

“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?

Introduction

Over time, the European Court of Human Rights (ECtHR) has shown increasing interference into sports’ governance, with human rights regulations now commonplace in the work of sports governing bodies (SGBs), such as FIFA¹. This has led to fierce debate on whether this is a positive step, with critics referring to the importance of autonomy of the regulatory bodies and that the ECtHR does not have jurisdiction with private corporations, as is the case for many SGBs². Alternatively, proponents have advocated a need for interference, highlighting failures of current procedures, and benefits of ECtHR interference, such as *Fédération Nationale des Syndicats Sportifs (FNASS) and others v France*³.

I believe that ECtHR interference in competition rules and sports regulations is good for sports’ governance. In arguing this, I will present the current failures of sports’ governance and how interference has helped draw attention to these flaws, as well as offering solutions. I will also detail how interference has set standards of sports’ governance for SGBs, before outlining some of the criticisms and then reaching a conclusion that the ECtHR has been

¹ FIFA Statutes 2022, s 56(1)

² Antoine Duval, *Lost in translation? The European Convention on Human Rights at the Court of Arbitration for Sport* [2022] *The International Sports Law Journal* 132, 133

³ *Fédération Nationale des Syndicats Sportifs (FNASS) and others v France* App no 48151/11 and 77769/13 (ECtHR, 18 April 2018)

good for sports governance through unmasking deficiencies in processes in the sports industry.

Recognising the issue

The European Convention on Human Rights⁴ was a landmark legal intervention, making the terms of the Universal Declaration of Human Rights binding. Many sports tribunals have faced criticism over an inherently poor arbitration procedure, including the Court of Arbitration for Sport (CAS), established in 1984 to settle sports-related disputes, which has been accused of impartiality and an unfair decision-making system⁵. One argument supporting the ECtHR is that it has exposed the structural issues of such organisations.

The CAS operates under the administrative authority of the International Council of Arbitration for Sport (ICAS), who also appoint arbitrators⁶. ICAS has been criticised for providing an unfair advantage to SGBs due to the structure of its membership. Of the 22 members who make up the ICAS membership, only 4 are obligated to be independent from global SGBs, with the same figure representing the interests of players. However, it is the members who have been appointed to represent the respective SGB interests who select the members representing players and those independent from global SGBs.⁷ This includes the International Olympic Committee, the International Sports Federation, and the Association of National Olympic Committees⁸. Thus, in this setting, players often find themselves at a disadvantage due to the unbalanced recognition of players rights. In a

⁴ European Convention on Human Rights 1950

⁵ *Mutu & Pechstein v Switzerland* App no 40575/10 and 67474 (ECtHR, 2 October 2018)

⁶ ICAS Code of Sports-related Arbitration 2023, s 2, s 3

⁷ *Ibid.*, s 4(d)

⁸ *Ibid.*, s 4(a), (b), (c)

situation of bias, which places appellants at a disadvantage, this seemingly violates Article 6 of the Convention – the Right to a Fair Trial.

The case of *Mutu & Pechstein v Switzerland*⁹ is an example where the impartiality of the CAS arbitration procedure was questioned. This involved two claimants challenging judgements made by the CAS. One, a professional footballer challenging drug claims after traces of cocaine was found in his blood sample; the other, a skating champion banned for two-years for anti-doping reasonings. In the case of the second appellant, Claudia Pechstein, who was refused a public hearing to challenge her ban, the ECtHR viewed that Article 6(1) was violated. This was on the basis that the absence of a public hearing affected the professional reputation of Pechstein. In both claims the impartiality and independence of the CAS was questioned. As such, this exemplifies procedural issues which may exist within sports governance, and violations of Convention rights, and how interference by the ECtHR can draw attention to these flaws and create a just and fair system of sports governance.

Examples are evident in other sports disciplinary proceedings. For instance, in the case of the Football Association, *FA v David Manasseh (2018)*¹⁰, which centred on a football agent who was facing a 3 month ban for illegally entering into a contract with an underage player. This revealed that the FA were using a redacted form of a decision from another case, which was not made available to Manasseh's party. Also, one of Manasseh's counsel, De Marco KC, detailed that similar issues have arisen in many CAS cases where appellants do not

⁹ *Mutu & Pechstein* (n 4)

¹⁰ *The Football Association v David Manasseh* (Regulatory Commission of the Football Association, 28 September 2018)

receive decisions available to the opposing counsel¹¹. As such, the ECtHR has helped draw attention to procedural issues in sports disciplinary proceedings, as well as criticisms of impartiality and unfairness. It provides a legal avenue to counteract and challenge these weaknesses.

