Global Constitutionalization and Eurocentric Adjudication: 
The case of human rights in sports law

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Imagine a football (soccer) international match in Sudan between Sudanese and Egyptian teams organized by the African Confederation of Football (CAF) with headquarters in Egypt. The match is suspended before the end of the reglementary time given the violent incidents conducted by the fans of the Sudanese team. CAF imposes severe penalties against the Sudanese team. So far, this situation appears to be a dispute where all the relevant facts take place in Africa. If we were to analyze this situation from a constitutional law perspective we could look into the Constitutions of Egypt and Sudan in order to determine if they contain any particular regulations related to sports. If we were to explore the situation from a human rights perspective we could look at the United Nations (UN) or African human rights system to see if there are any particular standards to the respect of human rights in the sports field.¹

However, given that football is a transnational system, the Sudanese team can only (as established in the CAF and FIFA regulations) appeal the CAF sanctions in front of the Court of Arbitration for Sports (CAS), an arbitral private tribunal with seat in Switzerland. In our analysis we could look into the constitutive documents of CAF, FIFA and CAS to see if they include any references to human rights. Similarly, we could explore the Swiss Constitution and possible the European Court of Human Rights (European Court) to understand if they deal with sports related matters. Briefly, a football dispute originated in Africa becomes regulated, at least in part, by European law.²

This article intends to explore part of the interrelationship between constitutionalism, human rights and sports as exemplified by the Sudanese case. Despite an ad hoc, intermittent and patchwork approach, the United Nations as well as other regional intergovernmental organizations are increasingly demonstrating a concern to secure full respect of human rights in the sports field. This process, that I call righting sports law, refers to the recognition of the right to participate in sports; the realization of human rights through sport; the use of international

human rights to monitor the functioning of sporting governing bodies (SGB); the promotion and protection of human rights in sports practices, competitions, and mega-sporting events; and the increasing attention to sports by human rights organs. The article deals with the righting sports law in its first section.

The righting sports law is particularly clear in the European context. The European Court has ruled on issues touching directly or indirectly on sports. In particular, the Court has decided cases dealing with arbitration in sports (including CAS), on disciplinary actions in the context of sports and on the rights and obligations of different stakeholders in the sports ecosystem. A parallel development takes place in the European Court of Justice and in the activities, resolutions and treaties adopted by the European Union and the Council of Europe. It is a phenomenon that I identify as sporting European Human Rights Law and address in the second part of this article.

Two particular trends are present in the process of righting sports law. The first one is the inclusion of human rights references in the constitutions, charters, policies and/or regulations of sporting governing bodies (SGBs). Traditionally, international federations resisted the application of international human rights law to their operations and decisions. The righting sports law process has moved SGBs (including CAF and FIFA) to incorporate diverse types of commitments to follow internationally recognized human rights in their activities. The International Olympic Committee (IOC) and at least 90 SGBs that form part of the Olympic Movement have human rights references in their documents and/or policies. I label this development constitutionalizing human rights in sports law, which is explained in the third part of the article.

A parallel trend is taking place at the national level. At least 94 national constitutions (among them the Egyptian and Swiss) include explicit references to sports in their texts. Those constitutional rules could be broadly grouped into three categories: a) sports as a right (autonomous or as part of other rights such as health, education, culture, leisure or the rights of children/youth); b) sports as one of the objectives of the social policy or State’s objectives and; c) sports as one of the competencies attributed to legislative and/or executive branches and to the national, state and/or local authorities. I denominate and explain this approach constitutionalizing sports in the following section of the paper.

CAS is a critical actor in the sport ecosystem. By adjudicating international sports disputes CAS is performing the role of a “Supreme Court for Sport” and a (quasi) constitutional court that exercises a type of judicial review over the functioning of SGBs. Today almost all sports federations and all national Olympic committees recognize CAS. CAS’ caseload has involved 73

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3 I use the term sports ecosystem to the understanding that sport is the result of and influenced by a series of private, public and non-for profit stakeholders acting and interacting at the local, national, regional, transnational and international levels. See Center for Sports and Human Rights, Sports Ecosystem, https://www.sporthumanrights.org/what-we-do/sports-ecosystem
5 The U.S. professional leagues, Formula 1, and the English Football are the main SGBs that have not accepted CAS as the final arbitration mechanism. However, the CAS has decided cases related to current or former NBA players.
different sports.\textsuperscript{6} From its establishment\textsuperscript{7} until 2022 CAS has registered 9695 proceedings.\textsuperscript{8} In 2022 alone CAS registered 830 cases.\textsuperscript{9} This number is as large or larger than the dockets of other major arbitral tribunals and human rights adjudicatory bodies. On the arbitral side, CAS is as active if not more than the Permanent Court of Arbitration (204 cases in 2022),\textsuperscript{10} the International Court of Arbitration of the International Chamber of Commerce (775 cases),\textsuperscript{11} the London Court of International Arbitration (327 cases),\textsuperscript{12} and the International Center for Dispute Resolution (993 in 2018).\textsuperscript{13} Comparing with the number of cases decided by human rights institutions, CAS is a quantitative important adjudicatory body. The Inter-American Court of Human Rights had received only 401 since its establishment in 1979 and its sister, the Inter-American Commission on Human Rights had 3,629 pending petitions by the end of 2022.\textsuperscript{14} The African Court of Human and Peoples Rights had registered 338 cases since 2004 and the African Commission on Human and Peoples Rights has 220 pending communications.\textsuperscript{15} For its part, the UN Human Rights Committee has registered 4,121 communications concerning 94 States parties since 1977, of which 211 were registered during 2021.\textsuperscript{16} The European Court of Human Rights, by far the most active body, had more than 74,000 pending communications by the end of 2022, a year in which issued more than 7,000 judgments.\textsuperscript{17}

\textsuperscript{6} Id. at 39.
\textsuperscript{7} HC X. v. Ligue Suisse de Hockey sur Glace (LSHG), CAS 86/1 (Ct. Arb. for Sport Jan. 30, 1987) was the first award rendered by CAS. The case involved a dispute between an ice hockey coach, an ice hockey club and the Swiss Ice Hockey Federation regarding a disciplinary sanction. See also Erika Hasler, Back to the Future: The First CAS Arbitrators on CAS's First Award (TAS 86/1, HC X. c. LSHG) and Its Evolution Since Then, 2016 Y.B. INT’L SPORTS ARB. 3, 3 (2016).
\textsuperscript{8} \textit{Statistics}, COURT OF ARBITRATION FOR SPORT, \url{https://www.tas-cas.org/fileadmin/user_upload/CAS_Annual_Report_2022.pdf} (showing registered proceedings include ordinary (1551); appeal (7221); ad hoc (161); anti-doping (75); mediation (105) and consultation (82) procedures).
\textsuperscript{9} Id.
\textsuperscript{10} Permanent Ct. of Arb., \textit{Annual Report}, 20 (2022).
\textsuperscript{11} See INTERNATIONAL CHAMBER OF COMMERCE [ICC], ICC DISPUTE RESOLUTION 2020 STATISTICS 9 (2021).
\textsuperscript{12} See LONDON CT. OF INT’L ARB., ANNUAL CASEWORK REPORT 7 (2022).
\textsuperscript{14} Inter-American Ct. of HR, \textit{Annual Report}, 44 (2022) and Inter-American Commission on Human Rights, \textit{Annual Report}, 299 (2022)
\textsuperscript{16} Human Rights Committee, \textit{Report} at 22 (2022).
\textsuperscript{17} European Court of Human Rights, \textit{Annual Report} 139 (2022).
In the *Al Hilal* case\(^\text{18}\) as well as in a growing number of sports arbitrations, CAS refers to the rights guaranteed by the European Convention on Human Rights (the European Convention) and to the European Court. Despite its global jurisdiction, CAS failed to consistently use the United Nations or other regional human rights standards. Additionally, by reviewing the decisions of CAS, the Swiss Federal Tribunal (the SFT) applies indirectly, under limited and strict circumstances, the European Convention (but not the United Nations treaties ratified by Switzerland) to determine if the CAS awards are compatible with public policy and thus valid decisions. I explore this phenomenon that I call *exporting European human rights law* to the realm of sports in the fifth section of the paper.

The majority of CAS arbitrators and the arbitrators appointed for specific CAS panels are European or based in Europe. In the *Al Hilal* case the three arbitrators were from Switzerland, Italy and the Netherlands.\(^\text{19}\) CAS arbitrators quite often apply, in addition or in lieu of European human rights law, European Union competition rules in cases involving human rights issues, despite that Switzerland is not a European Union State and most of the SGB are Swiss corporations. I denominate *CAS Eurocentric biasing of sports law* the process of favoring European human rights and competition law and European arbitrators.

