

OUR FOOTBALL IS BROKEN

How to Fix South African Football's Dispute Resolution System



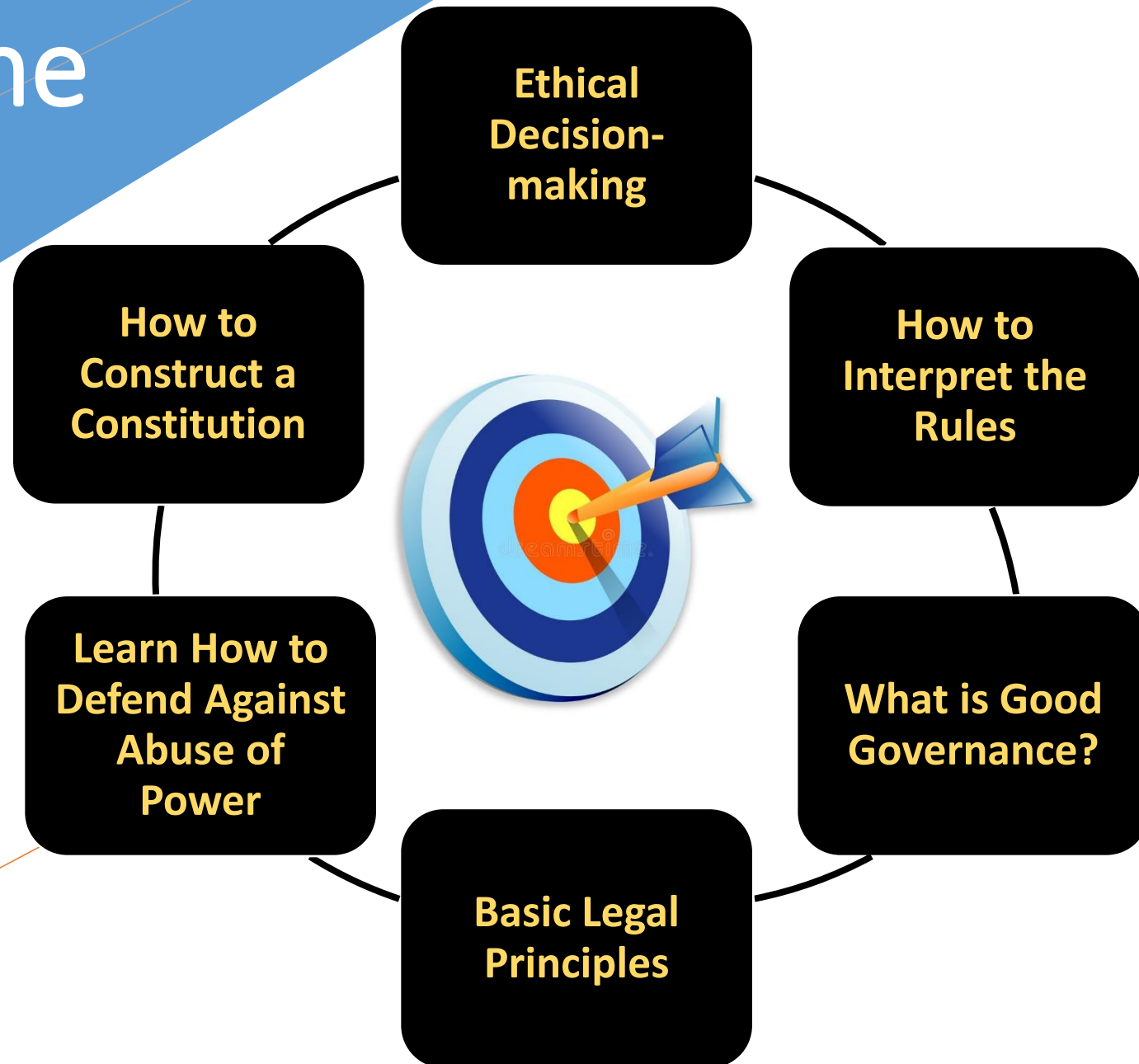
Dennis A. Mumble



How to fix the football dispute resolution system



Purpose of the Workshop



Structure of the Workshop



PART ONE:

Introduction & Highlights
Suggested Reading Material
What is Good Governance?

PART TWO:

A Brief Primer on Ethics & Morality

PART THREE:

The legal principles that underpin the *lex sportiva*
The Basic Structure of a Constitution
Understanding the Structure of the Football Association

PART FOUR:

What is Administrative Action?
Different Types of Administrative Actions
Definition of a “Sanction” or a “Decision” According to CAS
List of Sanctions and When to Apply Them

PART FIVE:

How to Challenge Administrative Decisions
Does FIFA Prohibit Going to Ordinary Courts of Law?
Structure of a Tribunal (DC, Appeal, Arbitration)
Establishing an Alternate Dispute Resolution Capability

Introduction of Participants



Because this is an **interactive** workshop, it is important to know who is participating so that each can **contribute actively** to the discussions based on his/her real-life experiences so that the concepts become meaningful to all

Part 1



HIGHLIGHTS

From the book

Our Football is Broken



Workshop

The Book is a Window to One Part of the DR Ecosystem



1. Players' Status	2. Agents	3. Disciplinary
4. Compliance	5. Rights (naming, image)	6. Interpretation
7. Inter-Member Disputes	8. Interpersonal Conflicts	9. Behaviorial Conflicts
10. Gender-Based Violence	11. Racism	12. Int'l Coach Disputes
13. Territorial	14. Solidarity & Training	15.



Because our legal system is based on two sub-disciplines of Western philosophy – **Morality** and **Ethics**



Scope of the Book

“Our Football is Broken”



PART ONE - UNDERSTANDING THE DISPUTE RESOLUTION SYSTEM

1. The Constitution is the Bedrock
2. Revisions to the SAFA Statutes - 2022
3. Democratization of World Football
4. Separation of Powers
5. SAFA's Relationship with Its Members
6. SAFA's Regulatory Framework
7. The Different Types of Sanctions
8. Disciplinary Powers of an Executive Committee
9. Unreasonable Delays & *Blocking*
10. Role of the SAFA Judicial Bodies
11. What Are *Unforeseen Contingencies*?

12. What is *Force Majeure*?
13. What Is the Meaning of *Disrepute*?
14. Proportionality in CAS Jurisprudence
15. Abuse of *Ad Hoc* Committees
16. The Applicability of PAJA
17. Constitutional Protections for Accused Persons
18. How to Challenge Disciplinary Sanctions
19. A Toolkit for Disciplinary Hearings
20. Procedural Rules for Disciplinary Committees

PART TWO - RESTORING THE BALANCE OF POWER

21. Democracy Through Free and Fair Elections
22. Six (6) Case Abstracts
23. Epilogue – The Value of Rules



Why This Workshop?

Until our ... system accounts for people as well as things, we will operate our organizations in the dark. Of course, some people don't mind the dark, especially those who are into "*mushroom management*", **the primary ethic being "Keep people in the dark, pile lots of manure on them,** and when they are fully ripe, cut off their heads and can them."

Stephen R Covey, Principle-Centered Leadership, p225

NATURAL JUSTICE

INTEGRITY

POLICIES

COMPLIANCE

APPLICABLE LAW

UNIVERSITAS

STATUTES / CONSTITUTION
REGULATIONS

AUDI ALTERAM PARTEM

PAJA

TRANSPARENCY

FAIRNESS

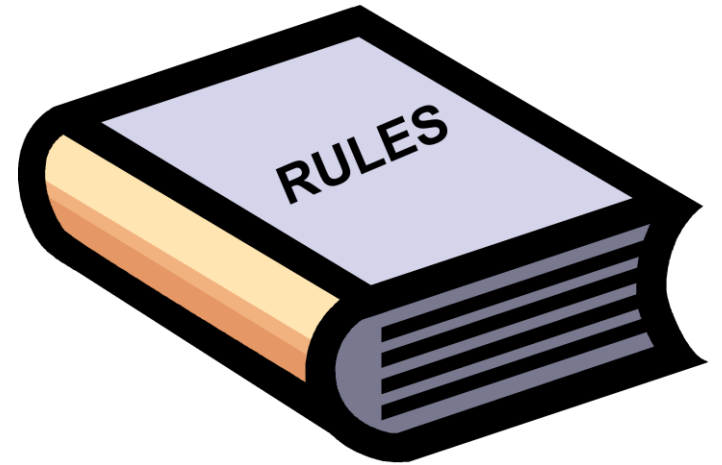
DISCIPLINE

NO BIAS

COMPLIANCE

RULES

SEPARATION OF POWERS



Suggested Reading Material for the Workshop

Football Rules	<p>FIFA Statutes SAFA Statutes (National) SAFA Statutes (Regions) SAFA Statutes (LFAs) SAFA Disciplinary Code SAFA Uniform Competition Rules</p>
South African Jurisprudence	<p>-South African Constitution -Constitutional Court Judgement - <i>NUPSAW v NLB</i> –disrepute -<i>Ndoro-Ajax v SAFA, NSL and Others</i> -Unterhalter, D -CCT 16-98 - <i>President v SARFU</i> -SGHC-40614-2011 - <i>Louisvale Pirates v SAFA</i> -Mbha, P -2005-12-20 - Cape HC - 8363-2005 - <i>Tirfu Raiders RC v SA Rugby</i> -Yekiso, J -SCA Judgement - <i>HPCSA v Dr Stephen Grieve</i> - Case No. 1356-2019 –disrepute</p>
CAS / FIFA Jurisprudence	<p>-CAS Code -CAS 2008-A-1574 - <i>Nicholas D'Arcy v AOC</i> – disrepute -CAS 2011-A-2586 - <i>William Lanes de Lima v FIFA</i> -who decides to accept a case -CAS 2007-A-1291 - <i>Mikhaylo Zubkov v FINA</i> –disrepute -CAS - <i>WFRK v IWF</i> - Circumstances of Bringing a Sport into Disrepute – 2017</p>

Suggested Reading Material for the Workshop

Related Literature

- Dr Michael Mrkonjic – A Review of Good Governance Principles and Indicators in Sport – CIES 2016
- Definition of Disrepute - Various Sources
- Football Law - Football Discipline - Thomas Horton
- Le Roux, Lydia - An Analysis of What Force Majeure Is
- van Eetveld, Henri-Willem - The indirect review of administrative action in SA law -2018
- Van Dyk, Obakeng - The Influence of Oudekraal on the Legal Status of An Administrative Action
- “Our Football is Broken” by Dennis Mumble

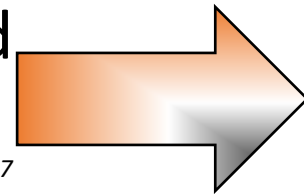
A Quick Overview
of What
Constitutes “Good
Governance”



A Definition of Good Governance

Football and sport in general must be a vehicle for the transmission of our **common values** and contribute to their protection. A radical change in the **culture** of football governance at all levels is needed, so that it is firmly based on:

Good Football Governance Report – EU Parliament – 15 Dec '17



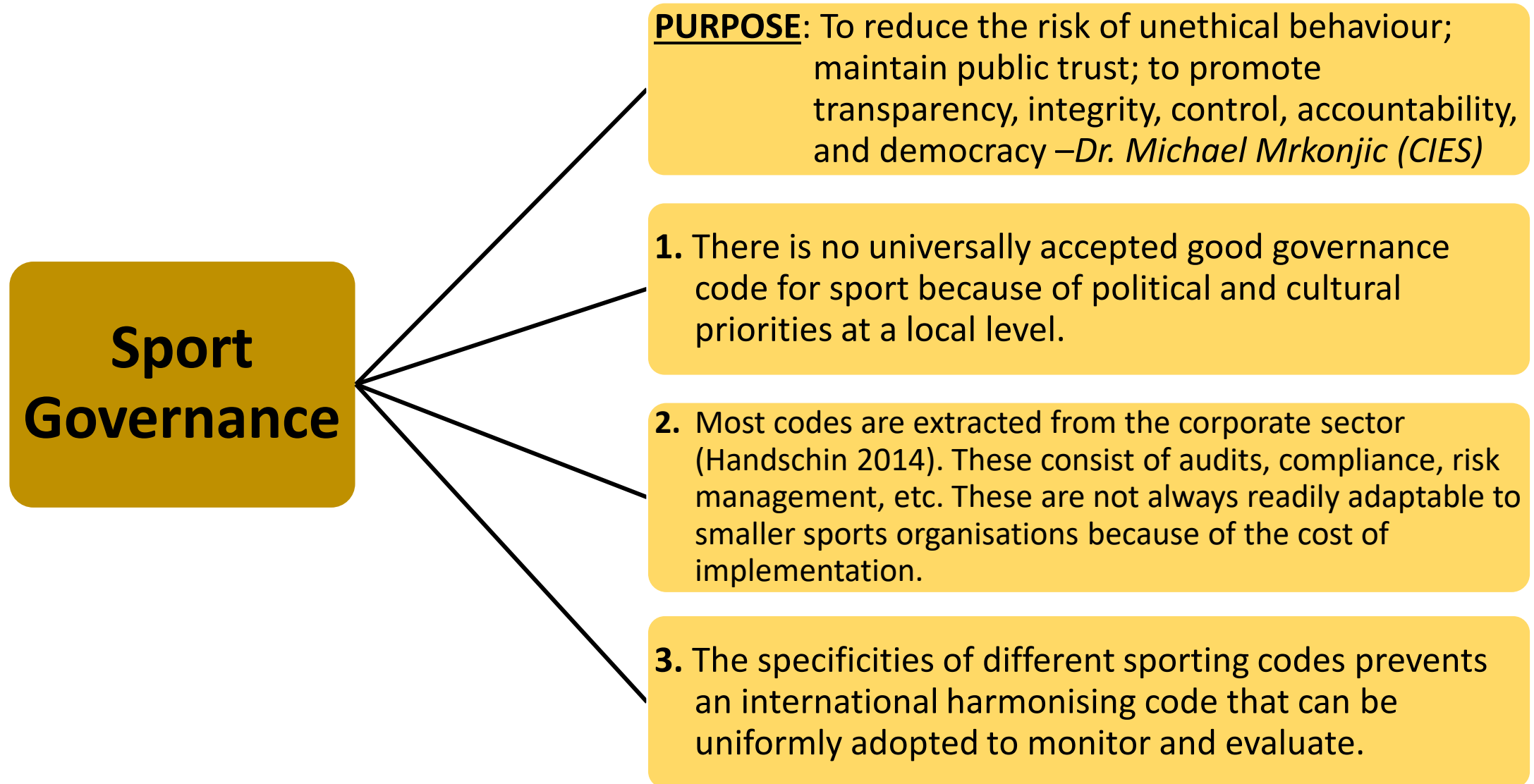
A Further Definition of Good Governance



“a complex network of policy measures and private regulations used **to promote integrity** in the management of the **core values of sport** such as democratic, ethical, efficient and accountable sports activities” (Council of Europe, 2005, n.d.)

From Corporate Governance to Sports Governance?

How Adaptable Is It?



Possible Criteria for a Standard Good Governance Code

1. **ENFORCEMENT**: The degree to which the various pressures on sport organisations to adopt good governance behaviours are able to be enforced.
2. **SCOPE**: *Scope* refers to the volume of good governance principles included in the set and is measured with three possible levels: narrow, moderate, broad.
3. **OPERATIONALISATION**: It informs on the number of levels of deconstruction proposed by the set, from an abstract concept or broad principles to measurable indicators including a scoring system. *Operationalisation* is measured with three possible degrees: low, average, high. It is assumed that the more the set is operationalised, the clearer the expectations are for the target group.
4. **STRUCTURE**: *Structure* is measured by two possible answers: yes or no. It is assumed that a structured set provides clearer expectations towards the behaviour of sports organisations.
5. **OUTREACH**: *Outreach* is measured by three possible levels: narrow, moderate, broad. It is assumed that the broader the target group is, the more difficult it will be to find solutions that meet the concrete needs and priorities of sports organisations.
6. **IMPLEMENTATION**: The sixth criterion measures whether the set recommends specific mechanisms (instruments, procedures, etc.) that would guarantee that the principles and the indicators are effectively and successfully implemented by the target group, for example the inception of a follow-up committee or a reporting system.

4 Dimensions of Good Governance (NSGO – 2018)

4 DIMENSIONS OF GOOD GOVERNANCE

Transparency refers to an organisation's reporting on its internal workings, which allows others to monitor these workings. Democratic processes entail free, fair and competitive elections; the involvement of affected actors in decision-making processes; and fair and open internal debates. Internal accountability and control refers to both, the implementation of the separation of powers in the organisation's governance structure as well as a system of rules and procedures that ensures that staff and officials comply with internal rules and norms. Societal responsibility refers to deliberately employing the organisation's potential and impact in order to have a positive effect on internal and external stakeholders and society at large.

