A/2435), award of 30 November 2011.

International Standard for Results Management (ISRM)⁶¹ and the 2021 WADA Code.⁶² Despite this, there are gaps in the application of procedural fairness rights of athletes, particularly at a domestic level. Given the positive reforms in some developed countries, as opposed to the access to justice issues and the systemic procedural issues that exist in some developing countries, the difficulties of compliance with procedural norms may be more prevalent in developing countries.

In *Amar Muralidharan v. Indian National Anti-Doping Agency (NADA)*,⁶³ an Indian swimmer, Muralidharan tested positive for methylhexanamine (MHA), a banned substance under the WADA Code, during an in-competition test at the Indian national championships in August 2010. He was informed of the anti-doping rule violation in September 2010 (when he was provisionally suspended) but the case was subsequently heard for the first time by the Anti-Doping Disciplinary Panel (ADDP) 2 years later, in September 2012. After further delays in the ADDP issuing its award, a 2-year suspension was imposed on 5 November 2012, taking into account the time he had served under his provisional suspension. The entire duration of the ban was served by the time ADDP reached its final determination.

While this delay at first instance, inter alia, exposes procedural concerns, the athlete's appeal to the Anti-Doping Appellate Panel (ADAP) was heard on 13 March 2014, more than 13 months after the required deadline under the NADA Rules.⁶⁴ The decision was reached by the ADAP on 3 June 2014, almost 4 years after the alleged anti-doping violation. On appeal, the CAS stated that, in doing so, the NADA had "undisputedly violated the Appellant's right to a procedure in line with the timing requirements."⁶⁵ However, it was further held that the virtue of the CAS appeal system was its ability to cure any procedural defects.⁶⁶ The athlete's entitlement, therefore, "was to a system which allowed any defects in the hearing before the ADDP that was to be cured by the hearing before the CAS."⁶⁷

Shaun Star and Sarah Kelly argue that "*these types of violations of procedural norms are inconsistent with the concept of fairness that the WADA Code purports to uphold.*" *These are alleged to cause "unreasonable delays such as those in the Amar case that undermine the athlete's right to a fair trial and are unjust. Yet, despite this, the CAS maintains that it can cure all such defects on appeal. That aside, relying only on the de novo mechanism of the CAS to fix procedural problems in the system is short-sighted and focuses only on the case at hand."*⁶⁸

61 The ISRM, which is effective from January 2021, is a mandatory international standard developed as part of the World Anti-Doping Program. It sets out the core responsibilities of Anti-Doping Organizations (ADOs) with respect to results management.

62 The WADA 2021 Code states "International Standards for different technical and operational areas within the anti-doping program have been and will be developed in consultation with the signatories and governments and approved by WADA. The purpose of the international standards is harmonization among Anti-Doping Organizations responsible for specific technical and operational parts of antidoping programs." https://www.wada-ama.org/sites/default/files/resources/files/2021_wada_code.pdf.

63 CAS 2014/A/3639.

64 *National Anti-Doping Rules, 2010* (India), Rule 8.3.8.

65 CAS 2014/A/3639, para 88.

66 CAS 2014/A/3639, para 89.

67 CAS 2014/A/3639, para 89.

68 Shaun Star, Sarah Kelly, "A level playing field in anti-doping disputes? The need to scrutinize procedural fairness at first instance hearings", *International Sports Law Journal* 21, no. 1-2 (2021): 94-117, <https://doi.org/10.1007/s40318-020-00176-6>.

The authors argue further that empirical research is required on procedural fairness in the anti-doping dispute resolution process across jurisdictions. Such research may provide persuasive data to support reform and appraise the level of “*compliance with procedural fairness norms as required under the applicable rules, and adherence to time limits under the ISRM and domestic rules, by domestic panels and NADOs in domestic anti-doping disputes, particularly from developing countries such as India; comparative procedural fairness issues across developed and developing countries such as India; and to consider the barriers of appealing athletes disputes to the CAS to be and what mechanisms would remove or reduce these barriers from the perspective of athletes, including inter alia improving access to legal aid for quality legal counsel and scientific expertise, promoting regional CAS hearings.*”

