LEX SPORTIVA: FROM LEGAL EFFICACY TO TRANSCONSTITUTIONAL PROBLEMS

// *LEX SPORTIVA*: DA EFICÁCIA JURÍDICA AOS PROBLEMAS TRANSCONSTITUCIONAIS

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>> ABSTRACT // RESUMO

This paper aims to analyze the *lex sportiva* considering the legal efficacy of its decisions. For this, an analysis of the structures of l*ex sportiva* will be carried out, considering the possibility of compliance of its decisions by associated actors. This will be possible under the existing ruling of which exists from the international competitions. As a transnational order, when confronted with other legal orders (local, national, international and supranational), the *lex sportiva* decisions will succeed. This implies some problems of *transconstitutional* order that will demand opening for dialogue. Therefore, problems as access to Justice, principle of equality, freedom and human rights will earn a new meaning from the collisions between orders. // Este artigo visa analisar a lex sportiva sob a ótica da eficácia jurídica das suas decisões. Para isso, será feita uma análise de como é a estrutura da *lex sportiva*, tendo em vista a possibilidade de cumprimento das decisões por parte de seus atores associados. Isso será possível diante do comando que existe a partir das competições internacionais e, mais do que nunca, porque há uma ordem jurídica que os envolve. Enquanto ordem transnacional, quando confrontada com outras ordens jurídicas (local, nacional, internacional e supranacional), ela logrará êxito na eficácia das decisões. Isso implicará alguns problemas de ordem transconstitucional que demandarão uma abertura para o diálogo. Assim, problemas como acessibilidade à Justiça, princípio da igualdade, liberdade, direitos humanos merecerão uma nova significação a partir de colisões entre ordens.

>> KEYWORDS // PALAVRAS-CHAVE

Lex sportive; legal efficacy; collisions between orders; *transconstitutionalism*; fundamental rights. // *Lex sportiva*; eficácia jurídica; colisões entre ordens; transconstitucionalismo; direitos fundamentais.

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INTRODUCTION

The Court of Arbitration for Sport (CAS) has become, in face of a complex network of relationships, the center of sports law. However, it is not purely restricted to sports matters. The growth of complexity in judgments regarding sports is the result of a greater complexity of themes discussed at the CAS. One example worth of mention are the cases of doping involving athletes, regardless of age and sex. These athletes may be prohibited by a non-state agency to exercise their paid activity if it is identified consistent use of illegal substances. This is an example of issue that will embrace several areas of legal knowledge. Considering that, its pivotal to state that the phenomenon of transnational sports law - *lex sportiva* - deserves deeper consideration by the doctrines of the General Theory of Law and International Law, as well as Constitutional Law.

The article seeks to understand how *lex sportiva*, as an autonomous order, works to ensure the effectiveness of its decisions. Constitutional problems, when collide with other legal systems, emancipate from the State to gain new applications in courts outside the state orbit. The power of linkage of *lex sportiva* - here understand as law without constitution - over its actors brings a new vision regarding the State legal sovereignty, particularly when its decision overrides any state organ.

Establishing the limits of *lex sportiva* is as important as identifying constitutional problems. Often it will be noticeable that the justification of transnational order to plead jurisdiction to rule effectively has a constitutional character, particularly when it is faced with state orders. However, *lex sportiva* is not isolated in the legal system in relation to other legal orders. When more than one legal order is engaged in constitutional issues, it is pivotal to verify the situations that require establishing the limits and possibilities for dialogue. The legal system requires greater consistency and integration between the actors that are constitutionally involved, even if the requirement is void of force.

On the first topic, it will be studied the structure of sports legal system and the efficacy derived from its decisions. On the second topic, the concept of "transconstitutionalism" will be delimited in order to contextualize the possible collisions with other orders. From the third topic and on, it will be discussed the limits of sports legal order and its ways of learning from other jurisdictions.

1. REASONS TO OBSERVE, COMPLY WITH OR EXECUTE SPORTS LEGAL SYSTEM

There is something that unites and something that separates football matches played in land fields from professional football. The prevalence of athletic performance over the field rules features a common narrative related to what the sport is. At the same time, the official recognition of performance results demands organization.

An athlete who seeks to participate in official competitions needs recognition not only for its records in competitions, but also, and above all, the recognition for its quality as an athlete. To do so, they are subject to sports regulations, as well as they bind to the National Sports Federations (NFs) to compete nationally and bind to International Federations (IFs) to participate in international competitions. As a ripple effect, the affiliation to the IF and the NF results in the imposition of institutionalized rules to athletes[1]. In order to be recognized as an athlete, the person is subject to an associative relation that links them, like a contract of adhesion, to institutions that they did not seek directly. It is noteworthy that the athlete does not have the prerogative to not join a NF, since the membership is an imposition by the IFs that are responsible for the release of the licenses to participate in international competitions. On the one hand, the license gives the right to compete; on the second hand, it imposes the duty to submit to federal power[2].

On preliminary analysis, sport, athlete and sports bodies desire the global recognition of their activity. In that sense, they dispute the dominance over sportive competitions. The International Olympic Committee (IOC) plays important role of managing the major global sports competition, the Olympic Games. Under the aegis of the Olympic Charter (a kind of superordinate regiment)[3], the IOC recognizes the IFs (sports entities) to plead and manage their sport in the Olympics and also recognize the National Olympic Committees (NOCs) that are institutions that seek to supervise and administer the Olympic affairs at the national level. The IOC chooses the location where the Olympics will be held, and the chosen place will have an Organizing Committee of the Olympic Games (OCOG) - important institution that establishes a relationship between the State that hosts the Olympic Games and the IOC. It is a high accomplishment for an institution internationally understood as an NGO[4]. While it does not have clauses guaranteeing the inviolability of their sites and files - such as the Red Cross - and also does not benefit from immunity from jurisdiction and execution, not even to their leaders[5], one cannot ignore the power of negotiation and enforcement its rules, especially in countries hosting the Olympics.

The World Anti-Doping Agency (WADA) is another sports player in transnational regulatory structure. After several failed attempts to regulate international fight against doping in sport[6], WADA has came as a way of engaging concern about the health of athletes, by States, and sports equality, by sports organizations. It presents itself was a way to prevent sports principles to be overly evolved by politics, as well as to prevent politics of being influenced by sports. For such, two groups compose WADA's regulations: half of the participators are state actors and half are private sports actors[7]. Together they dictate to the entire sports community what is "forbidden", "permitted" or "mandatory" regarding doping according to what is established in the World Anti-Doping Code (Code). It is important, however, not only to regulate doping but also to make decisions about it.

It can be stated that given the recognition of major transnational sports organizations, the Court of Arbitration for Sport (CAS) is the center of sports law. Located in Lausanne, Switzerland, the CAS is a private court and it is bound by the rules of sports organizations linked to its decisions. The CAS has an autonomous structure in terms of financial management, since it does not depend exclusively on the IOC to survive. It must be highlighted that the indications of the arbiters who will decide over sports issues, in the CAS, are not under the IOC ruling. The appointment of the panel of arbitrators is left to the International Council of Arbitration for Sports (ICAS). Its members are not only indicated by the IOC, but also by the IFs and the NOCs.

