



**A DISCOURSE ON THE NON-APPLICATION OF THE TRAINING
COMPENSATION SYSTEM TO FEMALE FOOTBALLERS AND ITS
RAMIFICATIONS**

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By

Ouno Sharon Adhiambo

101265

Prepared under the supervision of

Mr Cecil Abungu

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DECLARATION

I, OUNO SHARON ADHIAMBO, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:

Date:

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed: *Cecil Abungu*

[Supervisor's Name]

DEDICATION

I would like to dedicate this dissertation to my loving parents, siblings, and friends who have been with me through the journey, offering support and encouragement when the road was not easy. This paper is also dedicated to all the female footballers who have fought for equality.

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I thank the Lord Almighty for the grace that He has shown me through my journey in law school. I would also like to thank my supervisor, Mr Cecil Abungu for his guidance and patience through this writing process.

ABSTRACT

Compared to previous centuries in which female footballers faced disparaging discrimination, the 21st Century is considered as a time of progress when it comes to gender equality. It is, however, worrying that article 20 of the FIFA RSTP seems not to reflect the level of progression expected of an organisation such as FIFA.

This paper aims to show that the exclusion of women from training compensation is not only to some extent disadvantageous and discriminatory but also enhances existing inequalities. The paper undertakes to do this by answering the following research questions; Is training compensation significant to the football industry and is it efficacious? Is the exclusion of female players from receiving training compensation discriminatory and if it is, is it justified? Is there need to amend article 20 to be gender inclusive and how does the exclusion affect female players?

The paper makes use of the theories of discrimination and equality to justify the amendment of article 20 of the FIFA Regulations on the Transfer and Status of Players (RSTP). This research draws inspiration from an award that was issued by the Court of Arbitration for Sports (CAS) which affirmed that the ‘difference in financial reality’ argument often used to exclude women from training compensation is superfluous.

Drawing lessons from the Bernard case, the 2011 case presented before the Dispute Resolution Chamber (DRC), and the 2016 CAS award in *Spartak Subotica v FC Barcelona*, this paper makes the case for the need to revisit article 20 of the FIFA RSTP to fix its failures among which is, its lack of gender inclusivity.

LIST OF ABBREVIATIONS

UNESCO-United Nations Educational, Scientific and Cultural Organisation

FC-Football Club

WFC-Women's Football Club

ECJ-European Court of Justice

EU-European Union

FIFA -Federation Internationale de Football Association

RSTP-Regulations on the Status and Transfer of Players

DRC-Dispute Resolution Chamber

ICCPR-International Covenant on Civil and Political Rights

CAS-Court of Arbitration for Sports

ECHR-European Convention on Human Rights

UEFA-Union of European Football Associations

MLS-Major League Soccer

USA-United States of America

LIST OF CASES

Case 411375, FIFA Dispute Resolution Chamber, Zurich, Switzerland, 7 April 2011.

Olympique Lyonnaise SASP v Olivier Bernard, Case C -325/08, para. 35-50.

WFC Spartak Subotica v FC Barcelona, CAS 2016/A/4598.

LIST OF LEGAL INSTRUMENTS

Preamble, International Charter of Physical Education, Physical Activity and Sport, UNESCO,2015.

Article 26, International Convention on Civil and Political Rights,23 March 1976.

FIFA Regulations on the Transfer and Status of Plyaers,2021.

1.0. CHAPTER ONE: INTRODUCTION TO THE RESEARCH

1.1. BACKGROUND

The importance of sports is considered to be diverse and broad ranging from its economic, social as well as political value.¹ Sports are creating opportunities for young people to realize a non-academic potential and serving as a tool for promoting gender equity and social inclusion for girls and women. In present-day sports is big business and is a source of youth employment.²

Training compensation is a recent development in modern football. It can be considered synonymous with taking care of a child and later ‘eating the fruit of your labour’.³ It can be simply described as a financial payment to a player’s training club when he signs his first contract with a professional club or every transfer until his 23rd birthday. If the owner of a football club trains a player from the age of 12 till the player turns 21 and the player leaves the club on a free transfer by not signing a new contract, the club deserves to be compensated for the education and training provided to the player.⁴ The origin of the right to receive training compensation for the training of young players emerged in the 1997 case of *Olympique Lyonnais SASP v Olivier Bernard* and Newcastle United Football Club.⁵

The court’s judgment in the Bernard case affirmed that considering the social importance of sporting activities and in particular football, in the European Union, the aim of encouraging recruitment and training of young players must be accepted as legitimate. In the court's view, the prospect of receiving training fees is likely to encourage football clubs to seek new talent and train young players.⁶

¹ Preamble, International Charter of Physical Education, Physical Activity and Sport, UNESCO,2015.

² Wangari G *et al* , ‘Challenges faced by women football players who participate in football leagues’,15.

³ Ayomide E, ‘What is training compensation in football?’ Sportlicitors,10 December 2018._<<https://sportlicitors.com/what-is-training-compensation-in-football/>> On 2 December 2020.

⁴ Ayomide E, ‘What is training compensation in football?’ .

⁵ Drummond J, ‘Training compensation in football’, Journalism, law, and politics._<<https://jvdlld.com/2012/11/06/training-compensation-in-football/>> on 27 October 2020.

⁶ ‘Player contracts: Football transfers v European law : analysis’ Grand Court Chambers,13 May 2014._<<https://gclaw.wordpress.com/2014/05/13/player-contracts-football-transfers-v-european-union-law-analysis/>> on 2 December 2020.