The CAS statements have repeatedly criticized the unreasonable delays of the first-instance hearings conducted in some developing countries.⁶⁹ This implies only a small percentage of cases are heard by the CAS, which suggests that most procedural defects have remained unrecognised and irredeemable. Article 8.3 of the NADA ADR (which, in essence, follows Article 8.1 of the WADA Code) provides, *inter alia*, for detailed procedural rights of athletes as to being provided fair and timely information of the asserted anti-doping rule violation, an expedited hearing for a provisional suspension, and a fair hearing on whether the asserted anti-doping rule violation has been committed.⁷⁰

It was further acknowledged that this provision had not been complied with in the initial proceedings against *Muralidharan*. However, given that the CAS has the power for *de novo* review, the sole arbitrator determined that the procedural delays that took place before the ADDP and ADAP could have been cured by a full CAS hearing. This is because the delay did not “unduly prejudice his right to obtain evidence, interview witnesses, or adequately defend the claims brought against him.”⁷¹ The Sole Arbitrator held that “*while the NADA showed an alarming inability to effectively, timely, and appropriately handle the Appellant’s case, such delay did not fundamentally violate the Appellant’s procedural rights.*”⁷²

The *de novo* right of review of the CAS may be an effective mechanism to fix some procedural defects, but only when such cases are appealed to the CAS.⁷³ Although the *Muralidharan* ruling was the only appeal by an Indian athlete to CAS, the ruling delivered on 8 April 2015 (more than 4 years after his anti-doping violation), was the first recognition by the CAS where Indian

69 Venezuela: *International Paralympic Committee (IPC) v. I., Venezuelan National Paralympic Committee (COPAVEN), Venezuelan National Anti-Doping Organization (VNADO) and Sport Federation for Visually Impaired Athletes in Venezuela (FEPOCIVE)* (CAS 2012/A/2789), award of 17 December 2012; South Africa: *WADA v. Gert Thys, Athletics South Africa and South African Institute for Drug-Free Sport* (CAS 2011/A/2435), award of 30 November 2011; *Simpson v. Jamaica Anti-Doping Commission* (CAS 2014/A/3572), award of 7 July 2015; *Powell v. Jamaica Anti-Doping Commission* (CAS 2014/A/3571); *World Anti-Doping Agency v. Amit and National Anti-Doping Agency of India* (CAS 2014/A/3869), award of 23 November 2015.

70 CAS 2014/A/3639, para 85.

71 CAS 2014/A/3639, para 91.

72 CAS 2014/A/3639, para 91.

73 In the *Arbitration Tatyana Chernova v. International Association of Athletics Federations (IAAF)* (CAS 2017/A/4949) the ruling stated that the “Validity of a rule providing for CAS jurisdiction in the first instance. The *de novo* power of review conferred upon a CAS panel under Article R57 of the CAS Code allows it to consider jurisdiction and the grounds there anew. According to the Swiss Federal Tribunal, a court can find that it has jurisdiction on grounds different from those enunciated previously, “as long as the facts found by the arbitral tribunal are sufficient to justify the substitution of new reasons,” para. 1.

dispute resolution bodies were allowing undue delay and violations of athletes' rights of procedural fairness. While a *de novo* review of this case may have cured the defects in this particular case, the extended duration of the dispute resolution process was in violation of the express time limits of the NADA Rules, 2010, and, therefore, breached the procedural rights of the athletes, as acknowledged by the CAS.⁷⁴ There needs to be more legal academic reflection and practitioners also need to contribute towards a critical analysis in interdisciplinary research in anti-doping, ensuring "... that the resulting insights are appropriately transposed into regulatory terms."⁷⁵

In the *Arbitration Tatyana Chernova v. International Association of Athletics Federations (IAAF)*,⁷⁶ the ruling stated that the "validity of a rule providing for a CAS jurisdiction in the first instance was a *de novo* power of review conferred upon a panel under Article R57 of the CAS Code. This allows it to consider jurisdiction and the grounds for review. According to the Swiss Federal Tribunal, a court can find that it has jurisdiction on grounds different from those enunciated previously, "as long as the facts found by the arbitral tribunal are sufficient to justify the substitution of new reasons." Therefore, the reasons for a CAS panel's findings on jurisdiction in appeals proceedings can differ from those identified by a CAS Sole Arbitrator in the first instance.

There needs to be a holistic approach to evaluate the present structure of the CAS to consider the extent of allegations of impartiality and independence and their substantive merit and whether structural improvements are necessary to improve the legitimacy of these institutions. The need is for research to further this inquiry to determine the perspectives of operational and institutional independence of national first instance and appellate panels.