The binding decisions of the CAS have the necessary differentiation between a social system from another, since it is essential that there is a simultaneous development of internal differentiation[8]. In such sense, the CAS is built over an internalized logic in which there is an interlocking hierarchy between judgment and regulation, in other words, there is no overlapping each other. Instead, what exists is a system of circularity[9]. Therefore, sports law (statutes, Code, Olympic Charter, contracts etc.) determines that the CAS is the competent institution to enforce its provisions. At the same time, the CAS is conditioned to implement legislation from what is in it, that is, the CAS validates the legislation, which makes it closer to law[10] guiding role on behavior.

Even though the legal effectiveness is not the primary definition element of a legal order, it is important in the sense that it reveals the limits of such order. Unlike social efficacy (or effectiveness), the legal efficacy is the ability to produce the effects that are typical of regulations[11], which means that it is possible to verify compliance, applicability or enforceability of the legal rule[12]. The other species of legal effectiveness are: effective execution in the strict sense (as a forceful action of the fact) and the "normative application [which] can be conceptualized as the creation of a concrete rule from the fixing of the meaning of an abstract normative text in relation to one particular case"[13], adding "not only the production of (individual) 'rule-making' case, but also the production of (general) 'rule of law' applicable to the case"[14]. The idea of a decision that is localized and the idea of an embodiment that is delocalized have great strength in sports structures. The effectiveness of the order lies in the athletes linking to the competitions in which they are participating. Regardless of their national territory, the athlete must comply with the rules of those associations that, by ripple effect, will have to comply with the rules of foreign organizations. For example, as outlined below, the athlete cannot run away from transnational rules. Usually, if there is state intervention in sports rules, the State runs the risk of not only the athlete but also the FN being suspended from the legal system. It must be observed, therefore, how the sports order justifies the event and imposes itself on another law. However, for better understanding the "transconstitutional" framework, the meaning of "transconstitutionalism" should be defined, in advance.

2. TRANSCONSTITUTIONALISM

More than national issues, fundamental rights (and human rights) have become increasingly important on global scale - as well as a mechanism of control and limitation of power. These problems call legal orders to stand out, "implying a permanent cross-relationship between legal systems around common constitutional problems"[15]. Despite having been originated in the State with regional base, constitutional law has been showing emancipation, "given that other legal orders are directly involved in the solution of basic constitutional issues. In many cases it even prevails against the policy of the state order"[16].

In his work *Transconstitutionalism*, Marcelo Neves is inspired on the assumptions of systems theory and also extrapolates the theory giving it a theoretical jump, since he perceives that the concept of "cross-ratio" (proposed by Welsch) may be considered adequate in developing constructive links. Different from the structural coupling (but with proper affinity), there is a "preordained complexity" of a system put at the disposal of other systems in an accessible way, making possible the "constructive exchange of experiences among several partial rationalities"[17]. Hence, there is the concept of a certain reason which "is involved with twists that work as 'transition bridges' between heterogeneous systems"[18]. It means that considering the perspective of systems theory in which the Constitution would be the place that would allow the coupling - while it functioned as a "filter of irritations and reciprocal influences"[19]- between political and legal systems, whose perception of a system over another would be like true "black boxes, "Neves comprehension regarding the State constitution starts from its cemented concepts, i.e., democracy in politics, and the principle of equality in law"[20] .

Therefore, Marcelo Neves seeks to avoid a semantic inflation on the term "Constitution". For him, what is being seen are strong social spheres before a weak legal system, much like in *lex mercatoria* in which law serves money, thus failing to guarantee legal equality when faced with powerful economic players. There is, however, the recognition of the "proliferation of different legal orders, that are subordinate to the same binary code, i.e. 'lawful/unlawful', but with different programs and criteria"[21], which results in "differentiation within the legal system"[22]. When one notes the existence of "transition bridges" developed from the respective judges and courts[23], the multiplication of relations between these orders acquires greater significance. Hence, in such situation, the center of a legal system (judges and courts) will serve as the periphery of another system, developing a relationship of learning, without the "ultimate primacy of one of the orders, that is, a legal *ultima ratio*"[24].

The author does not deny that such "dialogue" has a virtual character of dispute over the object on which it focuses. Given the diverse legal perspectives[25], there is not a permanent cooperation. Neves also points out that the entanglement is not restricted to the relationship between

courts (despite being the main one), since the incorporation of normative meanings of other orders can be found in the informal relationship "between legislative, government and administrations of different countries"[26]. However, when it comes to "transconstitutionalism" what matters is the "constitutional dialog", therefore it is needless to talk about structural hierarchy between orders, but of "reciprocal incorporation of content", implying "a re-reading of sense according to the receiving order"[27]. This aspect is similar to the phenomenon of "irritation", studied by Teubner, that occurs when a order receives foreign content, therefore causing articulation and disarticulation of foreign direction in relation to the receiving order[28]. In this context, by quoting each other, the courts will be opened to constructive learning from a cross-rationality, which would result in a binding decision between courts[29].

According to Neves, constitutionalism - as a response to the enforcement of fundamental rights and guarantees, as well as limitation and control of state power - has won transterritorial and normative contours that lead to the "need to open constitutionalism beyond the State boarders"[30], which stops from being "a privilege of the constitutional law of the State, becoming legitimately faced by other jurisdictions, since they began to present itself as relevant to those"[31]. "Thus, in "transconstitutionalism", the important thing is to identify that "the constitutional issues arise in different legal regimes, demanding solutions based on the entanglement between these regimes[32]. Based on the binary code legal/illegal common to all legal systems, the "transconstitutional" learning between different orders makes possible to state that there is a normative openness that "can be verified in the solution of legal cases in which two (or more) orders are involved"[33]. There is no denial of the programs and criteria of each of the orders involved. What is verified, considering the problem, is that "the normative content becomes the process, enabling the constructive interaction between orders".[34]

Given the context, the author argues that what characterizes "transconstitutionalism" (while being the entanglement that is at service of the cross rationality[35]) "is, therefore, being a constitutionalism related to (solving) legal and constitutional problems show off simultaneously to several orders"[36]. When constitutional questions are submitted "to the concrete legal treatment, passing several jurisdictions, the constitutional 'dialogue' is indispensable"[37], but, aiming for full development, it always has the need of the presence, in each order, of the principles and rules that take seriously the basic problems of constitutionalism[38].