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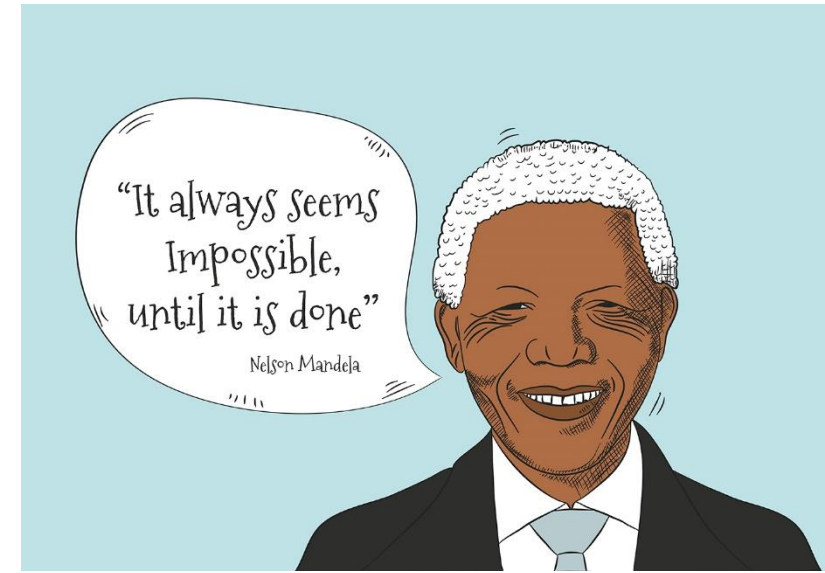
Societal responsibility refers to deliberately employing the organisation's potential and impact in order to have a positive effect on internal and external stakeholders and society at large

The Good Governance *Mirepoix*

(a good governance broth)



Core Components of a Good Governance System



Good governance principles also include:

1. Integrity
2. Control
3. Accountability

Good Governance = Fair Play



- All of these definitions on the previous slides contain all the elements of Fair Play.
- See the **FIFA Fair Play Code** for further details

but
first,

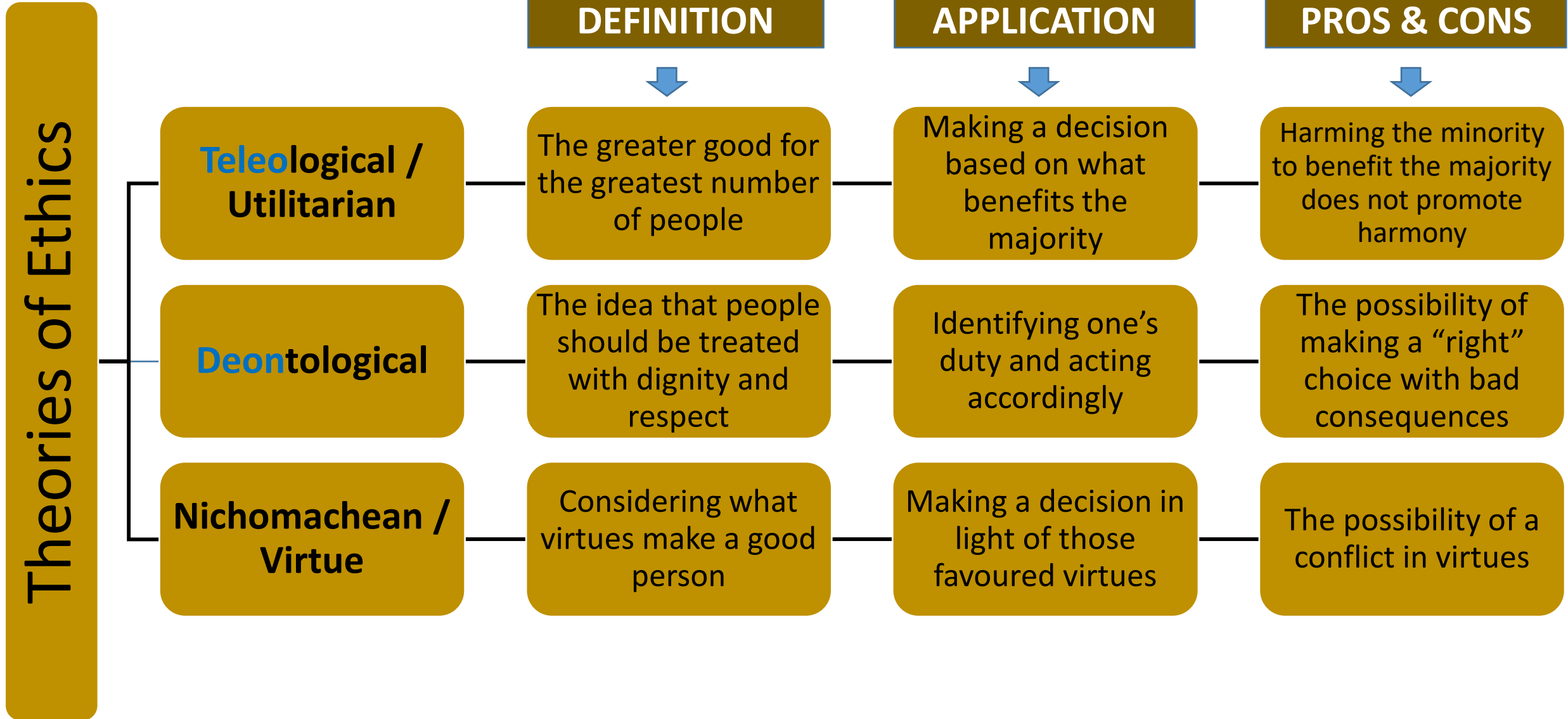


We must practice **Ubuntu** (a quality that includes the essential human virtues; compassion and humanity) in this process

In order for us to establish **high ethical standards**, we also need to understand the philosophies that guide the **quality of our decision-making**.



Comparison of Theories of Ethics





Teleological Ethics

GREEK → Telos = end or purpose
Logos = study

A neighbour put the heating on for a family who were away, as a surprise, and it burned down the house. How would we judge this in a teleological way?

Deontological Ethics (Immanuel Kant)

GREEK → Deon = duty

Logos = study

For Kant, morals are duties understood by reason, which everyone has, and founded upon one **categorical imperative** (aka the “*universal obligation*”)

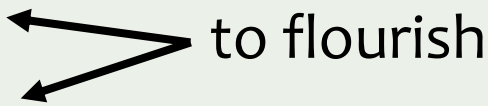
A **categorical imperative** is different than a hypothetical imperative, which Kant sees as consequential because **hypothetical imperatives** have the formula “if I want [*something*], then I will do [*something*]”.

Kant proposed two formulations of his categorical imperative:

1. “Act only according to that maxim [rule] whereby you, at the same time, **WILL** that it should become a universal law.”
 - Based on reason
 - Very general, with no specific obligation
2. “Act in such a way that you always treat humanity, whether in your own person or in that of any other, **never simply as a means**, but **always** at the same time **as an end**.”
 - A little more specific because it includes one value, namely human life

The 5 Key Principles of Nichomachean Ethics

Nichomachus was Aristotle's Son

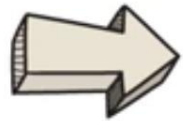
1. Eudaimonia	<p>Why we do what we do is to get this deepest sense of happiness. Happiness, not in the sense that we use the term in modern times, but something much deeper. Successfully actualising your potential. Being the best version of yourself. When you're flourishing.</p> <p>to flourish</p> <p>Eu = Good Daimon = Soul</p> 
2. Arete	Live with virtue. Always live your best life with virtue
3. Olympics	Greek for "every four years". Be the best in action consistently / Be the best in the moment (one swallow does not make a summer)

The 5 Key Principles of Nichomachean Ethics

<h2>4. The Mean / the Middle</h2>	<p>The doctrine of seeking the middle between virtue and excess. Courage is Aristotle's No. 1 virtue, amongst all the other virtues that he lists in his book. It vitalises all the other virtues. 'Courage' comes from the Latin word for 'heart'. The heart vitalises all the other organs in the body.</p> <p>Therefore, without courage, none of the other virtues can be vitalised. Ideas without the courage to put them into action, remain just ideas. You need to put your virtues into action when it is hard to put them into action. If you feel fear and you don't act, then you have a vice of deficiency – you're a coward. If you never feel fear, then that's not a virtue. That leads to rash behaviour. What you need is to find the mean/middle. That's the virtue. You need to know yourself well enough to know what is the virtuous mean. It is not always easy to find it, so you need to be always conscious of that because each of us have different tendencies and know when not to lean too far in any particular direction.</p>
<h2>5. Magnanimity</h2>	<p>Magna = Great ← Magnanimous / pusillanimous Animus = Soul</p> <p>Have a very high sense of what you're capable of and then do it On the other hand, know your limitations and don't be conceited. Be aware of the other side where you don't value yourself enough. Think about yourself as the best version of what you can be and know what that looks like. Then, go out and be the best version of yourself. Act on it! That makes you a eudaimon (a good soul).</p>

ARISTOTLE'S VIRTUE ETHICS

- is built around the premise that humans should aim to achieve excellent character



HUMANS SHOULD BECOME ETHICAL INDIVIDUALS



- **ETHICAL INDIVIDUALS**

= as having virtuous character (ethikē aretē” in Greek)

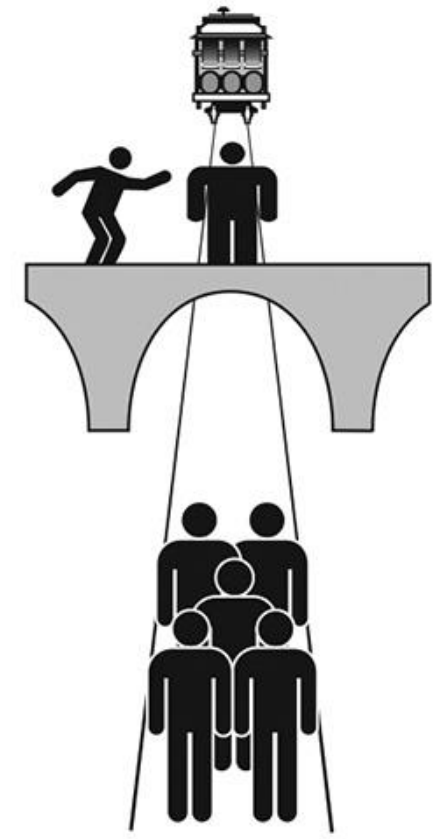
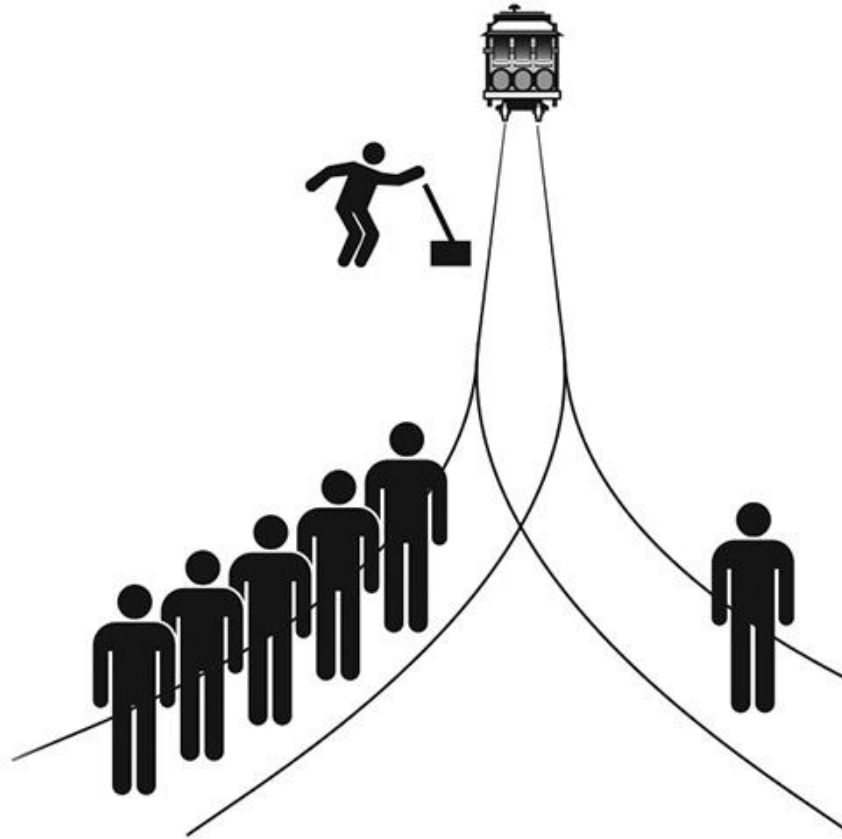
- **AN EXCELLENT CHARACTER**

= is the precondition for attaining HAPPINESS or EUDAIMONIA

is the ultimate goal of Aristotle's virtue ethics

According to Aristotle, happiness consists in achieving, through the course of a whole lifetime, all the goods — health, wealth, knowledge, friends, etc. — that lead to the perfection of human nature and to the enrichment of human life

The Runaway Trolley Predicament – What Would You Do?



**A Firm Moral
and Ethical
Foundation is
Essential for
Good
Governance to
Prevail**



PART 3



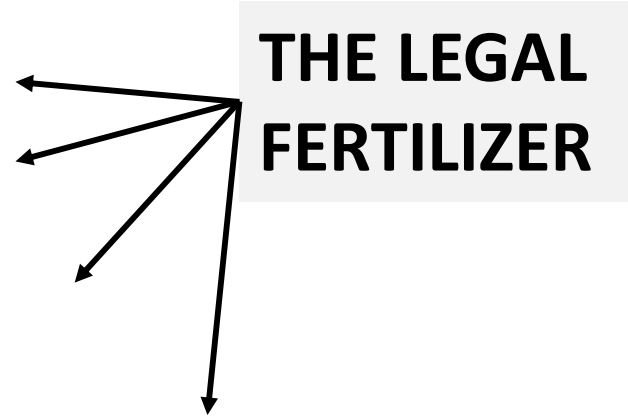
Let us look at how to
apply these lessons in
ethics and morality to
the dispute resolution
process



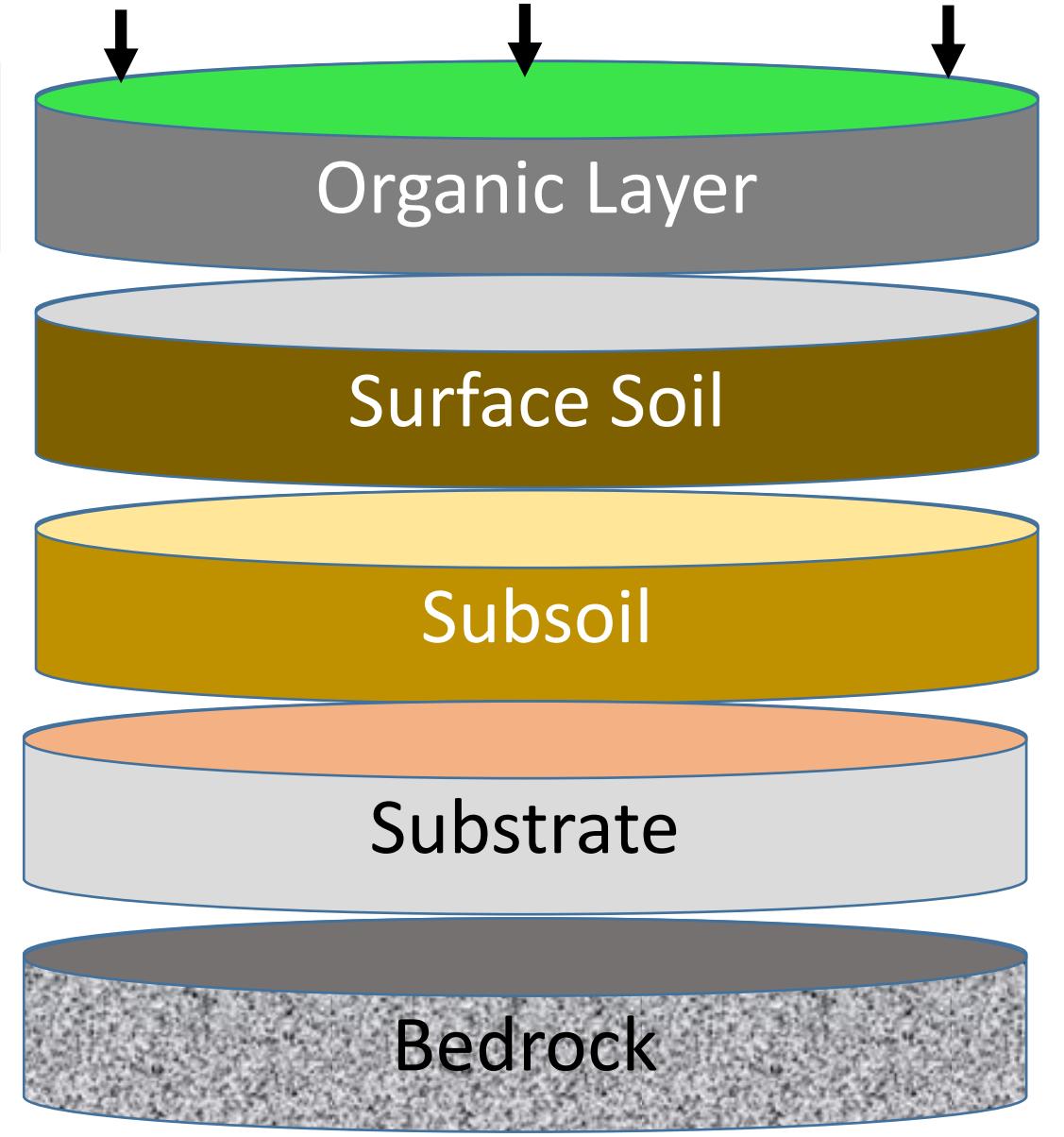


The following are some of the legal principles that underpin the *lex sportiva* (the sports law)