As a result of this case, Fédération Internationale de Football Association (FIFA) adopted rules under which the club and not the players pay compensation. This is established under article 20 in FIFA's Regulations on the Status and Transfer of Players (RSTP).⁷

However, of interest to this study is a clause in article 20 of the RSTP that states in verbatim that, 'The principles of training compensation shall not apply to women's football'. In 2020 FIFA joined in celebrating International Women's Day, a day to commemorate the fight for equal rights of women, but it continues to be tone-deaf about issues of equality.⁸

1.2. PROBLEM STATEMENT

Training compensation was designed to reward and encourage academies for developing players. However, according to the Dispute Resolution Chamber (DRC), training compensation does not apply to female players. The rationale for exclusion of women from training compensation, provided by members of the DRC, is that the 'reality of women's football significantly differs from that of the men's game. The budget, expenses, and costs currently involved in each are not comparable. ⁹That training compensation is inapplicable to the developing women's game.¹⁰

Matthijs Lambregts argues that the argument of financial difference is not convincing especially if the reason for the non-applicability of the tool is gender-based. There is a need for sufficient proof that the policy serves a legitimate aim and does not purpose to exclude women solely based on their gender. Lambregts states that the financial reality of men's football in Madagascar, Nepal, or Bulgaria is incomparable with the reality of the English Premier League or the German Bundesliga but still clubs from poorer and less developed region are not exempt from paying or receiving training compensation. ¹¹

The justification for the exclusion of women from training compensation is superfluous and is not a convincing reason for not applying a tool that would encourage the training of young

⁷ Article VII, FIFA Regulation on the Status and Transfer of Players, June 2020 edition.

⁸ Voght S, 'On International Women's Day FIFA continues to be tone-deaf about issues of equality' Nation, 8 March 2020. < <https://www.allforxi.com/2020/3/8/21170595/international-womens-day-fifa-ad-campaign-equality>> on 27 October 2020.

⁹ Matthijs L, 'No training compensation for female players', The Players' Agent, 8 March 2017 < https://www.theplayersagent.com/knowledgecenter/article/no_training_compensation_for_female_players> on 27 October 2020.

¹⁰ Matthijs L, 'No training compensation for female players'.

¹¹ Matthijs L, 'No training compensation for female players'.

female players.¹² This study, therefore, investigates whether the current training compensation system is discriminatory and disadvantageous to female players.

1.3. JUSTIFICATION OF THE STUDY

The challenges that the feminisation of football and sports face are enormous and strong inequalities persist. UNESCO highlights that football can be an effective tool to reduce the gender gap and empower women worldwide.¹³

Various international laws exist to promote the rights of women such as the Convention on Elimination of All forms of discrimination against women, Article 26 of the International Convention on Civil and Political Rights (ICCPR) and the Protocol to the African Charter on Human and People's Rights of the Right of Women. These are key treaties that were put in place to promote women's rights.¹⁴ However, despite the existence of such progressive treaties, women in football are still considered as second -class citizens.

In football, women are still facing the challenge of equal pay, proper funding, crowd turnout, and discriminatory policies. This study serves to add to the ocean of literature that advances women's rights but with a special focus on international sports law.

1.4. STATEMENT OF AIM AND OBJECTIVES

This study aims to analyse art 20 of the FIFA RSTP with specific regard to female football players. The specific aims are as follows:

- i. Evaluate the concept of training compensation, its importance in the football industry, and whether it is efficacious.
- ii. To assess whether the policy that excludes female football players from training compensation is discriminatory, if it is discriminatory, whether the discrimination is justified and its impact on female players.
- iii. To assess whether article 20 of the FIFA RSTP needs to be gender inclusive.

1.5. SIGNIFICANCE OF THE RESEARCH

¹² Matthijs L, 'No training compensation for female players'.

¹³ Schischlik A, 'Women and football: #Change the Game-towards gender equality in sports' UNESCO, 7 June 2019. < <https://en.unesco.org/news/women-and-football-changethegame-towards-gender-equality-sports> > on 9 November 2020.

¹⁴ Article 26, International Convention on Civil and Political Rights, 23 March 1976, treaty series number.*

FIFA continues to be a hegemonic masculinity that disregards the needs and interests of the girl child. There are several instances in which it has propagated gender inequality especially through a variety of its policies and practices. The paper is just a step in the thousand-mile journey in the fight for equality and seeks to contribute to the plethora of literature that is aimed towards gender equality in the world of sports.

1.6. RESEARCH QUESTIONS

The study is guided by the following research questions:

- i. Is training compensation of any significance to the football industry, if yes, is it efficacious?
- ii. Is the exclusion of female players from article 20 of the FIFA RSTP discriminatory, if yes, is the discrimination justified and does the exemption affect female football players?
- iii. Should Article 20 be amended to be gender inclusive ?

1.7. RESEARCH METHODOLOGY

The study will use qualitative data analysis which will encompass a review of existing literature on gender equality and sports. This will include primary and secondary sources which comprise of statutes, case law, journals, books, newspapers, and online internet resources.

1.8. THEORETICAL APPROACH

This dissertation is guided by the theory of equality which revolves around ensuring that every individual has an equal opportunity to make the most of their life. That no one should have poorer life chances because of the way they were born, where they come from, or what they believe in.¹⁵ It rests on the background idea that all human persons are equal in fundamental worth or moral status.¹⁶

¹⁵ Understanding concepts of equality ,diversity and rights in relation to health and social care: Equality’ The Open University,26 March 2020._< <https://www.open.edu/openlearncreate/mod/page/view.php?id=153113>>_ on 2December 2020.

¹⁶‘The Ideas of Equality and non-discrimination: Formal and Substantive equality’ Equal Rights Trust Organisation._< <https://www.equalrightstrust.org/ertdocumentbank/The%20Ideas%20of%20Equality%20and%20Non-discrimination.%20Formal%20and%20Substantive%20Equality.pdf>>_ on 25 November 2020.

The study acknowledges that a link exists between equality and non-discrimination therefore the theory of discrimination is also discussed herein.¹⁷ There are different types of equality or ways in which people might be treated the same or might relate as equals that might be thought as desirable.¹⁸

Equality's amorphous nature means it can take on a range of different interpretations.¹⁹ One of the interpretations of equality includes formal equality which claims that every citizen is equal before the law and deserves equal protection of the law. Formal equality supports the position that a person's individual physical or personal characteristics should be viewed as irrelevant in determining whether they have a right to some special benefit or gain.²⁰ This form of equality is also blind to the unique characteristics of individuals, this is its weakness.