When designing a methodology to "transconstitutionalim", Neves explains that its beginning lies in "double contingency", particularly among courts[39], in which an order consider the possibility that the action of another is different from that designed and vice versa[40]. One of the most important consequences of the double-contingency is the emergence of trust or distrust[41]. In this situation, an order, due to its inability to see clearly a problem, have the opportunity of experiencing another order privileged point of view. In that sense, firstly the order must consider its identity, to avoid incurring the risk of losing the difference

in its environment. When there is confrontation of constitutional problems common to several orders, "otherness must be considered"[42], even between among those orders that are not open to dialogue[43]. It is, therefore, the starting point of "transconstitutionalism"[44].

3. *LEX SPORTIVA*: LEARNING FROM THE INTERNATIONAL ORDER

When it comes to the control of the higher objective of the sports order - the competitions - the concern of the international order with *lex sportiva* hardly exists. Indirectly, the international order has been fueling the legal argument of *lex sportiva*, at the moment *lex sportiva* is showing greater openness to constitutional issues coming from other orders, which enables greater integration between legal orders.

Yet there is an example, found during the solution of doping in competitions that shows some contribution from both sides in an attempt to establish deeper integration. The creation of the WADA, CODE and the UNESCO Convention of 2005, which strengthened the fight against doping, serve as an illustration of this relationship, somehow harmonious. However, there are punctual episodes in which sports matter was limited by the determination of international bodies, as well as sports order has been faced with issues relating to International Conventions.

In the case analyzed by the CAS, No. 2008/A/1480, of May 16, 2008 - Pistorius v/ IAAF (International Association of Athletics Federation) - a relevant constitutional matter related to people with disabilities was addressed. The South African athlete Oscar Pistorius, a competitor of 100, 200 and 400 meters relay, appealed a decision made by IAAF, the international federation responsible for athletics. The decision had forbidden him to compete with athletes without disabilities. Pistorius lacked both legs and used two prostheses that according to the IAAF, in Rule 144.2 (e), would give him major advantages over his adversaries. The case shows that the athlete's results were growing to the point of getting close to the time of Olympic level athletes without disabilities, which entitle him to stop competing with people with disabilities. The IAAF Council, alleged that Pistorius was being benefited from the prostheses, therefore, the Council decided to ban him from competing.

Several questions had been raised on appeal, but what draws attention is what the "Convention on the Rights of Persons with Disabilities" was brought to the discussion. The appellant argued that the IAAF had denied Pistorios' fundamental human rights, and had also denied the Olympic principles and values. The regulations of the IAAF were used as basis for solving the conflict. The law of Monaco (host of the IAAF) on its side was applied to background issues. The Panel decided, however, that the Convention has not been ratified and enacted in the Principality legislation. Even though the CAS has initially discarded the application of the Convention, the Council showed that was opened for dialogue, when it took the Convention into account. For example, it highlighted the Article 30.5, which provides that States Parties shall encourage and promote the

participation of people with disabilities in activities at all levels *to enable them to participate on equal terms to sports activities*. The Panel understood the terms of the Convention as if it plead that an athlete, as the applicant, was allowed to compete under the same conditions as other athletes competed. Thus, the Panel understood that such question should be the issue to be under analysis. In other words, the matter that should be addressed was whether or not he was competing as an equal with other athletes who were not using similar prosthesis. Accordingly to what was stated, if the Panel decided that the athlete gained some advantage over the other competitors, the Convention would not attend to the case.

The CAS accepted Pistorous' appeal. However, the argument used was that the IAAF, being the responsible for the burden of proof, failed to demonstrate that his prosthesis put him on unequal conditions among other competitors. The Panel left the question open, in case some new research could prove that he was being benefited on unevenly scale. The Panel rejected the argument based on unlawful discrimination. On regard of this fact, it is foreseeable a discussion topic with potential constitutional conflict cargo.

The equal access for people with disabilities is connected to the constitutional principle of equality. The principle has two inseparable perspectives. One concerns "the neutralization of factual inequalities when taking the political e legal consideration of people and groups"[45]. The other perspective is related to the "constitutional processes that are sensitive to the interaction of the different ones and, thus, allow them a legal-political equitable treatment"[46]. In Article 30.5 the Convention states "States Parties shall take appropriate measures for people with disabilities to participate on an equal basis with others in recreational, leisure and sports activities [...]". The Convention's perspective about equality of opportunities, which is more connected to the second perspective of the principle, "is related to the right to be treated as an equal, or the right to be addressed with equal consideration and respect"[47].

In this case, from the point of view of *lex sportiva*, one can see that the concept of the principle of equality presented by the Convention takes on a new meaning. Sports equality is based on the sense that all athletes should have the same chance of winning, and that the best performance should be awarded. The Convention mentions the "equality of opportunity", which acquires the sense of "the same chance of winning" in sports law. Hence, "the right to be equal" on international level can only achieve its concreteness in the sports sphere when equal chances in the competition are guaranteed. The comprehension about a person with disability holds a different perspective than the comprehension about an "athlete with a disability" in the sports plan. Thereby, the CAS notes that the concept urges for an adjustment regarding its kind, considering the consistency that it is found in the CAS events, even if the adjustment means a new regard over constitutional law.

In the case decided by the CAS No. 2010 / A / 2307 of September 14, 2011 - WADA v/ Jobson, CBF (Brazilian Football Confederation) and STJD[48] (Superior Court of Sports Justice in Brazil), the football player Jobson,

who played for Botafogo in Rio de Janeiro, was caught in doping test during the Brazilian Championship in 2009, in the games against Coritiba and Palmeiras. It was detected the presence of cocaine in his urine (which is a substance prohibited by the doping regulations of FIFA). After being convicted with two-year suspension from sports activities, the athlete appealed the decision to a higher court of the agency that had condemned him, the Superior Court of Sports Justice (STJD). In May 2010, the penalty was reduced from two years to six months. Not agreeing with such a reversal of the decision, WADA appealed the decision requiring the athlete to fulfill the two years initially determined. The athlete, in turn, said that imposing a higher penalty would hurt the principles of protection of health and life, the principle of proportionality of the sanction and of equal treatment. Moreover, he argued that the substance did not improve athletic performance (Jobson declared himself a drug addict) and that he was inexperienced and did not knew the use of the substance was prohibited.

The Arbitration Panel ruled that the athlete had violated the anti-doping regulations. The Panel did not understand that circumstances argued by Robson - in this case, drug addiction - were exceptional for his behavior, since he was integrated into the professional culture that regularly conducts doping tests. The only chance to mitigate the punishment is the athlete's history, i.e., the non-recurrence in doping. The Court considered the argument regarding human rights in order to know whether there was disrespect to the international order and to the human rights by the implementation of the two-year sentence. The Panel took into account the views of the Swiss Federal Court to reaffirm that sports law does not disregard the legal orders mentioned above. In consequence, the Panel confirmed that the application of the two-year sentence did not violate regulations on human rights, and that the penalty was proportional. The principle of proportionality of sentences is applicable only in exceptional circumstances when, for example, an athlete proves that they were not responsible for the substance that was found in their body. The Court, therefore, accepted WADA's request for Robson to fulfill his two-year sentence.

