



TAS / CAS

TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT
TRIBUNAL ARBITRAL DEL DEPORTE

8th Conference CAS & SAV / FSA | Lausanne, Switzerland

Athletes and personality rights

Delphine DESCHENAUX-ROCHAT | CAS Counsel

Definition & Scope



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Definition & Scope

- ✓ Principle of autonomy of the association
- ✓ Deference to the freedom of the association and its decisions
 - ⇒ “*Basic principle of sports law*” (CAS 2020/A/7090)
- ✓ Limitations: mandatory provisions of law (Article 63(2) SCC)
 - ⇒ Principles of legality, equality of treatment, proportionality, right to be heard, public policy, ...
 - ⇒ Personality rights
- ✓ Sanction: decision is null and void



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Definition & Scope

- ✓ Article 27 SCC
 - 1 No person may, wholly or in part, renounce his or her legal capacity or his or her capacity to act.*
 - 2 No person may surrender his or her freedom or restrict the use of it to a degree which violates the law or public morals.*
- ✓ Article 28 SCC
 - 1 Any person whose personality rights are unlawfully infringed may petition the court for protection against all those causing the infringement.*
 - 2 An infringement is unlawful unless it is justified by the consent of the person whose rights are infringed or by an overriding private or public interest or by law.*



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Definition & Scope

- ✓ Right to health and bodily integrity
(SFT 4A_2478/2019)
- ✓ Right of movement
(TAS 2012/A/2720; CAS 2013/A/3091, 3092 & 3093)
- ✓ Professional and economic freedom
(TAS 2014/A/3642; CAS 2018/A/5607; CAS 2014/A/3463 & 3464; CAS 2014/A/3643)
- ✓ Right of professional athletes to actively practice their profession
(CAS 2016/A/4560; CAS 2017/A/5092; CAS 2020/A/6950)



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Definition & Scope

- ✓ Right to honour and professional consideration
(SFT 4A_248/2019; CAS 2010/A/2261 & 2263)
- ✓ Image rights
(SFT 129 III 715; SFT 127 III 481)
- ✓ Right to privacy
(TAS 2011/A/2433; CAS 2011/A/2425)



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Definition & Scope

- ✓ Employment law: Article 328 SCO
 - ¹ *Within the employment relationship, the employer must acknowledge and safeguard the employee's personality rights, have due regard for his health and ensure that proper moral standards are maintained. [...]*
 - ² *In order to safeguard the personal safety, health and integrity of his employees he must take all measures that are shown by experience to be necessary, that are feasible [...] and that are appropriate [...]*



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Definition & Scope

- ✓ Right to an effective occupation
 - ⇒ Player: Right to train and play against players of the highest possible level (CAS 2007/A/1369)
- ✓ Psychological harassment or mobbing (SFT 4A_310/2019)
- ✓ Liability of the club/association for the violations of personality rights committed by officials (SFT 130 III 699) or employees (SFT 137 III 303)



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Infringements of personality rights



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Infringements of personality rights

- ✓ Any act which in any way disturbs another person's personality in violation of the rights protecting it
(SFT 120 II 369)
- ✓ May result from a decision taken by a federation
(SFT 136 III 296; SFT 134 III 193, SFT 5A_982/2015)
- ✓ Good faith is irrelevant
(SFT 132 III 193)



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Infringements of personality rights

- ✓ Sports sanctions affect:
 - ⇒ the athlete's psychological integrity
 - ⇒ their honour, reputation and social consideration
 - ⇒ their economic fulfilment



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Infringements of personality rights

- ✓ Infringements in the field of anti-doping
 - ⇒ Blood collection affects the physical integrity of an athlete
 - ⇒ Urine collection affects the intimate sphere of an athlete
 - ⇒ Whereabouts requirements interfere with the right to private and family life and reduce personal autonomy
- ✓ Examinations of virilisation
 - ⇒ Undermine the right to physical integrity of athletes
(SFT 4A_248/2019)



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Infringements of personality rights