- nulla poena sine lege
- nulla poena sine lege clara
- force majeure
- disrepute
- stare decisis
- audi alteram partem
- nemo iudex in causa sua
- sine poena nulla lex
- contra proferentem
- ne eat iudex ultra petita partium
- nemo est supra legem
- nemo tenetur armare adversarium contra se
- nulla poena sine culpa
- nullum crimen, nulla poena sine praevia lege poenali
- sine poena nulla lex
- tempus regit actum
- ubi lex voluit dixit, ubi noluit tacuit
- expressio unius est exclusio alterius
- testis unus, testis nullus
- venire contra factum proprium
- omnia praesumuntur rite esse acta



THE FOOTBALL JURISPRUDENCE FIELD



Legal Principles That Permeate the Dispute Resolution System

PHRASE/PRINCIPLE	ENGLISH EXPLANATION
-ubi lex voluit dixit, ubi noluit tacuit	-If the law means something, it says it
-expressio unius est exclusio alterius	-One of the so-called maxims of statutory interpretation is expressio unius est exclusio alterius: to express one thing is to exclude another. "The maxim reflects a form of reasoning that is widespread and important in interpretation the a contrario argument ... negative implication ..implied exclusion ... "An implied exclusion argument lies whenever there is reason to believe that if the legislature had meant to include a particular thing within the ambit of its legislation, it would have referred to that thing expressly. Because of this expectation, the legislature's failure to mention the thing becomes grounds for inferring that it was deliberately excluded. Although there is no express exclusion, exclusion is implied." -Prof. Ruth Sullivan
nulla poena sine lege	The principle of legality requires that there be no penalty without a law

Legal Principles That Permeate the Dispute Resolution System

nulla poena sine lege clara	The principle of predictability requires that any rule or law must be clear and precise
Force majeure (Fr)	<p>“Vis major, or superior force, is some force, power or agency which cannot be resisted or controlled by the ordinary individual. The term is now used as including not only the acts of nature, vis divina, or ‘act of God’, but also the acts of man.” (Lydia Le Roux)</p> <p>-Force majeure is a common clause in contracts that essentially frees both parties from liability or obligation when an extraordinary event or circumstance beyond the control of the parties, such as a war, strike, riot, crime, plague, or an event described by the legal term act of God (hurricane, flood, earthquake, volcanic eruption, etc.), prevents one or both parties from fulfilling their obligations under the contract. In practice, most force majeure clauses do not excuse a party's non-performance entirely, but only suspend it for the duration of the force majeure. (Wille’s Principles of South African Law)</p>

Legal Principles That Permeate the Dispute Resolution System

Disrepute	Roughly, CAS defines 'Disrepute' as: bringing a person into disrepute is to lower the reputation of the person in the eyes of ordinary members of the public to a significant extent as a direct result of the action of the accused (and this must be proven to a certain standard)
stare decisis	Judicial precedent emanating from decisions of the judicial bodies. Certainty, predictability, reliability, equality, uniformity, convenience: these are the principal advantages to be gained by a legal system from the principle of stare decisis
Proportionality	To find out whether a sanction is excessive, a judge must review the type and scope of the proved rule violation, the individual circumstances of the case, and the overall effect of the sanction on the offender.
Audi alteram partem	The general application of PAJA must be acknowledged somehow (The Statutes already acknowledge the Bill of Rights, but this is not given much consideration. In fact, a provision is being removed from Art. 36 in new proposed amendments from the SAFA Legal Committee
principles of natural justice, including audi alteram partem	The principles of natural justice must be the centrepiece of a rights regime in football. The principle of justice could be described as the moral obligation to act on the basis of fair adjudication between competing claims. As such, it is linked to fairness, entitlement and equality
nemo iudex in causa sua	The legal principle that one should not be a judge in his own cause

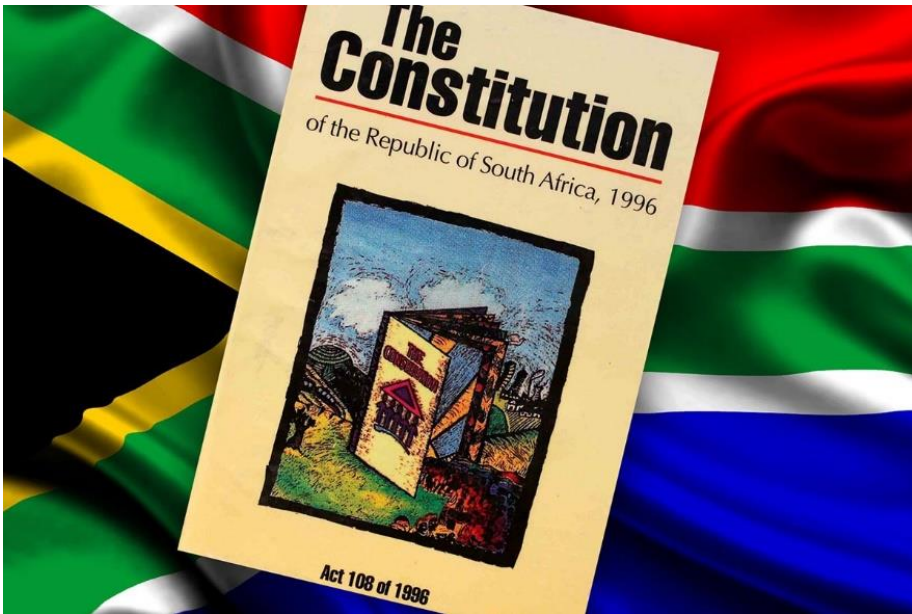
Legal Principles That Permeate the Dispute Resolution System

Contra proferentem	<p>Literally, against the profferor</p> <p>-In contract law, the doctrine of contractual interpretation which provides that an ambiguous term will be construed against the party that imposed its inclusion in the contract – or, more accurately, against the interests of the party who imposed it.</p> <p>The contra proferentem rule of interpretation may be of importance in contractual interpretation where one of the parties draft an obscure clause. It may also be of relevance in the interpretation of statutory rules predisposed by an entity, on disciplinary measures where unclear wording cannot be the basis of a conviction. (CAS 2015/A/4222 Italian Canoe Federation & Others v ICF & others)</p>
ne eat iudex ultra petita partium	<p>In law, the principle of non ultra petita, meaning "not beyond the request" in Latin, means that a court may not decide more than it has been asked to</p>
nemo est supra legem	<p>Nobody is above the law; or nemo est supra leges, nobody is above the laws</p>
nemo tenetur armare adversarium contra se	<p>No one is bound to arm an opponent against himself, meaning that a defendant is not obligated to in any way assist the prosecutor to his own detriment</p>
nulla poena sine culpa	<p>The guilt principle is a legal principle requiring that one cannot be punished for something that they are not guilty of</p>

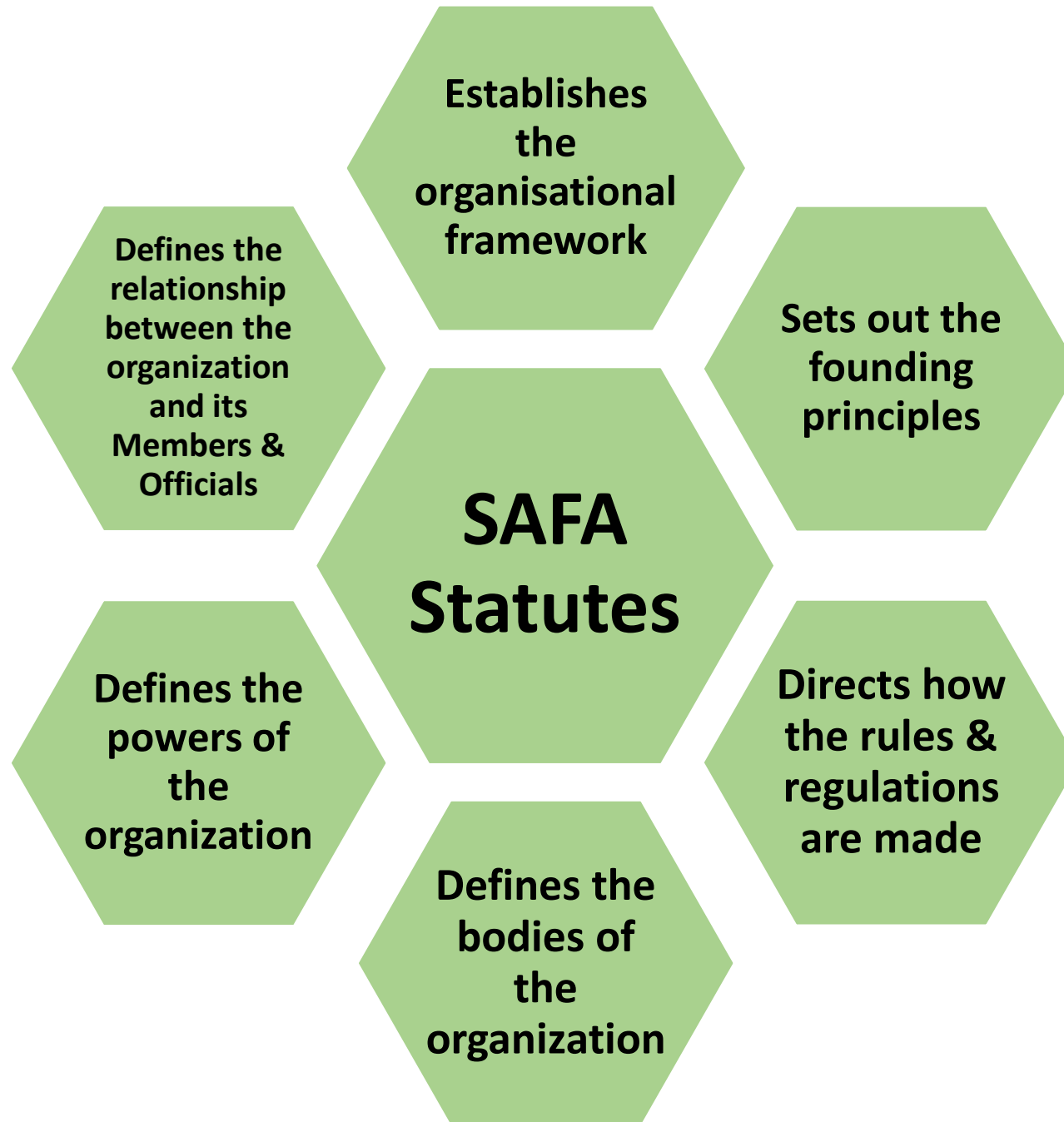
Legal Principles That Permeate the Dispute Resolution System

<p>-Nullum crimen, nulla poena sine praevia lege poenali -Nullum crimen sine lege is latin for "no crime without law."</p>	<p>-No crime, no punishment without a previous penal law -Legal principle meaning that one cannot be penalised for doing something that is not prohibited by law; penal law cannot be enacted retroactively.</p>
<p>sine poena nulla lex</p>	<p>“Without penalty, there is no law” -Refers to the ineffectiveness of a law without the means of enforcement</p>
<p>Tempus regit actum</p>	<p>The principle is a legal principle that applies to rules and regulations. They shall, in principle, not apply retroactively. (CAS-Ad Hoc Division Rio Olympic Games – Case #: 16/011)</p>
<p>testis unus, testis nullus</p>	<p>“one witness is not a witness”</p>
<p>venire contra factum proprium</p>	<p>“No one may set himself in contradiction to his own previous conduct.” The doctrine of venire contra factum proprium provides that where the conduct of one party has induced legitimate expectations in another party, the first party is estopped from changing its course of action to the detriment of the second party. CAS 2015/A/4195 FK Senica v. PFC Ludogorets 1945 & Fédération Internationale de Football Association (FIFA)</p>
<p>sine poena nulla lex</p>	<p>Without penalty, there is no law. In other words, penalties must be spelled out in a schedule of penalties that cannot be made up as we go along.</p>

The Fundamental Elements of a Constitution



The Basic Structure of a Constitution



Basic Structure of a Constitution

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graph LR; A[Basic Structure of a Constitution] --- B[1. Establishes the organisational framework]; A --- C[2. Sets out the principles on which the organization is founded]; A --- D[3. Directs how the rules & regulations are made]; A --- E[4. Defines the bodies of the organization]; A --- F[5. Defines the powers of the organization]; A --- G[6. Defines the relationship between the organization and its Members & Officials];
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1. Establishes the organisational framework

2. Sets out the principles on which the organization is founded

3. Directs how the rules & regulations are made

4. Defines the bodies of the organization

5. Defines the powers of the organization

6. Defines the relationship between the organization and its Members & Officials

The Organisational Founding Principles

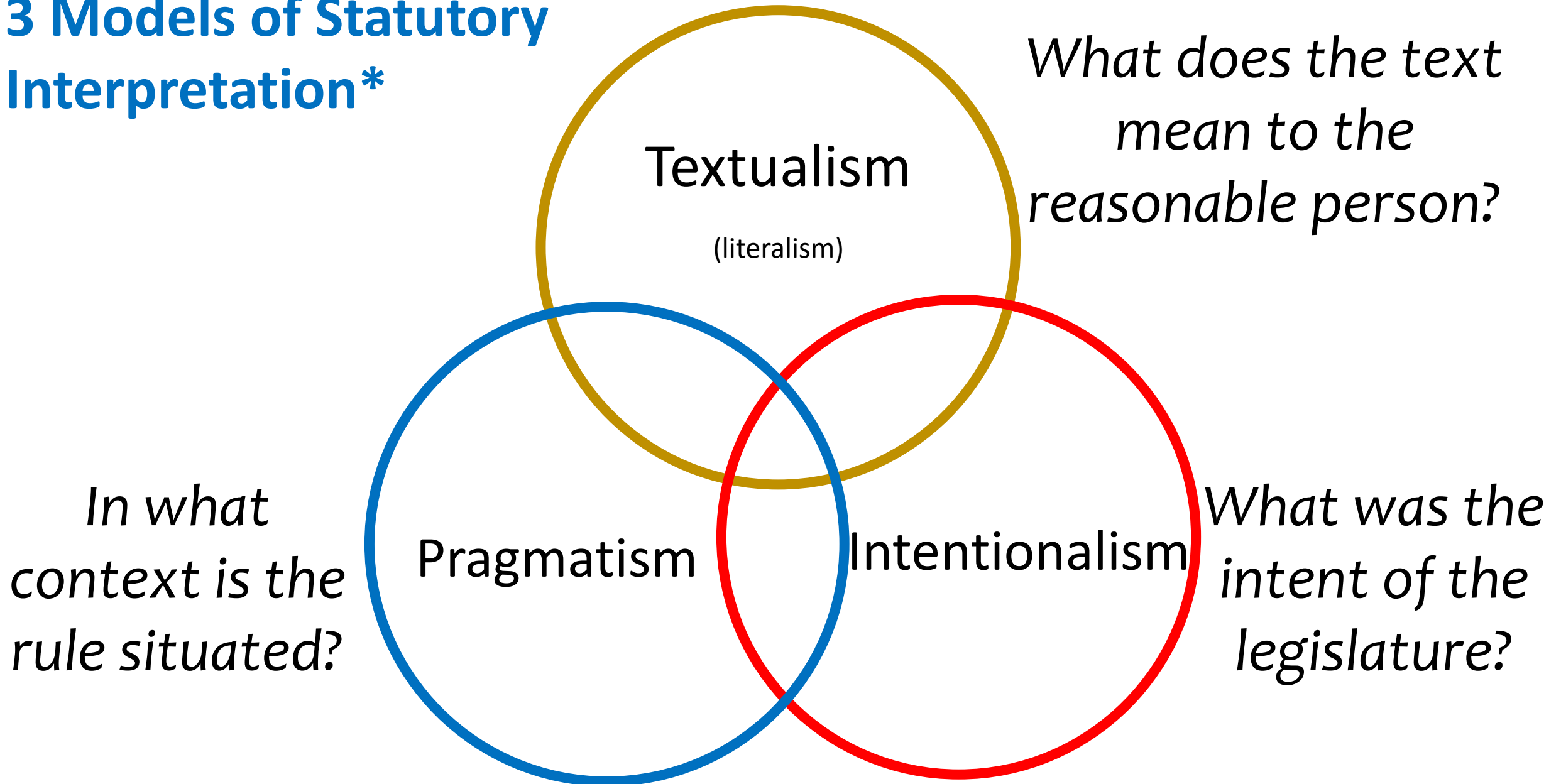
The Preamble and Article 2 Sets Out The Founding Principles