The intersection of *righting sports law*, *sporting and exporting European human rights law*, *constitutionalizing sports law* and *Eurocentric biasing of sports law* raises critical questions related to the interplay between a non-judicial and non-traditional adjudicatory body such as CAS with a worldwide constitutionalization of sports and a non-traditional constitutionalization process occurring at the level of sporting organizations. At its core, the paper explores CAS’ capacity to manage human rights arguments in a less Eurocentric approach. Currently there is a paradox and internal contradiction between CAS universal jurisdiction, the constitutionalization of universal human rights standards by SGBs and the global constitutionalization of sports in national constitutions and the exclusive (and inconsistent) use of European human rights law by CAS. I argue that the *constitutionalization of sports* and the *constitutionalizing human rights in sports law* process could act as a corrective measure against this Eurocentric bias.

**Righting sports law**

The Declaration or Program of Action of the 1993 Vienna World Conferences on Human Rights\(^\text{20}\) did not mention sports at all. Since then, other World Conferences such as the Beijing on

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\(^{18}\) *Al Hilal* Club, ¶ 67.

\(^{19}\) Id. ¶ 16.

Women\textsuperscript{21} and the Durban on Racism\textsuperscript{22}, The Second World Assembly on Aging\textsuperscript{23} or the 2030 Agenda for Sustainable Development\textsuperscript{24} make explicit references to human rights violations taking place in the context of sports and the role of sports in promoting and facilitating the enjoyment and respect of human rights.\textsuperscript{25} Despite an ad hoc, incoherent, intermittent and patchwork approach, the United Nations as well as other regional intergovernmental organizations are increasingly demonstrating a concern to secure full respect of human rights in the sports field. I call this process \textit{righting sports law.} I understand \textquote{righting sports law} as the use of international human rights to, among other things, recognize the practice of sports and physical activity as a human right\textsuperscript{26}, the monitoring of the functioning of SGB,\textsuperscript{27} including the respect,\textsuperscript{28} promotion,\textsuperscript{29} and/or violation of human rights in sports practices,\textsuperscript{30} competitions and in mega-sporting events;\textsuperscript{31} the adoption of human rights policies by SGB;\textsuperscript{32} and the increasing attention to sports by intergovernmental organizations and particularly human rights organs.\textsuperscript{33}

The UN as well as other regional organizations have adopted treaties related to sports that refer to human rights and human rights treaties that mention sports. For instance, UNESCO’s International Convention against Doping in Sport recalls in its preamble the \textquote{existing international instruments relating to human rights.}\textsuperscript{34} Equally, the Council of Europe Convention

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\footnote{Fourth World Conference on Women, \textit{Beijing Declaration and Platform for Action}, ¶¶ 83 (m); 107 (f); 183 and 280 (d), U.N. Doc. A/CONF.177/20 (Sept. 15, 1994).}
\footnote{U.N. A/70/1, Transforming our world: the 2030 Agenda for Sustainable Development (Oct. 15, 2015)}
\footnote{C.P. González, \textit{The effective application of international human rights law standards to the sporting domain: Should UN monitoring bodies take central stage?} INT SPORTS LAW J (2022). https://doi.org/10.1007/s40318-021-00209-8}
\footnote{UNICEF, \textit{CHILDREN’S RIGHTS IN SPORTS PRINCIPLES} 7 (2018).}
\footnote{Donnelly, at 391.}
\footnote{\textit{See generally} MEGA-SPORTING EVENTS PLATFORM FOR HUMAN RIGHTS, CHAMPIONING HUMAN RIGHTS IN THE GOVERNANCE OF SPORTS BODIES 9 (2018); \textit{Zack Bowersox, INTERNATIONAL SPORTING EVENTS AND HUMAN RIGHTS: DOES THE HOST NATION PLAY FAIR?} (2019).}
\footnote{See footnotes XXXX and accompanying text.}
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on the Manipulation of Sports Competitions\textsuperscript{35} and the Revised European Sports Charter\textsuperscript{36} mention human rights. Human rights conventions such as the Convention on the Elimination of All Forms of Discrimination against Women,\textsuperscript{37} the Convention on the Rights of Persons with Disabilities,\textsuperscript{38} include explicit references to sports. The International Convention against apartheid in sports, the first international convention dealing with sports is in fact a human rights treaty.\textsuperscript{39} In the Inter-American context with the Inter-American Convention on Protecting the Human Rights of Older Persons,\textsuperscript{40} and the Ibero-American Convention on the Rights of Youth also mention sports.\textsuperscript{41}

\textsuperscript{36} Appendix to Recommendation CM/Rec(2021)5, Revised European Sports Charter ¶ 1.2.a; 3.2; 4.3; 5.2.c; 6; 7.1; 8.a; 8.2; 16 and 20.3.
\textsuperscript{37} G.A. Res. 34/180, Convention on the Elimination of All Forms of Discrimination Against Women, arts. 10(g), 13© (Dec. 18, 1979).
\textsuperscript{40} Inter-American Treaties A-70, Inter-American Convention on Protecting the Human Rights of Older Persons, art. 22 (June 15, 2015).
\textsuperscript{41} Ibero-American Young Organization, Ibero-American Convention on Rights of Youth, art. 33 (Mar. 1, 2008). Technically this is not an Inter-American Convention as it was adopted in the context of the Iberoamerican Conference on Youth.
The UN General Assembly have adopted resolutions linking sports and human rights. A diverse set of specialized institutions such as UNICEF, UNESCO, ILO, WHO, UN Women, UNHCR and UNODC have dealt with human rights in the context of sports within their specific mandates. However other than these case-by-case instances, the UN currently has no single institution nor a document that focuses on the intersection between sports and human rights holistically. A timid effort to overcome this in silos effort is the Inter-Agency Group on Sport for Development and Peace (IAGSDP) established with the purpose of coordinating internal efforts within the UN, including the area of human rights and sports.

Some of the UN documents take a limited approach by referring to the promotion of human rights through sports rather than the protection of human rights in sports. Additionally, many of the UN documents, particularly those from the General Assembly, refer positively to sport

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42 G.A. Res. 67/17 ¶ 1 (Nov. 28, 2012) ONU, A/RES/67/17, Sport as a means to promote education, health, development, and peace; 5 UN General Assembly Resolution 27/8, Promoting Human Rights through Sport and the Olympic Ideal, (2014); UNGA Res 70/4 Building a peaceful and better world through sport and the Olympic ideal (13 November 2015); UNGA Res 73/24 Sport as an enabler of sustainable development (3 December 2018); UNGA Res 74/16 Building a peaceful and better world through sport and the Olympic ideal (13 December 2019); UNGA Res 74/170 Integrating sport into youth crime prevention and criminal justice strategies (18 December 2019); UNGA A/RES/77/27, Sport as an enabler of sustainable development (1 December 2022) and UNGA Res 77/324, World Basketball Day (25 August 2023).


51 See supra note XXXX.
autonomy. Sports autonomy tends to serve as a shield against stronger human rights protections. A human rights approach to sports requires a different understanding of autonomy than a simple independence from government interference. However, the concept of autonomy is being challenged and there are emerging theories such as ‘supervised autonomy’ or ‘responsible autonomy’ that advocate for more State supervision of sports and a more collaborative governance model.

International human rights law recognizes that autonomy of associations constitutes an important aspect of their freedom of association. Such autonomy does not preclude States from imposing restrictions in order, among others to protect the rights and freedom of others.

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52 See e.g., GA, A/RES/75/18 Sport as enabler of sustainable development ¶ 16 (supporting the independence and autonomy of sport); Resolution 8/4 adopted by the Conference of the States Parties to the United Nations Convention against Corruption at its eighth session, held in Abu Dhabi from 16 to 20 December 2019 Safeguarding sport from corruption (recognizing that sports organizations within the Olympic movement have the rights and obligations of autonomy) and HRC Promoting human rights through sport and the Olympic ideal (2020) HRC/43/L.24/Rev.1. (acknowledging the need to support the independence and autonomy of sport).


61 International Covenant on Civil and Political Rights, article 21.2; European Convention on Human Rights, article 11.2 and American Convention on Human Rights, article 16.2. The American Convention is the only human rights treaty that recognizes specifically the right to freely associate for sports purposes. I/A Court HR. Rights to freedom to organize, collective bargaining, and strike, and their relation to other rights, with a gender perspective (interpretation and scope of articles 13, 1, 16, 24, 25, and 26 in relation to articles 1(1) and 2 of the American Convention on Human Rights; articles 3, 6, 7, and 8 of the Protocol of San Salvador; articles 2, 3, 4, 5, and 6 of the Convention of Belém do Pará; articles 34, 44, and 45 of the Charter of the Organization of American States; and articles II, IV, XIV, XXI, and XXII of the American Declaration on the Rights and Duties of Man). Advisory Opinion OC-27/21 of May 5, 2021. Series A No. 27, ¶ 193.
Specifically, the UN human rights machinery has addressed sports related issues in multiple occasions in the last two decades. The Human Rights Council, the Advisory Committee and the Office of the High Commissioner for Human Rights have all addressed issues related to sports and human rights. The human rights treaty bodies in general comments, concluding observations and resolutions on specific cases have dealt with sports related issues. Similarly, different UN special procedures in their thematic reports, country reports; urgent appeals and

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other communications\textsuperscript{70} as well as intervention in specific cases\textsuperscript{71} have called the attention of different stakeholders regarding human rights in the context of sports.