Setting Standards

The ECtHR has also helped to set reference standards and the structure of disciplinary proceedings. The value of this is shown in the case of *Hartlepool United FC, Green, Chandler & Buncall v The FA (2018)*¹² in which the appellants were banned for 13 months over agreements to cover agents' fees, despite earlier cases being given only 6 months suspension¹³. This led to claims that the FA were "taking a firmer view of the penalties."¹⁴ This helps illustrate how in cases where the ECtHR does not interfere, inconsistency can exist when there are no clear guidelines on sanctions. Interference can have a positive effect in alleviating such issues.

This is also illustrated by *Fédération Nationale des Syndicats Sportifs (FNASS) and others v France*¹⁵. This followed a French government order surrounding anti-doping checks. These could take place at any time with the requirement for a "target group" of athletes to provide their daily schedule, as well as take part in unannounced checks. Jeanne Longo

¹¹ Nick De Marco KC, 'The Right to a Fair Hearing in Sports' cases' (2018) Sports Law Bulletin <<https://www.sportslawbulletin.org/right-fair-hearing-sports-cases/>> accessed 20 February 2024

¹² *Hartlepool United FC, Green, Chandler & Buncall v The Football Association* (Regulatory Commission of the Football Association, 6 September 2018)

¹³ Nick De Marco (n 10)

¹⁴ *Hartlepool United* (n 11) [43]

¹⁵ *Fédération Nationale des Syndicats Sportifs (FNASS) and others v France* App no 48151/11 and 77769/13 (ECtHR, 18 January 2018)

complained that she was a member of this target group for an unlimited period of time and that this disrupted her personal and private life. As such, the ECtHR viewed that this breached Article 8 – the right to respect private and family life¹⁶. It also initiated clear standards for change, for instance, limiting the duration of the programme to a one year maximum, and unannounced checks ceasing¹⁷. This example illustrates that the ECtHR has provided clarity for SGBs, set certain standards for sporting disputes, and helped create a just and fair system of sports governance.

Further, there is evidence that introduction of the ECtHR recommendations has helped to shape proceedings positively. For example, in the case of using testimony of anonymous witnesses in the CAS, providing procedural safeguards are followed¹⁸.

These case examples illustrate that the ECtHR has helped address violations of the legal process, and promoted standards of conduct that enable clarity, inclusivity, and consistency of proceedings.

Criticism

Despite some potential benefits, there is also criticism of the ECtHR's interference in sports governance processes.

As many SGBs, including the CAS, are not required to follow ECtHR guidance, this suggests that the ECtHR may have limited impact in shaping the current system and future of sports

¹⁶ *Ibid.*, 159

¹⁷ *Ibid.*, 185-187

¹⁸ Duval (n 2) 145-146

governance. In principle the ECHR only targets public decisions and not those made by private parties. Many SGBs are private associations, while the CAS often deals with private parties in relevant proceedings¹⁹. Based on this, several cases have denied ECHR applicability. For instance, in water polo, *Fédération Française de Natation (FFN) v. Ligue Européenne de Natation (LEN)* stated that “procedural fundamental rights protect citizens against violations of such rights by the State and its organs and are therefore only applicable to a jurisdiction established by a State and not to legal relationships between private entities such as associations and their members.”²⁰ Thus, this shows how in cases concerning private entities, they have precedent supporting their ability to refrain from applying ECHR measures. In this way, we can assert the interference of the ECtHR has limited impact.

Given that monopoly control is exercised by most SGBs²¹, this implies that there should be some degree of public authority associated with SGBs due to the sheer influence they hold in sports governance and regulation. As SGBs have sought to rely on internal processes, without ECtHR interference, this means that any successes relating to sports governance may have been led by existing processes, rather than the ECtHR.

Furthermore, there is an argument that the ECtHR may not be good for sports governance given instances when standards it has set have had a negative impact. Bodies such as the CAS have regularly used ECtHR precedent to support their organisation’s appeal system. For example, the CAS drew on the ECtHR to set a 10-day limit for FIFA’s dispute resolution

¹⁹ *Ibid.*, 133

²⁰ *Fédération Française de Natation (FFN) v. Ligue Européenne de Natation (LEN)* [2010] CAS 2009/A/1957 [15]

²¹ Duval (n 2) 134

bodies to lodge an appeal to them, despite challenges that this was too short²².

Furthermore, in shooting, the case of *USA shooting & Q. / Union Internationale de Tir* stated that “if the hearing in a given case was insufficient in the first instance (...) the fact is that, as long as there is a possibility of full appeal to the Court of Arbitration for Sport, the deficiency may be cured”²³. This follows on the back of the ECtHR case of *Bryan v the United Kingdom*²⁴ involving an enforcement served by the inspector for the demolition of a brick building which supposedly violated Article 6 rights as the inspector was not impartial. The ECtHR in this judgement detailed that no violation of Article 6 had been found since there was oversight by a body with full jurisdictions to guarantee Article 6²⁵. As such, with the ability to use the support of ECtHR precedent to reinforce their own internal proceedings, it will continue to undermine the integrity of the system of sports governance. Hence, it has been suggested that the ECtHR has in fact whitewashed the procedural failures which exist within the CAS²⁶, impacting on the creation of a just and fair system of sports governance, with the time and costs of sports procedures already limiting justice for many athletes.