5. JUDICIAL REVIEW AND THE ROLE OF QUASI-JUDICIAL TRIBUNALS

The right to be free from discrimination is a fundamental right of an athlete and this is enshrined in the Olympic Charter that is in force since 8 August 2021.⁷⁷ The salient points are as follows:

Principle 4. The practice of sport is a human right. Every individual must have the possibility of practising sport, without discrimination of any kind, and in the Olympic spirit, which requires mutual understanding with a spirit of friendship, solidarity, and fair play.

*Principle 6. The enjoyment of the rights and freedoms set forth in this Olympic Charter shall be secured without discrimination of any kind, such as race, colour, sex, sexual orientation, language, religion, political, or other opinion, national or social origin, property, birth or other status.*⁷⁸

74 The time limits are set out in procedural rules. R32 of the CAS Code, <https://www.tas-cas.org/en/arbitration/code-procedural-rules.html>.

75 See Marjolaine Viret, "Using interdisciplinary tools to improve anti-doping: utopia or necessity?", *International Sports Law Journal* 20, no. 1-2 (2020): 83, <https://doi.org/10.1007/s40318-019-00161-8>.

76 CAS 2017/A/4949.

77 Olympic Charter, 15 October 2023, <https://stillmed.olympics.com/media/Document%20Library/OlympicOrg/General/EN-Olympic-Charter.pdf>

78 Olympic Charter, p 8.

*The IOC's role is to promote safe sports and the protection of athletes from all forms of harassment and abuse.*⁷⁹

In relation to the appeals to CAS, there has been a determination that where the rights are protected, infringements may also take place. This has caused the procedural rules of the CAS to come under focus and be subjected to intense scrutiny by those who proffer that the body may be partial in its rulings against athletes from developing countries. The manner in which it has considered the appeals has come to attention because of the contentious nature of the ruling and the natural justice principles involved.

The above principles that CAS has formulated have been considered when appeals from athletes allege discrimination by the national and international federations. These have brought into sharp relief the relevance of the substantive and procedural rules of the arbitration process. In recent times, the appeals process has concerned athletes from developing countries and issues that have a direct impact on their human rights, and if these can be part of any equation in any adjudicative process.

In *Dutee Chand v. Athletics Federation of India (AFI) & International Association of Athletics Federations (IAAF)*⁸⁰ an Indian female athlete, who had been withdrawn from the national team in 2014 and prevented from participating in the Commonwealth Games in Glasgow, brought action against the national federation and the International Association of Athletics Federation (IAAF) due to them finding her natural testosterone concentrations elevated to male levels. The CAS determination was that the withdrawal and the ban were based on the lack of prima facie "evidence that does not equal the level of testosterone in females with a percentage increase in competitive advantage. In the absence of such evidence, one cannot conclude that hyperandrogenic female athletes may enjoy such a significant performance advantage that it is necessary to exclude them from competing in the female category."⁸¹ Specifically, the IAAF had "not provided sufficient scientific evidence about the quantitative relationship between enhanced testosterone levels and improved athletic performance in hyperandrogenic athletes."⁸²

The IAAF was given two years to provide such evidence to "validate" their claims.⁸³ The ruling had temporarily suspended the IAAF regulation then in force and held that the IAAF had not shown that athletes with hyperandrogenism had a significant advantage in terms of performance compared to other female athletes. The IAAF had a new policy effective in 2018 that stipulated a maximum level of hormone levels for female athletes, otherwise, they could not compete within the women's category in international events.

In *Mokgadi Caster Semenya v IAAF*,⁸⁴ and *Athletic South Africa v IAAF*⁸⁵ concerned an appeal

79 Rule 2.18 was included in the Charter in 2019.

80 Arbitration CAS 2014/A/3759.

81 CAS 2014/A/3759, para. 5.

82 CAS 2014/A/3759, para. 547.

83 CAS 2014/A/3759, para. 548.

84 CAS 2018/0/5794, Mokgadi Caster Semenya v. International Association of Athletics Federations, award of 30 April 2019.

85 CAS 2018/0/5798, Athletics South Africa v. International Association of Athletics Federations, award of 30 April 2019.

by the South African female middle-distance runner who was 18 years old when she won the gold medal in the women's 800 m at the World Championships in Berlin in August 2009. Despite her winning time of 2 seconds slower than the world record, the IAAF requested on that same day for her to undergo gender verification tests to determine her eligibility to compete in women's sports because of ambiguity with regard to her sex. She was allowed to compete by a panel of medical experts in 2012 and won the silver medal in the 800 m event at the Olympic Games in London, which was upgraded to gold after the Russian winner was proven to have been on stimulants because her victory was in the spotlight for higher than acceptable female hormonal levels.

