Sports Law Essay Competition 2024

"Sport participation is a privilege, not a right." To what extent is the European Court of Human Rights' interference with competition rules and sports regulations good for sports governance?

This essay critically analyses the extent to which the European Court of Human Rights' (ECtHR) interference with competition rules and sports regulations is good for sports governance. It argues that interference is not only good, but necessary, because of the private and transnational nature of sports regulations, which mean that they are placed beyond the purview of state control. As this risks the world of sports becoming a lawless zone, and places athletes at a heightened risk of rights violations, it is argued that the supervisory jurisdiction of a supranational court like the ECtHR is needed. Furthermore, it is shown that, in other privately-regulated professions, the interference of the ECtHR with disciplinary rules has helped to improve the governance of those professions, and can similarly do so with sport.

Sports are governed by a dense body of transnational rules issued not by public authorities, but rather by private Sports Governing Bodies (SGB) and enforced by private adjudicating bodies. This dense body of competition rules and sports regulations is known as *lex sportiva,* and lies beyond state control. Indeed, the private, transnational nature of this system is aimed squarely

at placing it beyond state control, with the President of the International Olympic Committee (IOC) stating that "the goodwill of all the members of any autonomous sport grouping begins to disintegrate as soon as the huge, blurred face of that dangerous creature known as the state makes an appearance".[1]

Whilst the transnational nature of *lex sportiva* has placed it outside the purview of national states, its private nature has traditionally placed it outside the jurisdiction of the ECtHR. Indeed, the ECtHR has historically had little involvement in sports regulation, and even less in matters related to sports arbitration. However, since 2018, the sports case law of the ECtHR has grown as it has begun to adjudicate on cases that would 'otherwise fall exclusively within the sports domain.'[2] For example, in the 2018 case of *Mutu and Pechstein v Switzerland*, the Court took a critical stance of *lex sportiva* by ruling that the acceptance of a CAS arbitration clause was not freely consented to given the restrictive implication of non-acceptance on the applicant athlete's professional life.[3] In the same case, the Court applied the right to a fair hearing under Article 6 ECHR to the CAS.[4] In the later case of *Ali Riza and others v Turkey*, the Court confirmed that the special characteristics of sports arbitration do not justify depriving athletes of fair trial guarantees.[5] As well as ruling on procedural issues, the Court has also ruled on substantive issues. For example, the Court in *Sedat Doğan v. Turkey* found that sanctions imposed by the

[1] P. De Coubertin. 1909. Une campagne de vingt-et-un ans (1887-1908). Paris: education physique, p. 152.
[2] D. West, "Revitalising a phantom regime: the adjudication of human rights complaints in sport." The International Sports Law Journal 19.1 (2019) p. 6.
[3] Mutu and Pechstein v Switzerland (Applications no. 40575/10 and no. 67474/10) (ECHR 324 (2018).
[4] Ibid.
[5] Ali Rıza and Others v. Turkey, nos. 30226/10 and 4 others, 28 January 2020.

Turkish Football Federation amounted to a violation of the right to freedom of expression under Article 10 ECHR.[6] Most recently, in *Semenya v Switzerland*, a majority in the Grand Chamber ruled that the Swiss Federal Tribunal violated the prohibition on discrimination under Article 14 ECHR (read together with the right to respect for private life under Article 8 ECHR), as well as the right to an effective remedy under Article 13 of the Convention.[7]

But to what extent is the ECtHR's increasing interference with *lex sportiva* good for sports governance? Arguably, it is not only good, but *necessary*. Private sport rules have a critical impact on the lives and careers of athletes. Yet, these rules are not the result of a democratic process or subjected to democratic control, as is the case for rules promulgated by the state. Instead, a group of non-democratically-elected actors establish rules and standards that are accepted as legitimate by actors who have no say in the definition of these rules. In this autonomous legal sporting order, the all-powerful SGBs exercise legislative, executive and judicial powers. For example, the Olympic Charter states that sports organisations have the right to freely establish and control the rules of sports as well as to determine their own structure and governance,[8] whilst the SGBs' own dispute resolution mechanisms in combination with the CAS perform the judicial function.

[6] Sedat Doğan v. Turkey (app. no. 48909/14).
[7] ECtHR , Semenya v Switzerland, App. no. 10934/21, 11 July 2023.
[8] International Olympic Committee (2017) Olympic Charter, Rule 61(2).