- Develop the Game of Football
- Be Mindful of Its History
- Respect the Bill of Rights
- Maintain Unity
- Set the parameters for the organisation's responsibilities
- Be neutral in politics and religion
- No discrimination of any kind (against a country, person, or group of people on account of race, ethnic origin, gender, language, religion, politics, or any other reason)



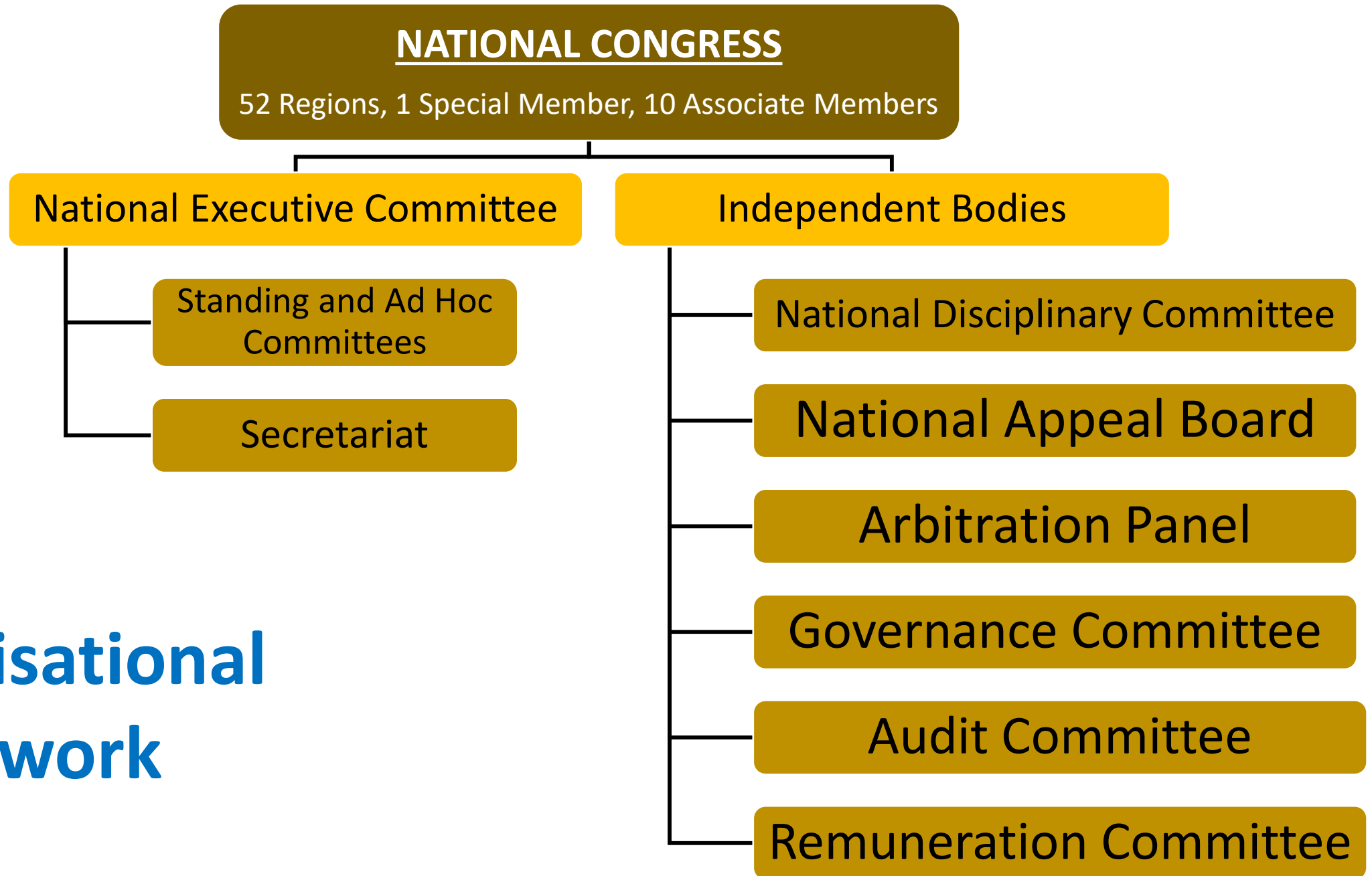
**FOUNDING
PRINCIPLES**

3 Models of Statutory Interpretation*

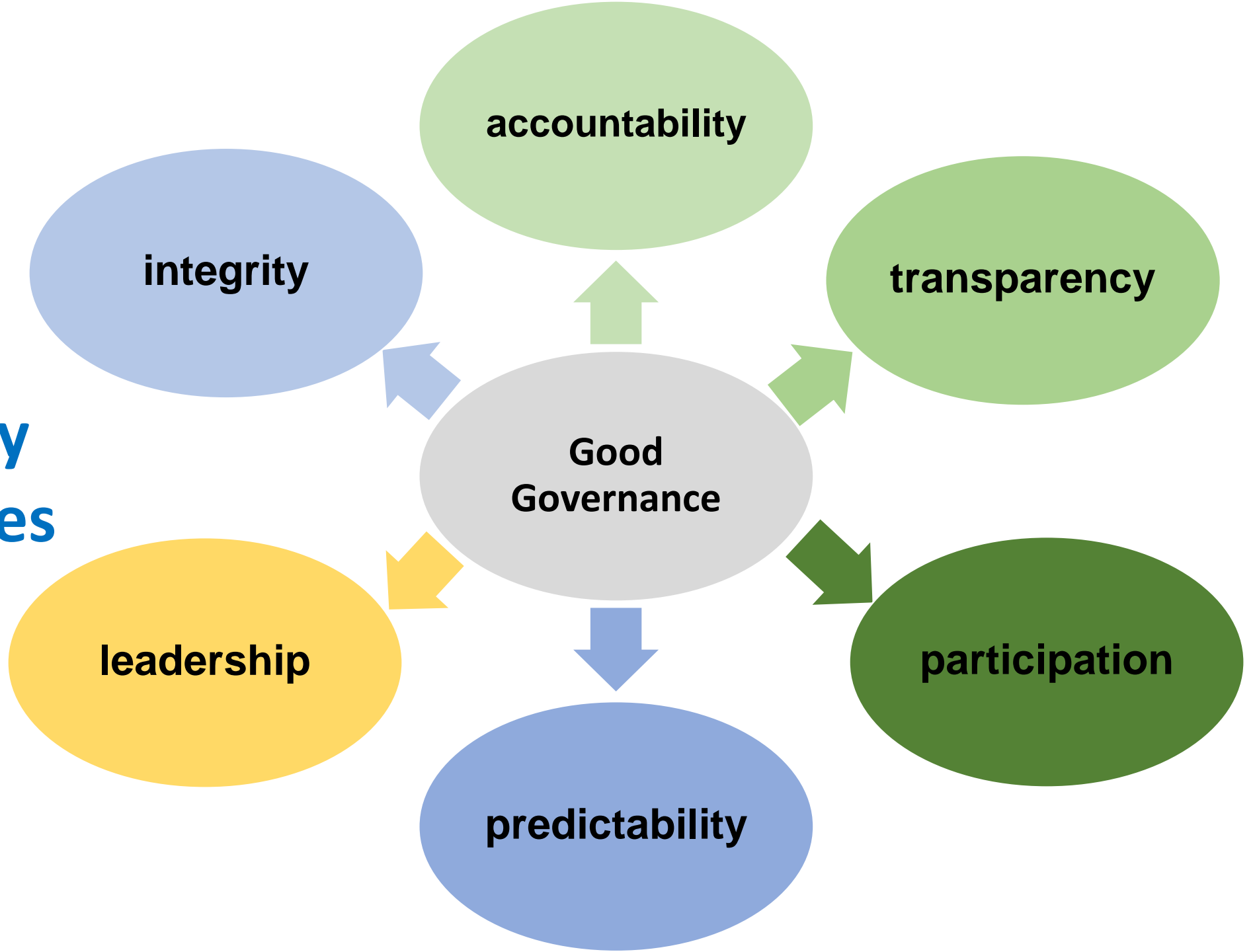


*Ruth Sullivan, Statutory Interpretation in the Supreme Court of Canada, University of Ottawa, [Ottawa Law Review, Vol. 30, No. 2, 1999](#), pg. 181