In sum, there is a rich experience, albeit limited, at the UN level of addressing human rights issues in the context of sports. All the UN initiatives refer to the universal or internationally recognised human rights standards, not restricting them to the European region as CAS does.

**Sporting European Human Rights Law**

The *righting sports law* is particularly clear in the European context. The European Court of Human Rights has ruled on issues touching directly or indirectly on sports. In particular, the Court has decided cases dealing with CAS.\textsuperscript{72} A parallel expansion, which started earlier, is taking place in the European Court of Justice (including dealing with cases on CAS)\textsuperscript{73} and in the activities, resolutions and treaties adopted by the European Union\textsuperscript{74} and the Council of Europe.\textsuperscript{75} It is a phenomenon that I call *sporting European Human Rights Law*.

The European Court’s docket of cases dealing with sports-related matters\textsuperscript{76} range from disputes where the sport matter is the central or most relevant issue to other legal controversies that took place in the

\textsuperscript{70} Special Rapporteur in the field of cultural rights and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance (AL OTH 90/2022); Special Rapporteur on the rights of indigenous peoples, James Anaya, OL Indigenous (2001-8) OTH 3/2014; https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=18160; 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, https://www.ohchr.org/sites/default/files/Documents/Issues/Health/Letter_IAAF_Sept2018.pdf

\textsuperscript{71} UN Special Procedures Written submission to the Court of Arbitration for Sport (CAS) on Cases CAS 2018/O/5794 and CAS 2018/O/5798 (pursuant to rule 41.4 of the Procedural Rules); European Court Of Human Rights, Application no: 10934/21, Case of Mokgadi Caster Semenya v. Switzerland, Intervention Pursuant to Article 36(2) of the European convention on Human Rights and Rule 44(3) of the Rules of Court, By the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, UN Working Group on discrimination against women and girls, and UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 8 October 2021.

\textsuperscript{72} For the most complete description of the work of the European Court in sports related matters, see Daniel Rietiker, Defending athletes, players, clubs and fans (2022)


context of sports or by persons related to sports, but where the sporting activity was not the main issue under review. The cases involve a multiplicity of stakeholders in the sports ecosystem from professional to amateur athletes and former professional sportspersons, from referees to managers and athletes’ representatives, from journalists to fans, from students involved in physical activities to property owners affected by hunting activities or by the construction of Olympic Games venues, from persons with disability to victims of human trafficking for the construction of sporting

78 Barcelona Llop, Javier, Cuestiones sobre derechos fundamentales y deporte en el marco del Convenio Europeo de Derechos Humanos, 209 REVISTA ESPAÑOLA DE DERECHO ADMINISTRATIVO, 173, 175 (2020).
82 Riza supra note XXX at 38.
85 See generally Cinquième Section, Affaire Ressiot Et Autres C. France, (Requêtes Nos 15054/07 Et 15066/07), 28 Juin 2012. (ECtHR, Ressiot).
facilities. Individual athletes, football teams and federations, associations of fans or to promote sports, sports-related workers, and sporting media have all standing to bring applications.

The issues dealt with by the Court include fans’ safety, hooliganism, discrimination, freedom of religion, association, and expression, and the right to privacy, property rights, sexual violence, trafficking and corruption in the context of sports and/or physical activity or physical

92 See generally Šimunić, supra, note 243.
93 See generally FC Mrešetić v. Georgia, Eur. Ct. H.R., App. No. 38736/04 (July 31, 2007) (Football team lack of access to a court regarding a dispute related to the transfer of a footballer).
96 See generally SGB, as a member of an international SGB, is not a victim even if is bound by the international SGB regulations and had certain duties with a view to implementing them).
102 See generally Ostendorf v. Germany, App No. 15598/08 (Mar. 7, 2013) (football supporter held in police custody for four hours to prevent a fight between hooligans); see generally S., V. & A. v. Denmark, App. Nos. 35553/12, 36678/12 & 36711/12 (Oct. 22, 2018) (applicants’ detention for over seven hours to prevent hooligan violence); see generally Serafin v. Croatia, App. No. 19120/15 (Oct. 9, 2018) (decision on the admissibility) (measures to deal with hooliganism) (ECtHR, Serafin); see generally Velkov v. Bulgaria, App. No. 34503/10 (July 21, 2020) (fan’s convicted twice administratively and criminally - of the same offence of breaching the peace during a football match).
104 See generally Dongru, supra, note XXX.
106 See generally Hatchette, supra, note XXX (conviction of the publishers and directors of two magazines for indirectly or unlawfully publishing tobacco advertising by including, in a sports magazine, photographs of a Formula 1 driver wearing the logo of a cigarette brand); Ressiot, supra note XXX (investigations carried out at the premises of two sports newspapers and at the homes of journalists in the context of a judicial investigation of possible doping in cycle racing).
education. It has pronounced indirectly on issues related to security during sporting mega-events such as the Olympic Games.\textsuperscript{110}

The European Court has played an increasingly significant role in overseeing the functioning of CAS, of other SGBs\textsuperscript{111}, and also in clarifying States’ roles in sports. Some principles that emerge from the Court’s case law reflect the same ideas that will be explained in the section on sports in national constitutions. The Court has recognized that the State has duties in relation with sports and that there certain public permissible aims that allow the State to restrict rights in the sports context. For instance, the Tribunal recognized the role of the State in effectively combating violence in stadiums and the legitimate expectations of individuals to attend sports events with complete security.\textsuperscript{112} The State has a positive duty to secure that SGB do not violate conventional rights and that those sports organizations and tribunal apply the Convention as interpreted by the Court.\textsuperscript{113} The State also has a legitimate interest in preventing disorder and combatting racism and discrimination in sports activities.\textsuperscript{114} The Court has also recognized that sport is a social activity that goes beyond the physical activity, accomplishing other objectives and influencing social behaviors. The Court has understood that the fight against doping in sports is a health concern in which the governing bodies of the sporting world owe responsibilities to both professional and amateur athletes as well as, in particular, young people.\textsuperscript{115} Additionally, doping sanctions are understood as pursuing the legitimate aim of ensuring “equal and meaningful competition in sports,” which is linked to the “protection of the rights and freedoms of others.”\textsuperscript{116} The use of ban substances not only produces an unfair advantage over other athletes, but it is also “a dangerous incitement to amateur athletes, and in particular young people, to follow suit in order to enhance their performance, and deprives spectators of the fair competition which they are entitled to expect.”\textsuperscript{117} The equal treatment of players with and without disability is not only a legal obligation but it also enhances the country’s reputation abroad and promotes inclusiveness domestically.\textsuperscript{118} Finally, the Tribunal has acknowledge the “self-evidently significant public interests of hosting the Olympics”.\textsuperscript{119}

\textsuperscript{113} See generally Platini, Mutu, Semenya supra notes XXXX.
\textsuperscript{115} FNASS, Eur. Ct. H.R. at ¶ 165 and 174-75.
\textsuperscript{116} Id. at ¶ 166.
\textsuperscript{117} Id. Similarly, CAS has found that fair play and health are the legitimate aims pursued by anti-doping regulations. Elizabeth Juliano, Owner of Horizon; Maryanna Haymon, Owner of Don Principe; Adrienne Lyle and Kaitlin Blythe v. Fédération Equestre Internationale (FEI), Arbitration CAS 2017/A/5114, Award, ¶ 66 (March 19, 2018).
\textsuperscript{118} Negovanović, Eur. Ct. H.R. at ¶ 88.
\textsuperscript{119} Belova, Eur. Ct. H.R. at ¶ 43.
Of relevance for this article, the Tribunal has decided cases directly involving CAS.\textsuperscript{120} *Semenya v. Switzerland*\textsuperscript{121} and *Mutu and Pechstein v. Switzerland*\textsuperscript{122} are the most important cases decided by the European Court.