Currently, the transnational, private nature of sports regulation and adjudication shelters *lex sportiva* from human rights accountability and acts as a 'cloak for continued self-regulation…[which] opposes a rule of law in regulating international sport".[9] Indeed, while States are legally obliged under national and international law to guarantee human rights compliance at all levels of rule-making and adjudication, supranational SGBs are not, enabling *lex sportiva* to remain free from human rights scrutiny. Respect for human rights ought to be "an indispensable element of any effective governance system",[10] but sports have been allowed to become 'human rights-free zones'.[11] The growing concern for this risk is evident in the joint letter written by 3 UN human rights mandate holders to the president of World Athletics.[12]

More concerning still, the lack of democratic accountability heightens the risk of non-compliance by SGBs with human rights standards. The ECtHR has itself recognised that professional environments are generally characterized by unequal power relations,[13] and has specifically recognised that competitive sport is characterized by a similar hierarchical structure.[14] In such contexts, human rights violations can, and do, occur since, just as many

[9] K. Foster, "Is there a global sports law? Entertain Sports Law", 2003, J 2(1):1–18.
[10] B. Schwab, "Embedding the human rights of players in world sport", Int Sports Law J 2018, Vol. 17, p. 215.
[11] Ibid.
[12] Letter by the Mandates of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, and the Working Group on the issue of discrimination against women in law and in practice, OL OTH 62/2018, p. 2.
[13] ECtHR, Hovhannisyan v. Armenia, App. No. 18419/13, 19 July 2018.
[14] ECtHR , Semenya v Switzerland, App. no. 10934/21, 11 July 2023.

employees are 'subordinates' to their 'superiors' in a work environment, so too athletes are confronted with often very powerful sports organizations.[15] As such, as the Court has recognised, there is no reason why 'judicial protection should be less for sports professionals than for persons exercising more conventional professions'.[16] Normally, it would be up to states to provide protection against the occurrence of human rights violations in the workplace, and to provide human rights justice where such violations occur. However, when it comes to transnational SBGs, only supranational human rights bodies, including the European Court of Human Rights (ECtHR), are in the position to prevent the world of sports from being a lawless zone.

At this point, it should be added that the ECtHR should no longer view the private nature of *lex sportiva* as a reason for non-interference. As Schwab states, "Players are people first, and athletes second", and it is unsustainable for the world of sports to remain an 'autonomous human rights-less' bubble.[17] The protection offered by the ECHR would be illusory if it could be circumvented simply by private actors generating their private system of rules and their private adjudication mechanisms, so bringing areas that attempt to circumvent human rights protection merits to be a priority concern of the ECtHR. Furthermore, in other privately-regulated professions, the ECtHR's interference with disciplinary rules has helped improved the governance of those professions. The sports world is not the only professional world that establishes its own internal rules and adjudication mechanisms, with the medical and legal fields

[15] Hovhannisyan v. Armenia (n 8).
[16] Semenya v Switzerland (n 7), 178.
[17] Schwab (n 5), 214.

both being governed by what are known as 'disciplinary rules'. Like the *lex sportiva*, these rules and adjudication mechanisms directly impact the lives of the relevant professionals, be they doctors or lawyers, as they determine many of the conditions under which the professionals in question carry out their roles. Typically, these rules are able to deny important opportunities to some professionals. In the past, when the ECtHR discovered that certain rules governing access to the profession were a violation of rights protected under the Convention, it intervened with the disciplinary rules. For example, the Court has applied the ECHR to, *inter alia*, procedures and sanctions of the adjudicating bodies of the Belgian Medical Association,[18] and the Dutch Bar Association.[19] In these cases, the Court did not see the fact that these issues arose in separate legal 'disciplinary orders' as obstacles to applying the Convention. Rather, it found that rules governing access to the profession for lawyers,[20] and accountants,[21] violated the Convention rights and, as such, warranted its interference in order to improve the governance of these professions.