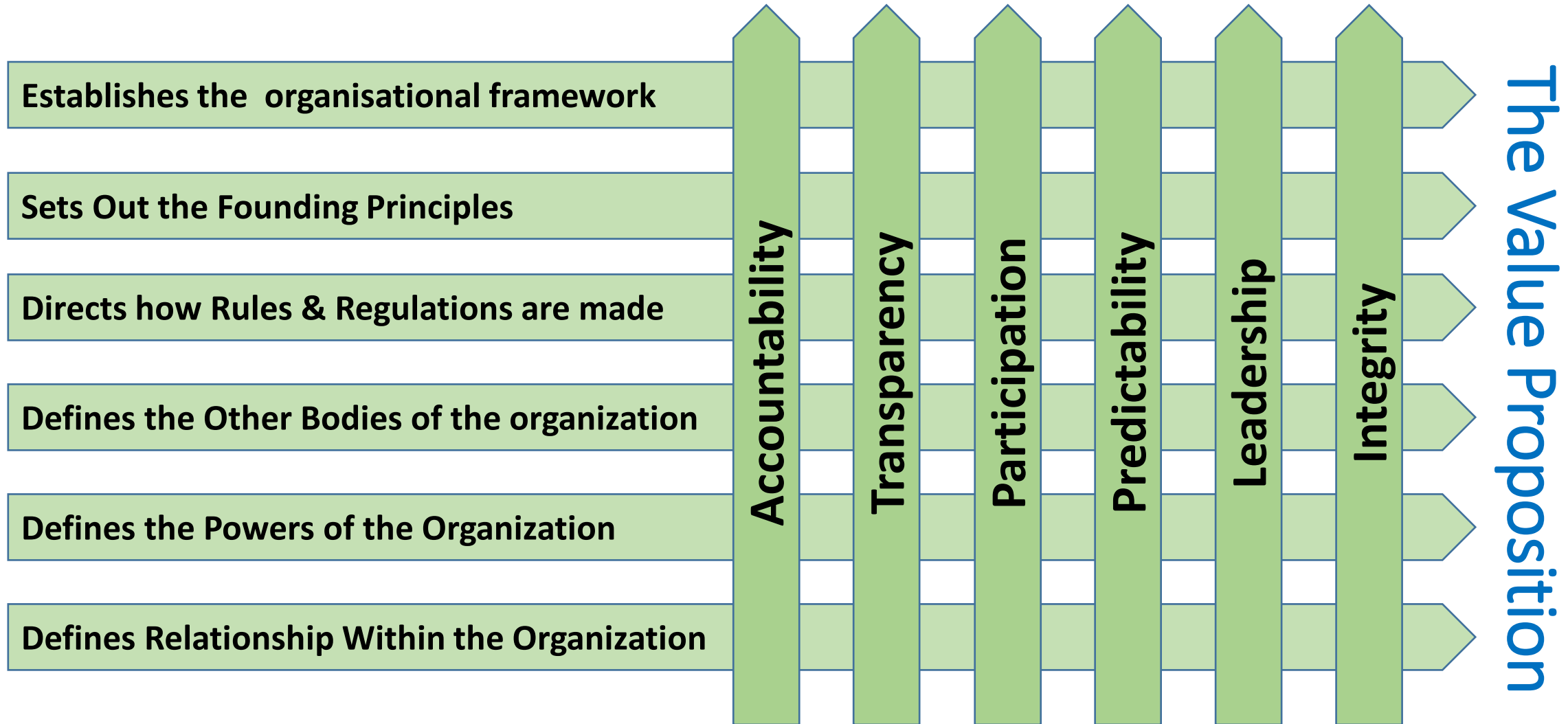
Organisational Framework



The Key Principles



The Matrix Governance Structure

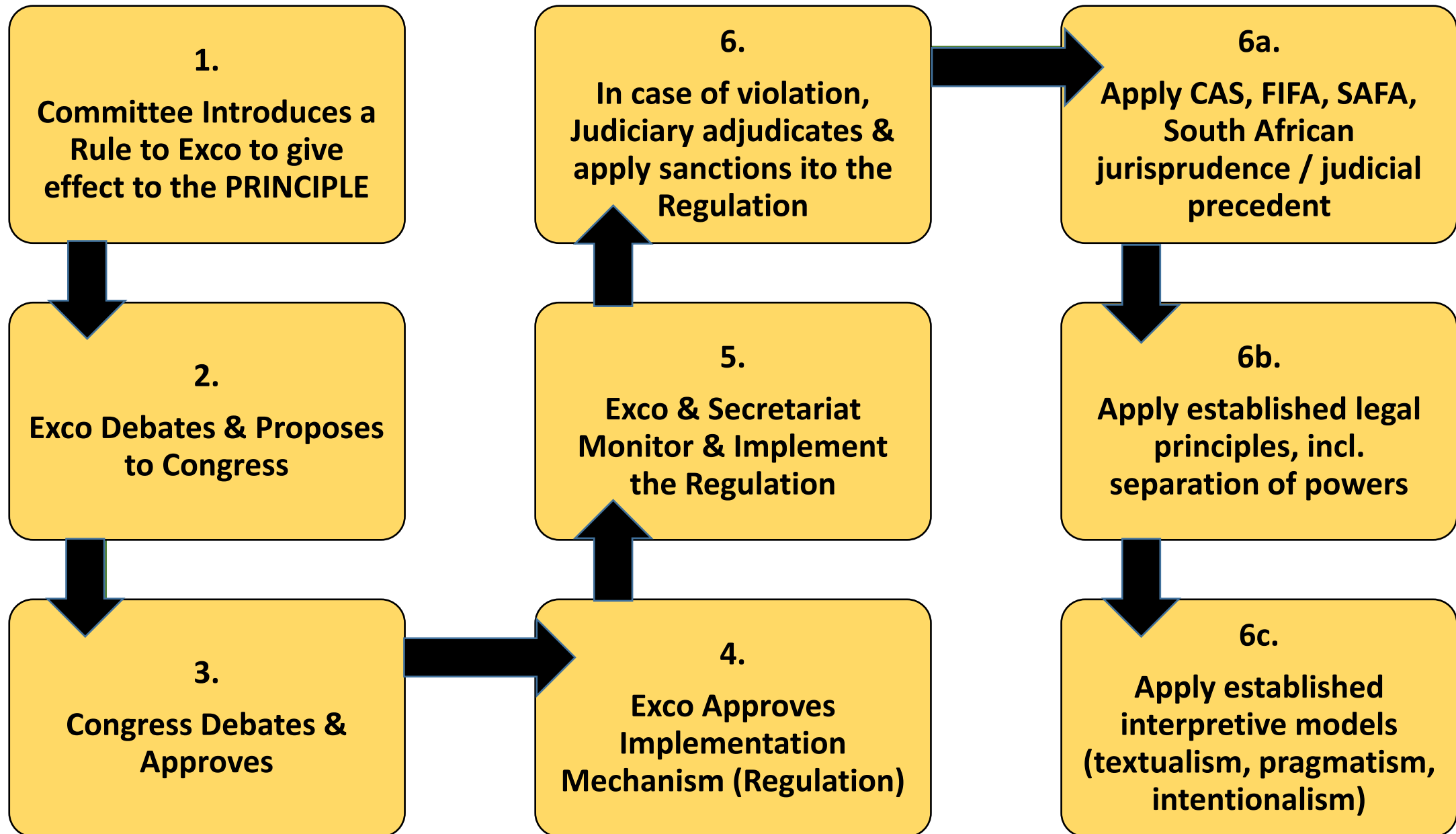




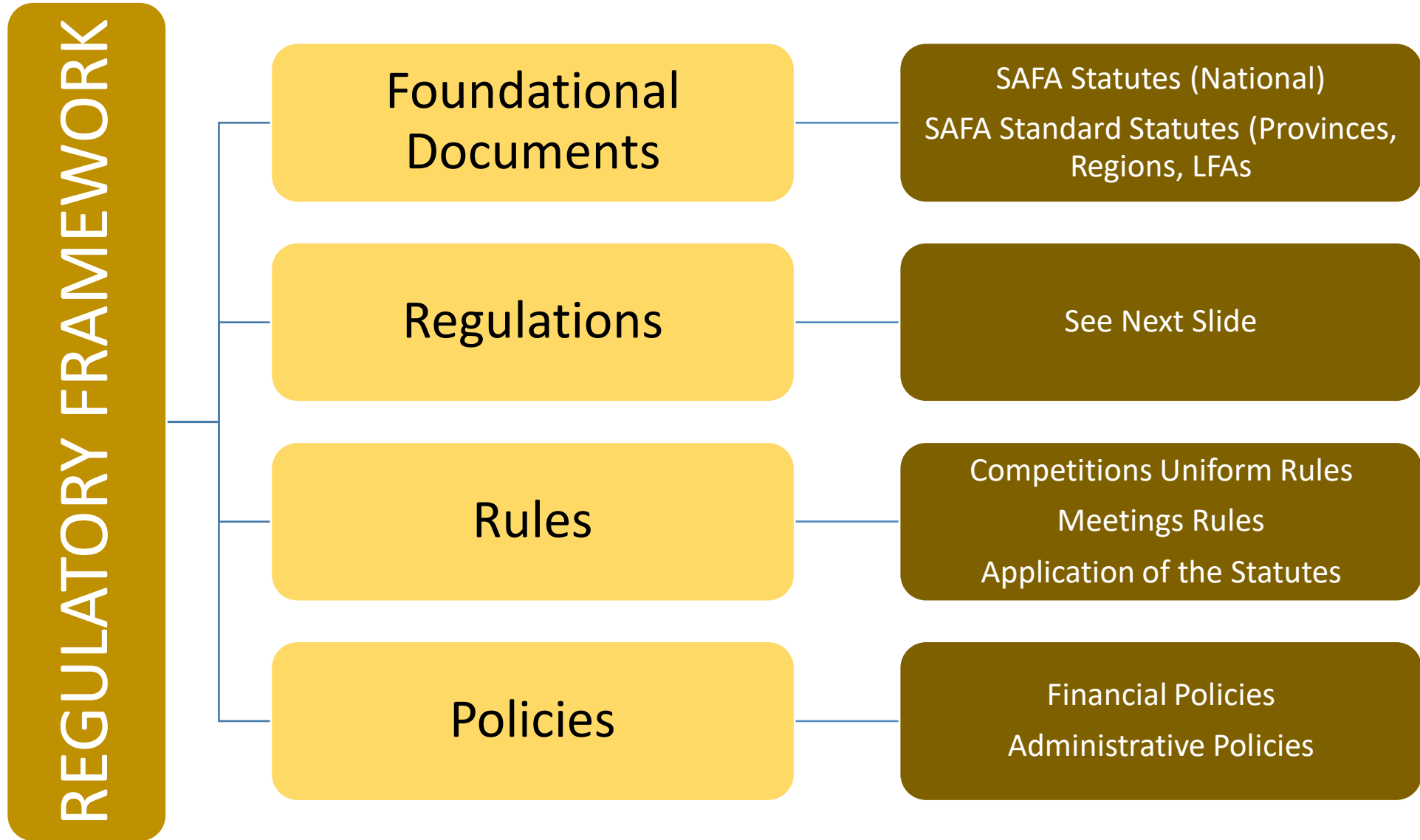
Let us look
at how the
football
laws are
made



How Are the Football Laws Made?



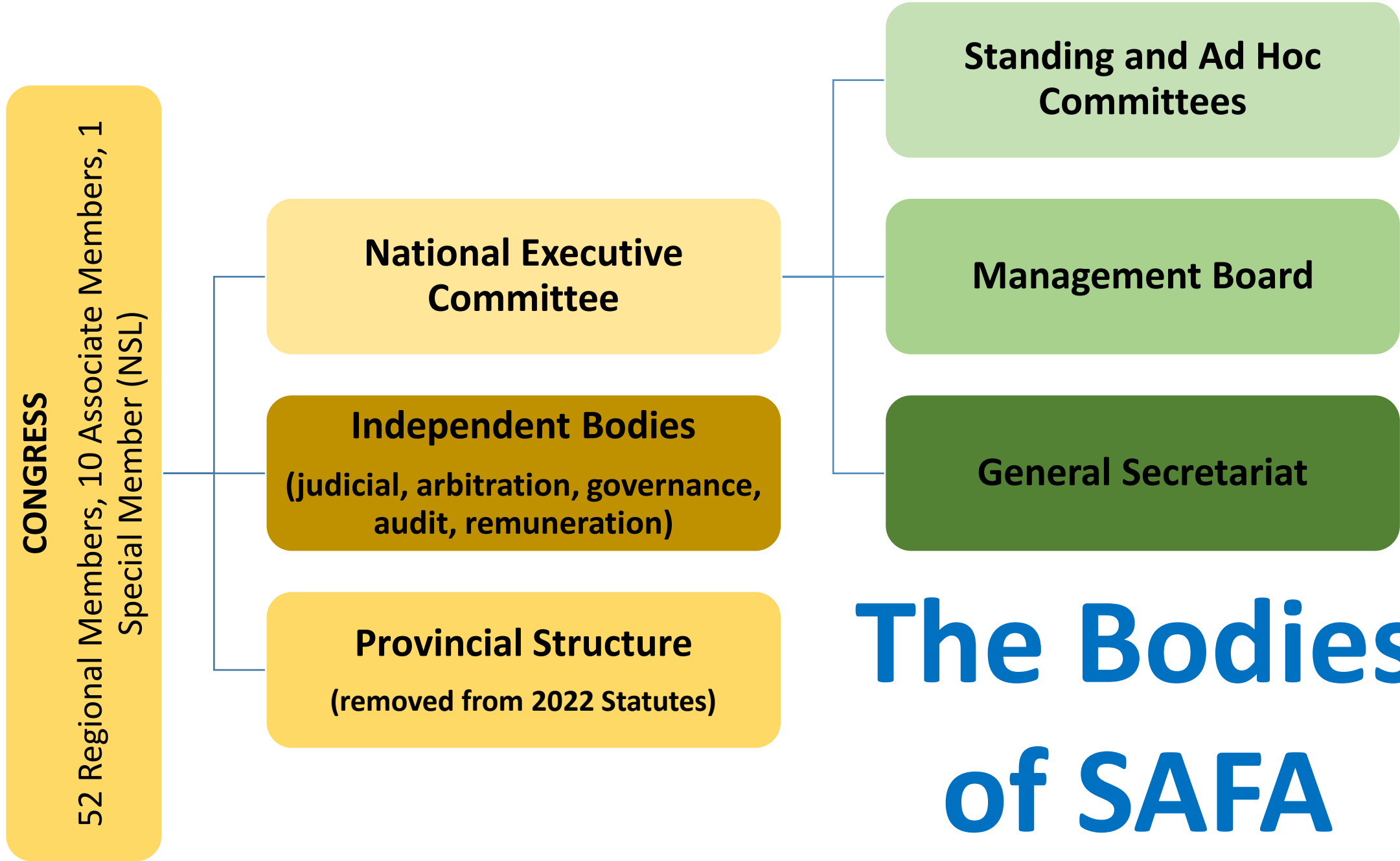
SAFA's Regulatory Framework



List of SAFA's Regulations



- Disciplinary Code
- Electoral Code
- Player Status & Transfer Regulations
- Players' Agent Regulations
- Academies Regulations
- Standing Orders for Meetings
- Club Licensing (amateur & professional)
- Code of Ethics
- Ethics, Fair Play & Anti-Corruption
- Hosting Int'l Matches in SA
- Communications Policy
- Match Commissioner Code of Conduct
- Electoral Code of Conduct
- Regulations on Application of the Statutes
- Referees Code of Conduct



The Bodies of SAFA

Article 2 Defines The Powers of the Organisation

Article 2 Defines the Powers of the ORGANISATION

- Develop the Game of Football
- Be Mindful of Our History
- Respect the Bill of Rights
- Maintain Unity
- Set the parameters for the organisation's tasks
- Be neutral in politics and religion
- No discrimination of any kind (against a country, person, or group of people on account of race, ethnic origin, gender, language, religion, politics, or any other reason)

SAFA's

POWER

The Separation of Powers Doctrine

JUDICIARY

POWER TO MAKE JUDGEMENTS ON LAW



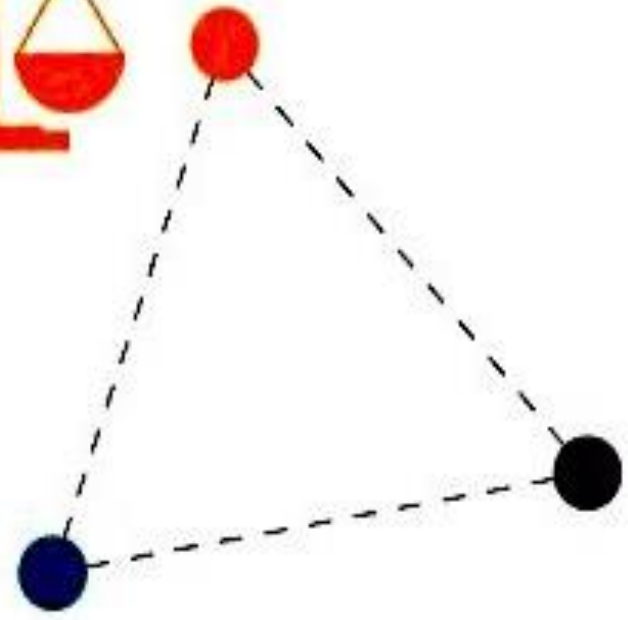
EXECUTIVE COMMITTEE

POWER TO PUT LAW INTO ACTION

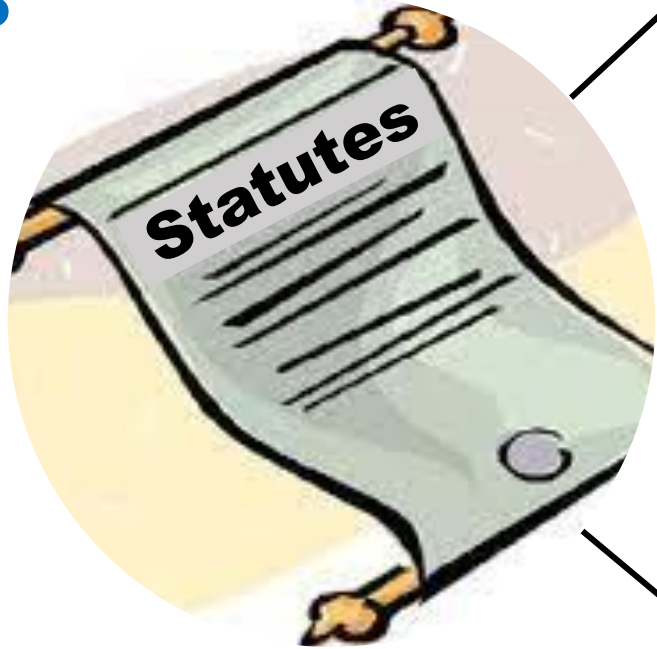


CONGRESS

POWER TO MAKE AND CHANGE LAW



Effective Separation of Powers



The Statutes prescribe
the boundaries for each
of these branches

Legislative

- Congress
- Passes all laws

Executive

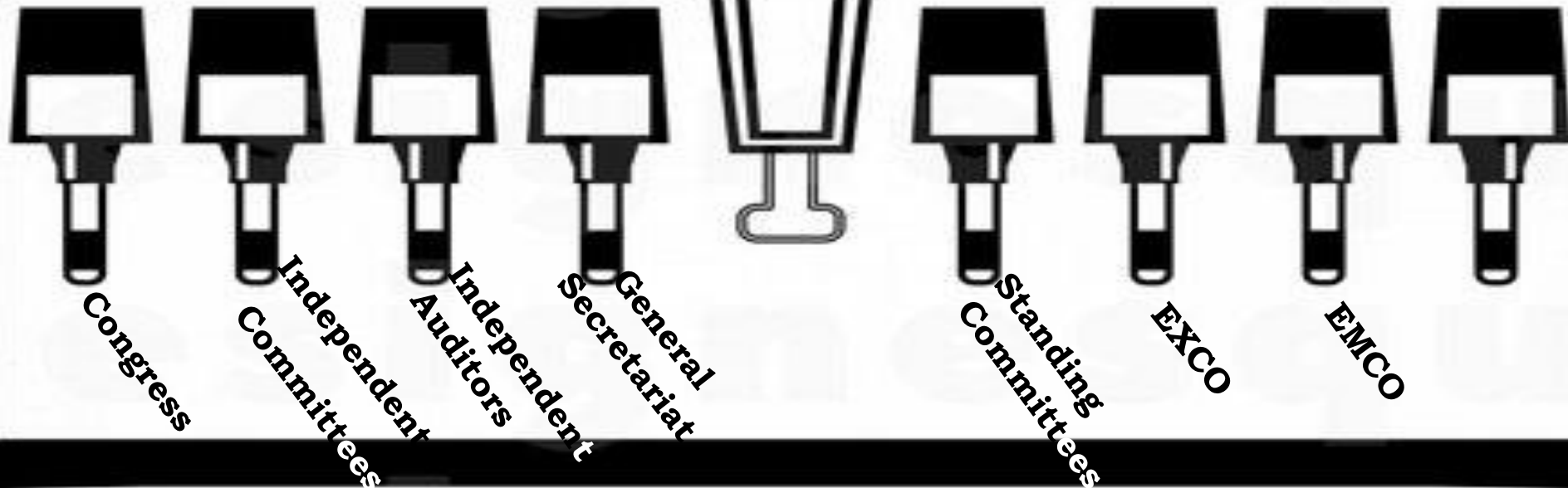
- Policymaking body
- Oversees Standing Committees & Secretariat

Judicial

- Interprets the constitution
- Imposes disciplinary sanctions

Article 2 of the SAFA Statutes

Aims, Objectives, and Powers of the Association




How Authority is Separated

Congress is the legislative body

Executive, EMCO, Committees, Auditors, and Independent Bodies

Executive,
Policy &
Judicial
Bodies

An upward-pointing black arrow connects the 'Executive, Policy & Judicial Bodies' box to the 'Executive, EMCO, Committees, Auditors, and Independent Bodies' text.

General Secretariat

Services the
Organisation

Administrative Body

A leftward-pointing black arrow connects the 'Administrative Body' box to the 'Services the Organisation' box.