The IAAF's April 2018 rule change that had lowered the threshold for the tolerable level of DSD for female athletes was a consequence of the recommendations, and Semenya challenged them at the CAS, as a breach of natural justice.⁸⁶ Semenya was disbarred from the competition by the (IAAF) for higher than permitted blood testosterone levels in breach of the "Eligibility Regulations for the Female Classifications (Athletes with differences of sex development)" (DSD Regulations) for her gender. Semenya challenged this stipulation at the CAS, which the South Africa Athletics Federation supported.

The IAAF had allegedly produced the evidence which has been described as a "flawed and highly questionable study."⁸⁷ The decision of the CAS was that "such discrimination was a necessary, reasonable, and proportionate means of achieving the legitimate objective of ensuring fair competition in female athletics in certain events and protecting the 'protected class' of female athletes in those events."⁸⁸

This ruling proved very controversial and evidence that was available from medically qualified experts on the amount of hormones that makes an athlete traverse the boundaries of the female gender was in favour of Semenya. The World Medical Association (WMA)'s Declaration of Geneva, and its International Code of Medical Ethics⁸⁹ place an obligation on medical professionals to act in the patient's best interest and uphold the highest standards of occupational conduct, and not to allow their judgement to be influenced by unfair discrimination. The WMA Declaration on Principles of Health Care for Sports Medicine⁹⁰ obliges doctors to

86 The regulations, which came into effect on 8 May, state that events from 400 m to the mile, including 400 m, hurdles races, 800 m, 1,500 m, 1-mile races, and combined events over the same distances ('Restricted Events'), require any athletes who have DSD to meet certain criteria: the athlete is required to be recognised by law as either female or intersex (or equivalent); her blood testosterone level must be reduced to below 5 nmol/L for a continuous period of at least 6 months; and thereafter, her blood testosterone level must be maintained below 5 nmol/L continuously for as long as she wishes to remain eligible.

87 The Special Rapporteur of Human Rights under the United Nations (UN) Human Rights Special Procedures issued an open letter to the IAAF in which he highlighted several "Human rights considerations. Several human rights concerns have become apparent as a result of the IAAF regulations, which highlighted contraventions of international human rights norms and standards, including: the right to equality and non-discrimination; the right to the highest attainable standard of physical and mental health; the right to physical and bodily integrity; the right to freedom from torture, and other cruel, inhuman or degrading treatment and harmful practices. OHCHR report (§ 54(b)). United Nations Human Rights Special Procedures. Open letter to IAAF. 24 Sept 2018. <https://www.sportsintegrityinitiative.com/un-urges-iaaf-to-withdraw-dsd-regulations/>.

88 CAS 2018/0/5798, para 626.

89 World Medical Association. International Code of Medical Ethics. *Adopted by the 3rd General Assembly of the World Medical Association, London, England, October 1949 (as amended)*, <https://www.wma.net/policiespost/wma-international-code-of-medical-ethic>.

90 WMA Declaration on Principles of Health Care for Sports Medicine. *Adopted by the 34th World Medical Association*

oppose or refuse to administer any interventions that are contrary to medical ethics and could be harmful to the athlete using them. This includes interventions that artificially modify blood constituents or biochemistry, such as forcing contraception on female athletes.

Both the WMA⁹¹ and the South African Medical Association⁹² have condemned the IAAF regulations and the WMA has urged physicians globally not to implement the rules and to refrain from prescribing treatment for a condition that is not recognised as pathological.⁹³ In addition, the right not to be subjected to medical or scientific experiments without informed consent is protected by the UN Covenant on Economic, Social, and Cultural Rights⁹⁴ and in SA by section 12(2) of the Bill of Rights, where it is defined “as a non-derogable, fundamental right.” These instruments also apply to sporting bodies that have a responsibility to abide by international standards and ban discrimination in sports. The principle exists that the right to bodily integrity, which allows for the control of all aspects of one’s health, informed consent, and autonomy, must not be violated.