The interference of the ECtHR is particularly necessary when it comes to arbitration, where athletes are at heightened risk of human rights abuse. In private transnational sports regulation, the Court of Arbitration for Sport (CAS) adjudicates on private sports rules and regulations at the international level using the SGBs' own dispute mechanisms during arbitration. This process

[18] ECtHR, Le Compte, Van Leuven & De Meyere v Belgium, App. no. 6878/75; 7238/75, 23 June 1981; ECtHR, Albert & Le Compte v Belgium, App. no. 7299/75; 7496/76, 10 February 1983.
[19] ECtHR, Steur v the Netherlands, App. No. 39657/98, 28 October 2003.
[20] ECtHR, Alexandridis v. Greece, App. no. 19516/06, 21 February 2008.
[21] ECtHR, Thlimmenos v. Greece (GC), App. no. 34369/97, 6 April 2000.

sees the CAS adjudicate on claims arising between parties that have signed an arbitration agreement, in which the parties consent to assigning disputes that would arise between them to the relevant SBG. Yet, in the context of sports, such consent is not always given freely. Often, athletes are forced to sign agreements with 'forced' arbitration clauses as a prerequisite to participating in their respective sport. This system of forced arbitration only seems to be accepted due to the misconception that athletes have a choice about whether to participate. However, in the context of elite athletes, the idea that sport is a voluntary activity and that participants can walk away if they do not like the rules is largely illusory, since by the time athletes have invested sufficient time and effort to get to the pinnacle, the time to 'choose' has long gone. The ECtHR has itself recognised that, unlike other contexts in which arbitration is used, professional athletes and SGBs are not on an equal footing when agreeing on arbitration,[22] which means that consent is not always freely given. For example, in *Mutu and Pechstein v Switzerland,* the Court found that: "the only choice in the second applicant's case was between accepting the arbitration clause and thus earning her living by practising her sport professionally, or not accepting it and being obliged to refrain completely from earning a living from her sport at that level'.[23]

The right to an effective remedy under Article 13 ECHR means that complaints of human rights violations that are found to have substance must be addressed effectively. But victims who,

[22] Semenya v Switzerland (n 7), 177.
[23] Mutu and Pechstein v Switzerland (n 4),113.

because of an arbitration clause, are forced to bring their case before CAS do not enjoy this right. Whilst the CAS claims to be 'human rights friendly' forum,[24] a general lack of expertise on human rights among CAS arbiters poses an obstacle to settling human rights claims through the tribunal, and there are serious and credible accusations that CAS 'sidelines' IHRL. For example, in a report on female eligibility rules in sports, Human Rights Watch maintained that 'CAS has proven to be an inadequate justice mechanism for women athletes'.[25] The Institute for Human Rights in Business also says that sport's regulatory framework and arbitration system fail to protect the human rights of athletes,[26] a sentiment echoed in 2020 by the United Nations Office of the High Commissioner for Human Rights (OHCHR).[27] These concerns became a stark reality in 2023, when the ECtHR criticized the flagrant disregard of human rights concerns by the CAS panel.[28] Given the increasing commentary about CAS by the ECtHR, there is a clear need for a stronger judicial process for dealing with sport and human rights. Interference by the ECtHR with arbitration is thus not just good for sports governance, but necessary, as it gives the Court the opportunity to, indirectly, offer human rights guidance to the CAS.

For these reasons, the ECtHR's increasing interference with private rules and sports regulations is to be welcomed. For example, in the *Semenya v Switzerland* judgement, the Court made clear

[24] Faraz Shahalei, 'The collusion between human rights and arbitration: the game of inconsistencies at the Court of Arbitration for Sport' (2024) Arbitration International.
[25] Ibid.
[26] Ibid.
[27] Ibid.
[28] Semenya v Switzerland (n 9)

that it expected both the Swiss Federal Tribunal and the CAS to rigorously review whether the DSD Regulations were in conformity with the prohibition of discrimination included in the ECHR. In this way, a stronger engagement with the ECHR by the CAS could have reduced the procedural obligations on Switzerland to ensure the effective respect for the ECHR in a horizontal relation. In other words, since the CAS is the world-leading authority for deciding on disputes between professional athletes and SGBs, the Semenya judgment could *de facto* result in SGBs (based in Europe and potentially across the globe) now having to comply with the ECHR in designing their internal regulations. As the world of sport grapples with an ever-increasing number of issues that touch on human rights, from the future of women's sports to Environmental Social and Governance factors, this can only be a welcome step.

In conclusion, this essay has argued that the ECtHR's increased interference with competition rules and sports regulations is not only good, but necessary, for sports governance. By scrutinising both procedural and substantive sports rules as applied by the CAS, the ECtHR can improve human rights protection in what is otherwise at risk of being a rights-less sports world, and give strong incentives to SGBs and sports adjudicating bodies to robustly uphold human rights protection. Ultimately, what might be an irritating interference for SGBs is, for human rights advocates, a long-overdue supervisory jurisdiction.