The relevant aspect of the decision is the argumentative consideration of human rights regarding the implementation of sports penalties. Bigger than that there is the understanding that the legal system is integrated to a global legal system, whose problems are under the consideration of various orders. Consequently, it is noted a "transconstitutional" dialogue that also provides a defense against other orders when the fear of the ineffectiveness of the decisions of *lex sportiva* is faced. As it will be seen in the paper, there are other orders that can define, reshape or repeal the CAS decisions based solely on the territoriality factor.

This topic proved that the limits of *lex sportiva*, when its limits face the international order, tend not to be in conflict. At most, it is possible to perceive a learning opportunity from the concepts that are alien to the CAS surroundings. In such cases, there are no conflicts between international courts and the CAS. The most complete form to verify

"transconstitutional" problems and ways of learning from it is when a court is faced with common constitutional problems. In any case, one realizes that the CAS has been opening itself to a certain understanding of human rights. Even though the court does not necessarily confirm a universal sense of human rights, the CAS builds a new perspective about them from the cases that are under analysis. Although *lex sportiva* does not show a long list of normative conflicts with the international sphere, the conflicts are common in state and supranational contexts.

4. THE CAS HOST COUNTRY AS THE LIMITER OF *LEX SPORTIVA*

Switzerland is the host country of the CAS, the IOC and some IFs. These organizations must be established on a territory, what makes them vulnerable, to some extent, to some state legal requirements. In some cases such situation has resulted in state intervention over decisions regarding sports order. Concentrating the study in Switzerland, the topic will focus on certain state legal provisions that led to cases of intervention.

Article 23 of the Swiss Constitution is the first device to establish that "freedom of association is guaranteed," adding that any "person has the right to establish associations, to join or to belong and participate in membership activities". Article 60.1 of the Swiss Civil Code reinforces the idea of autonomy of activities in Swiss territory when it provides that the " associations with a political, religious, scientific, cultural, charitable, social or other non-commercial purpose acquire legal personality as soon as their intention to exist as a corporate body is apparent from their articles of association."

Associations do not have absolute autonomy. Article 75 of the Civil Code states that "any member who has not consented to a resolution which infringes the law or the articles of association is entitled by law to challenge such resolution in court within one month of learning thereof". The focus now will be over international associations, more specifically "the arbitral tribunal that is placed in Switzerland" (article 176.1 of the Federal Statue on Private International Law - FSPIL). Article 190.2 sets some conditions for that its decisions may be challenged in court. These conditions are applicable "if the sole arbitrator was not properly appointed or if the arbitral tribunal was not properly constituted", " if the arbitral tribunal wrongly accepted or declined jurisdiction", "if the arbitral tribunal's decision went beyond the claims submitted to it, or failed to decide one of the items of the claim", "if the principle of equal treatment of the parties or the right of the parties to be heard was violated" or "if the award is incompatible with public policy". The article 192.1 adds that "if none of the parties have their domicile, their habitual residence, or a business establishment in Switzerland, they may, by an express statement in the arbitration agreement or by a subsequent written agreement, *waive fully the action for annulment*" (author's highlight).

The precepts mentioned are protected by Article 29 of the Swiss Constitution, which, in its paragraphs 1 and 2 exhibits respectively that "every

person has the right to equal and fair treatment in judicial and administrative proceedings and to have their case decided within a reasonable time" and "each party to a case has the right to be heard". However, even with that confluence of concepts between the constitutional provision and the Swiss federal law, the CAS' statue does not provide any possibility of appeal to the Swiss courts. Moreover, the statue even excludes the exceptions previously mentioned in national law, since Article R46 expresses that:

> *The award notified by the CAS Court Office shall be final and binding upon the parties. It may not be challenged by way of an action for setting aside to the extent that the parties have no domicile, habitual residence, or business establishment in Switzerland and that they have expressly excluded all setting aside proceedings in the arbitration agreement or in a subsequent agreement, in particular at the outset of the arbitration.*

The Swiss Federal Tribunal, considering its legal field of action, was a relevant actor to promote change to the CAS rules. The decision BGE 119 II 271 - GUDEL v/ International Equestrian Federation and the Court of Arbitration for Sport was also relevant when it was declared, for the first time, the view of the Federal Court over *lex sportiva*. When it stated that a free and independent judicial control "can be entrusted to an arbitral tribunal, provided that the court constitutes a true judicial authority and not simply the organ of the association concerned by the fate of the litigation". With regard to the case (but making some restrictions), the Federal Court recognized the quality of judicial authority of the CAS. However, in was on the decision 129 III 445 - A and B[49] v/ IOC, International Ski Federation and the CAS, that the Federal Court recognized the full independence of the CAS regarding all its actors, which allowed the decisions taken by the body to be "considered as true sentences that are comparable to judgments of a state court". The decision also stated that the "the system of arbitrators list satisfied the constitutional requirements of independence and impartiality that were applied to arbitral tribunals". Thus, the Federal Court, rather than recognizing the independence of the order and the effectiveness of their decisions, brings a new way of understanding the constitutional principle of access to justice. Despite recognizing the autonomy of the CAS, it does not mean that the Federal Court closes its eyes to the decisions that are contrary to its constitutional provisions.

The decision BGE 133 III 235 - Cañas v/ ATP (Association of Tennis Players) Tour and Court of Arbitration for Sport - was the first one that annulled a decision of the CAS. In the case, Cañas, Argentine tennis player, on February 21, 2005, provided a urine sample that revealed the presence of a prohibited substance. Although the athlete alleged that the substance in his body was the result of a drug he was taking to fight flu, the CAS decided by a suspension for 15 months, the loss of the results and the obligation to derive financial restitution for his tournament winnings. On June 22, 2006, Cañas brought an action for public law, in order to obtain

a judgment to annul the decision of the CAS, complaining that the Court had violated the right to be heard. In response, the CAS said the athlete had waived the right to appeal. Building on earlier Federal Court ruling, Cañas said the desire to resign should be made by express act.

The Federal Court held that the waiver was ineffective because it had been signed under duress, considering the case law built from the Convention for the Protection of Human Rights and Fundamental Freedoms. The Court also stated that a player "pseudo-waiver" would enshrine a distortion to Article 192 of FSPIL. Finally, in the fight against doping, the only way to apply FSPIL Article 192 and respect the principle of equality would be to deny all reach to an advance waiver of the appeal. For the Court, this is because the athlete who wishes to participate in a competition organized under the control of an IF will only be successful if they first accept the arbitration clause in the Statute. Since it is their profession, the athlete is required to accept the clause. Also, since the athlete does not have domicile, residence or establishment in Switzerland, the possibility of appellate decisions of the CAS is excluded. Therefore, one of the decisive points was whether the athlete could refuse to sign the declaration of appellate waiver against any sentences the CAS, what would maintain his possibility to enroll in competitions organized by the sports Federation. The Federal Court recognizes that "nothing would prevent the players and organizers to create a parallel circuit to ATP's circuit." However, this does not mean that the athlete would have other option but to exclude recourse against decisions of the CAS. As ATP brings together the best male professional tennis players and the most lucrative competitions, it would be hard to imagine that the athlete would have another option.