After the determination by the CAS, Semenya lodged an appeal to the SFT that challenged the ruling arrived at by arbitration. In *Caster Semenya & ASAF v. IAAF*,⁹⁵ the SFT dismissed the appeal made by Semenya and the ASAF against the CAS decision upholding the CAS’s ruling that had found that the Difference in Sexual Development (DSD) regulations were reasonable and proportionate. The SFT held that “CAS was the only possible dispute settlement mechanism in the case, as the DSD Regulations hold explicitly that any dispute related to the rules’ application must be submitted to the CAS.”⁹⁶

The SFT emphasized that its competencies in the case were limited to examine whether the CAS Award violates fundamental and widely recognized principles of public order, which, as it clarified, includes the prohibition of discrimination, certain personality rights of athletes and the notion of human dignity.⁹⁷ The SFT further stressed that an arbitration award violates “public order” only when it is “manifestly untenable,” clearly disregards important legal principles, and “shockingly” offends the feeling of justice and equity.⁹⁸ The decision noted that as the case involves an agreement between the two private bodies, World Athletics and an athlete, it is doubtful whether the prohibition of this specific type of discrimination “is included in the scope of the restrictive notion of public order.”⁹⁹

General Assembly, Lisbon, Portugal, September/October 1981, <https://www.wma.net/policies-post/wma-declaration-on-principles-of-health-care-for-sports-medicine/>.

91 World Medical Association. WMA urges physicians not to implement the IAAF rules on classifying women athletes. 5 May 2019 <https://www.wma.net/news-post/wma-urges-physicians-not-to-implement-iaaf-rules-on-classifying-women-athletes/>.

92 South African Medical Association. SAMA support to Caster Semenya. SAMA Media release. 28 February 2019 <https://www.samedical.org/cmsuploader/viewArticle/822>.

93 Sofia Mahomed and Ames Dhai, “Global injustice in sport: The Caster Semenya ordeal – prejudice, discrimination and racial bias”, *South African Medical Journal* 109, no. 8 (2019): 548-551, DOI:10.7196/SAMJ.2018.v109i1.13268

94 Article 12 (1) states “The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”

95 SFT 4A_248_2019 & 4A 398_2019, Judgment of 25 August 2020 (*Caster Semenya & ASAF v. IAAF*)

96 SFT, *Caster Semenya & ASAF v. IAAF*, paras. 5.2, 5.3.

97 SFT, *Caster Semenya & ASAF v. IAAF*, paras. 9.4, 10.1, 11.

98 SFT, *Caster Semenya & ASAF v. IAAF*, para. 9.1.

99 SFT, *Caster Semenya & ASAF v. IAAF*, para. 9.4.

Lena Holzer argues that the “SFC also failed to discuss other issues related to the principle of non-discrimination, which could potentially be the case because Semenya and ASA might have not raised them in their submissions.”¹⁰⁰ For instance, the SFC did not debate whether it is discriminatory against women that there are no upper testosterone limits for men, as the DSD Regulations’ rationale that high testosterone harms the ‘level playing field’ by conferring a competitive advantage should logically also apply to men’s competitions. The SFC judges equally ignored the Regulation’s problem of (indirect) race discrimination, substantiated by some evidence showing that mainly black and brown athletes and athletes from the Global South have been subjected to testosterone tests based on the DSD Regulations. Lastly, it is unfortunate that the SFC did not fully embrace the protection against horizontal discrimination as part of an issue of ‘public order.’”

Furthermore, the SFC stated in its decision that it was not a proper Appeal Court for CAS awards, but that its jurisdiction is limited to overturning an award if it is incompatible with “public order,” which “happens only on extremely rare occasions (*“est chose rarissime”*). Additionally, it held that violations of the Swiss Constitution and the European Convention on Human Rights (ECHR) cannot be invoked in the SFT review of the CAS Award, even if principles of the Constitution and the ECHR can help to interpret the notion of ‘public order.’¹⁰¹

This implies that, at least when the CAS is the dispute settlement mechanism, athletes like Semenya can avail themselves neither to a proper appeal mechanism nor the protection of European and constitutional human rights protections. The argument that the ECHR does not apply to private arbitration awards assessed by the SFC cannot be sustained in the context of the 2018 ruling of the European Court of Human Rights (ECtHR) in *Mutu and Pechstein v. Switzerland*¹⁰² The Human Rights Court made several important points concerning the applicability of the ECHR to CAS Awards and it concluded that the “athletes’ acceptance of settling a dispute with a sports federation through CAS arbitration is mostly *de facto* compulsory, instead of voluntary.”¹⁰³ Deciding between accepting the CAS arbitration or electing not to participate in competitions is not a prudent choice for athletes because their “careers depend upon participating and winning competitions.”¹⁰⁴ Thus, the ECtHR can hold Switzerland accountable for validating acts or omissions by the CAS that are contrary to the ECHR.