✓ Exclusion

- ⇒ Exclusion of a club from participating in matches
(TAS 2012/A/2720)
- ⇒ Exclusion of a member from a federation
(CAS 2015/A/4241)
- ⇒ Deregistration of a player
(CAS 2013/A/3091, 3092 & 3093)



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Infringements of personality rights

- ✓ Procedural aspects
 - ⇒ Inclusion of blood samples in the CAS case file (TAS 2009/A/1879)
 - ⇒ Admission of private conversations as evidence (CAS 2011/A/2425)
 - ✗ Failure to observe the deadline to file an appeal (CAS 2018/A/5989)



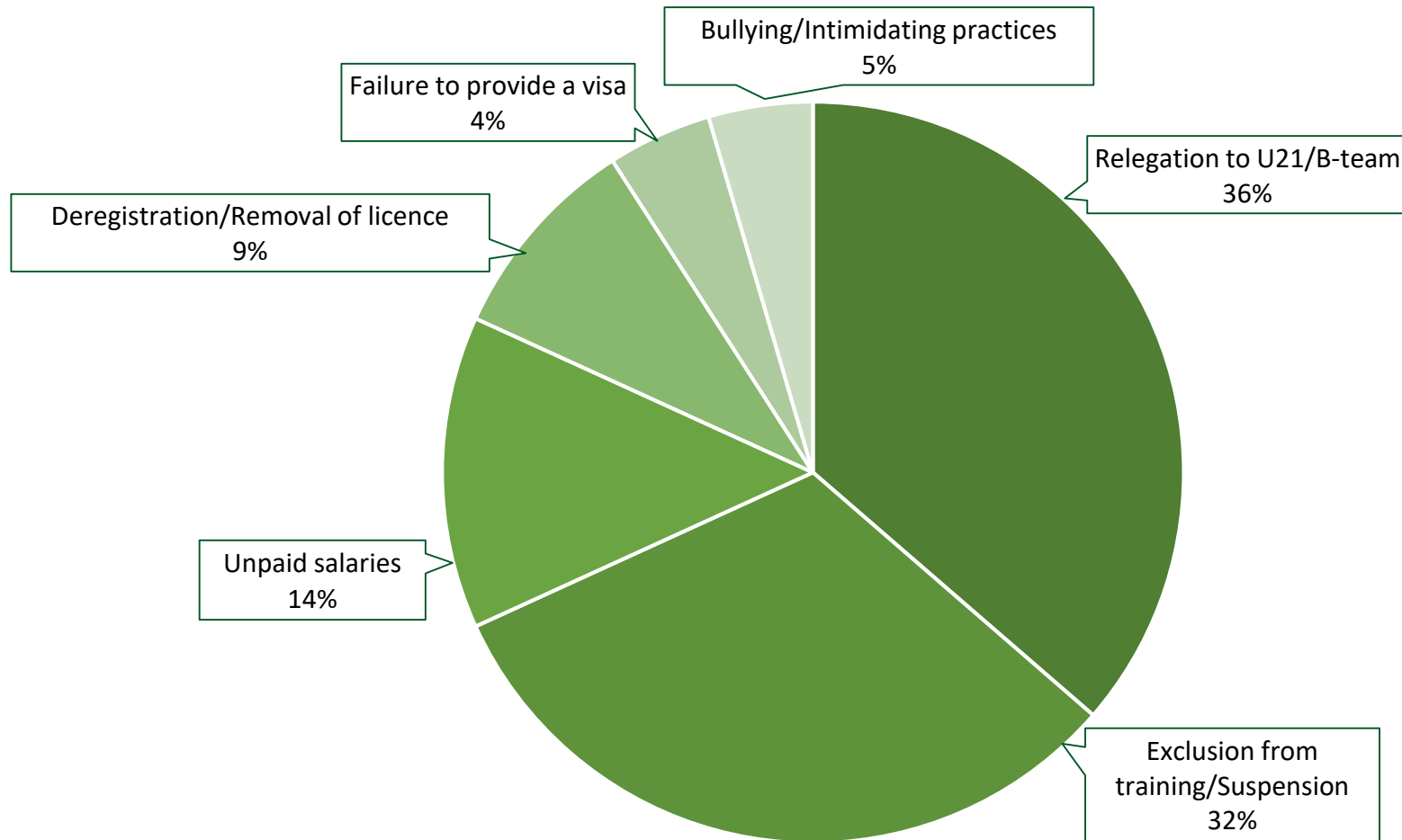
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Infringements of personality rights