Another interpretation is that of equality of opportunity which promotes equalising starting points irrespective of a person's background or status. There is also the theory of equality of outcome which constitutes policies such as affirmative action.²¹

However, this study contends with the human rights approach to equality. Equality as a standalone principle has little impact on combating substantive disadvantages.²² The shortcomings of the different models of equality have led to a human rights-based approach. It highlights areas in which economic integrationist models have neglected. The approach finds its basis in dignity, it speaks to treating individuals as equals which suggest a right to equal concern, dignity, and respect as espoused by Ronald Dworkin.²³

It creates the potential for a more purposeful application of law and policy. It also avoids the political rhetoric which surrounds the current equality discourse. The human rights-based approach proposes treatment as an equal, not equal treatment.²⁴ Previously the advancement of women's rights was regarded as important for an outcome such as economic development or

¹⁷ Grant E, 'Dignity and Equality' 7 (2) *Human Rights Law Review*, 2001.

¹⁸ 'Egalitarianism', Stanford Encyclopaedia of Philosophy 24 April 2013, <<https://plato.stanford.edu/entries/egalitarianism/>> on 11 November 2020.

¹⁹ Ideas of equality and non-discrimination.

²⁰ 'The Ideas of Equality and non-discrimination: Formal and Substantive equality' Equal Rights Trust Organisation.

²¹ 'The Ideas of Equality and non-discrimination: Formal and Substantive equality' Equal Rights Trust Organisation.

²² Western P, 'The Empty Idea of Equality' 95 *Harvard Law Review*, 537

²³ Dworkin R, 'Taking Rights Serious' Duckworth, London, 1997, 227.

²⁴ 'The Ideas of Equality and non-discrimination: Formal and Substantive equality' Equal Rights Trust Organisation.

population policies. More than ever the international community has come to consider the empowerment and autonomy of women and the improvement of their political, social, economic, and health status as important ends in themselves. This highlights a shift to a human rights approach to resolving concerns of women.²⁵

The study will also consider the theory of discrimination. The study defines discrimination as the disadvantageous treatment of a salient social group based on inadequately justified factors other than belonging to the salient social group. The disadvantageous treatment may be propagated by individual behaviours or institutional practices.²⁶ Under this theory, the concept of direct and indirect discrimination is discussed. Direct discrimination, which is the most common form of discrimination, is the intentional and explicit disadvantageous treatment of a particularly salient social group.

On the other side, the concept of indirect discrimination is when an act disproportionately disadvantages the members of a particularly salient social group without any intention whatsoever to disadvantage that particular group. These concepts are further expounded in chapter two of the study.

1.9. LITERATURE REVIEW

Through Marco Cusumano's article, the base for the research paper is laid by analysing in detail the concept of training compensation. He succinctly describes the concept of training compensation and how the system works. Training and developing of young players as reflected in the FIFA Regulation on the Status and Transfer of Players, hereinafter as RSTP), is regarded as fundamental in the world of football. Therefore, rewarding of training clubs is considered to contribute to what is known as the 'trickle-down effect, which portrays a situation in which compensation is distributed from the top of the football pyramid to the very bottom.²⁷

It is aimed at maintaining the competitive balance between the clubs and allows them to continue training and developing players in the knowledge that they will be compensated for their efforts. The functioning of the mechanism is based on Article 20 of the FIFA RSTP and

²⁵Goonesekere S, 'A rights-based approach to realising gender equality'. <<https://www.un.org/womenwatch/daw/news/rights.htm>> on 12 November 2020.

²⁶Altman A, 'Discrimination' The Stanford encyclopaedia, Winter 2020 Edition. <<https://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=discrimination>> on 30 November 2020.

²⁷Cusumano M, 'The training compensation system' Laffer Abogados, <<https://www.lafferabogados.com/2017/04/07/the-training-compensation-system/>> on 30 October 2020.

annex 4 thereto, training compensation is paid to a player's training club or clubs whenever he signs his first contract as a professional, and thereafter each time he is transferred until his 23 birthdays.

In detail, he describes various cases that have been brought before the Dispute Resolution Chamber (DRC) as well as the Court of Arbitration for Sports (CAS) with regards to disputes that involve the issues of when training compensation is owed and to whom it is owed. In his conclusion, he brings out the advantage as well as disadvantages of the Training Compensation mechanism. He states that the system pursues a legitimate aim and is justified because of public interest which is, to have a system in place that aims at ensuring that small and poor training clubs do not disappear.²⁸

It is indeed reality that wealthy clubs offer young talented players contracts with amounts that the clubs that are trained them will never be able to offer. The prospect of receiving training compensation encourages football clubs to seek new talent and young players. Training compensation, therefore, plays a role in the development of young players and in maintaining the stability and integrity of the sport.²⁹

The concept is further elaborated by Frank Hendrix who elaborates on the *Bosman* and *Bernard* case and makes a comparative analysis between the two landmark cases. He attempts to define the conditions under which training compensation could be valid under European law.³⁰

Oliver Dickinson sets the pace of the discussion on the exclusion of women from training compensation through his concise but articulate article. It was notable that he was among the few writers who examined training compensation from a female's perspective. While speaking on football in Scotland, he states that the development of women's football in Scotland needs to become more financially viable. He writes that clubs will continue to lose their best players if a plan to compensate them is not put in place.

He further states that compensation allows clubs to invest back into their playing squad. Dickinson avers that this does not happen in the women's game which is something that would be a game-changer in Scotland because it would encourage more investments from top clubs.

²⁸ Cusumano M, 'The training compensation system' .

²⁹ Cusumano M, 'The training compensation system' .

³⁰ Hendrickx F, 'The Bernard Case and Training Compensation in Professional Football' *European Labour Law Journal*,2010,380.