The ECtHR had also stated that Switzerland’s responsibilities under the ECHR could be engaged concerning the acts and omissions of the CAS Award, since the SFC had given the Award the force of law under the Swiss legal system.¹⁰⁵ The Court’s conclusion was that in such cases of compulsory CAS arbitration, waiving safeguards provided for under Article 6.1 of the ECHR is not plausible. The CAS proceedings must therefore guarantee, at least, the right to a fair trial as protected by ECHR Article 6.1.”¹⁰⁶

100 Lena Holzer, “The decision of the Swiss Federal Supreme Court in the Caster Semenya Case: A Human Rights and Gender Analysis”, *Opinio Juris*, accessed October 9, 2023, <http://opiniojuris.org/2020/09/30/the-decision-of-the-swiss-federal-supreme-court-in-the-caster-semenya-case-a-human-rights-and-gender-analysis>.

101 SFT, *Caster Semenya & ASAF v. IAAF*, para. 9.2.

102 ECtHR, Case no 40575/10 and 67474/10, 2 October 2018, Dissenting Opinion of Judges Keller and Serghides, para 2.

103 ECtHR, Case no 40575/10 and 67474/10, 2 October 2018, para. 123.

104 ECtHR, Case no 40575/10 and 67474/10, 2 October 2018, para. 181.

105 ECtHR, Case no 40575/10 and 67474/10, 2 October 2018, para. 62-67.

106 ECtHR, Case no 40575/10 and 67474/10, 2 October 2018, para. 95-96.

In *Semanya v Switzerland*¹⁰⁷ the argument before the ECtHR was that there had been a breach of ECHR in being forced to lower her DSD levels. The Court framed 10 questions to the parties which included as follows: “Does the obligation to take contraceptives in order to lower one’s testosterone level, and by the allegedly stigmatising and demeaning effect of the DSD Regulations, has the applicant suffered treatment contrary to her human dignity, her physical and mental integrity, and her social and gender identity, in violation of Article 3 of the Convention?”¹⁰⁸ Secondly, “Did the applicant suffer a violation of the right to respect for her private life as protected by Article 8 of the Convention? In addition, has she suffered an infringement of her right to practice her profession?”¹⁰⁹

There is also precedence in another case which went to the European Court of Human Rights and was from a decision by the CAS not to hear an appeal by a Turkish footballer against his club in Turkey that it had infringed his rights. This application stemmed from Ali Riza, a professional football player who played for ‘Trabzonspor Kulbu Derneği,’ which in January 2008 fined him for violating contractual terms. The applicant later terminated his contract due to the non-payment of his salary. The club later brought claims against him, and he raised counter-claims before the Dispute Resolution Committee of the TFF, which upheld in 2 December 2008 the club’s claims. The Arbitration Committee of the TFF, upon the objection by the first applicant, commenced an investigation whose findings upheld the Dispute Resolution Committee’s findings. However, it reduced the amount owed by the applicant to the club. He took the matter to CAS, which declared his application inadmissible for the lack of an “international element.”¹¹⁰

While the matter was still pending at the SFT, the applicant raised the matter at the ECtHR by invoking his rights under Article 6 (1). In *Ali Riza v. Turkey*¹¹¹ the claims raised in this application related to the alleged violations of this provision and his right to a fair hearing and the rule against bias. Riza’s application alleged that the manner in which the arbitration proceedings of the Turkish Football Federation (TFF) were conducted denied him substantive and procedural justice. The Court addressed the issue whether the TFF Arbitration Committee’s rulings were final, and therefore, not amenable to judicial review by any court.¹¹²

The Court first clarified that the Arbitration Committee can be considered as a tribunal within the meaning of Article 6 (1) (§204). With respect to the elements of independence and impartiality, the Court found ‘the existence of a number of strong organisational and structural ties between the Board of Directors and the Arbitration Committee.’¹¹³ The Court considered

107 ECtHR, *Semanya v Switzerland*, Application No. 10934/21.

108 In ECtHR, *Platini v Switzerland*, Application No. 525/18, the applicant had argued that the eight-year ban on him infringed his ‘freedom to exercise a professional activity.’ See para 52. Platini’s application was dismissed. The ECtHR did confirm that Switzerland was accountable for validating acts or omissions by the CAS that are contrary to the ECHR. Paras. 36-38