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Infringement of personality rights

- ✓ CAS 2015/A/4286 Sebino Plaku v Wroclawski Klub Sportowy Slask Wroclaw S.A



Infringement of personality rights

- ✓ June 2013: Employment agreement
- ✓ August 2014: ankle injury
 - ⇒ Club proposed a salary reduction
- ✓ September 2014 – January 2015:
 - ⇒ Relegation to the B-team
 - ⇒ Individual training
 - ⇒ Salaries not properly paid



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Infringement of personality rights

- ✓ Key factors considered by the Panel
 - ⇒ Permanent measures
 - ⇒ No sporting justification
- ✓ Breach of the player's personality rights



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Infringement of personality rights

- ✓ Principle : unlawfulness
(SFT 5A_805/2015; CAS 2017/A/5092)



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Justification



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Justification

- ✓ Consent
- ✓ Law
- ✓ Overriding private or public interest
 - ⇒ Burden of proof: infringer



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Justification

- ✓ Law
 - ⇒ State laws
 - ⇒ Little relevance in practice



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Justification

- ✓ Consent
 - ⇒ Express or implied
 - ⇒ Some personality rights confer an absolute protection, so that consent is impossible
 - ⇒ Consent to serious injury or death would violate Article 27 SCC
 - ⇒ Must be freely given



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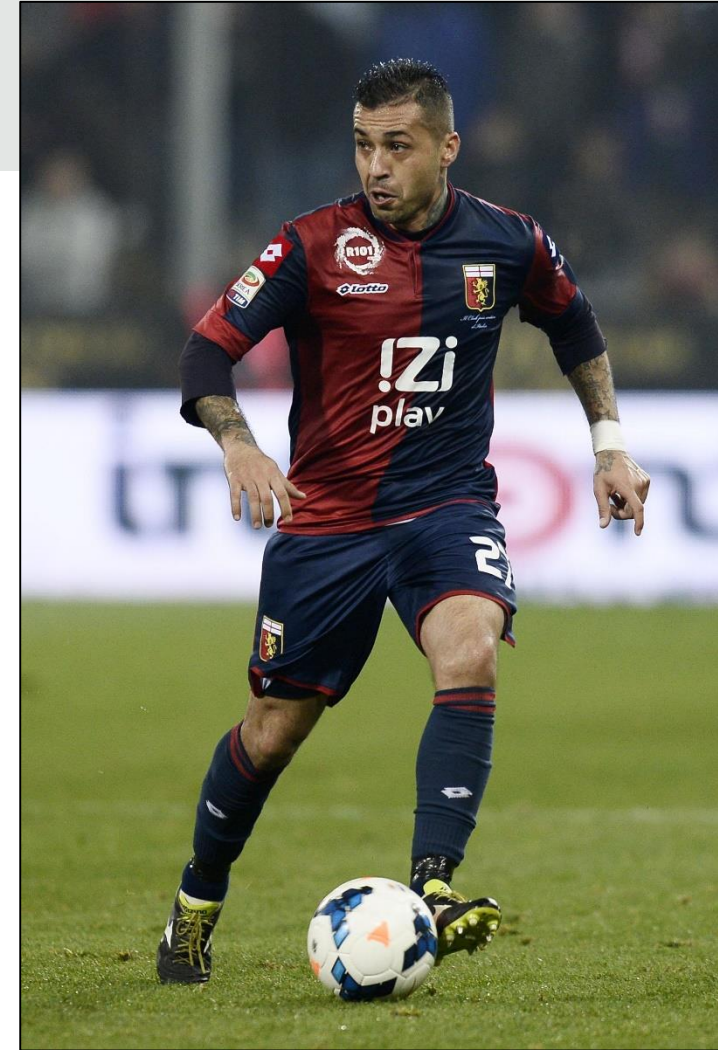
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Justification