NATIONAL CONGRESS

(The Legislature)

52 Regions, 1 Special Member, 10 Associate Members

National Executive
Committee

Judicial Bodies

Standing and Ad
Hoc Committees

National
Disciplinary
Committee

Secretariat

National Appeal
Board

Art. 34 decides what
the NEC can do

Arts. 41-69 decide
Committees roles

Art. 65 decides what
Secretariat can do

Art. 22 decides
what Congress
can do

Arts. 67 & 68
decide what
judiciary can do

REGIONAL CONGRESS

(The Legislature)

of LFAs, # of Associate Members

**Regional Executive
Committee**

Art. 34 decides
what the REC can
do

**Standing and Ad
Hoc Committees**

Art. 50 decides
what the
Committees can do

Secretariat

Arts. 51 decides
what the
Secretariat can do

Judicial Bodies

Art. 22 decides
what Congress
can do

**Regional
Disciplinary
Committee**

(serves as Appeal Committee
for LFA Appeals)

Arts. 52-54
decides what
Judiciary can do

LFA CONGRESS

(The Legislature)

of LFAs, # of Clubs

**Local Executive
Committee**

Judicial Body

**Standing and Ad
Hoc Committees**

**LFA Disciplinary
Committee**

Secretariat

**Art. 22 decides
what Congress
can do**

**Arts. 52-54
decides what
Judiciary can do**

**Art. 51 decides
what the
Secretariat can do**

**Art. 34 decides
what the LEC
can do**

**Art. 50 decides
what the
Committees can do**

NSL BOARD OF GOVERNORS

(The Legislature)

16 Premier League Clubs, 16 First Division Clubs

**Executive
Committee**

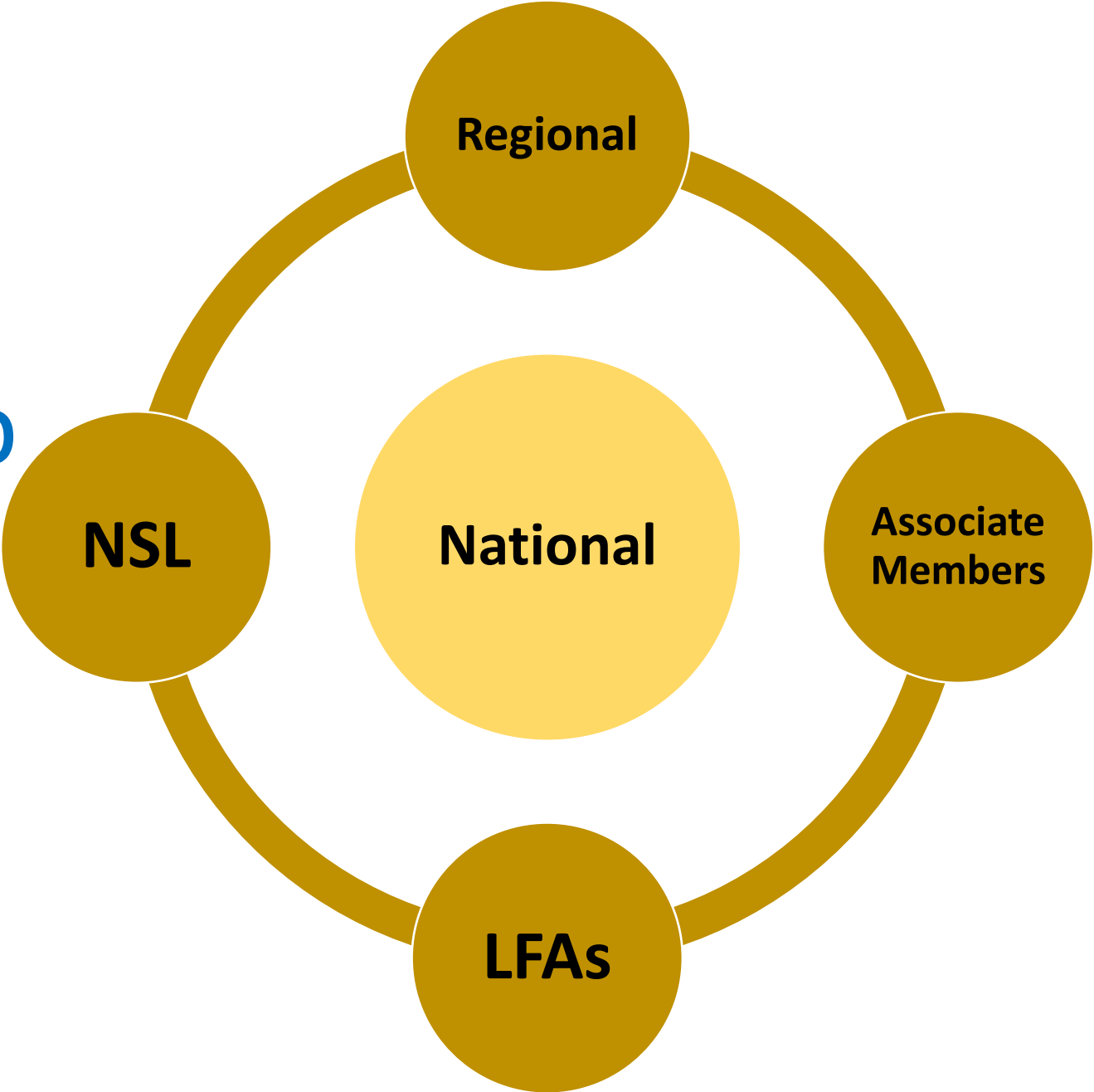
**Standing and Ad
Hoc Committees**

**NSL Disciplinary
Committee**

**Premier Soccer
League**

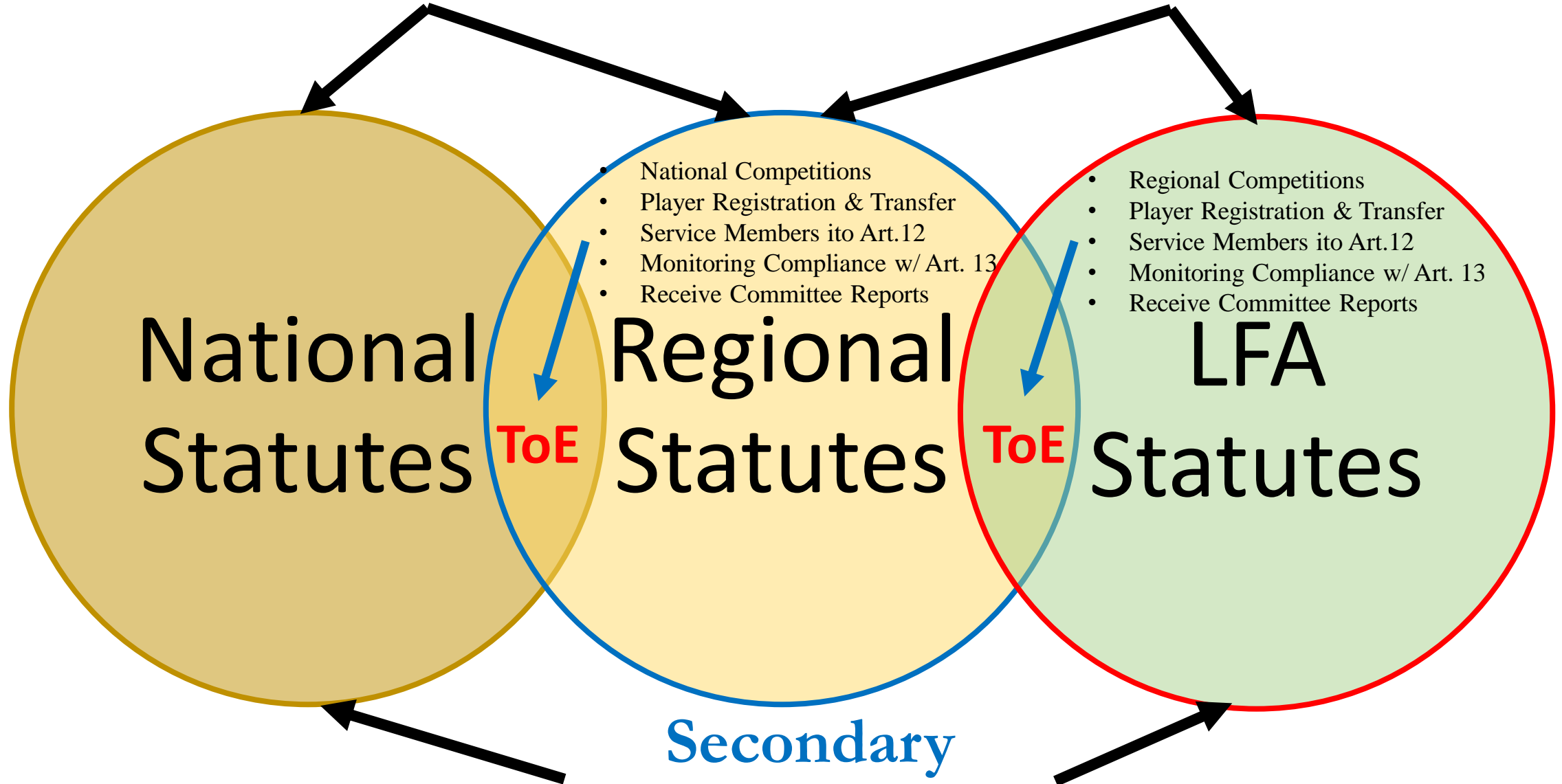
**National First
Division**

Understanding the Relationship Between SAFA and Its Members



Primary Relationship

Primary Relationship



Secondary Relationship

ToE = Terms of Engagement

The Structure in a Nutshell



Part

4

- Does SAFA perform a public power?
- What is administrative action?
- What is a Decision?
- What is a Sanction?
- What is Blocking?
- Abuse of Art. 2.17.16

SAFA Performs a Public Function / Power

“[11]...A constitution of a trade union [voluntary association] is a statutory document. **Non-compliance with it equates non-compliance with the law and ultimately non-compliance with the rule of law.**”¹



In *Van Zyl v New National Party & Others*, supra at p1187 paragraph 75, Van Reenen J observed:

“No statutory definition of the concepts ‘**exercising a public power**’ and ‘**performing a public function**’ has been provided for in AJA. Accordingly, recourse has to be had to the dictionary meaning thereof. The *Shorter Oxford English Dictionary*’s definition of ‘public’, in the context, means belonging to, affecting or concerning the community or the nation and ‘power’ means the ability to act in a particular way. On the basis of the dictionary meanings of the constituent components of the concept ‘**exercising a public power**’ it **conveys the ability to act in a manner that affects or concern the public.**”³

1. ZALC J300-22 -Tonyela NO v Numsa (2022)

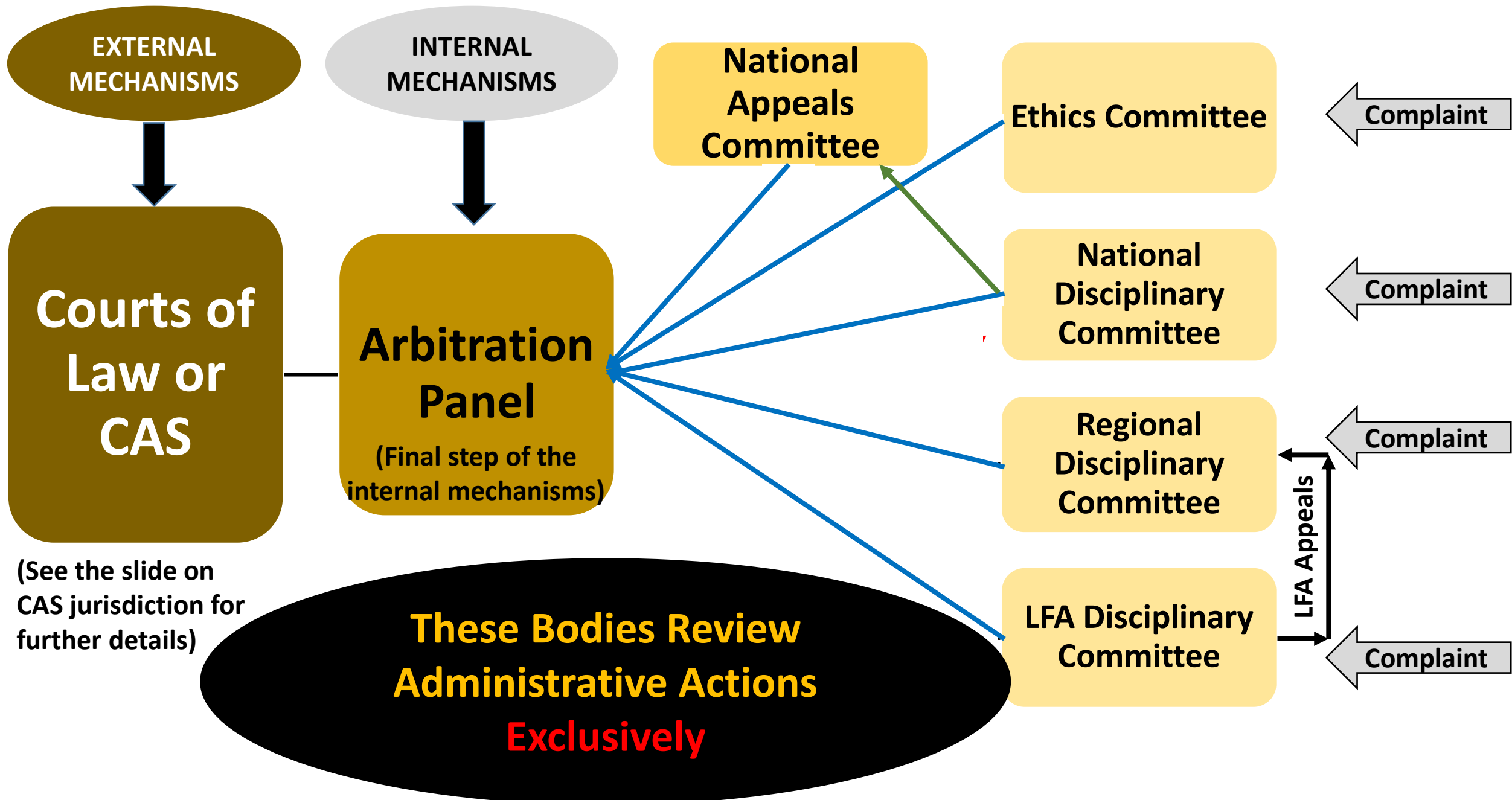
2. HCCGH 8363/2005 – Tirfu Raiders RC v SARFU & Others

SAFA Performs a Public Function / Power



“I can see no reason why the regulatory powers of FIFA, SAFA and the NSL, which includes their dispute settlement provisions (as I have found) should not permit of the application of the public law disciplines of PAJA.”

HCSG 16/16836 – Tendai Ndoro and Ajax Cape Town v SAFA, NSL, Cassim, Platinum Stars, Orlando Pirates (2018), para 48





ADMINISTRATIVE ACTION

“Any action taken by a body exercising a public power or performing a public function”

Types of Administrative Action





CAS Defines a Sanction and a Decision

What is a Sanction?

For a measure to qualify as a SANCTION or disciplinary in nature, the prevailing view requires that the adverse effects be inflicted in response to an alleged violation of the rules or some form of misconduct. In short, there are three necessary elements of a sanction:

- (i) adverse consequences;
- (ii) that are designed to punish;
- (iii) misconduct by the addressee of the sanction.

CAS 2020/O/6689 World Anti-Doping Agency (WADA) v. Russian Anti-Doping Agency (RUSADA), award of 17 December 2020

What is a Decision?

A DECISION is a unilateral act sent to one or more determined recipients and is intended to produce legal effects. Such act must:

- (i) express an *animus decidendi* (an intention to decide on a matter) of a sport governing body in connection with a specific topic or legal situation, and
- (ii) be communicated to the relevant addressee.