109 ECtHR, *Platini v Switzerland*, Application No. 525/18, at para 62

110 CAS 2010/A/1996 *Omer Riza v. Trabzonspor Kulübü Derneği & Turkish Football Federation (TFF)*, award of 10 June 2010, para. 22

111 ECtHR, *Ali Riza & others v. Turkey*, Application No. 5809/08.

112 ECtHR, *Ali Riza & others v. Turkey*, para. 181.

113 ECtHR, *Ali Riza & others v. Turkey*, para. 216.

the procedural justice issues and examined whether the functioning of the Arbitration Committee of the TFF can be described as independent and impartial. It found that there was a 'significant level of influence that the Board of Directors enjoyed over the functioning of the Arbitration Committee,' and members of the Arbitration Committee were not required to follow "any rules of professional conduct' or 'to swear an oath or make a solemn declaration before taking up their duties."¹¹⁴

Further, the Court found that members of the Arbitration Committee "are not obliged to disclose potential and/or actual conflicts of interest nor does there exist procedure to challenge their independence and impartiality."¹¹⁵ After concluding that there was a breach of natural justice in the procedures, the ruling alluded to the cases of *Mutu and Pechstein*, by distinguishing the proceedings before the Arbitration Committee of the TFF and those before the CAS by stating that most Members of the TFF Board of Directors are former or current club executives, whereas other stakeholders such as players, referees and others have been only marginally represented.¹¹⁶

The Court therefore found that the "fact that the players do not enjoy the same level of representation as clubs may be considered to tip the balance in favour of clubs in proceedings before the Arbitration Committee."¹¹⁷ There were systematic shortcomings in the absence of effective legal protections that cast doubts on its functioning, particularly given the extensive influence of the Board of Directors.¹¹⁸ The Court thereby confirmed the existence of not only potential, but also actual organisational and structural conflicts of interests between the Arbitration Committee and the Boards of Directors, which taints the fairness of arbitration proceedings. As for the execution of this judgment under Article 46 ECHR, the Court focused on the endemic flaws in the resolution of football disputes in Turkey and caused the Football Federation to adopt general measures aimed at reforming the arbitration process under the TFF' and "at restructuring of the institutional basis of the Arbitration Committee' in order to guarantee its normative and organisational independence."¹¹⁹

As a consequence of this ruling by the ECtHR the domestic sports associations will now have to reform their dispute resolution systems in order to ensure their arbitration bodies comply with the Article 6 (1) ECHR and/or provide for judicial review of their decisions. The fact that the decisions of the Arbitration Committee (and, more generally, the decisions of all sports tribunals) were final was also decisive in the *Riza et al.* Judgment. The exclusion clause of the Constitution of sports arbitration bodies generally provides that "(...) Decisions of arbitration committees are final and shall not be appealed to any judicial authority." The ECtHR had already stated in *Mutu and Pechstein* that there is a "right to a public hearing before CAS"¹²⁰ and that fair trial guarantees be strengthened both at the international and domestic levels. The *Ali Riza* case extends the "fair trial guarantees not only to quasi-judicial tribunals, such as CAS, but also domestic arbitration bodies without judicial supervision." It therefore,

114 ECtHR, *Ali Riza & others v. Turkey*, para. 216.

115 ECtHR, *Ali Riza & others v. Turkey*, para. 215.

116 ECtHR, *Ali Riza & others v. Turkey*, para. 219.

117 ECtHR, *Ali Riza & others v. Turkey*, para. 219.

118 ECtHR, *Ali Riza & others v. Turkey*, para. 219.

119 ECtHR, *Ali Riza & others v. Turkey*, para. 242

120 ECtHR, *Mutu and Pechstein v. Switzerland*, Application No. 40575/10 and 67474/10, para. 183.

affirms, reinforces, and also broadens the previous judgment in terms of the natural justice scope of the ruling.¹²¹

In the claim of *Ali Rıza v Switzerland*¹²² the ECtHR had ruled that the fact that the applicant could not exercise his right to an independent and impartial tribunal in Turkey did not imply that there was automatically an obligation on Switzerland to guarantee such proceedings before a Swiss tribunal. The Court left the question whether or not the applicant could rely on a right of access to SFT open, stating that “there is no foundation for the alleged violation to be appealed from the CAS decision not to hear the case”.¹²³ The Court stated that the right to access to a court is not violated by a decision that a “*court lacks jurisdiction when the applicant’s arguments in favour of the court’s jurisdiction have been the subject of ‘a real and effective examination’ and the court has adequately substantiated the reasons on which its decision is based.*”¹²⁴