Essentially, the athlete claimed that his right to be heard had been violated, because the CAS would not examine some relevant and essential statements to make its decision. The Federal Court has extended the right to be heard to the field of international arbitration, including sports arbitration. The Federal Court also considers that the right to be heard is violated when the Arbitral Tribunal, either by mistake or misunderstanding does not consider the alleged facts, arguments, and evidence presented by the parties and relevant to the decision. The appellant alleged that the attitude of the CAS was of that sort. The CAS could have demonstrated that the omitted information was not relevant to the case, and, therefore, there was no violation of the right to be heard, even in the constitutional sense of the term. The applicant said that the CAS had not examined the argument that he was not guilty about the ingestion of the drug, which, by the way, was even detrimental to his athletic performance. On the athlete's point of view, taking into account such issues could change the outcome of the trial.

The Federal Court held that the Arbitration Panel implicitly dismissed the subsidiary arguments of the appellant, considering that that was the only tool of argument the athlete had (excluding the argument that he did not lived in the country), and also considering the absence of reasons that led the CAS to apply the principle of proportionality in the fifteen-month suspension. Thus, the Federal Court decided to annul the award.

The decision described above deserves to be analyzed in the "transconstitutional" context. The Federal Court recognizes that the CAS is a real court, which reorients the perspective of the constitutional principle of access to justice. Consequently, the Swiss Court admits the sovereignty of its decisions, therefore, the autonomy of its order. However, in order to ensure that its decision is definite, sports order excludes any appeal opportunity from another order. This attitude, which was verified in the specific case, infringed constitutional provisions regarding the right to be heard and human rights. Consequently, this means that the CAS is not the *ultima ratio* in matters that regard the constitutionality. The CAS cannot deny access to the Swiss Justice. The annulment of the CAS decision may give the idea that the Swiss order disregarded the sports order. Indeed, it is difficult for the Swiss Court to understand the principle of strict liability that is applied to cases of doping in sport. According to the principle, the athlete's argument that he was not responsible for the doping is an argument that is frequently not taken into account by arbitral precedents. This is the way in which *lex sportiva* ensures sports equality. Even though the decision of the Federal Court is not of revising nature, but termination nature, it shows a behavior of self-containment. Clearly there was interference at the CAS point of view, but the review does not invade the merits of the CAS in acknowledging the right. Marcelo Neves, in this regard, consider:

> *Even in the cases in which the Swiss Federal Tribunal would insist on promote a revision or a rescission, which would be contrary to the rules of the CAS, it would be up to the institutions of transnational sports right the choice to move its headquarters to a country that would be willing to admit the autonomy of transnational law sports. The mobility power of legal and sports entities "delocalized" (i.e. that are not permanently linked to a territory in order to exist), along with their competence to exclude certain states from international tournament or competitions, makes the transnational legal order "sovereign" over States and therefore when it is in competition with the State legal orders, it leads to the emergence of "transconstitutional" problems.*[50]

The "multiplaced" feature of *lex sportiva* also generates "transconstitutional" conflicts with other orders. Such conflicts occur in a larger number than the examples mentioned about the host country, without, however, being less important. Therefore, it is only adequate that the next topic analyze the conflicts and solutions, mainly the "transconstitutional" ones, between state and *lex sportiva*, which consequently expose the limits of the autonomy of *lex sportiva*.

5. THE LEGAL AUTONOMY OF *LEX SPORTIVA* FACING NATIONAL ORDERS

The sports order has a locality, i.e. it is located on a territory. It is where the sports order has its headquarters installed or where its competitions

are held. Their decisions, however, have multiple locations given the existence of other bodies and athletes linked to the sports order. Other bodies and athletes, engaged in an associative coordination, become linked to the sports order decisions even when located in different territories from where they take binding decisions. Even though it is possible to identify countries that see in sport values that should be under their state control, transnational rules of sports law overlap, almost in its entirety, state control when disciplinary measures aimed at the successful development of an international competition are involved. Such measures may include matters such as nationality, labor contracts, health, and economic issues such as sports commercialization[51]. At the first look, essentially all these themes refer to constitutional issues[52].

When conflicts between *lex sportiva* and another legal order are identified, usually the CAS stands in favor of the sports order through the constitutional principle of equality. Besides the prospect of equal access, the principle of equality requires that cases be treated equally. It is connected to the regularity of the normative application, i.e., the principle of legality[53]. Legality here does not mean law enforcement in the state sense. It means the implementation of private regulations (and the Code) related to sports players. Therefore, it is on the CAS the responsibility to apply the private regulations to cases that are equal. There was no exception to the sentence CAS 2006 / A / 1119, of December 10, 2006 - The International Cycling Union (UCI) v/ L and the Royal Spanish Cycling Federation (RFEC)[54].

After a positive doping test performed by a laboratory accredited by WADA, the Union Cycliste Internationale (UCI), which is the federation responsible for the world cycling, condemned the athlete and then determined, based on the doping data, that the Spanish Federation should follow disciplinary procedures in terms of the Federations' anti-doping regulation. Through the National Committee on Competition and Discipline - national disciplinary body constituted by law - the professional cyclist had the benefit of the doubt granted because the process was incomplete since it did not fulfill all legal requirements applicable, which would not guarantee a solid result. Exploring the existing provision in Code, the UCI appealed to the CAS in order to reverse the decision. The athlete claimed that the CAS was incompetent, because Spanish law provides that, in cases of resources, it is the National Committee on Competition and Discipline competence, whose decisions may be the subject of appeal at a Spanish administrative court. Spanish law also prohibited appealing arbitration in matters of doping. According to the athlete, appealing to the CAS was contrary to the inalienable right of access to justice, recognized in his Constitution[55]. It must be added that he claimed he did not give the consent to submit himself to arbitration of the CAS.

The CAS stated that only international authorities could legally manage their sports competitions, as they tend to submit all athletes to equal treatment, since they make sure that the NFs do not keep passive when faced with its athletes' acts of violation. Legal and sports order

aim to ensure respect for the sincerity of competitions (i.e. to guarantee the initial impossibility of knowing what may result it the end) and the equality among the competitors. The CAS justified the effectiveness of its order by using the argument of the constitutional principle of equality, because if it would trust "the national laws ruling the conditions within which international competitions must be developed, it would end in an incoherent and non egalitarian system"[56]. If that happened, there would be a race for the least repressive legislation in regard to doping. One single sports discipline has the ability to submit all participants to the same set of rules. The CAS does not deny the national sovereignty, what it does is to delimit the national sovereignty to its own territory. It would be theoretically conceivable if there were, at the expense of the sports authority, the State interference in international competitions. However, such behavior would contradict the fight against doping, and could result in the exclusion of the country from international competitions[57].