*Mutu* deals with challenges to the lawfulness of CAS proceedings, the forced arbitration clause, the independence and impartiality of CAS and finally the lack of a public hearing.\textsuperscript{123} The European Court established its jurisdiction given that the acquiescence of the Swiss authorities in the acts of private persons within its jurisdiction may engage the State’s responsibility.\textsuperscript{124} On the merits, the Court confirmed that the Convention allows the establishment of an arbitral tribunal to try certain disputes, including the importance of having a centralized and specialized sports adjudicatory body such as CAS.\textsuperscript{125} However, as the acceptance of such arbitration clauses includes the waiver of certain Convention rights, the consent should be free, lawful and unequivocal. The Tribunal found that Mutu provided free consent;\textsuperscript{126} while Pechstein was forced to arbitration, meaning that the only possibility for her to practice her sport at a professional level was to accept the arbitration clause. In those circumstances, all the guarantees of Article 6.1 must be

\textsuperscript{120} In addition to the cases discussed in the text, the Court had decided other cases involving CAS. In *Platini* the European Tribunal explicitly established that SGB (in this case FIFA and UEFA) are private associations and as such, not directly subject to the European Convention. However, States may be required to adopt measures aimed at respecting the right to privacy even in the relationships of individuals with each other. ECtHR, Platini v. Switzerland (Application No. 526/18), judgment of 11 February 2020. In rejecting the application of Dutch cyclist Erwin Bakker ban for a doping offence the European Court considered that the restriction on the right of access to a tribunal (CAS and the TF ) was neither arbitrary nor disproportionate. ECtHR, Third Section, 3 September 2019, Bakker v. Switzerland, no. 7198/07, ¶ 27 and 29. Finally, in *Riza*, the Court expressed certain doubts as to whether the applicant could avail himself of a right of access to a court vis-à-vis Switzerland, as the dispute had only a very tenuous link with Switzerland given that the dispute was almost entirely within Turkey and not substantively involving CAS jurisdiction. Troisième Section, Affaire Ali Riza c. Suisse, (Requête no 74989/11), Arrêt, 13 juillet 2021, ¶ 81. See Mavromati, Despina. "CAS through the lens of the European Court of Human Rights and other tribunals." In Handbook on International Sports Law, pp. 196-241(2022). There are cases in which the European Court ruled against a different State rather than Switzerland despite that the CAS given that the complaints did not involve the procedure or merits of CAS award. *Ali Riza*, Eur. Ct. H.R. at ¶ 21-24; Croatian Golf Federation v. Croatia, App. No. 66994/14, ¶ 38-39 (December 17, 2020), https://hudoc.echr.coe.int/eng?i=001-206513; *Šimunić*, Eur. Ct. H.R. at ¶ 3.

\textsuperscript{121} Semenya was decided by a 4-3 majority decision that could be refer to the Grand Chamber of the European Court. World Athletics note that the decision came from a “deeply divided” chamber and that it will be “encouraging” the Swiss Government “to seek referral of the case to the ECHR Grand Chamber.” World Athletics responds to European Court of Human Rights decision, July 11, 2023. https://worldathletics.org/news/press-releases/response-european-court-human-rights-decision-2023 The Grand Chamber accepted the referral on November 6, 2023. See Referral to the Grand Chamber, https://www.echr.coe.int/w/referral-to-the-grand-chamber-1?p_l_back_url=%2Fsearch%3Fq%3Dsemenya

\textsuperscript{122} In fact, the first case challenging CAS independence was brought by Larisa Yevgenyevna Lazutina and Olga Valeryevna Danilova. See Larisa Yevgenyevna Lazutina et Olga Valeryevna Danilova contre la Suisse, App. No. 38250/03, ¶ 1-3 (July 8, 2008), https://hudoc.echr.coe.int/eng?i=001-88255. The applicants challenged the independence of the CAS from the IOC. However, the complaint was withdrawn before the Court could rule on the merits.


\textsuperscript{124} Id. at ¶ 64.

\textsuperscript{125} Id. at ¶ 94.

\textsuperscript{126} Id. at ¶ 116-120.
The Court did not find a violation regarding CAS alleged lack of independence. The Court rejected the challenges concerning CAS’s lack of institutional independence and impartiality. The Court found a violation of Convention regarding the absence of a public hearing. The dispute surrounding the doping sanction required a hearing subject to public scrutiny.

Semenya involved the well-known situation of South African middle-distance runner who challenged the World Athletics’ Eligibility Regulations for the Female Classification (Regulations) that define the circumstances under which female and intersex sportspersons with particular kinds of differences of sex development (DSDs) can participate in international competitions. Semenya complained that the requirement to lower her natural testosterone levels in order to participate as a woman violate the prohibition of inhuman or degrading treatment, her right to respect for her private life, the prohibition of discrimination and the right to a fair hearing and to an effective remedy. This case is particularly important, as it directly challenged CAS and STF rulings on substantive human rights, rather than the independence or procedure of CAS as in Mutu. The Court first ruled on its jurisdiction relying mainly on Mutu. The Court understood that the complaint involved the regulations and actions of two private actors, the IAAF (a Monegasque private-law association) and CAS (a Swiss private association), both of which were non-State actors. Thus, the Convention did not apply to them directly. However, to the extent that CAS award was reviewed by the STF, the case fell within the “jurisdiction” of Switzerland. On the merits, the Court found that Switzerland had not been afforded sufficient institutional and procedural safeguards because CAS and the STF failed to apply the relevant provisions of the Convention or the Court’s case-law. This failure constituted a violation of the equality provision of the Treaty. For similar reasons, the Court found a violation of the right to an effective remedy.

The Sporting of European Human Rights Law is an especially important process that helps to clarify the responsibility (albeit indirect) of SGB to guarantee and enforce human rights

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127 Id. at ¶ 115.
128 Id. at ¶ 159.
129 Id. at ¶¶ 159, 165 & 168.
130 Id. at ¶ 183.
131 Id. at ¶ 182.
134 Tribunal fédéral [TF] [Federal Supreme Court] Aug. 25, 2020, 4A_248/2019 4A_398/2019 BGE 147 III 49 S. 50 (Switz.).
135 Id. ¶ 174 and 200.
136 Id. ¶ 240.
standards. Additionally, the European Court had provided guidance on the positive obligations of States in guaranteeing that the conventional rights are respected by SGBs. The European Tribunal has also recognized a role for the State in the sports ecosystem.

**Constitutionalizing human rights in sports law**

Several SGB include human rights references in their constitutions, charters, policies and/or regulations. I call this process *constitutionalizing human rights in sports law*. The righting sports law has moved more SGBs to include diverse types of commitments to follow internationally recognized human rights.

The process of *righting* and *constitutionalizing* sports demonstrates that sports regulation is “collaborative, polycentric and networked, undertaken by a variety of different actors (state and non-state; public and private) across multiple sites (local, national and international).” Nor is regulation confined to rules made and coercively enforced by the state. Rules also can be made by private (non-government) entities” as described by Windholz. Connecting the SGB and national constitutions demonstrate the private/public, State/non-State, national/transnational/international interactions taking place in the sports area and the polycentric characteristics of sports regulations. And CAS, as part of the sports ecosystem, became an integral part of this polycentric character and judicial and jurisdictional pluralism including national courts and regional human courts and adjudicatory bodies.

The *constitutionalization* of sports and human rights plays a significant role. The practice of sports could become a constitutional right. Similarly, the inclusion of human rights in the SGBs constitutions means that human rights become constitutional rights in the realm of such SGBs. Bützler explains that constitutional rights have a dual function in transnational sports adjudication. According to Bützler, constitutional rights embody the fundamental values informing the normative content and structure of transnational institutional arrangements. Second, constitutional rights provide the framework for guaranteeing procedural legitimacy standards.

**SGB documents as Constitutions**

The main documents of the SGB could be considered as or at least equated to a Constitution. The IOC defines itself as the “supreme authority of the Olympic Movement” and the Introduction...
to the IO Charter stipulates that basic instrument of a constitutional nature CAS has established that even non-Olympic members, such as the “Recognized International Federations, are subject and bound to the Olympic Charter.”\(^ {143}\) The doctrine has also utilized the constitutional framework to describe the SGBs and their founding documents. For instance, Gürcüoğlu discusses whether the Olympic system can be defined as a constitutionalized one and concludes that the IOC “appears as a constitutional order to a certain degree.”\(^ {144}\) Similarly, Butz Bützler and Shoddert consider that FIFA is going through a “constitutionalizing process.”\(^ {145}\) Muñiz Perez speaks about a “constitutional vocation” of the Olympic Charter that “emulates the national model”\(^ {146}\) Others have talked about a “self-constitution”\(^ {147}\), a “soft-Constitution”\(^ {148}\), a “social constitution”\(^ {149}\), a “constitution-like document”\(^ {150}\) or a “transnational constitution.”\(^ {151}\) “Indeed, relying on a constitutional vocabulary with regard to the OC is not absurd, neither in descriptive nor in normative terms. It captures the very real transnational authority bestowed on this text inside and outside of the Olympic regime, as well as the tone of the legitimate demands that must be opposed to it in the name of the public(s).”\(^ {152}\)

Accepting a constitution-like approach means that sports federation can freely establish their provisions. However, there are limits to this autonomy.\(^ {153}\) The SGBs are limited when adopting rules and regulations by the higher-ranking SGBs provisions, particularly their statutes.\(^ {154}\) So, the human rights provisions contained in the constitutive documents should act as a limit to the actions of the SGBs. However, and as correctly pointed out by CAS, “a federation cannot opt out from an interpretation of its rules and regulations” considering principles “of human rights just by omitting any references in its rules and regulations to human rights.”\(^ {155}\)

CAS has treated SGB and their regulations similarly to a constitution. CAS for instance, has recognized FIFA as a “self-regulated organisation, being only slightly curtailed in its autonomy at


\(^{147}\) Bützler and Schoddert, at 53 and Bützler at 100.