CAS 2016/A/4586 Altay Football Club v. Professional Football League of Kazakhstan & Football Federation of Kazakhstan (FFK), award of 23 January 2017 (operative part of 24 October 2016)

Expulsion

- **from the sport itself**

Suspension

- **from a match/es for a defined period**

Dismissal

- **for a defined period of time**

Ban

- **from a place or activity under the jurisdiction of the Association, player acquisition and transfer**

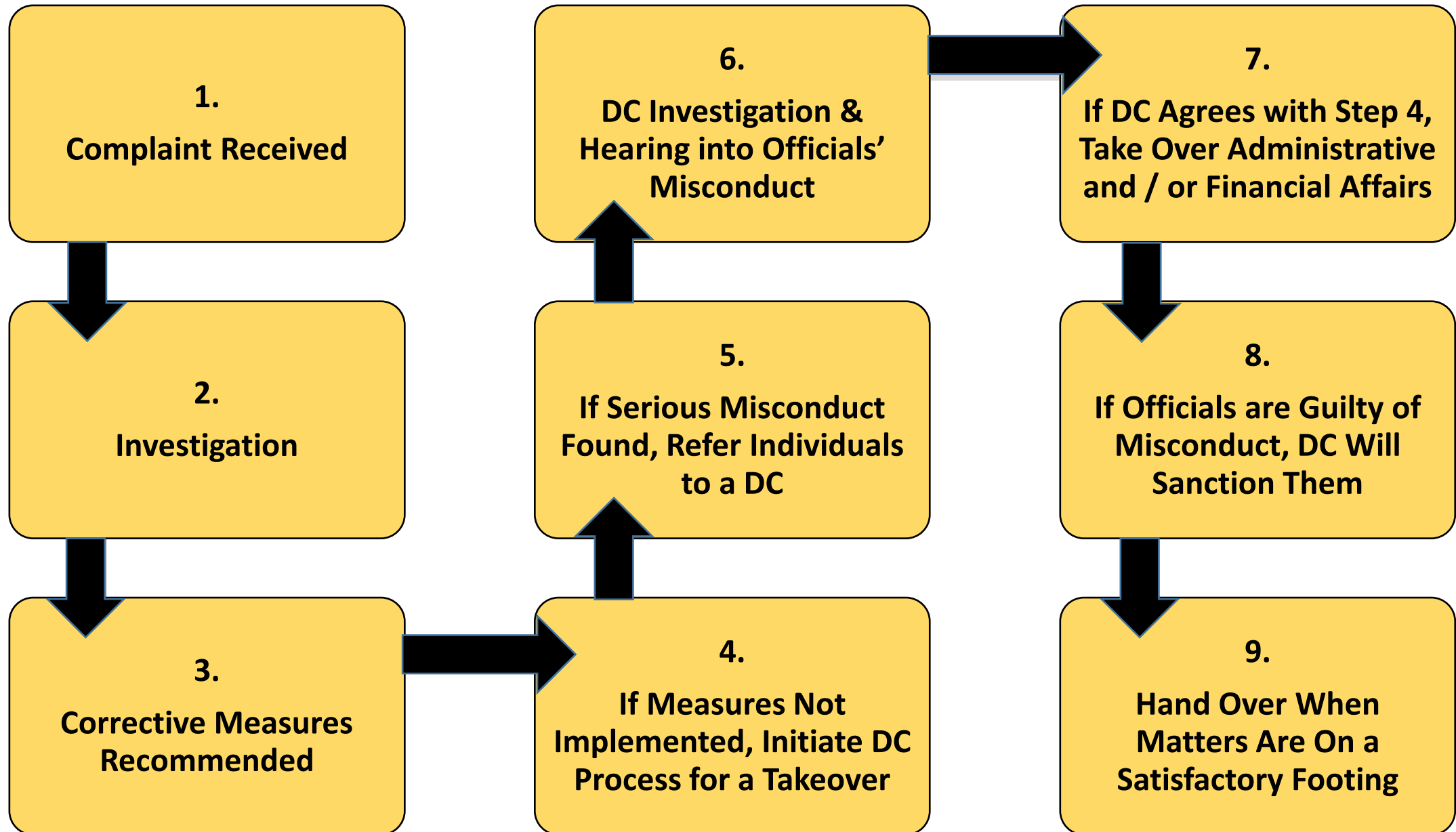
Removal of Elected Officials

- **How to remove officials according to the rules**

Invoking Article 2.17.16

- **Intervening in the administrative and/or financial affairs of a Member**

How to Operationalise Article 2.17.16



“Blocking” Is Another Form of Decision

“A DECISION is a unilateral act sent to one or more determined recipients and is intended to produce legal effects.”

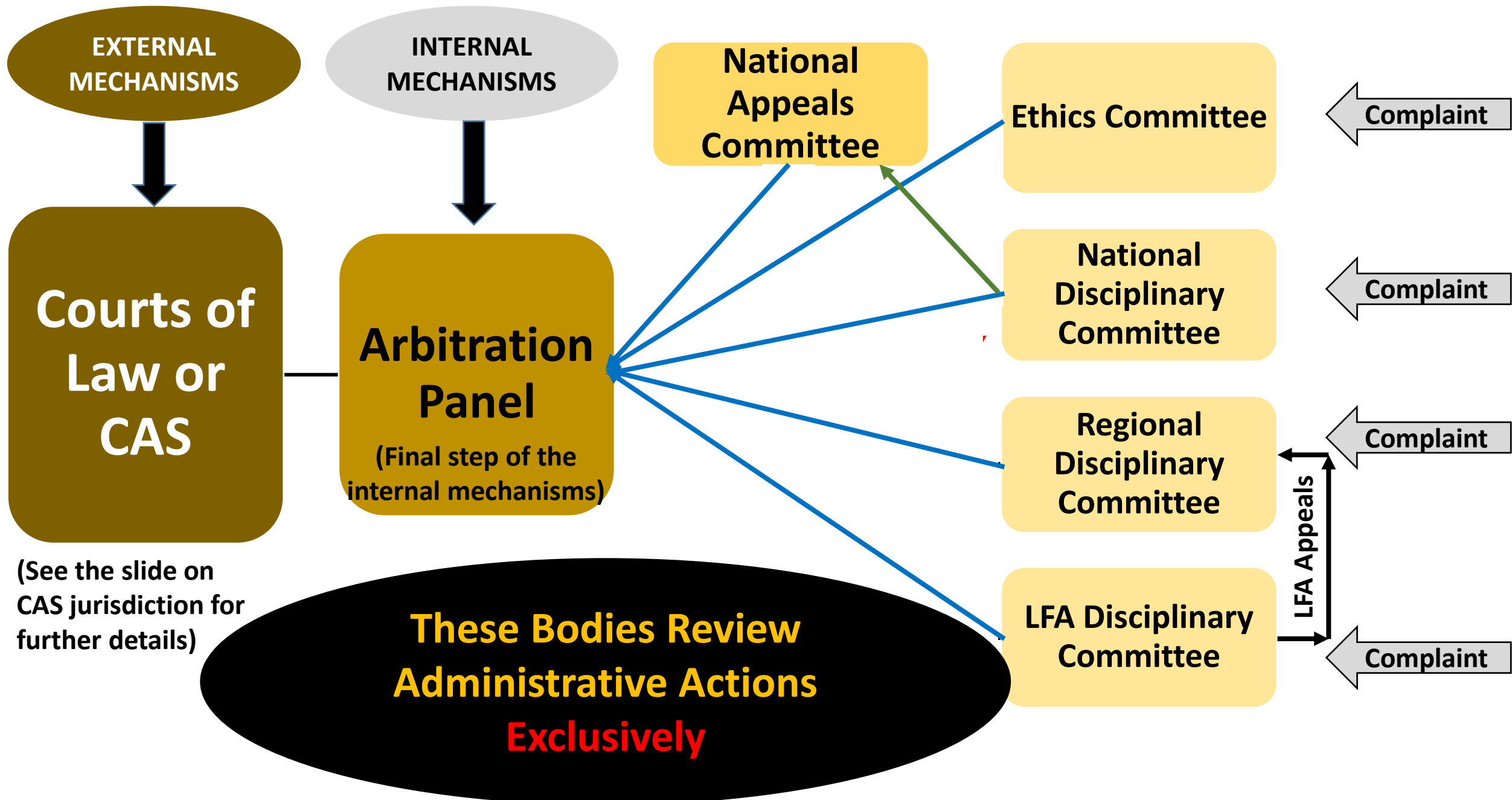


Refusal to forward a matter to the relevant body is not a binding decision, but rather an administrative act of not forwarding a complaint to the first instance body tasked with dealing with the matter. (CAS jurisprudence)

Part 5

How to Challenge Administrative Decisions





The Structure of a Tribunal

**Pro-Forma
Prosecutor**

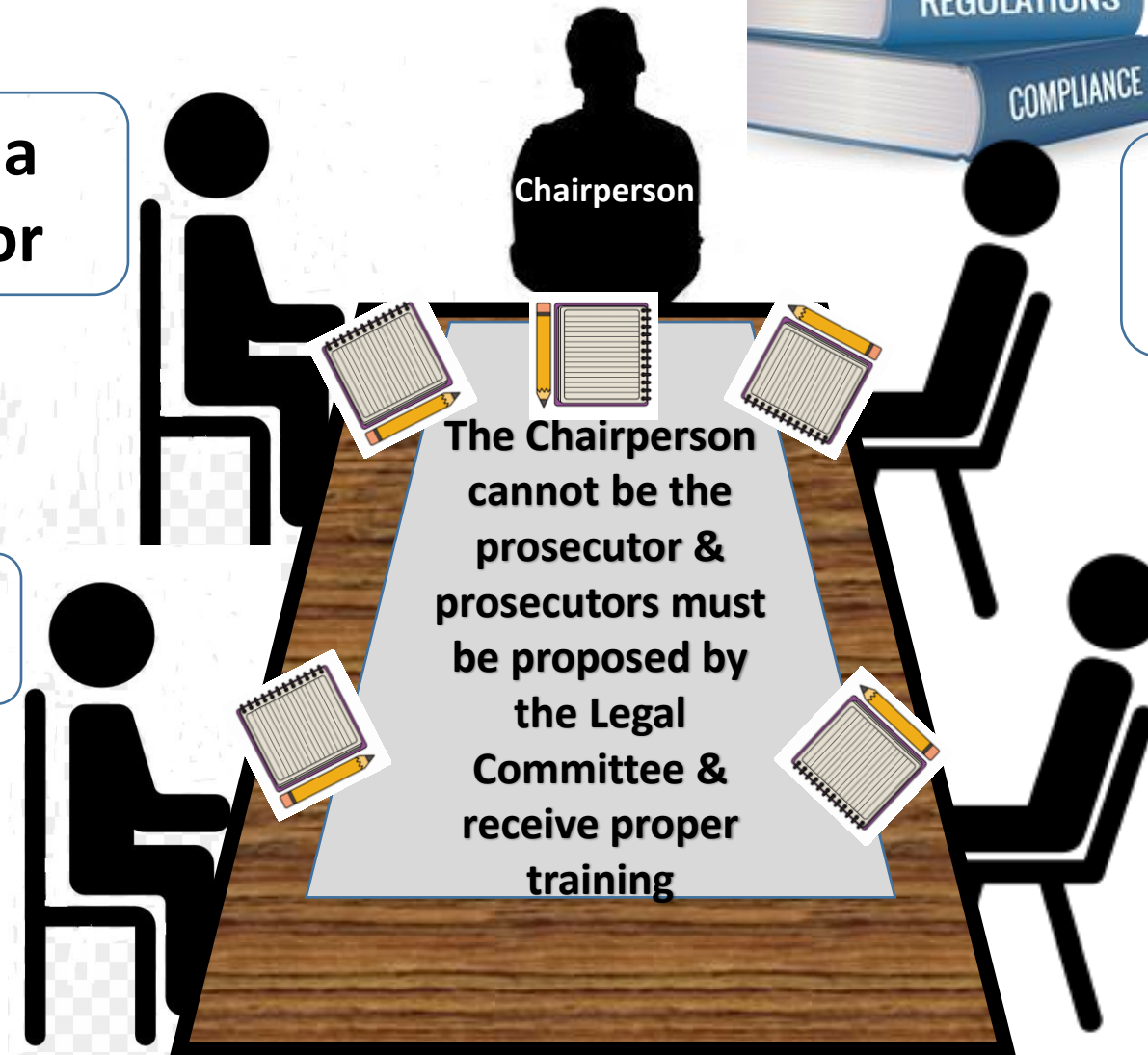
Chairperson

**Legal
Representative**

**Respondent's
Representative**

**The Chairperson
cannot be the
prosecutor &
prosecutors must
be proposed by
the Legal
Committee &
receive proper
training**

**Defendant or
Applicant**



The Ground Rules for the Hearing

Points to Raise During or After the Hearing:

What Are the Frames of Reference of the Projected Outcome:

- Is the alleged misconduct proscribed i.e. *nulla poena sine lege* (no penalty without a law / principle of legality)
- Is the Rule clear and precise i.e. *nulla poena sine lege clara* (principle of predictability) – rules cannot be made “on the fly”
- Is there a *Schedule of Penalties* to ensure the outcome is proportional to the severity of the alleged offence?
- If no *Schedule of Penalties*, how will the Panel apply the common law or use some other criteria?



Points to Raise *in Limine*

- Confirm if the Panel has Jurisdiction in the Matter
- Was due process followed as per the Disciplinary Code and PAJA?
(*audi alteram partem*)
- Was the panel approved by the Congress (National/Regional/LFA)?
- Under what Rule was this Panel convened?
- Validity of the Rule in Law
- Is the Rule clear and precise i.e. is the law clear? Does it comply with the principle of predictability (*nulla poena sine lege clara*)
- What are the terms of reference for this sitting?
- What is the jurisdiction of this Committee/Panel?
- Is the alleged misconduct proscribed i.e. there should be no penalty without a law / principle of legality (*nulla poena sine lege*)
- Are there substantive differences between the Rule in question and that of SAFA/FIFA/CAS?
- The principle of proportionality (Does the sanction fit the severity of the infringement and what is the common law in this regard?)



Key Questions to be Addressed at the Hearing

- ***What is the Enabling Rule / Legislation:***
 - Was the Statutes approved by the relevant Congress?
 - Was the Statutes reviewed by the relevant Legal Committee?
 - Are copies of the applicable Rules available to the participants?
- ***Status of the Applicant/s and the Respondent/s?***
 - Is the Applicant authorised to bring the action?
 - Is the Respondent's representative duly authorised to represent?
 - Is this an action against an individual or a structure?
 - Were the prosecutors provided by the Legal Committee or by an unauthorised official?



On Procedural Fairness

- Was formal notice served, and how?
- Did the Defendant receive adequate notice?
- What constitutes adequate notice?
- Was the opportunity presented for the Defendant to defend her/himself?
- Will the proceedings be recorded? (It is important for a future appeal)
- Did the Defendant invoke the right to legal representation or expressly waive it?
- Was the procedure just and fair?
- Was the right of appeal confirmed?
- Was the charge made within a reasonable time after the misconduct was allegedly committed?



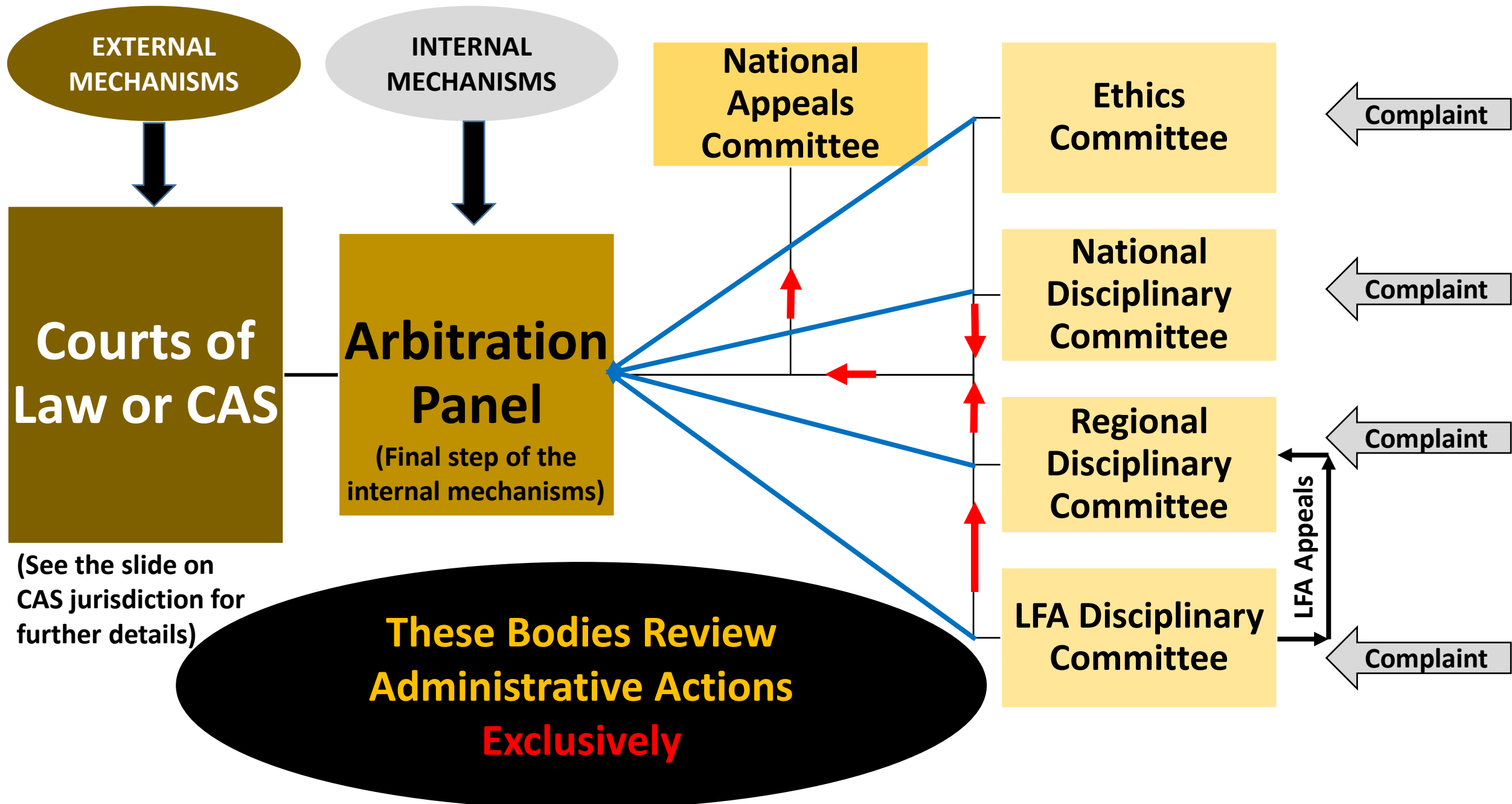
The Justice & Fairness Line-Up in Football Governance



The Statutes
Laws of the Game:

Lex Sportiva
The Referee:

Affordability
Speedy Trials



Does FIFA Ban Referrals to Ordinary Courts of Law?