Financially, he asserts, there is no incentive for clubs to develop the players because they are not getting a return on their investments.³¹

Another author that offers more clarity on why women are excluded from article 20 of the RSTP, is Vasiliev. He also discusses cases that have been brought before the Dispute Resolution Chamber concerning training compensation. The reason for the exclusion, he states, is that the current training system was created considering the reality of the men's eleven a side football only. Indeed, the training costs used for calculating the training compensation were established after a large and complete study of the relevance of the men's eleven-a-side football. The training compensation was also determined within the scope of an extensive process initiated by FIFA with the participation of all stakeholders and constituted a response to the needs of men's football after the challenge by the European Commission of the International transfer system in place. The budgets, expenses, and costs currently involved in each slightly differ.³²

A counterargument to Vasiliev's article is highlighted in Matthijs Lambregts's article, the author states that the reality argument that is offered is not convincing, especially if it is based on gender. The author further elaborates that the financial reality of men's football in Madagascar, Nepal, or Bulgaria is incomparable with the reality of the English Premier League or the German Bundesliga but still clubs from poorer and less developed regions are not exempt from paying or receiving training compensation. The 'developing phase status' argument that is offered appears not to be reasonable for not applying a tool that would aid the development of the women's game.

Michele Krech in her paper speaks on FIFA's vision for the future specifically and repeatedly recognising women's equality rights in conjunction with human rights expressing a commitment to the promotion of human rights and gender equality. The FIFA Human Rights

³¹Oliver Dickinson, 'No Reward for developing players in women's football' STV News, 5 February 2019. <<https://archive.news.stv.tv/sport/1435286-no-reward-for-developing-players-in-women-s-football.html>> accessed on 31 October 2020.

³² Vasiliev I, Aroyan M, 'The main issue on paying the training compensation in FIFA Dispute Resolution Chamber' 8 (4) *Vestnik of Saint Petersburg University Law* ,480-482.

Policy that FIFA had adopted, identifies discrimination as one of the most salient human rights risks in the world of football both on and off the pitch.³³

She sheds light on how gender discrimination has not only been a 'human rights risk' but a longstanding and acute reality in the world of football. She highlights just but a few forms of discrimination that have been ongoing such as the fact that FIFA did not hold a Women's World Cup until 1991 and did not elect a woman to its council up until 2013, 109 years later. She investigates the Women's Football Strategy, which is FIFA's main weapon in addressing its institutional disregard for gender discrimination. The strategy highlights three major strategies which are growing participation, enhancing its commercial value, and strengthening its regulatory foundation.³⁴

While speaking on regulation she states that stepping under FIFA's umbrella requires surrendering to the controlling features of the organised sport, the rules of which were primarily developed by men for the men's game. The Women's Football Strategy, therefore, proposes to add unique dimensions to the game. This is to avoid women from around the world being limited to and entering a pre-established game and industry but rather given a chance to mould it to suit their interests and identities. She establishes that using girls and women to grow the game will be anti-feminist if it simply brings more of them into a sport premised on masculine superiority and dominance. The involvement of more women in positions of power might amplify the voice of women but still brings out the tokenisation of such positions and the exclusion from FIFA's longstanding boy's club.³⁵

1.10. HYPOTHESIS

Considering the research questions as framed, this study hypothesise as follows: -

The lack of application of article 20 of the FIFA RSTP to female soccer players directly propagates gender discrimination and enhances gender inequality. The lack of training compensation for female football players acts as a deterrent when it comes to club investing. That at the end of the day, majority of football club owners are businessmen. The ownership

³³ Krech M, 'FIFA for Women or Women for FIFA? The Inherent Tensions of FIFA's Women's Football Strategy' VerfBlog, 7 August 2019, < <https://verfassungsblog.de/fifa-for-women-or-women-for-fifa-the-inherent-tensions-of-fifas-womens-football-strategy/> > on 30 October 2020.

³⁴ Krech M, 'FIFA for Women or Women for FIFA? The Inherent Tensions of FIFA's Women's Football Strategy'.

³⁵ Krech M, 'FIFA for Women or Women for FIFA? The Inherent Tensions of FIFA's Women's Football Strategy'.

of a football club is not only about the development of talent (considering the capitalist society we live in) but also investments. Some of the football clubs invest heavily in training some of these young talents and compensation that is provided under the FIFA RSTP is considered as a return on investment. The lack of returns on such an investment disincentives clubs from investing. That it would take the world a step closer to gender equality in the sports industry if there was the abolishment of the current training compensation system which on face value is discriminatory.

1.11. LIMITATION

The subject matter of this paper is new thus very few authors who have written on training compensation from a female perspective.

1.12. CHAPTER BREAKDOWN

Chapter one of the study will lay out the background of the study, the legal problem in question, its justification, and the methodology applied in the study. Additionally, the theoretical framework used is introduced as well as a review of the literature. The chapter concludes by discussing the hypothesis of the study as well as its limitations.

Chapter two will discuss in detail the theoretical framework of the study. The study will be grounded on the theory of equality and discrimination. The chapter will lightly touch on the various theories of equality after which it will briefly elaborate on the theory of discrimination.

Chapter three will focus on whether there is a need for training compensation in the football industry by discussing training compensation in-depth, expounding on the current legal framework that establishes training compensation and concludes by highlighting whether the system is favourable or injurious to the football industry.

Chapter four elaborates on the exclusion of women from training compensation and attempts to find out whether the exclusion of women from the scope of article 20 of the FIFA RSTP is discriminatory. It also attempts to find out whether the discrimination is justified. In conclusion the chapter seeks to find out whether article 20 of the FIFA RSTP should be amended to be gender inclusive.

Chapter five wraps up the study by providing conclusions as well as various recommendations

2.0. CHAPTER TWO: THEORIES OF EQUALITY AND DISCRIMINATION

2.1. Introduction

For a long period, women's football has been relegated to the backseat. Female football players have faced (and continue to face) direct discrimination as well as indirect discrimination, for example, in the form of discriminatory policies. The discrimination that female players face is most of the time (if not all the time) by virtue of their belonging to the female gender. The effect of the pervasive discrimination is the creation of inequalities.

In this case, if training compensation as a policy sets out to exclude women from its purview, then there is a need for proper justification otherwise it would constitute discrimination and would widen the existing inequality between the men's and the women's games. This chapter aims to advance this argument based on the theory of discrimination which is also linked to the theory of equality.