This ruling by the Court affirmed the ruling by CAS not to hear the arbitration application had to be balance limitation on the right of access to a court with the proportionate aim to ensure that the substance of the right was not affected.¹²⁵ As there was no international element, the Regulations on the Arbitration Committee of the TFF could not be used as a basis for jurisdiction of CAS. The Court considered that a restriction on the right of access to CAS whose purpose was the legitimate aim of the proper administration of justice and the effectiveness of domestic judicial decisions.¹²⁶ This validates the CAS ruling that the case was inadmissible and the SFT’s decision not to proceed with the appeal on the matter of jurisdiction. The ECtHR will not overrule decisions if the grounds provided by the SFT for not hearing the case include “answering all grounds raised by the applicant with ‘clear reasoning and convincing conclusions’ and if the Federal Court refusal is ‘neither arbitrary nor manifestly unreasonable.’”¹²⁷

6. CONCLUSION

The governance of Olympic sports is based on the European model of sports, a hierarchical, inverted pyramid model in which each sport is governed vertically on a global basis by an international body with the corresponding transnational, national, regional, and local federations. Although Olympic athletes have a voice and representation on IOC bodies, they lack any collective veto power and must accept the dispute making procedures that have been established by the Olympic Committee. The CAS arbitration system, which was established to resolve on the merits virtually all disputes involving Olympic sports athletes, is supervised by very limited judicial review of the Swiss Federal Tribunal (Switzerland’s highest court) and other national courts.

121 Strasburg Observer, Sports Law Blog, The Future of the Rule of Law in Sport. 20 March 2020 <https://strasbourgoobservers.com/2020/03/18/the-future-of-the-rule-of-law-in-sports-law-ali-riza-and-others-v-turkey/>.

122 ECtHR, *Ali Rıza v. Switzerland*, Application No. 74989/11.

123 ECtHR, *Ali Rıza v. Switzerland*, para. 83.

124 ECtHR, *Ali Rıza v. Switzerland*, para. 88.

125 ECtHR, *Ali Rıza v. Switzerland*, para. 91.

126 ECtHR, *Ali Rıza v. Switzerland*, paras. 96-97.

127 ECtHR, *Ali Rıza v. Switzerland*, paras. 96-97.

The CAS arbitration process is vested with the plenary governing authority over the international sports bodies in their relations with athletes, and the rulings are the final and binding resolution of disputes. It is onerous to objectively measure the extent to which the CAS has a compiled body of substantive law because it is not an appellate court that has a system of precedence and each case turns on its own facts. This decision-making process that is drawn from both the civil and common law system, consists of an inherent degree of subjectivity. The procedural fairness, if it is achieved, will increase the likelihood of substantive justice, and that will depend on the perspective of athletes from the countries that have outstanding issues, such as discrimination in their appeals. The approach of CAS has been to override the suspicion of unfairness by a compromise approach, that is, by considering the policy of the national governments and their respective judicial systems, which is directly related to the general level of good faith in the trust that its principles embody the principle of natural justice.

The breach of human rights, that is, manifest in its approach towards the athletes of developing countries, and in this regard the appeals have been rejected in the case of Semenya, which is based on human rights considerations, and of Ali Riza which is declared to be in admissible needs of a more holistic approach. There was a breach of the rule against bias in the former case and of the rule against a fair hearing in the latter case, and in each instance the evidence was ignored by international legal and ethical principles. The issues at stake need to be viewed from the perspective of the injustice that these athletes have suffered and that the determination should have been in their favour.

It is important to ensure that the arbitrators are aware of international treaties and obligations. They need to harmonise their approach with the athletes, sports governing bodies, attorneys, and academics to facilitate a predictable, reconcilable, and equitable decision-making process by CAS. There should be a single supreme appellate panel above the ad hoc body considering appeals within the CAS to achieve substantive and procedural fairness. This will enable the development of a consistent body of international *lex sportiva*, and fairness in the decision-making process. This should be an essential component of the existing CAS system of international legal pluralism that needs to be enhanced in order for human rights standards to be adopted and for the athletes in developing countries to be given a fair hearing.

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