\(^{148}\) Perez Muniz, at 20.

\(^{149}\) Bützler and Schoddert, at 53.

\(^{150}\) Gürcüoğlu, at 15.


\(^{152}\) Id. at 269.


\(^{155}\) Tatyana Andrianova v. All Russia Athletic Federation, CAS 2015/A/4304, 45 (Apr. 14, 2016).
international level by a few court decisions.” FIFA acts “in a manner analogous to that of a state legislator” treating its “own regulations much like laws, promulgating them as binding on national . . . associations, clubs, players.” Given these special powers and albeit being a private entity, FIFA “must respect general principles that also constrain legislators and governmental administrations.” This correct reasoning should lead CAS to subject SGBs to the same human rights standards as those binding public authorities.

Additionally, the regulatory status, functionally equivalent to state legislators and the special responsibilities that accompany them, should require that SGBs follow standards even if they “were conceived as applicable to the conduct of public authorities.” CAS has emphasized the obvious parallel between a public authority and a sports federation. SGB adopt their rules and reach their decisions by a process similar to those used by State authorities and those actions have an analogous effect on those concerned as State actions do. Freeburn challenged the idea of equating SGB to State regulatory entities precisely for the lack of accountability. In this sense, our approach proposes to use the analogy of States to held SGBs accountable for human rights violations.

Building upon the parallel between a State and an SGB, CAS determined that a domestic sporting tribunal action could be attributed to the pertinent SGB. CAS explained that the identical legal approach developed in public international law where States are internationally liable for judgments rendered by their independent courts. In the same light, CAS could be equated to a Swiss state court bound by international human rights law.

The forced arbitration character of CAS makes the traditional contractual sports model obsolete and leads to a more constitutional interpretation of the sports ecosystem particularly the role that CAS plays in it. Professional athletes must accept not only all the regulations of international federations but also submit their disputes for arbitration to CAS. For instance, Rule 61 of the Olympic Charter defines CAS’ jurisdiction, stating that any Olympic Games-related dispute “shall be submitted exclusively to the Court of Arbitration for Sport in accordance with the Code of Sports Related Arbitration.”

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157 Id. ¶ 240.
162 International Olympic Committee (IOC), Olympic Charter, Rule 61(2) (Aug. 8, 2021). More broadly, it also provides that any disputes regarding the IOC decisions or its application or interpretation of the Olympic Charter are to be submitted to the CAS for resolution. Id. Rule 61(1).
sport arbitration.” Today almost all sports federations and all national Olympic committees recognize CAS. The Federal Swiss Tribunal recognized that professional athletes need to accept the SGBs regulations and CAS final jurisdiction. In most situations, athletes lack enough power over their sport federations having to accept the SGB rules. Therefore, professional athletes wishing to participate in a competition organized by a SGB that has a mandatory arbitration clause in its regulations have the sole option of accepting such clause. Athletes either agree with the mandatory arbitration or renounce to practice their sport as a professional and watch the competitions on television or practice their sport in their garden. This is exactly one of the roles that a constitution plays in a national context. It determines who has the power to dictate and enforce the laws, what the rights are, and who and how disputes are adjudicated. ADD CITATION

CAS as a constitutional court

CAS acts and understands that part of its role is to function as a constitutional court. For instance, CAS has declared unlawful and invalid internal rules of sporting federations or required the adoption of certain procedures based on the Olympic Charter or the Statutes of the specific sporting federation.

CAS serves the same function as a constitutional court by checking how the SGBs exercise regulatory and executive powers. In many aspects, CAS resembles a constitutional court when interpreting and applying the constitutive documents of the different SGBs. CAS itself has asserted its role as exercising “judicial review,” by overruling the norms of sports federations. In that sense, CAS acts as a centralized review mechanism over sporting institutions. In several awards, CAS has claimed the primacy of its rulings over domestic

164 The U.S. professional leagues, Formula 1, and the English Football are the main SGBs that have not accepted CAS as the final arbitration mechanism.
165 Canas v. ATP Tour, Tribunal fédérale [TF] [Federal Tribunal] Mar. 22, 2006, 4P.172/2006 ¶ 4.3.2.2 (Switz.).
166 Id.
167 Id.
168 Id.
169 Id.
170 Leeper, Ruling 2.
171 SNOC Ruling 1.
CAS controls whether SGBs act within their competencies and follow established procedures and particularly respect the rights of different stakeholders.\textsuperscript{177} Lindholm considers that this is a vertical, constitutional-like form of review. The CAS also engages in horizontal constitutional review by settling disputes where SGBs disagree on the division of powers between them.\textsuperscript{179}

CAS, in recent years, has established that its jurisdiction cannot be imposed in violation of the athlete’s rights. CAS arbitration should provide the same level of protection of the athletes rights afforded by a state court. “[A]rbitration may be accepted, in the eyes of the European Convention on Human Rights, as a valid alternative to access to State courts, only if arbitration proceedings constitute a true equivalent of State court proceedings.”\textsuperscript{180}

In conclusion, I consider that the constitutive documents of the different SGBs could be equated to constitutions; the sports regime could be assimilated as a self-contained constitutional regime and CAS as a sport constitutional court.

**Human Rights in SGBs Constitutions**

Since 1996 the Olympic Charter has recognized that “the practice of sport is a human right”\textsuperscript{181} requiring all National Olympic Committees to ensure that no athlete “has been excluded for racial, religious, or political reasons or by reason of other forms of discrimination.”\textsuperscript{182} This provision is one of the Olympic values. CAS has clarified that the practice of sport as a human right does not mean the right to participate in the Olympic Games.\textsuperscript{183} In October 2018, the IOC adopted the Athletes’ Rights and Responsibilities Declaration (the Declaration).\textsuperscript{184} The Declaration defines a “common set of aspirational rights and responsibilities for athletes within the Olympic Movement. Athletes and their interests are integral to the Olympic Movement.”\textsuperscript{185}


\textsuperscript{178} Id.

\textsuperscript{179} Id.

\textsuperscript{180} Katusha Management SA v. Union Cycliste Internationale, CAS 2012/A/3031, ¶ 68 (May 2, 2013) (operative part of 15 February 2013).

\textsuperscript{181} Olympic Charter, supra XXX, Fundamental Principles of Olympism ¶ 4.

\textsuperscript{182} Id. at 44.4.

\textsuperscript{183} Arbitration CAS ad hoc Division (OG Tokyo) 20/005 Oksana Kalashnikova & Ekaterine Gorgodze v. International Tennis Federation (ITF), Georgian National Olympic Committee (GNOC) & Georgia Tennis Federation (GTF), award of 23 July 2021 at 7.5

\textsuperscript{184} International Olympic Committee, Athletes’ Rights and Responsibilities Declaration, 133d IOC Session (Oct. 9, 2018), https://www.gymnastics.sport/site/pdf/safeguarding/IOC_Athletes_rights_and_responsibilities_declaration.pdf.

\textsuperscript{185} Id.
The IOC includes in Article 1.4 of its Code of Ethics “respect for international conventions on protecting human rights insofar as they apply to the Olympic Games’ activities.” The contract of the IOC with the host city for the Olympic Games also includes as one of the Core Requirements the protection and respect of human rights. And finally, the IOC adopted in September 2022, its “Strategic Framework on Human Rights”.

The inclusion of human rights in the IOC Charter as one of the Fundamental Principles of Olympism is particularly important given that the Charter “is hierarchically the paramount body of rules governing the IOC’s activities.” International federations and national Olympic committees are bound by the Charter. International federations are bound by the Principles of Olympism as detailed in the Olympic Charter. International federations and national Olympic committees must comply with the Olympic Charter’s rules and fundamental principles. Referring specifically to Principle 4, a CAS ad hoc panel said that “[t]he principles of Olympism must axiomatically inform an interpretation of the substantive rules and by-laws of the Charter”.

CAS has acknowledged that FIFA’s recognition of human rights in its Statute creates the possibility that rights claims will play a greater role in disputes at the CAS. The arbitral tribunal “would have to assess the compliance of a particular FIFA decision or regulation with internationally recognized human rights.” In *Leeper*, CAS was required to decide on the applicability of the IOC Charter, including its reference to human rights. CAS ruled on whether a SGB (in that case, the IAAF) is subject to “The Fundamental Principles of Olympism” as set out in the Olympic Charter including the recognition of the practice of sport as a human right. CAS understood

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189 The Charter makes references to the Fundamental Principles of Olympics. See Olympic Charter, XXX, at 5.1, 14.4, 10.4, 18.3, 28.2.4.9 97.4, 13.7.

190 COC & Scott v IOC, TAS 2002/O/373 (December 18, 2003).


195 Id. at 267.

196 Id.
that in the particular case, the provisions of the IAAF were sufficient to decide the dispute. However, the Panel added that the IAAF, is bound by the IOC Charter, including the human rights principle by virtue of its participation in the Olympic Movement.