The theory of equality is not a straight-forward theory, various forms of equality comprise the notion of equality. The first subset of the theory is formal equality which calls for laws and policies to treat different groups of people equally.³⁶ The second is equality of opportunity which aims at equalising starting points irrespective of background or status. It is enacted through positive action which compensates disadvantages faced by a particular group.³⁷ The third is equality of outcome which takes the form of social redistribution. It is carried out through affirmative action, reverse discrimination, and positive discrimination. Lastly, Amartya Sen's equality of capacity emphasises capacity building to enhance equality.³⁸

Finally, a correlated theory is considered, the theory of discrimination which elaborates on the disadvantageous treatment of a salient social group based on inadequately justified reasons. In

³⁶'The Ideas of Equality and non-discrimination: Formal and Substantive equality' Equal Rights Trust Organisation. <
<https://www.equalrightstrust.org/ertdocumentbank/The%20Ideas%20of%20Equality%20and%20Non-discrimination,%20Formal%20and%20Substantive%20Equality.pdf>> on 25 November 2020.

³⁷ 'The Ideas of Equality and non-discrimination: Formal and Substantive equality' Equal Rights Trust Organisation.

³⁸ Well T, 'Sen's Capability Approach' Internet encyclopaedia of Philosophy. <
<https://iep.utm.edu/home/about/>> on 25 November 2020.

approaching these theories, the study will first determine the content of the theory and then look at how it is applied to training compensation in football.

2.2. The concept of equality

When Thomas Jefferson suggested that all men were created free and equal, he raised two interesting questions. The first was ‘What is freedom?’ and the other was ‘What is equality?’.³⁹ Equality is considered a complicated idea therefore it is not possible to reduce it to a single definition.

Equality means an equivalence between a group of different objects or persons that ought to have similar qualities in certain aspects.⁴⁰ Equality needs to be distinguished from similarity which is to simply state that persons or objects are identical. Equality implies similarity rather than sameness.⁴¹ Equality acknowledges the differences between the group of different objects or persons.

Different notions of equality arise from different schools of thought. The ancient medieval scholars viewed inequality as not only natural but also desirable. The hierarchy from the emperor to the peasant was deemed as normal. As early as the 17th-century proceeding to the 18th-century scholars such as Locke, Spinoza, and the Levellers asserted a new and different social idea that we may call the principle of liberal equality.⁴² The foundation of liberal equality was based on two ideas. The first was individualism, which asserted that every human being (at first applicable only to men but it eventually applied to women as well) should be judged not by their birth and antecedents or the inherent nature of their occupation but be judged as themselves, based on their behaviour and actions.⁴³ The second foundation was that of social or moral equality, which went beyond legal equality.

Equality of welfare was also a notion proposed by classical liberals such as John Locke and Bentham, it was majorly about utilitarianism, which was equal opportunity to pursue pleasure,

³⁹ MacDuffee C, 1 *The Mathematics Teacher* 29, January 1936,10.

⁴⁰ Gosepath S , ‘Equality’ *The Stanford Encyclopaedia of Philosophy*’ Spring 2011 Ed._<<https://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=equality>> on 24 November 2020.

⁴¹ Edwards B, ‘Confusing "Equality" with "sameness": A Complementarian Misconception’ *The Junia Project*,20 January 2015.-< <https://juniaproject.com/confusing-equality-sameness-complementarian-misconception/>> on 24 November 2020.

⁴² Davies S, ‘The classical liberal ideal of equality’.

⁴³ Davies S, ‘The classical liberal ideal of equality’.

distributional equality.⁴⁴ While the classical liberal's equality implied the abolition of privilege modern liberals took equality a step further into the substantive nature of equality.⁴⁵ Modern liberals went further and proposed equality of resources as well as equality of opportunity. Amartya Sen in *Equality of what?* criticises the three types of equality proposed by liberal scholars and proposes equality of capacity. Equality of capacity recognises the shortcoming of the other concepts that fail to identify the fundamental differences between human beings, he asserts that to achieve equality it would be essential to recognise the diversity among people.⁴⁶

The foregoing section will broadly discuss formal equality, equality of opportunity, equality of outcome, and Amartya Sen's equality of capacity. In the next few paragraphs, I will attempt to explain how each of these principles relates to the right to training compensation for women.

2.2.1. Formal equality

Formal equality implies that all men are equal because of their human essence, natural rights theories that dominated political thought informed this theory. The idea can be traced back to Aristotle and his dictum that equality meant 'things that are alike should be treated alike'.⁴⁷ It majorly advocated for treating equals equally and is the most widespread understanding of equality today. It calls for laws and policies to treat different groups of people the same in social, political and economic aspects of life. That a person's unique physical or personal characteristics should be viewed as irrelevant in determining whether they have a right to a benefit.⁴⁸

The principle of formal equality is negative, and its task was to eradicate the special privileges of feudal times, its enemy was an aristocratic privilege that was believed by ancient medieval scholars to be desirable.

Formal equality, however, assumes the existence of a 'Universal Individual' which can neglect the variety and diversity of modern society. Modern society is diverse, and the approach of

⁴⁴ Saleh T, 'John Locke, Jeremy Bentham and J.S Mill on equality and the redistribution of wealth' On Political Thought, 26 November 2017. < <https://medium.com/auctoritas-to-authority/liberalisms-founding-fathers-on-the-redistribution-of-wealth-part-ii-f391d3f6e827>> on 25 November 2020.

⁴⁵ Davies S, 'The classical liberal ideal of equality'.

⁴⁶ Well T, 'Sen's Capability Approach' Internet encyclopaedia of Philosophy. < <https://iep.utm.edu/home/about/>> on 25 November 2020.

⁴⁷ Fulford A, 'Peter Westen's "The empty Idea of equality"' The Calvinist International, 5 May 2015. < <https://calvinistinternational.com/2015/05/05/peter-westens-the-empty-idea-of-equality/>> on 3 December 2020.

⁴⁸ 'The Ideas of Equality and non-discrimination: Formal and Substantive equality' Equal Rights Trust Organisation.

formal equality annihilates the personal characteristics of an individual therefore when it comes to gender equality advocates of formal equality would proscribe to gender blindness rather than gender consciousness.⁴⁹ Failure of recognising the ‘unique’ characteristics of individuals is the faultline of this notion of equality.