- ✓ Matuzalem (SFT 138 III 322)
- ✓ The threat of an unlimited occupational ban is:
 - ⇒ Inadequate
 - ⇒ Unnecessary
 - ⇒ Illegitimate
- ✓ Commitment is excessive



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Justification

- ✓ Consent must be freely given
- ✓ Athletes have no option but to accept rules and regulations of their federation
 - ⇒ Athlete's waiver of appeal against future awards (SFT 133 III 235)
 - ⇒ Hyperandrogenous athletes' agreement to take contraceptives to reduce their testosterone level (SFT 4A_248/2019)
- ✓ Unlikely that a violation of personality rights may be justified by consent alone



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Justification

- ✓ Overriding public interest
 - ⇒ Concern to ensure fairness and equality (SFT 4A_248/2019)
 - ⇒ Need to tackle doping (ECHR, FNASS and others v. France)
 - ⇒ Protection of the health of the athletes & combating the use of dangerous substances (SFT 134 III 193; SFT 5A_982/2015; TAS 2009/A/1879)
 - ⇒ Discerning the truth (CAS 2020/A/6785)
 - ⇒ Exposure of illegal / unethical conduct (CAS 2011/A/2426)



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Justification

- ✓ Overriding private interest
 - ⇒ Private interest of a federation in the smooth running of its competitions
 - ⇒ Interest in preserving the reputation of the federation
 - ⇒ Private interests of other athletes (SFT 4A_248/2019)



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CAS 2011/A/2426

- ✓ Investigation by undercover journalists
- ✓ Recordings passed on to FIFA
- ✓ Opening of disciplinary proceedings
- ✓ Admissibility of the recordings?



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Justification

- ✓ Violation of the appellant's personality rights
- ✓ Overriding interest?
 - ⇒ General public interest in the exposure of illegal/unethical conduct such as corruption
 - ⇒ Interest of FIFA to restore the truth and its image
 - ⇒ Interest in identifying and sanctioning any wrongdoing to act as a deterrent
 - ⇒ Private interests of national associations



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*In light of the above, the Panel has no difficulty in finding that **the balance of interests definitely tilts in favour of the disclosure and utilization as evidence in these proceedings of the evidentiary material collected by the Sunday Times. Considering that the infringement of the Appellant's personality rights is justified by overriding public and private interests, the Panel thus holds that the Recordings submitted by the Respondent must be admitted as evidence into these arbitral proceedings.***

(CAS 2011/A/2426, § 102)