The 2021 edition of the FIFA Statutes contains stricter language in Article 58, tightening the prohibitions on referring any football matter to ordinary courts of law. **Article 58 now reads as follows:**

1. The confederations, member associations and leagues shall **agree to recognise CAS** as an independent judicial authority and to ensure that their members, affiliated players and officials **comply with the decisions passed by CAS**. The same obligation shall apply to football agents and match agents that are licensed by FIFA.
2. Recourse to ordinary courts of law is prohibited unless specifically provided for in the FIFA regulations. Recourse to ordinary courts of law for all types of provisional measures is also prohibited.
3. **The associations shall insert a clause in their statutes or regulations**, stipulating that it is prohibited to take disputes in the association of disputes affecting leagues, members of leagues, clubs, members of clubs, players, officials and other association officials to ordinary courts of law, unless the FIFA regulations or binding legal provisions specifically provide for or stipulate recourse to ordinary courts of law. **Instead of recourse to ordinary courts of law, provision shall be made for arbitration**. Such disputes shall be taken to an independent and duly constituted arbitration tribunal recognised under the rules of the association or confederation **or** to CAS. *[emphasis mine]*

Does FIFA Ban Referrals to Ordinary Courts of Law?

[Article 58.3 cont.] The associations shall also ensure that this stipulation is implemented in the association, if necessary by imposing a binding obligation on its members. The associations shall impose sanctions on any party that fails to respect this obligation and ensure that any appeal against such sanctions shall likewise be strictly submitted to arbitration, and not to ordinary courts of law.

- Article 58.3 contains a proviso that “The associations shall insert a clause in their statutes or regulations ...”. Like many other FIFA mandates, **SAFA has not satisfied this obligation**. They had an opportunity to insert this provision on 26 March 2022, but failed to do so. This oversight will cause CAS to reject an appeal from South Africa until SAFA implements FIFA’s precondition. It did exactly that in a matter involving Royal AM in the first half of 2022.

Does FIFA Ban Referrals to Ordinary Courts of Law?

If an association decides to add a mandatory option to appeal to CAS, Article 57 of **the FIFA Statutes limits the type of referral** in the following manner:

CAS, however, does not deal with appeals arising from:

1. violations of the Laws of the Game;
2. suspensions of up to four matches or up to three months (with the exception of doping decisions);
3. **decisions against which an appeal to an independent and duly constituted arbitration tribunal recognised under the rules of an association or confederation may be made.**

CAS Jurisdiction

CAS will accept jurisdiction only under the following conditions

1. There must be an agreement between the parties to the appeal/dispute
2. There must be a “decision” of a federation, association or another sports-related body
3. All internal remedies must have been exhausted

These 3 conditions must be satisfied cumulatively

or

4. There must be a binding rule in the organisation’s statutes

or

5. If it is an appeal against a FIFA decision

or

6. If there is an appearance of an arbitration agreement

or

7. If it is a cross-border sports-related dispute of any kind



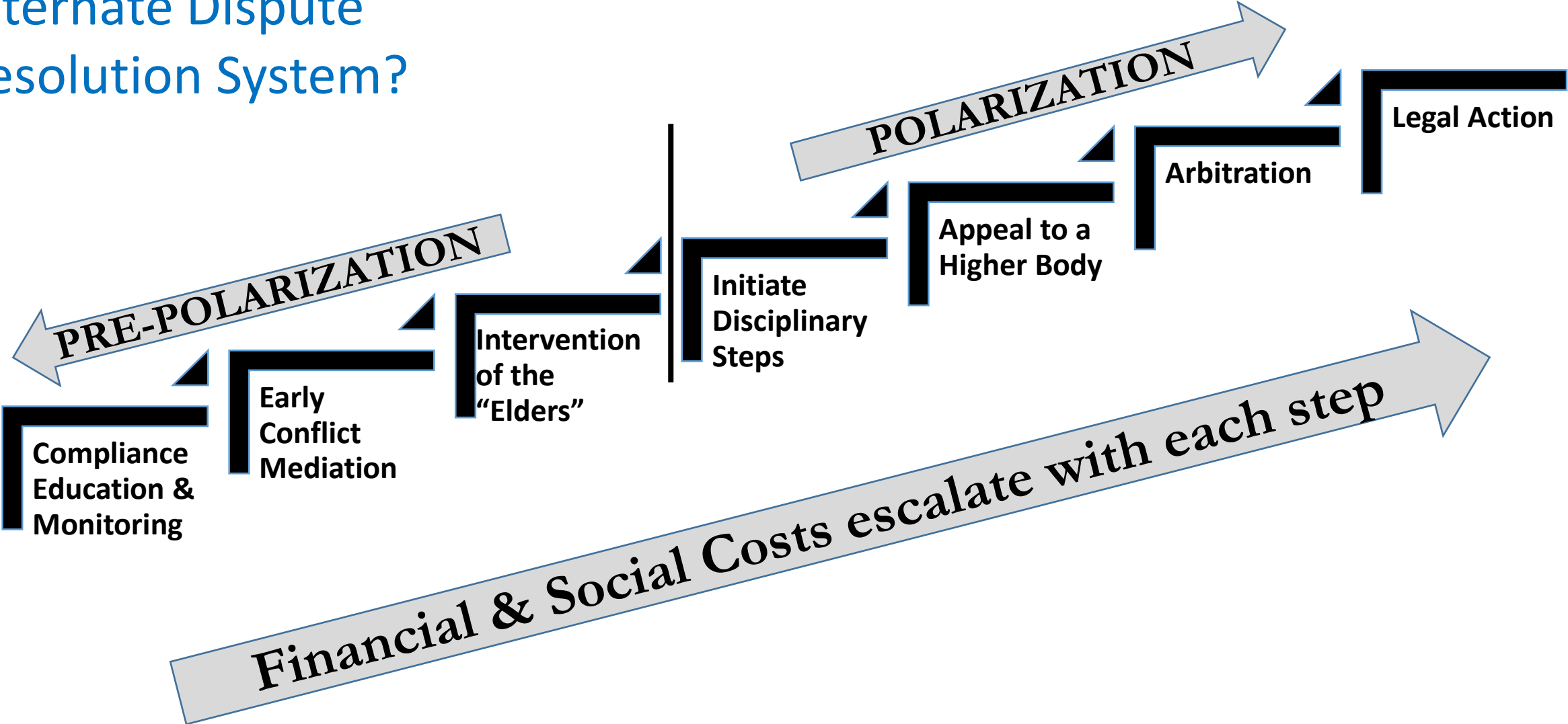
TAS / CAS
TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT

What is a Pathological Arbitration Clause & How Does CAS Deal With It?

According to a CAS Panel, a clause is generally said to be pathological if it contains any of the following features:

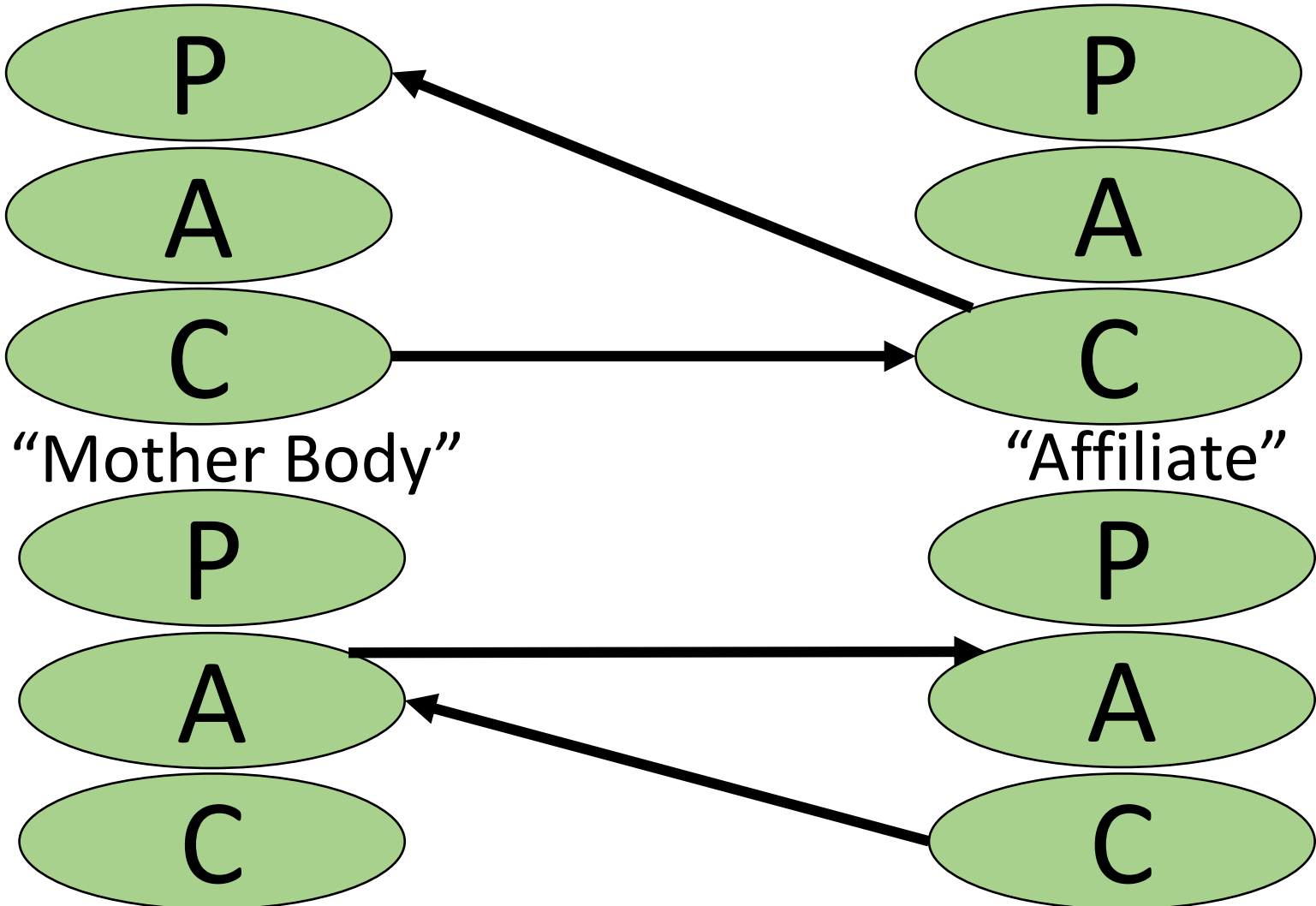
- 'If it is vague or ambiguous as regards private jurisdiction or contains contradicting provisions;
- If it fails to mention with precision the institution which will appoint the arbitral body chosen by the parties;
- If it fails to produce procedural mandatory consequences for the parties in the event of a dispute;
- If it fails to exclude the intervention of State courts in the settlement of the disputes, at least before the issuance of the award;
- If it does not vest powers to the arbitrators to resolve the disputes likely to arise between the parties;
- If it does not permit the putting in place of a procedure leading under the best conditions of efficiency and speed to the rendering of an award that is susceptible of judicial enforcement.'

Why Develop an Alternate Dispute Resolution System?



Crossed communication occurs when the message sent by one person's ego state is reacted to by **an incompatible unexpected ego state** on the part of the other person

Communication is Central to Harmony in an organisation



Source: HRDC India

OUR FOOTBALL IS BROKEN

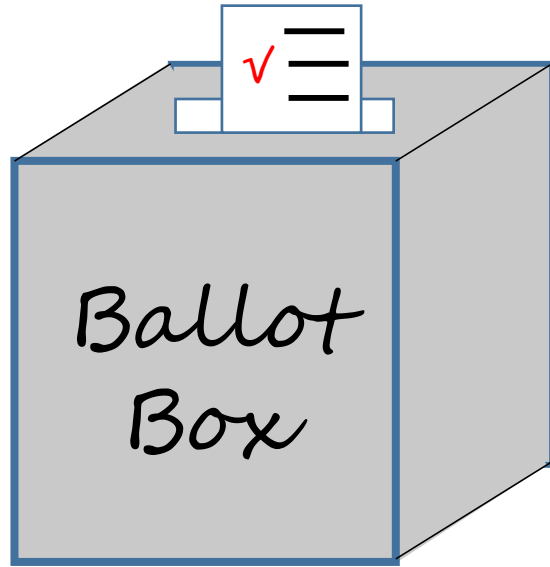
How to Fix South African Football's Dispute Resolution System



Dennis A. Mumble

Free and Fair Elections Are Vital to Democracy in Football





The Electoral Committee is responsible for ALL elections in SAFA.

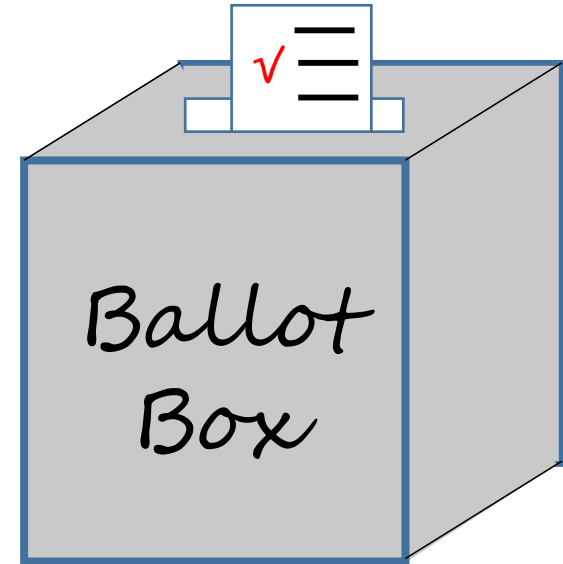
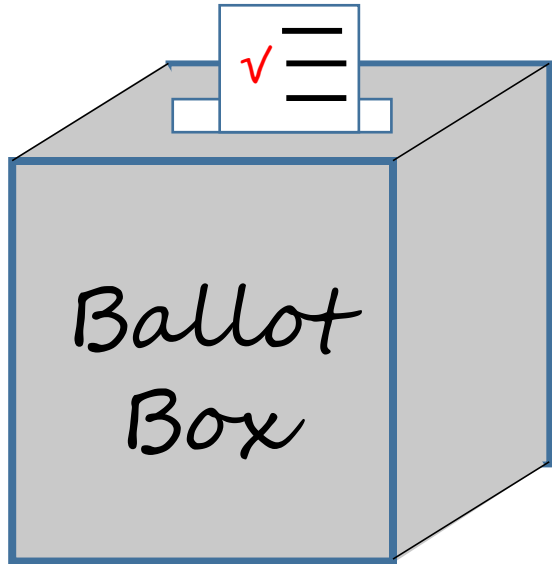
If Regions or LFAs do not have their own electoral codes, then the SAFA Electoral Code must be applied in terms of Article 1(b)

If the Electoral Committee did not oversee the election, it is not legitimate



O T E

**Voters must choose
their leaders!**



**Leaders must not
choose their voters!**

Congress Sets Date for Elections

1. The oversight committee/officer must be appointed to start preparations for the elections

2. Nomination form are submitted to Art. 25.6

3. The auditor verifies signatures, acceptance forms

4. The CEO receives verified nomination list & hands it over to the oversight committee/officer

5. Eligibility checks are conducted and election is overseen by the oversight committee/officer

6. The List of Approved Nominees is released by the oversight committee/officer

7. Electoral Appeal Committee receives appeals against any decision (art. 12 Electoral Code)

For National Elections to Be Free & Fair, The Following Must Happen

EXCO Sets Date for
Congress (Art. 26.2)

1. An Independent Electoral Committee must be elected at the previous Ordinary Congress to start election preparations (Art. 25 in the Statutes & Art.3(a) in the SAFA Electoral Code)
2. Members must submit nomination forms to the ISP 60 days before (Art. 25.6)
3. Auditor verifies signatures, acceptance forms & timelines
4. Secretary receives verified nomination list 53 days before & hands it over to the Eligibility Committee (Art. 25.9)
5. Eligibility Committee(?) runs the election from this point forward
*Eligibility Committee(?) runs eligibility check (Art. 25.10)
6. The ISP issues a List of Approved Nominees (Art. 25.11)
7. The Electoral Appeal Committee receives appeals against any decision of the Eligibility(?) Committee (Art. 12 – SAFA Electoral Code)

◀ The role of the Auditor ends here

Thank You