2.2.2. Equality of opportunity

Then there is the equality of opportunity that departs from the traditional notion of formal equality of treating likes alike. It is based on a redistributive justice model which proposes that measures must be taken to rectify past discrimination, the lack of which would leave different groups at different starting points. It seeks to equalise starting points irrespective of a person’s background or status. This comes in form of positive action to prevent and compensate for disadvantages and to promote equality.⁵⁰ Equality of opportunity amends the shallow nature of formal equality by injecting a substantive element into its framework.⁵¹ The best example of equality of opportunity was the introduction of Title IX in the United States of America which improved the participation of female footballers.⁵² However, the limitation of this notion of equality is that it does not take into consideration circumstances that are beyond human control that affect one’s ability to compete for resources.

2.2.3. Equality of outcome

Equality of outcome seeks to enhance equality through the redistribution of wealth and income.⁵³ It strives to ensure that everybody has an equal share. A critic of this concept is that it focuses on outcomes rather than opportunities shifting attention away from the starting point of life to its result, from chances to rewards. It implies that all runners finish the race in line together regardless of the starting point and the speed at which they run. It destroys individuality as it seeks to make everyone the same.⁵⁴

⁴⁹ ‘The Ideas of Equality and non-discrimination: Formal and Substantive equality’ Equal Rights Trust Organisation.

⁵⁰ ‘The Ideas of Equality and non-discrimination: Formal and Substantive equality’ Equal Rights Trust Organisation.

⁵¹ ‘The Ideas of Equality and non-discrimination: Formal and Substantive equality’ Equal Rights Trust Organisation.

⁵² Rothman L, ‘How Title IX first changed the world of women’s sports’ Time, 26 June 1978. <<https://time.com/4822600/title-ix-womens-sports/>> on 25 November 2020.

⁵³ ‘The Ideas of Equality and non-discrimination: Formal and Substantive equality’ Equal Rights Trust Organisation.

⁵⁴ ‘The Ideas of Equality and non-discrimination: Formal and Substantive equality’ Equal Rights Trust Organisation.

Equality of outcome is considered radical and a controversial face of egalitarianism, socialism, communism, and anarchy. The high level of social equality required by equality of outcome can be regarded as utopic. Its utopic objective can also be its major weakness.

2.2.4. Equality of capacity

Amartya Sen in *Equality of what?* criticises the three types of equality proposed by liberal scholars and proposes equality of capacity. Equality of capacity recognises the shortcomings of the other concepts that fail to identify the fundamental differences between human beings. It affirms that to achieve equality it would be essential to recognise the diversity of the society and the individual characteristics that each person is endowed with.⁵⁵For example, if the law grants every individual the equal right to eat at an expensive restaurant but fails to address their capacity to exercise the right e.g., availability of money then it is evident that the inequality persists.

2.2.5 Equality from a human rights approach

Unlike the other notions of equality, a human rights approach to equality encompasses a moral aspect that carries with it a persuasive moral authority. It enables individuals to claim their rights based on their intrinsic worth as individuals, therefore, making it an end in itself rather than a means to an end. It also contains an element of involvement of the state thus it calls for a sense of duty from the state.

2.3. Connection of the theory to training compensation

The reason we need to treat individuals equally goes back to the fundamental aspect of human dignity. What equality aims at is the establishment of legal, political, or social conditions in which people can enjoy equally worthwhile and satisfying lives.⁵⁶The goal is not uniformity rather it is about levelling conditions of social existence which are thought to be crucial to human well-being.

First, there is equal consideration, then equal opportunities, and finally equal satisfaction of basic needs. Fight for gender equality would be better based on a moral and human rights

⁵⁵ Well T, 'Sen's Capability Approach' Internet encyclopaedia of Philosophy. <<https://iep.utm.edu/home/about/>> on 25 November 2020.

⁵⁶Bhargava R, Acharya A , *Political theory: An introduction* , Pearson Longman ,58-65chapter 4 Ashok Acharya ,2008.*

argument. This concept is grounded on the idea that all human beings as such and without exception, are entitled to certain rights, respect, dignity, and treatment as ends rather than means.⁵⁷

Up until the age of enlightenment, it was assumed that human beings were unequal by nature that there was a natural human hierarchy. In this natural human hierarchy, men occupied a higher position compared to women. This line of thought was defeated with the introduction of the idea of natural rights and its assumption of an equality of natural order among all human beings. Natural rights sought to banish the social stratification existent in society. This, therefore, makes equality between men and women a moral imperative.⁵⁸ So to say that men are equal is not to say that they are identical instead equality implies that underneath apparent differences there are certain recognisable units that by which men and women can be said to be 'equal'.⁵⁹

In this case, formal equality calls for training compensation as a policy or law to apply uniformly to all football players without regard to the player's unique physical characteristics which in this case is their gender. However, it is worthy to note that if the law is blind to the distinctive individual characteristics of these female players it might result in counterproductive results rather than beneficial ones.

Concerning the theory of equality of opportunity, opportunities granted to male football players should be equally granted to their female counterparts. Therefore, if FIFA offers a platform for football clubs training men to benefit from the training compensation system, then there should be a similar opportunity afforded to women. This, the study assumes will be granting them equal starting points. However, as stated earlier, the theory ignores other circumstances such as luck and talents.

When it comes to equality from a human rights approach, it is claimed that female footballers just like their male counterparts are human beings. By these recognisable units, which in this case is being a human being and a football player, they can be termed as equals. Therefore, being regarded as equals they deserve the same treatment. That is not to say, as severally

⁵⁷Woolf A, 'Civil Rights and Moral Equality: Why human moral equality is necessary but not sufficient for American Civil Rights' ARC Digital, 5 April 2018. < <https://arcdigital.media/civil-rights-and-moral-equality-842a0405dca>> on 28 November 2020.

⁵⁸ 'From where I stand: Equality between men and women is a moral imperative' Women, 12 Friday, July 2019. < <https://www.unwomen.org/en/news/stories/2019/7/from-where-i-stand-taher-sellami>> on 29 November 2020.

⁵⁹ Thomson D, *Equality*, Cambridge University Press, Cambridge, 1949.

mentioned, that male and female footballers are ‘same’ therefore the concept of training compensation should apply to women.