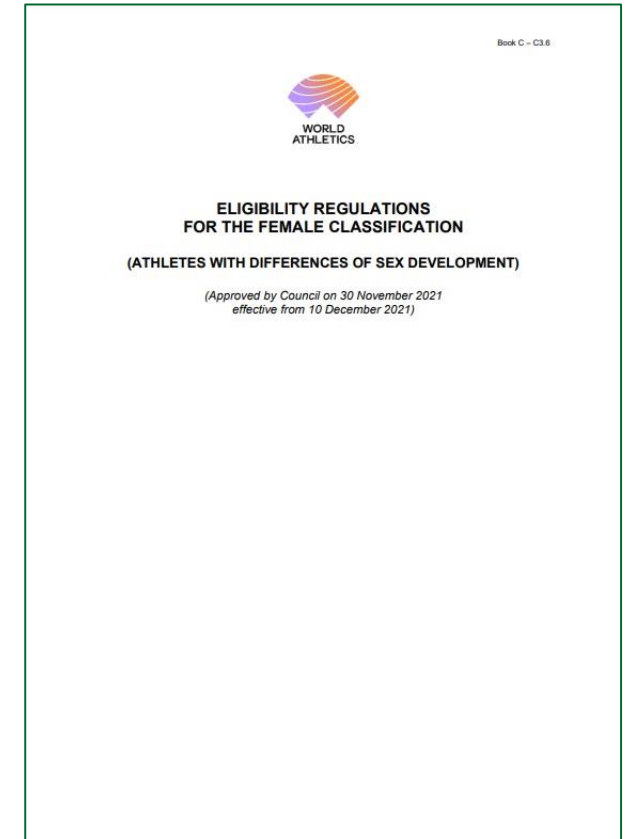
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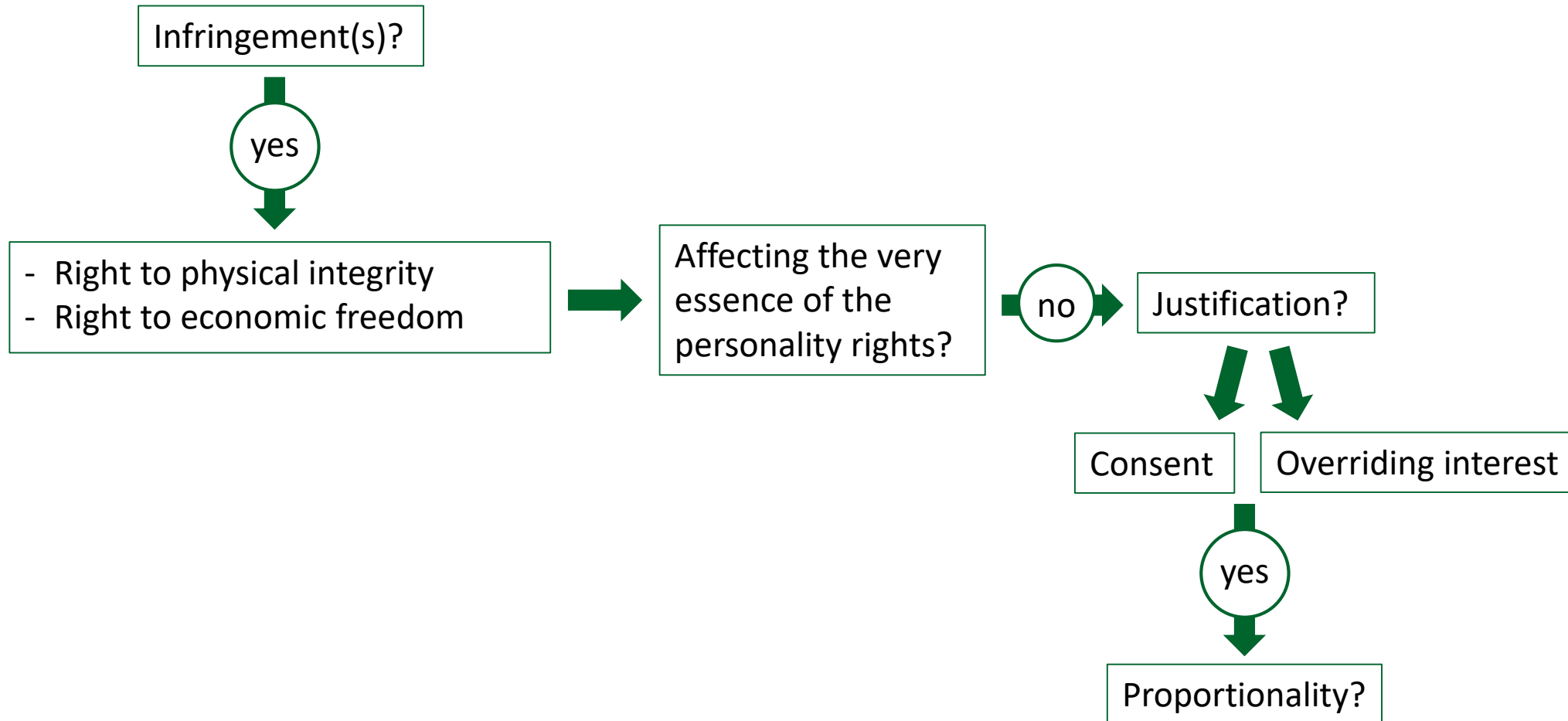
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THANK YOU FOR YOUR ATTENTION !

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