The inclusion of human rights references has another important effect as they are not limited to the regulation of mega-sporting events but all the operations and actions of the SGBs. So far, the human rights references have not fully been measured or properly understood. For instance, a comprehensive study on the national sports governance does not consider the inclusion of human rights policies or commitments as one of the elements to be assess.

The inclusion by FIFA and the IOC of human rights language in their constitutive documents served to spread by example as they are the two largest, most influential sporting organizations and administer of the two biggest mega-sporting events in the world. The IOC and FIFA are not alone in this process of constitutionalizing human rights. Organizations considered part of the Olympic movement include references to human rights in their constitutive or similar documents. 11 international sports federations (ISF), 19 recognized federations (RF), 16 recognized organizations (RO) and 13 National Olympic Committees (NOC) expressly mention human rights in their documents.

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200 Id. at 277.
201 Id.
204 National Sports Governance Observer 2. Benchmarking governance in national sports organisations Author Sandy Adam (ed.) (2021) at 11 (including 46 none of which specifically refer to human rights in general although some are extremely pertinent such as “gender equality” or “athlete’s rights”).
206 For the list of the institutions belonging to the Olympic movement, see https://olympics.com/ioc/olympic-movement

The adoption of human rights policies by the sponsors is quite important as many of the changes in the SGBs were the result of pressures or initiatives coming from the major commercial partners of the SGBs. Cho, Wan-Ching; Tan, Tien-Chin; Bairner, Alan (2022). Managing the compliance of national federations: an examination of the strategies of international Olympic sports federations. Loughborough University. Journal contribution. [https://hdl.handle.net/2134/20935414.v1]. and Recommendations for an IOC Human Rights Strategy Independent Expert Report by Prince Zeid Ra’ad Al Hussein and Rachel Davis at 19 (March 2020).
Out of those 58 SGBs with expressed references to human rights, 23 make those commitments in their Statues, Constitutions, Charters or By Laws. 4 SGBs have adopted specific human rights policies or frameworks. The Code of Conduct, Ethics or Integrity of 20 SGBs mention human rights. Finally, 23 SGBs include human rights provisions in diverse documents such as policies on gender equality, safe sports or good governance.
Every single document reviewed refers to “human rights” or “international recognized human rights” or similar expressions. None of these references to human rights are limited to the European Convention. I could not find any SGB document referring to the ECHR. The introduction of human rights commitments in the statutes, regulations and/or policies of the different international organizations should affect how CAS settles sport-related disputes. Indeed, Article 58 of the Sports Code requires that the Panel decide the dispute according to “the applicable regulations” of the SGB. This means that human rights should no longer just apply subsidiarily (if at all), but directly. As CAS said in 2009 if the Constitutional Rules and Regulations of an SGB include rights based on the ECHR or if they refer to the ECHR as applicable to its disciplinary proceedings then the Convention is applicable based on that SGB’s own Rules and Regulations.

The Code makes the relevant sports regulations the primary default rules applied in appeals. CAS and the TF have recognized the autonomy of SGB or their freedom to establish their own provisions. CAS endorses this autonomy imposing mainly governance limits. The SGBs are limited by their higher ranking provisions, in particular the association’s statutes, when adopting new rules and regulations. The sports regulations apply over domestic law unless that legislation is part of the public order. If there is a contradiction with domestic law, the provisions of the SGB are still applicable. In Semenya, the CAS noted that the SGB regulations could be unenforceable in or contrary to domestic law. It would be for the national estic courts to make such determinations rather than CAS. In sum, as long as the SGB rules do not contradict public policy in the limited understanding of the TF, follow the SGB’s statutes, the CAS will not further review their substance but will rely on the autonomy of the association.

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209 CAS 2009/A/1957 Fédération Française de Natation (FFN) v. Ligue Européenne de Natation (LEN), award of 5 July 2010, para. 20.
213 Id. ¶22.
215 CAS 2018/O/5794 Mokgadi Caster Semenya v. The International Association of Athletics Federation (IAAF) and CAS 2018/O/5798 Athletics South Africa v. The International Association of Athletics Federation (IAAF), ¶¶ 553, 469 and 555.
Autonomy has been used to avoid State intervention in sports human rights cases.\textsuperscript{217} In the first published CAS award referring to FIFA’s Human Rights Policy, the Panel avoided deciding on the merits of the allegation that FIFA’s decision to postpone dealing with the conflict between the Palestinian and Israeli Federations was a violation of such article.\textsuperscript{218}

The mere inclusion of human rights commitments in the SGBs founding documents is not going to be enough to change the sports culture of refusing to apply international human rights standards. For instance, Haas, a prominent sports law professor and one of the most appointed arbitrator to CAS has argued for a limited effect of those inclusions. Haas proclaims that those self-human rights commitments of SGBs should be construed in light of the specific nature of sports.\textsuperscript{219} Insisting with the idea that human rights are mainly applicable to States actors and arguing that SGB can not lead to the application of international human rights law to them.\textsuperscript{220} Finally, for Haas, the main purpose of those human rights commitments is to serve as a uniform guideline that exceptionally could have a binging nature.\textsuperscript{221}

Another aspect to consider is the lack of athletes’ proper knowledge of their rights. A survey determined that close to 80% of athletes were unaware of their rights\textsuperscript{222}. So, the inclusion of human rights commitments needs to be accompanied by a comprehensive strategy including education to athletes.

**Constitutionalizing sports**

A second constitutionalization process is taking place at the national level. At least 94 national constitutions include explicit references to sports in their texts. I denominate this approach *constitutionalizing sports*. The following chart provides a classification of the constitutional provisions related to sports.\textsuperscript{223}

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\textsuperscript{218} Palestine Football Ass’n v. Fédération Internationale de Football Ass’n, CAS 2017/A/5166 & 5405 ¶¶ 97-98 (Ct. Arb. Sport 2018).


\textsuperscript{220} Id. at 306.

\textsuperscript{221} Id. at 306-307.

\textsuperscript{222} Tuakli-Wosornu, Y. A., Goutos, D., Ramia, I., Galea, N. G., Mountjoy, M. L., Grimm, K., Wu, Y., & Bekker, S. (2022). 'Knowing we have these rights does not always mean we feel free to use them': Athletes' perceptions of their human rights in sport. *BMJ Open Sport and Exercise Medicine*, 8(3), [e001406]. https://doi.org/10.1136/bmjsem-2022-001406

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Those constitutional rules could be broadly grouped into three categories: a) sports as a right (autonomous right to the practice of sports or as part of other rights such as health, education, culture, leisure or the rights of children/youth and persons with disabilities); b) as one of the objectives of the social policy or State’s objectives and; c) sports as one of the competencies attributed to legislative and/or executive branches and to the national, state and/or local authorities.

The constitutional sports provisions are a global phenomenon as those regulations come from all over the world. In fact, out of the 94 Constitutions, 30 belong to Africa, 23 to Europe, 20 to Asia, 19 to the Americas and 2 to Oceania.
Among the constitutions that refer to sports as a right, 19 recognize it as an autonomous right to the practice of sports, 10 as part of the right to health, 9 as an aspect of children and/or youth rights, 9 consider sports as integrative part of cultural rights, 4 as connected to the right to education, 2 to the rights of persons with disabilities and finally 10 constitutions include sports in different rights categories.

The *constitutionalization of sports* offers important consequences. First, those constitutions assume a true commitment to the recognition of an active role of the State in the area of sports. In fact, the only three constitutions that refer to sports autonomy (Brazil, Guatemala and Morocco) still provide for an active State involvement in the sports field. In fact, constitutional courts and high courts have ruled on the basis of constitutional human rights arguments. The Colombian Constitutional Court has clearly recognized that football is not exempt from rights protection extending the reach of such rights to private relations among private actors such as players, teams and sports federations. 224 In *Comitis*, a South African court recognized the public function of the National Soccer League. 225 Additionally, given soccer’s large support, the fate of professional players constitutes a matter of public interest. In this context, the constitutional rights of professional players should be protected. 226 In *Zee Telefilms*, the Indian Supreme Court was very clear that the SGB (the cricket national board) does discharge some activities that similar to public duties or State functions. 227 In those cases, if there is a violation of a constitutional obligation or rights, the victim does not enjoy access to a constitutional remedy. 228 However, that

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226 *Id.* at 1264.
227 Zee Telefilms Ltd. v. Union of India, AIR 2005 SC 2677 (India).
228 *Id.*
does not mean that the SGB would not have to respond because they are not a State actor. Under Indian law there should always be a remedy for violation of a right.229

Secondly, the recognition of sports as a constitutional right means that the constitutional remedies of those rights could be exercised in the realm of sports.230 Constitutional courts in Colombia,231 Chile,232 and Peru233 have allowed the use of constitutional remedies in order to enforce constitutional rights against SGB, recognizing that constitutional protections are enforceable vis a vis private entities.