2.4. Theory of discrimination

It is a well-known fact that society is stratified. Some groups have higher status and greater privilege than others. In this unequal social system, there is often unfair treatment directed against certain individuals or social groups.⁶⁰

In his review of treaties that outlaw discrimination, Wouter Vandenhoele finds that there is no universally accepted definition of discrimination.⁶¹ Even core human rights treaties fail to define discrimination, they simply provide a non-exhaustive list of the grounds on which discrimination is prohibited.⁶² For example, Article 26 of the International Convention on Civil and Political Rights (ICCPR) leaves unaddressed the definition of discrimination.

For this study, however, discrimination is defined as actions, practices, or policies that are biased towards a social group, which is salient.⁶³ The discriminatory conduct must impose a disadvantage, harm, or wrong on the group to whom it is directed. The treatment should be disadvantageous rather than simply differential treatment.⁶⁴

Discrimination can occur in various ways. It may be direct or indirect. Discrimination is often subtle; it is highly unlikely that discriminatory remarks will be made directly or that someone will openly voice their stereotypical views as a reason for their behaviour. For these subtle signs to be decoded, a pattern of behaviour that has existed for a while ought to be identified.⁶⁵

Direct discrimination may explicitly and intentionally pick out a group for disadvantageous treatment. In other situations, a discriminator may adopt a policy that on the surface makes no explicit reference to the group that the discriminator aims to disadvantage. Instead, the policy

⁶⁰ ‘Examples of discrimination in society today’ Khan Academy_ < <https://www.khanacademy.org/test-prep/mcat/individuals-and-society/discrimination/a/examples-of-discrimination-in-society-today>> on 30 November 2020.

⁶¹ Altman A, ‘Discrimination’ The Stanford encyclopaedia, Winter 2020 Edition. < <https://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=discrimination>> on 30 November 2020.

⁶² Altman A, ‘Discrimination’.

⁶³ Rasmussen L, *The Routledge Handbook of the Ethics of Discrimination*, Kasper edition, Routledge, New York, 2018.

⁶⁴ Altman A, ‘Discrimination’.

⁶⁵ ‘Forms of discrimination’, Ontario Human Rights Commission. < <http://www.ohrc.on.ca/en/policy-preventing-discrimination-based-mental-health-disabilities-and-addictions/10-forms-discrimination>> on 3 January 2020.

will apply the policy in a facially neutral way however it accomplishes the discriminator's hidden aim.⁶⁶ An example is the Jim Crow era where literacy tests were used to exclude African Americans from the franchise. Because African Americans did not have adequate educational opportunities all of them were disqualified by the test. Thus, the point of the literacy test was to exclude even though the testing policy made no explicit reference to race.⁶⁷

However, it is not always the case that direct discrimination is intentional. Lippert Rasmussen pointed out that there can be cases of direct discrimination not involving the intention to disadvantage anyone based on belonging to a certain salient social group. However, it still counts as direct discrimination because the disadvantageous treatment comes from an objectionable mental state (indifference or bias) of the agent.⁶⁸

On the other hand, indirect discrimination is when an act imposes a disproportionate disadvantage on the members of a certain group even though the agent has no intention to disadvantage members of that group, it still counts as being discriminatory. In *Shanaghan v United Kingdom*, the European Court of Human Rights held that “when a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be considered as discriminatory notwithstanding that it is not specifically aimed or declared at that group”.⁶⁹

The European Court of Human Rights (ECHR) says that policies with disproportionate effects may be discriminatory even if that is not the aim of the policies. Unless the policy can meet a suitable standard of justification, it would be considered as discriminatory.⁷⁰

2.5. Connecting the theory to training compensation

In this case, article 20 of the FIFA RSTP explicitly excludes women, who are a salient social group, from the benefits of training compensation. Women are excluded based on their membership in a salient social group because article 20 explicitly classifies men and women. Therefore, article 20 of the FIFA RSTP rules as a policy is directly discriminatory. The rationale offered by the members of the DRC for the exclusion of women was the difference in financial realities, however, the decision imposes a disproportionate disadvantage on the

⁶⁶ Altman A, 'Discrimination'.

⁶⁷ Altman A, 'Discrimination'.

⁶⁸ Altman A, 'Discrimination'.

⁶⁹ Altman A, 'Discrimination'.

⁷⁰ Altman A, 'Discrimination'.

members of a certain group. Female players just like their male counterparts deserve an equal opportunity to benefit from such a mechanism. Therefore, in excluding women from training compensation it constitutes a denial of equal opportunity. Male and female players deserve equal protection of the law therefore there is need for equal but separate protection when it comes to the application of the training compensation mechanism.

2.6. Conclusion

This chapter has discussed the concept of equality as well as discrimination. The study appreciates the fact that there is no standard definition of equality therefore it discusses the various principles that comprise the concept of equality. The forms of equality that were discussed included formal quality, equality of opportunity, equality of outcome, and equality of capacity. The chapter also discussed the concept of discrimination, which is described as, the disadvantageous treatment that is imposed on certain individuals by belonging to a salient social group. The next chapter will discuss whether training compensation in the football industry is a mechanism that is a *sine qua non* or whether female footballers can do without it.

CHAPTER 3.0: AN ANALYSIS OF THE EFFICACY OF THE PRINCIPLE OF TRAINING COMPENSATION IN THE FOOTBALL INDUSTRY

3.1. Introduction

This chapter seeks to answer the first research question as highlighted in chapter 1; it provides an in-depth understanding of the concept of training compensation in football. The chapter, therefore, looks into the following: the origins of training compensation through the *Olivier Bernard* case, the legal framework governing training compensation and finally it attempts to appraise whether training compensation serves a meaningful purpose in the football industry. Enlightenment on the concept of training compensation will aid in appreciating the urgency of the concerns on the exclusion of women from training compensation.