Impact of interference

However, despite this important criticism, another reason why I support ECtHR interference is that it has been instrumental in promoting a greater awareness over human rights by SGBs, including FIFA and the Olympic Committee²⁷.

²² *Ibid.*, 137

²³ *USA shooting & Q. / Union Internationale de Tir (UIT)* [1995] CAS 94/129 [59]

²⁴ *Bryan v the United Kingdom* App no 19178/91 (ECtHR, 22 November 1995)

²⁵ *Ibid.*, [40]

²⁶ Duval (no 2) 139

²⁷ Court of Arbitration for Sport, ‘Sport and Human Rights: Overview from a CAS perspective’ (28 November 2023) <https://www.tas-cas.org/fileadmin/user_upload/CAS_Human_Rights_in_Sport_November_2023_.pdf> accessed 28 February 2024

Major SGBs, such as UEFA, have clarified that for the EURO 2024 bidders must meet stipulated requirements around human rights and fundamental freedoms²⁸. Similarly, following cases such as Pechstein, the Olympic Charter Fundamental Principles of Olympism was brought into force in August 2021²⁹. Principle 4 of the Charter details that the practice of sport is a human right, without discrimination of any kind. Similarly, Principle 6 reinforces that such rights and freedoms are to be enjoyed, free from any discrimination³⁰. As such, it shows that ECtHR rulings have had a positive influence, with many bodies adopting recommendations, even if this may not always be consistent across SGBs. Furthermore, figures suggest improvements in gender disparity for many public bodies, with interference by the ECtHR drawing attention to Article 14 of the Convention – namely, prohibition of discrimination. For instance, in 2019 women made up 40% of Sport England board members and across UK sport-funded bodies, which was greater than the required benchmark of 30%³¹. Similarly, 3% of members are identified as LGBTQ+, compared to the national average of 2%³². Accordingly, the ECtHR has helped reduce social inequality, providing opportunities to formerly marginalised groups. In this way, interference by the ECtHR has been a positive step.

Although interference by the ECtHR may not have influenced change directly, it has helped set standards for sports governance and created a fairer sports system. Furthermore, the ECtHR continues to handle cases of discrimination. For instance, *Negovanović and Others v*

²⁸ The 2024 EURO bidding requirements and staging agreement 2017, s 3(3)

²⁹ Court of Arbitration for Sport (n 25)

³⁰ The International Olympic Committee, 'Olympic Charter' (17 July 2020) 11-12

³¹ Sport England, 'Executive Summary: Diversity in Sport Governance Report (Inclusive Board Ltd, 2018) <[file:///Users/oliverpedlingham/Downloads/Executive%20Summary%20-%20Diversity%20in%20Sport%20Governance%20Report%20FINAL%20\(1\).pdf](file:///Users/oliverpedlingham/Downloads/Executive%20Summary%20-%20Diversity%20in%20Sport%20Governance%20Report%20FINAL%20(1).pdf)> accessed 28 February 2024)

³² *Ibid.*,

*Serbia*³³, which centred on the discrimination of blind chess players who were denied certain financial benefits and awards received by non-blind players, the ECtHR found that there was a violation of Article 14, showing that there are obvious violations which occur within sport, with interference prompting subsequent change. Similarly, in the recent case of *Semenya v Switzerland*³⁴, concerning a runner who refused to undergo hormone treatment to lower her natural testosterone levels to compete in the female events, the ECtHR judged that Article 14 had been violated with the discrimination surrounding the inability to compete due to increased testosterone resulting from differences in sex development. As a result, of such interference and the ECtHR drawing attention to these seemingly frequent instances of violations has led to measures also being taken by SGBs, such as UEFA, the IOC, the WADC, and FIFA³⁵. This includes establishing a Human Rights Advisory Board and publishing FIFA's Human Rights progress, with all reflecting the work of the ECtHR, suggesting that SGBs are taking a more progressive stance to sports governance following guidance set by the ECtHR. This shift in approach has created a more inclusive and fairer system.

Conclusion

I believe, on balance, that interference by the ECtHR in relation to competition rules and sports regulations has been good for sports governance. Although, the ECtHR guidance has not always been followed and there is potential risk to autonomy of SGBs, the ECtHR has helped create awareness and driven change of inherent structural problems that exist in

³³ *Negovanović and Others v Serbia* App no 29907/16, 30022/16, 30322/16 et al (ECtHR, 25 January 2022)

³⁴ *Caster Semenya v Switzerland* App no 10934/21 (ECtHR, 11 July 2023)

³⁵ Court of Arbitration for Sport (n 25)

sports governance. The effect has been to create a more inclusive and just system of sports governance and ultimately to protect the human rights of our sporting elite.

Word Count (excluding title): 2499