In particular, different courts have ruled on the compatibility of sports arbitration, particularly CAS, based on constitutional grounds. The Colombian Constitutional Court, in Tutela T-550/16 implicitly recognized that access to CAS could be considered an effective remedy given its role as the final instance to decide sports disputes.234 The Colombian Court admitted that access to CAS could present obstacles such as additional costs for international travel and lodging and the need to count with international experts.235 Thus, it ordered the Football Colombian Federation to cover those costs.236 The Peruvian Constitutional Court recognized that arbitration is the main form of solving sporting disputes and that the autonomy of SGB allows them to impose sanctions to its members as far as they respect due process guarantees and respect fundamental rights.237 It also allows SGB to use arbitration as the main tool to decide disputes, including giving jurisdiction to CAS.238 However, arbitration runs in parallel and does not displace the jurisdiction of regular courts to protect fundamental rights if needed or to intervene in matters, such as criminal cases, that cannot be dealt by arbitration and are not protected by freedom of association.239 In Germany, the Federal Constitutional Court found, on that CAS arbitration violated the right to a public hearing with similar arguments as those of the European Court in Mutu. In this case, the Federal Constitutional Court was noticeably clear in requiring that if there is forced arbitration, the constitutional requirements are fully applicable.240

229 Id.
231 See generally Corte Constitucional, [C.C.] [Constitutional Court], octubre 11, 2016, Sentencia T550/16, M. P: Aquiles Arrieta Gómez, Expediente T-5.489.438(Colom.).
232 See generally Corte Suprema de Justicia [C.S.J.] [Supreme Court], 3 noviembre 2021, Rol de la causa: 56.134-2021 (Chile).
233 See generally Constitutional Tribunal Constitucional [T.C.] [Constitutional Tribunal], 1 octubre 2007, Exp No. 035 74-2007-PA/Tcat 54 (Peru).
234 Corte Constitucional [C.C.], octubre 11, 2016, T 550/16, M.P.: A. Gómez, ¶ 6.8 (Colom.).
235 Id. ¶ 7.2.
236 Id.
238 Id. At 31.
239 Id. At 41, 61, 63.
The Ecuadorian Constitutional Court recognized that the autonomy of sports organizations allow them to establish arbitration mechanisms to enforce their international regulations. That autonomy does not violate the Constitution. To the contrary, other tribunals have rejected the idea that arbitration and the impossibility of challenging SGB in domestic courts are compatible with constitutional protections. For instance, the Chilean Supreme Court found it unconstitutional to prohibit football teams from challenging decisions of the Chilean Federation in ordinary courts and to impose sanctions on the team if they used such courts.

The introduction of constitutional references to sports provides an important element for CAS as R58 of the Sports Code establishes that in the absence of a choice of law by the parties, the Panel should decide “according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled”. Additionally, CAS has recognized that even when national rules do not directly apply, CAS still finds them useful to take inspiration from such rules. In fact, the constitutional review by domestic courts of CAS has been called “constitutionalizing” CAS.

Exporting European human rights law

In a number of sports arbitrations, CAS has made increased references to the rights guaranteed by the European Convention on Human Rights (the European Convention) and to the European Court. Additionally, by reviewing the decisions of CAS, the Swiss Federal Tribunal (the SFT) applies indirectly, under limited and strict circumstances, the European Convention to determine if the CAS awards are compatible with public policy and thus valid decisions. I call this phenomenon exporting European human rights law to the realm of sports. The process of borrowing from the European human rights system is not unique to CAS. In fact, several judicial and human rights bodies have relied or “imported” the case-law and analytical methodology of the European Court.

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244 KSF, Saud Abdulrahman Ahmad Habeeb, Pouya Mohammadreza Norouziyan & Elham Hossein Harijani v. IOC & ISSF (2016) CAS 2015/A/4289, para. 133.
A legal fiction\textsuperscript{249} (the seat of CAS in Lausanne, Switzerland\textsuperscript{250}) means that CAS and its awards come under the jurisdiction of Swiss law and made European human rights law relevant even if none of the relevant facts in a particular case took place in Europe. The seat of CAS also opens the possibility of accessing the European Court to question the rulings of the Swiss Tribunal and indirectly the procedure and reasoning of CAS. CAS arbitrators quite often apply European Union competition rules\textsuperscript{251} in cases involving human rights issues\textsuperscript{252} despite that Switzerland is not a European Union State and most of the SGB are Swiss corporations.

Most CAS decisions consider that “[w]hether and to what extent sports associations are bound by the ECHR in the context of their disciplinary jurisdiction is not clear.”\textsuperscript{253} Generally, CAS arbitrators raise “serious doubts as to the applicability of the ECHR in said cases in view of Art. 1 ECHR. According to this provision only state authority, not private third parties, are bound to observe the rights under the Convention.”\textsuperscript{254} CAS has explained that rights are directed against the State and involved a vertical relationship between the State and the individual and not intended to apply directly in private relationships.\textsuperscript{255}

For CAS, the Convention protects individual rights against violations by the state. The ECHR is not applicable to legal relationships between private entities such as associations and its members.”\textsuperscript{256} SGBs are not an organ of the State, notwithstanding the fundamental importance of its role in the organization of sports.\textsuperscript{257} Recently, CAS reaffirmed its reasoning asserting that “the ECHR, and Article 8 ECHR in particular, in principle cannot be invoked by private parties against another private party, such as FIFA, in purely horizontal situations”.\textsuperscript{258}

CAS asserted that human rights norms should be excluded when not explicitly chosen by the parties. According to the Code and its case law, and to the extent that there are gaps in SGB

\textsuperscript{249} See Gabrielle Kaufmann-Kohler, \textit{Globalization of Arbitral Procedure}, 36 \textsc{Vanderbilt Law Review} 1313, ¶ 1318 (describing the seat of arbitration as a “legal fiction”).

\textsuperscript{250} Code, S1

\textsuperscript{251} See Agreement between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws and Margareta Baddeley, \textit{The application of antitrust legislation by Swiss Courts in cases involving international sports governing bodies in EU Antitrust Law and Sport Governance}, pp. 71-84. Routledge, 2022.

\textsuperscript{252} See for instance, TAS 2016/A/4490 RFC Seraing c. FIFA (taking into consideration of European Union law as applicable law and the legality of FIFA’s regulations on status and transfers of players with regard to freedom of movement and competition law; CAS 2012/A/2852 SCS Fotbal Club CFR 1907 Cluj SA & Manuel Ferreira de Sousa Ricardo & Mario Jorge Qintas Felgueiras v. FRF, ¶ 77 (on the principle of non-discrimination and freedom of movement) and CAS 2016/A/4492 Galatasaray v. UEFA, ¶ 42 – 45 (on the mandatory nature of European Competition Law and EU fundamental rights).


\textsuperscript{254} Id.

\textsuperscript{255} Bordeaux v. Fédération Internationale de Football Ass’n, TAS 2012/A/2862, ¶¶ 105-07 (Jan. 11, 2013) (translation by the author, internal references omitted); see also Diakite v. Fédération Internationale de Football Ass’n, TAS 2011/A/2433, ¶ 23 (Mar. 8, 2012).

\textsuperscript{256} Eder v. Ski Austria, CAS 2006/A/1102, TAS 2006/A/1146, ¶ 45 (2006).

\textsuperscript{257} Bordeaux, TAS 2012/A/2862, ¶¶ 105-07; see also Diakite, TAS 2011/A/2433, ¶ 23.

\textsuperscript{258} CAS 2023/O/9370 Professional Football Agents Association (PROFAA) v. FIFA.
statutes, CAS could use Swiss law that reflects European human rights standards to fill the regulatory gaps. In the Semenya case the CAS considered unnecessary to examine “detailed principles” of “international human rights law” including the International Convention on the Elimination of all forms of Discrimination against Women. CAS determined the irrelevancy of those human rights instruments even if they are part of the domestic legislation of the country where the SGB’s headquarters are located or the legal systems of the members of the SGB or where the SGB conducts competitions. This lack of proper human rights analysis was the main reason for the European Court to rule against Switzerland in this case.

CAS Eurocentric biasing of sports law.

So far, and despite its global jurisdiction, CAS failed to use the United Nations or the African or Inter-American human rights standards. This is a process that I denominate CAS Eurocentric biasing of sports law. Additionally, by reviewing the decisions of CAS, the SFT applies indirectly, under limited and strict circumstances, the European Convention (but not the United Nations treaties ratified by Switzerland) to determine if the CAS awards are compatible with public policy and thus valid decisions. Similarly, CAS arbitrators quite often apply European Union competition rules in cases involving human rights issues, despite that Switzerland is not a European Union State and most of the SGB are Swiss corporations.