The CAS declared itself competent as a transnational authority to judge such causes, and rejected the athlete's constitutional argument according to which there was disrespect to the inalienable right of access to justice and the courts. The Court stated that there is a complementary relationship between orders, given that the same behavior may be criminally punished, but the behavior may not lead to a penalty against the cyclist on the international sphere. Likewise, an athlete may be excluded, but not be criminally sanctioned. This situation ends up being consistent with two decisions of the Court, during in the judgment of the CAS No. 2007 / O / 1381 of November 23, 2007 - Royal Spanish Cycling Federation & V. v/ Union Cycliste Internationale (UCI)[58]. At that case, the IF tried to use criminal proceedings to suspend the athlete. On another decision made by the CAS, No. 2008 / A / 1572; / 1632; / 1659 of November 13, 2009 - Gusmão v/ FINA (International Swimming Federation), the athlete wanted to be acquitted on sports matter, after being criminally acquitted.

The ruling rejected the appeal of the UCI, respecting the arguments against the irregular procedure lifted by the athlete. In order to reflect about "transconstitutionalim", it is pivotal to understand how the conflict between the principles of sovereignty and access to justice on the one hand was articulated, and on the other hand how the principle of equality was articulated. When the athlete claims on appeal that the CAS is not competent due to the constitutional rules of his country, a collision between constitutional principles of various orders is generated. At the same time, when the CAS states that there are several spheres competent to deal with the same theme, the CAS puts itself under the situation in which the Court must perceive that doping may be punished by other orders without damaging its sovereignty. Thus, "complementarity and tension between transnational law and state law are manifested simultaneously around constitutional issues, and neither of them may have *a priori* primacy, i.e. be the owner of *ultima ratio* (last resort)"[59].

So far, some cases were analyzed in which *lex sportiva* demonstrates its autonomy from other orders. At the same time, when *lex sportiva* performance is questioned, it elaborates constitutional concepts. Conflicts

between orders were also analyzed - particularly conflicts in orders' courts -, when the orders were faced with common legal problems, and then, promoting various constitutional solutions over those problems. Without denying the otherness, i.e. the co-regulation of common problems, *lex sportiva* has a strong plead, through the principle of equality, to enforce its decisions to the state orders. Still, one cannot deny that, in principle, a national court would not reverse a decision of the CAS. Even if the national court tried to disable the effectiveness of the CAS decisions in its territory, it would not prevent the sports community to withdraw recognition of the NF that binds the athlete. In other words, if the decision of the CAS is not respected, there is the risk that all athletes and national institutions linked to the sports network be prevented from participating in international competitions. The situations mentioned above fit the requirement of an intertwining of orders aimed at solving problems and at constitutional learning, which, in a way, it was not possible to be observed widely on the studied cases through the "conversation" between courts. This is when a question arises: in what sort of situation it is possible to verify a constructive entanglement of orders during the solution of common constitutional problems? In order to answer that question the supranational order will come into play.

6. THE IMPOSING POWER OF COMMUNITY LAW FACING *LEX SPORTIVA*

The ease with which *lex sportiva* has been successful in achieving most of its decisions in several territorially bounded orders finds no parallel under Community law.Community law will have great power to influence changes in sports law, as well as facilitate new insights over legal problems. This occurs for the following reasons:

> *When comparing the force of Community law over the transnational sports law, it is observed that the EU has a position of greater autonomy before the transnational sports federations than States. This is so because in the context of Europe there are no sports federations, whose development and maintenance are relevant factors of the Union legitimacy. In contrast, the States, in which the national federations are primarily linked to transnational federations, become very dependent on transnational federations for develop sports at the internal level, which is one of the factors of legitimation*[60]*.*

The strength of European Union law is far from being destructive to sports order. It "has played an important role of "transconstitutional" intermediation between state legal systems of its Member States and the transnational sports legal order"[61]. The European Court of Justice (ECJ) decision C-415/93, on the case of *Union Royale Belge des sociétés de football association* (ASBL) and others v/ Jean-Marc Bosman and others exemplifies the conflicting situations between sports and community order.

In May 1988, Jean-Marc Bosman, a Belgian athlete, signed a contract with a Belgian first division club, SA Royal Club Liégeois (RC Liège). It was agreed that, at the end of the contract, the club could retain his pass, so that at any future transfer of the player, at the end of his contract, the Belgian Football Association would rule the transfer. Two months before the end of the contract, the club offered the player a one-year contract by a lower value, which made him reject the new terms. However, based on regulation of the Belgian Association regarding player transfers, the club placed him on the list of "compulsory transfer", which meant that if the player and the club that wanted him agree to pay the transfer and fee, the transfer could follow despite the acceptance of the supplier club. On June 1, the period of compulsory transfer came to an end and began the period in which the player could be traded freely with the consent of the supplier club, given that nobody was interested in the athlete's pass. Bosman tried to leave the club, signing a contract with the French club US Dunkerque, which offered him a higher salary. On July 27, 1990, an agreement was established for the loan of the athlete for a season with predetermined purchase price, under the rules of the Belgian Association. But, as there were fears of insolvency of the French club, the signed contract was left with no effect. On July 31, 1990, RC Liège suspended Bosman, preventing him from playing all season[62].

On August 8, 1990, Bosman preceded a legal issue before the Liège Court of First Instance against his club. Parallel to the main action, the athlete filed an application with respect to provisional issues, which aimed primarily to prohibit the impediment tools that worked against the freedom to hire his services, which raised a prejudicial question to the ECJ. On November 9, the judge of provisional measures ordered the Belgian club and its federation to pay the athlete an amount of 30 000 Belgian Francs and ordered them not to impede his hiring. Furthermore, it raised prejudicial question to the ECJ regarding the free movement of workers (previously Article 48 and currently Article 39 of the Treaty that establishes the European Community). Despite the halt condition given by the judge regarding the provisional measures, it could be verified that the athlete was subject to boycott by all European clubs that could sign him.