In general, CAS does not pay attention to the pertinent applicable human rights standards. For instance, in the Al Hilal case, the dispute between the Sudanese professional football club and the Confédération Africaine de Football with its headquarters in Egypt, the CAS referred to a European Court case that is inapplicable in the domicile country of the team and the federation. Similarly, in Kuže, a controversy between the state of a coach and a Chinese football team, CAS referred to a commentary of the European Convention but not the UN documents applicable in China. 261


263 Id. It is important to note that we include 30 citations of the European Convention of human rights, 66 mentions of the European Convention on Human Rights and 12 references to the European Convention for the Protection of Fundamental Rights.

2 to the Convention on the Rights of Persons with Disabilities\textsuperscript{265}, 2 to the Convention on the Rights of the Child\textsuperscript{266}, one to the International Convention on the Elimination of All Forms of Racial Discrimination\textsuperscript{267} and one to the Convention on the Elimination of All Forms of Discrimination against Women\textsuperscript{268}. There are no references to any of the United Nations treaty bodies, such as the Human Rights Committee. In fact, in an almost insulting manner, in the \textit{Caster Semenya} case, the CAS panel said that the opinion of the UN human rights experts were not “particularly useful.”\textsuperscript{269} This Eurocentric approach contrasts with the fact that Switzerland has ratified almost all the core United Nations human rights treaties with the exception of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.\textsuperscript{270} There are also no CAS awards mentioning the Inter-American and African regional human rights systems or treaties.

“Sports and Human Rights. A CAS perspective,” a document prepared by the CAS Secretariat also reflects this Eurocentric approach.\textsuperscript{271} The first section of the document titled “Human rights in sport regulations” refers to the IOC, FIFA, WADAC, World Athletics, and to two United Nations documents: the United Nations Guiding Principles on Business and Human Rights and the Sports for Climate Action. The only regional sporting organization mentioned is the European UEFA despite the fact that all other regional football federations include express references to human rights in their Statutes or Code of Conduct.\textsuperscript{272} The second section of the CAS document titled "Selected CAS cases related to human rights," includes a segment on “Procedural rights and European Convention on Human Rights (ECHR)” with a subsection on “Indirect application of Article 6(1) ECHR.” The next section is titled “Sport and the European Convention on Human Rights (ECHR).” The document does not mention any other United Nations or regional human rights instrument. Similarly, the section of the document citing the eight seminars related to

\begin{itemize}
\item \textsuperscript{265} See e.g., Leeper v. Int’l Ass’n of Athletics Fed’ns, CAS 2020/A/6807 (Ct. Arb. Sport Oct. 23, 2020).
\item \textsuperscript{266} See e.g., Stichting Anti-Doping Autoriteit Nederland v. W., CAS 2010/A/2311 & 2312, ¶ 66 (Aug. 22, 2011).
\item \textsuperscript{267} Feyenoord Rotterdam N.V v. UEFA (2016) CAS 2015/A/4256, para. 48.
\item \textsuperscript{271} Sport and Human Rights. Overview from a CAS perspective (as at 20 June 2022), available at https://www.tascas.org/fileadmin/user_upload/2022.06.20_Human_Rights_in_sport__20_June_2022_.pdf
\end{itemize}
human rights conducted by CAS include three specific seminars on the European Convention with no other focusing on any other human rights instrument.

Probably no data shows the Eurocentric bias more than the list of CAS arbitrators. According to CAS, there are currently 467 arbitrators. 25 of those arbitrators are African nationals, 28 from Oceania, 68 from Asia, 90 from the Americas and 236 from Europe. In other words, 52% of the CAS arbitrators are Europeans. This imbalance is even more pronounced if disaggregating the European arbitrators by nationality. 70% of the European arbitrators come from 6 countries (UK with 39, Switzerland 36, France 29, Italy 24, Spain 22 and Germany 16). Similar data revealed that the imbalance is present in the appointments to a specific panel. Of the 2,194 arbitrator appointments for specific panels, more than 77 percent went to European based arbitrators. In the context of those arbitrators with “specific expertise in human rights,” 55% are Europeans. The CAS repeats many of the problems of other international adjudicatory bodies by relying on European sources rather than on universal ones.

Conclusion

CAS does not apply a human rights analysis to the cases even if it refers to similar principles. As the European Court has established in the Semenya case, even if CAS conducted a detailed examination of the allegation of discrimination and applied a criterion quite similar to the Court's considerations, CAS failed to apply the relevant provisions of the Convention or the Court's case-law.

A more proper protection of human rights in the sports ecosystem calls not only for the consistent application of human rights law by CAS but also for the use and application of United Nations and/or regional human rights institutions and standards. Similarly, CAS should pay proper attention to the constitutionalization process of sports at the national level and at the SGBs. A global approach calls for the recognition and protection of a common universal core of

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273 Of course, this Eurocentric bias reflects the same problem present in the SGBs in general. According to the Sports Political Power Index, 5 of the top 10 countries with most powerful representations in SGBs are Europeans. If we add the US, Canada and Australia, the only non-Western or European country is China. The sports political power index 2019-2021 at 21 (2022).

274 Even Goh who considers that CAS substantially follows the standards and practices of other international arbitral tribunals, criticizes the egregious regional imbalance of CAS’ list of arbitrators. Goh, Chui Ling, and Jack Anderson, The Credibility of the Court of Arbitration for Sport, HARVARD JOURNAL OF SPORTS & ENTERTAINMENT LAW 13, no. 2 (2022).


276 There is a discrepancy in the CAS list. While it cites a total of 267 arbitrators, the total sum of all the regional groups results in 447 arbitrators.

277 Supra note xxx.


279 See supra notes xxx and xxx.


281 Troisième Section, Affaire Semenya c. Suisse, (Requête no 10934/21), 11 juillet 2023, at 174 and 200.
basic human rights standards. A comprehensive approach should understand the multilevel protection of human rights taking place at the national level as well at different transnational systems. In this integration, CAS should apply what the Inter-American Court calls “the corpus juris of International Human Rights Law” a “series of international instruments with different legal content and effects (treaties, conventions, decisions, and declarations).”

CAS needs to move beyond the sole and inconsistent application of the European Convention that is only applicable for a limited number of European States. The European Court has asserted that the European Convention is a multi-lateral treaty operating in a regional context, notably in the Europe. The Convention was not designed to be applied throughout the world, even regarding the conduct of European States. When CAS uses human rights standards based on the SGBs norms, it should apply all internationally recognized rights and not just the European Convention. Additionally, international human rights law tends to integrate the regional and universal systems and shows a need to complement regional with universal human rights mechanisms.

CAS Eurocentric approach of using a regional human rights treaty applicable only in Europe limits CAS’ aspiration to become a global sports court. The OHCHR explained that the sport ecosystem is a global one that extends far beyond Europe. The Eurocentric approach by CAS creates “the risk of inconsistencies among jurisdictions in terms of protection and remediation for human rights violations in sport.” A more universal approach will increase equity and legitimacy as well as the quality of CAS reasoning. For instance, the Inter-American human

285 Bankovic and Others v. Certain NATO Member States, Grand Chamber Decision as to the Admissibility of Application no. 52207/99, 12 December 2001 ¶ 78.
286 Id. ¶ 41 and 43.
288 OHCHR, Race and Gender, supra note 35, ¶ 49.
The Eurocentric approach taken by CAS is more problematic as many interpret that CAS is the creator of a sort of “lex sportiva,” the foundational legal principles regulating sports. As far as CAS continues with this Eurocentric bias, the whole “lex sportiva” will be impregnated by the same bias. This is another twist in the Eurocentric character of international law and the legal favoritism for the Global North.

The European Court could accelerate the globalization process by consistently applying the Riza “tenuous link” standard to determine the joint, concurrent, or exclusive responsibility of other European States (in Europe rather than Switzerland) or non-European States for the actions or omissions of SGB and CAS. The often-disputed concept of legal space (espace juridique) of the European Convention should lead the Court to encourage CAS to apply other human rights standards when there is only a “tenuous link” between the European space and the sport dispute. And finally, the Court should continue its approach in Semenya by looking closely to the iuris corpus developed by the United Nations and other regional bodies in areas intersecting sports and human rights.

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293 Id.
295 Riza involves a dispute between a professional football player and his team decided by Turkish Football Federation and appealed to CAS. The Court was doubtful that Riza could claim a right of access to a Swiss court given that the dispute had only a very “tenuous link” with Switzerland. The Turkish proceedings had no connection with the Swiss courts and no international element. Accordingly, there had been no right of appeal to the CAS or the Swiss TF .
296 In Bankovic the European Court describe the Convention as a multi-lateral treaty operating in an essentially regional context in the “legal space (espace juridique)” of the European states. The Convention was not designed to be applied throughout the world, even in respect of the conduct of European States. Bankovic and Others v. Certain NATO Member States, Grand Chamber Decision as to the Admissibility of Application no. 52207/99, 12 December 2001 at 78. The Bankovic decision has been vastly criticized for creating a distinction “between what Contracting parties can do ‘at home’ and what they can do ‘abroad.” Matthew Happold, Bankovic v. Belgium and the Territorial Scope of the European Convention on Human Rights, 3 HUM. Rts. L. REV. 77 (2003) ¶ 88.