On May 28, 1991, Liège Court of Appeal revoked the Liège Court of First Instance provisional measure, in a way that a prejudicial question to the ECJ was raised (what made it be revoked). That did not stop the Court from condemning the club to pay a monthly amount to the athlete and to the Federation and put the athlete at the disposal of any club that wanted to obtain his services, free from the obligation to pay any compensation. On August 20, 1991, Bosman requested that the Union of European Football Associations (UEFA) would participate in the litigation initiated by him against the club and the Belgian Federation. Bosman addressed against the latter an action based on the responsibility to adopt regulations that were prejudicial to him. On April 9, 1992, Bosman modified its original application, amplifying his demand, now being also against UEFA. In addition to the request for payment of damages suffered, Bosman plead the European Court to declare that the UEFA rules regarding transfers,

nationality clauses, which served as the object of invocation to the ECJ the question, were not applicable. The Court of Appeal of Liège, following a challenge of the respondents accepted the athlete's actions against UEFA and the Belgian Federation, particularly in regard to disregard of the (current) Articles 39 (free movement of workers, abolishing any discrimination based on nationality), 81 (prohibition of measures that impede free competition) and 82 (prohibition of measures taken by companies that explore, on abusive way, a dominant position within the common market). To make possible the ECJ to rule, the article above of the Treaty of Rome were contextualized by the Court of Appeal on the following issues: is a football club entitled to demand new employer club and the payment of a amount of cash due to the contract of one of its players, at the end of their contract? Do associations and national and international sports federations have the right to establish certain provisions in their regulations that limit the access of foreign players from the European Community to the competitions that they organize? The first question relates to the UEFA transfer rules in which the seller club may receive compensation for the player pass, justified by the fact that the athlete was developed and trained at the club, even if the contract is not currently into force. The second refers to the limited number of athletes from the EU in each club that follow the rule of "3 + 2", i.e. clubs cannot have more than three non-nationals and two "assimilated", i.e. who are players that have been playing in the country for five consecutive years[63].

Given the issues raised, the ECJ considered that Community law ruled sports practice to the extent that it constitutes an economic activity, as in cases of professional or semiprofessional football players, since they perform remunerative activities. In order to implement these provisions, it is not necessary that the company that are employing possess legal personality. The Court stated that the rules governing economic relations between employers in an industry are included in the scope of the Community provisions on freedom of movement, as they affect the conditions of employment of workers. This is the case of the transfer rules of players between football clubs, since the economic relations between then affects the chances of these professionals to find jobs. This is so because obligation for employers to pay compensation to clubs when hiring a player from another club may cause that effect. The ECJ acknowledges the autonomy of private organizations, but does not accept that they hurt the limits of the exercise of the right of free movement under the Treaty. For the case, the argument that legal rules are internal rules, which does not include the Community legal order, does not fit. In that sense the rule of the "athlete's pass" *wounds the right of free movement* of players who wish to pursue their activity in another Member State. According to the ECJ, it is not legitimate to say that the rule is adequate to achieve the financial and competitive balance between clubs, to perform the search of talented players and to promote the training of young players, because it does not prevent the richest clubs from obtaining the services of the best players, besides the economic factors are not definitive for the balance between clubs in sports competition.

Finally, the Court stated that the rule of "3 + 2" does not respect the principle of non-discrimination in terms of nationality. Such rule cannot be considered as something that is inherent to sports practice neither as a factor of maintenance of equality, and consequently as a toll that guarantees the uncertainty of the outcome of the final outcome of the competition (as it was alleged by the opposing parties), because nothing prevents teams with greater purchasing power to hire the best players. Therefore, the Court has decided to follow the claims of the athlete and to dismiss sports law.

The strength of the sports argument was based on equal opportunities and the uncertainty of the outcome. Such perspective was rejected by the ECJ, which justified the application of the Treaty because the sports legislation wounded two precepts of constitutional feature: freedom and nationality. The role of the ECJ is crucial: it allows the state orders to not be silenced by *lex sportiva*. The European Court exercised "transconstitutional" function by transferring the idea of nationality in the European context, thus rejecting legal sports requirements. Moreover, the freedom of movement of workers and freedom of competition will also have an important role because they also will influence the state orders that are outside the European context. As an example, is should me mentioned the Law 9.615 / 98, popularly known as "Pele Law", which is part of to the Brazilian legal system and which aims to establish a "free pass", i.e. after the end of the contract between the club and the player the latter will be free to sign a contract with any other team that is interested in their services.

The Bosman case suppressed the rules that were declared contrary to Community law by the Court. UEFA gave up its nationality clauses and restrictions on foreign players. In the latter case, some countries have regulations restricting the number of foreign players, except the ones from within the community[64]. On the transnational field regarding other sports, FIBA (International Basketball Federation) learned from the ECJ decision and allowed the free movement of players worldwide.[65] Even though the legal effect of the decision in the Bosman case has brought positive aspects to the different legal systems[66], it is important to highlight an apparent danger: the European Community law, which is limited to the number of countries that are part of the Community, may perform imperative acts over all NFs[67], even those that are outside Europe. Thus the European Community law denies the autonomy of sports order. This is an apparent risk, so far, as the European order acknowledges *lex sportiva* autonomy.

The decision C-51/96 and C-191/97 of April 11, 2000 - Christelle Deliège v/ Francophone Judo League and related disciplines (LFJ), Belgian League judo (LFJ, in Frech), European Judo Union, and François Pacquée (President of LFJ) - describres the conflict between, on the one hand, the sports rules that allow national quota in the NFs selection processes for the participation in international tournaments and on the other hand, the rules of the European Community about the freedom to provide services and to engage competition applicable to enterprises. The athlete argued that sports rules that limited the number of athletes per nation and the

ones that imposed the need for federal authorization to participate in individual competitions were obstacles to the free exercise of the provision of an economic service and the exercise of professional freedom. Sports institutions disagreed with the athlete. They expressed that there was no economic barriers in their rules, but specific barriers that aimed to limit the participation of athletes with better performance. Acknowledging the social importance of sport, the ECJ recalled that the provisions of the Treaty regarding the free movement of people, do not oppose to rules or practices that exclude foreign players from participating in sports events, *provided they are not for economic reasons, but for reasons inherent in the nature and the specific context of these meetings, focused exclusively to the sport practice*. On that account, the selection rules do not prevent professional athletes from accessing the labor market, as it does not limit the number of athletes from other European countries members of the Community to participate in the competition. The Court concludes that, although the selection rules have the effect of limiting the number of participants in a tournament, this is the very logic of international sports competitions that requires specific selection criteria. Therefore, such rules are justified when faced with the restriction on the freedom to provide services prohibited by the Treaty.

When it comes to doping, the ECJ respects *lex sportiva*'s autonomy of decisions, according to the sentence C-519/04 P, related to an appeal of a decision of the Court of First Instance of 18 July 2006, from the athletes David Meca-Medina and Igor Majcen. The Court of First Instance dismissed the action for annulment of the European Commission decision. The European Commission has rejected the complaint plead against the IOC and FINA in which certain practices relating to doping control were questioned. For recurrent applicants the practices were going against the Community rules on competition and freedom to provide services. The Court ruling stated that the anti-doping regulations focus on loyalty, integrity, ethics and objectivity of the sports competition and also focus on equal chances for athletes to compete. The Court stated that the limitation to competition is inherent to the successful development of sports competition. The repressive nature of anti-doping regulation has adverse effects on competition, when "*sanctions prove to be unfounded*," and, thus, when they "*lead to the unwarranted exclusion of athletic contests and, as such, distorting the conditions of the exercise of the activity in question*". Therefore, the anti-doping rules must "*be limited to the absolute necessary in order to ensure the smooth running of the competition*". As there was no proof of the disproportionate character of the anti-doping regulations, the Court rejected the appeal.

The cases mentioned denounce "a confluence of complex 'transconstitutional' problems" which often results in the "restraint of competent state bodies and [in] the expansion of the competence and performance directly or indirectly of transnational and supranational bodies around constitutional issues"[68]. European legal institutes regarding the "*free movement of workers, without discrimination of nationality*", the "*prohibition of measures that impede free competition*" and "prohibition of measures

that abusively explore a dominant position within the common market" overlap *lex sportiva*; except when the inherent rules of the sports order might limit them. More than a supranational order of restraint, the statement reveals a posture that enables a constructive entanglement with *lex sportiva*. Thus, starting from the ECJ historical perspective on the issue of freedom, the CAS will manifest for the solution of particular case, as in the case of decision No. CAS 2004 / A / 708 of 11 March 2005 - Player X v/ FIFA and Z[69] club, whose arbiters also stated:

> *[The limitations] to the unilateral termination of the employment contract* **may constitute an obstacle to freedom of movement** *of players, but this restriction can be justified by a legitimate aim recognized by the ECJ in the case Lehtonen -* **ensure the stability of the teams** *to ensure the regularity of the competitions and the integrity of the league. (Author's highlight).*

The important point of the decision above is how it got entwined with supranational order. Sports order did not sought to give a "last word" when it got involved in a constitutional issue regarding freedom. Sports order tried to seek dialogue with the ECJ by putting it in it surroundings, which favored the emergence of a "constitutional cross-fertilization"[70]. The principle of equality was reinforced around a common constitutional problem. It is observed that both orders have dealt with "substantive common and institutional problems"[71], and learned "with each other from their experiences and reasons" and cooperated "directly to resolve specific disputes"[72]. Such cooperation could only take place because the asymmetries between orders[73] were reduced, even in specific cases, so that one could consider a different way of thinking and acting about the same problem. Situations like these show "transconstitutionalim" as an interesting contribution to integrate orders that are, in principle, fragmented, "without leading to a final hierarchical unity"[74].

CONCLUSION

The paper made possible to observe that the sports structure controls its actors from a complex network in which all subjects end up under the direct or indirect interest of sports competitions. Likewise, it made evident that the foundations of some sports decisions are made over a constitutional base. Therefore, *lex sportiva* has been affirming itself autonomous from the principle of equality. At the same time, it reframes concepts of international law, particularly those related to human rights.

However, *lex sportiva*'s autonomy meets its limits when faced with supranational order, where there is no specific location as in national orders. The supranational order imposes to the sports order a form of constitutional comprehension. On its side, the sports order does not lose the validity recognition of its decisions, particularly when the European Court self-imposes a limit on matters considered purely sports issue.

This entanglement shows the possibility of recognizing otherness mainly through mutual reference between orders.

This seems to be the first step towards a better integration of the legal system on global legal issues. In other words, considering the fragmentation in the fields of law, it is not possible to think a global structure that does not see the peculiarities of each order. It is possible, however, to foresee dialog and the state that the "other" has a range. Other problems still deserve further discussion before such phenomena. That is, the problem on how the law will deal with the classical problems of sovereignty, citizenship and nationality without territoriality. I believe "transconstitutionalim" may be an integrative solution.

>> ENDNOTES

[1] Latty, 2007: 85 and 125-8.
[2] Simon, 1990: 35 and 109-15.
[3] Rule 15.4 of the Olympic Charter.
[4] Ettinger, 1992: 108-9
[5] Latty, 2007: 438-9.
[6] See Chappelet / Kubler-Mabbott, 2008: 132-6.
[7] Article 6 of the Statute and sections of the AMA; Article 2 of the Declaration of Copenhagen; Chappelet / Kubler-Mabbott, 2008: 136-42.
[8] Luhmann, 2005: 359-60: The term "internal differentiation" is understood as "the way in which the relationships between partial systems (subsystems) express the order of the overall system," and also expressing everything that belongs to the system and what is your surroundings.
[9] Cf. Neves, 2008: 191.
[10] Luhmann, 1983: 109; Teubner, 2003: 22
[11] Carvalho, 2006: 54-61.
[12] Neves, 2007: 43.
[13] *Ibid*: 45.
[14] *Ibid*: 45.
[15] Neves, 2009: XXI
[16] *Ibid*.
[17] *Ibid*: 37-8.
[18] *Ibid*: 39.
[19] *Ibid*: 62.
[20] *Ibid*: 62.
[21] *Ibid*: 115.
[22] *Ibid*: 115-6.
[23] *Ibid*: 116-7.
[24] *Ibid*: 117.
[25] *Ibid*: 117-8.
[26] *Ibid*: 118.
[27] *Ibid*.
[28] *Ibid*.
[29] *Ibid*: 119.
[30] *Ibid*: 120.
[31] *Ibid*.
[32] *Ibid*: 121.
[33] *Ibid*: 126.
[34] *Ibid*.
[35] *Ibid*: 130
[36] *Ibid*: 129
[37] *Ibid*.
[38] *Ibid*: 130.
[39] *Ibid*: 270.
[40] *Ibid*: 271.
[41] *Ibid*: 272.
[42] *Ibid*: 272.

[43] *Ibid*: 276.

[44] *Ibid*: 275.

[45] Neves, 2008: 170.

[46] *Ibid*.

[47] *Ibid*: 171

[48] Extracts and comments sentencing No. TAS 2010 / A / 2311 & 2312, TAS 2010 / A / 2268 and TAS 2010 / A / 2307 in Latty, 2012: 665-8.

[49] “A” and “B” shares are not identified in the process. In some cases, the Swiss court and the TAS maintains the confidentiality of litigants.

[50] Neves, 2009: 206.

[51] Latty, 2007: 423-24

[52] Judgment on May 17, the Court of Appeals, 6th Circuit, with extracts and comments Bitting, 2008: 660-62.

[53] Neves, 2008: 169.

[54] JDI, 2008: 234-58, with extracts and comments from Eric Loquin; and Neves, 2009: 198-201.

[55] JDI, 2008: 236.

[56] *Ibid*: 233 and 242; Neves, 2009: 199.

[57] *Ibid*: 234; Neves, 2009: 199.

[58] JDI, 2009: 218-39, with extracts and comments from Eric Loquin.

[59] Neves, 2009: 200-01

[60] *Ibid*: 244.

[61] *Ibid*.

[62] Extracts and commentary Parrish, 2003: 92-8.

[63] Parrish, 2003: 94.

[64] Latty, 2007: 723.

[65] *Ibidem*: 728-9.

[66] Cf. Latty, 2007: 730.

[67] Cf. Latty, 2007: 729.

[68] Neves, 2009: 245.

[69] 69 JDI, 2005: 1329-37, with extracts and comments from Eric Loquin.

[70] Neves, 2009: 119, citing Slaughter, 2003: 194.

[71] Slaughter, 2003: 193.

[72] *Ibidem*

[73] Neves, 2009: 286.

[74] *Ibidem*: 288.

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