3.2. The Origin of training compensation: *Olivier Bernard case*

The origins of training compensation can be traced back to Bernard and some extent the Boseman case. The major issues that were addressed in both cases include the following: violation of free movement of workers, the encouragement of training talented workers, and the protection of human capital investment of the employer.⁷¹

In *Olympique Lyonnais SASP v Olivier Bernard*, the facts are as follows, Olivier Bernard was a 'joueur espoir' at Olympique Lyonnais, one of the strongest clubs in French Football. The category of *joueur espoir* was allocated to players between the age of 16 and 22 who were considered trainees under a fixed-term contract by Olympique Lyonnais.⁷² Bernard was offered a one-year contract by Olympique Lyonnais which he turned down choosing to sign a professional contract with New Castle (a leading English club at the time).⁷³

The issue had been that his actions were contrary to the '*Charte du Football Professionnel*' (the Charter) which at the time governed the employment of football players in France. According to the Charter a 'joueur espoir' was to sign (if the training club so wished) his first professional contract with the club that trained him.⁷⁴ The charter had not envisioned a scenario in which a

⁷¹ Hendrickx F, 'The Bernard case and training compensation in professional football' 3 *European Labour Law Journal*, 2010, 380. <https://pure.uvt.nl/ws/portalfiles/portal/1305848/Hendrickx_The_Bernard-case_110209_publishers_embargo_1_y.pdf> on 5 December 2020.

⁷² Weatherhill S, 'The Olivier Bernard Case : How, if at all, to Fix Compensation for Training Young Players?' 1-2 *The International Sports Law Journal*, 2010, 3.

⁷³ *Olympique Lyonnaise v Olivier Bernard and Newcastle United UFC*, Case C-325/08, Judgement of the Court of Justice (Grand Chamber) ECJ of 16 March 2010, (unreported).

⁷⁴ *Olympique Lyonnaise v Olivier Bernard and Newcastle United UFC*, ECJ, para. 3, 4 and 5.

player would reject the offer however it provided a remedy for damage which would be provided by the courts once the training club brought an action against the *joueur espoir* for breach of a contractual obligation under the Charter as well as the French *Code du travail* (Employment Code).⁷⁵

Therefore, Olympique Lyonnais sued and a tribunal in Lyon finding a unilateral breach of contract contrary to the charter ordered Bernard and Newcastle United to pay damages.⁷⁶ The court of appeal in Lyon quashed that judgment finding that the scheme had restricted the players' contractual freedom and had infringed on Article 39 of the EC(now article 45 of The Treaty on the Functioning of the European Union), which governs the free movement of workers between member states of the EU.⁷⁷ The court stated that the award of damages in such circumstances as identified by the charter would serve as a discouragement to players from exercising their rights of free movement.⁷⁸

Olympique Lyonnais appealed against that decision. The Court of Cassation referred the case for an opinion from the European Court of Justice. The ECJ was to issue an opinion on whether the rules described in the Charter conflicted with the principle of freedom of movement for workers enshrined in article 39 EC and, if so, whether the rules would be justified by the need to incentivise the training as well as recruitment of young professionals.⁷⁹

The question that the court attempted to answer was whether the French scheme governing *joueurs espoir* was justified regardless of how its restricted labour mobility within the EU. Focusing on the opinion of Advocate General Sharpston, she observed that measures that are applied that might hinder the exercise of fundamental freedom might escape prohibition if the end goal is a legitimate aim which does not go beyond what is necessary to achieve the objective.⁸⁰ In this case, the recruitment and training of young professional footballers was a legitimate aim compatible with the treaty.⁸¹

⁷⁵ Weatherhill S , ‘ The Olivier Bernard Case’ , 3 ,2010.

⁷⁶ *Olympique Lyonnaise v Olivier Bernard and Newcastle United* UFC, ECJ, para 19.

⁷⁷ *Olympique Lyonnaise v Olivier Bernard and Newcastle United* UFC, ECJ, para 12.

⁷⁸ Hendrickx F, ' The Bernard case and training compensation in professional football',381-382.

⁷⁹ Hendrickx F, ‘ Justification of Training Compensation in European Football: Bosman and Bernard Compared’ , The Bernard Case Sports and Training Compensation, 1 European Sports Law and Policy Bulletin, 2010,19.

⁸⁰ *Olympique Lyonnaise v Olivier Bernard* , Case C-325/08, Opinion of Advocate General Sharpston.

⁸¹ *Olympique Lyonnaise v Olivier Bernard* , Case C-325/08, Opinion of Advocate General Sharpston.

The opinion of encouraging rather than discouraging the training and recruitment of young players was identified as a broad public consensus. This led to the conclusion that the likelihood of recouping training fees would stimulate football clubs to scout for new talent and train young players.⁸² Due to the inadequacy of the benefits that the clubs derive from these players during the period of training with the club, the clubs would not be motivated to invest in players unless a scheme is created in which they may recoup the costs of training.⁸³ This is of considerable importance to small clubs whose training investments in young players at the local level enhance the social and educational function of football.⁸⁴

For the sake of balancing rights, the compensation system must be able to attain its objectives proportionately. The court in its ruling appreciated that football had a ‘special’ arrangement for training compensation that was non-existent in other industries.⁸⁵

3.3. The Legal Framework governing training compensation

Having introduced the concept of training compensation, the next step is to briefly discuss the framework that governs training compensation. Training compensation is governed by the Federation Internationale of Football Association (FIFA). FIFA oversees and has developed a set of rules related to players transfers. These rules are codified in what is known as the FIFA Regulations on the Status and Transfer of Players (RSTP). Training compensation is one of the reward schemes highlighted under the FIFA rules.⁸⁶

Training compensation may be required at two different times of a player's professional football career. The first time the player registers as a professional player in another country other than the one he was trained and the second is during the player's subsequent international transfers. The club where the player registers must pay training compensation to every club that contributed to the player's training starting from the season of the player's 12th birthday through the season of his 21st birthday. The other circumstance in which payment of compensation

⁸² Laskowski J, ‘Solidarity compensation framework in football revisited’18 *The International Sports Law Journal*, 2019,150-184.

⁸³ *Olympique Lyonnaise v Olivier Bernard*, ECJ, para.44.

⁸⁴ Hendrickx F, ‘The Bernard case and training compensation in professional football’382-385.<
https://pure.uvt.nl/ws/portalfiles/portal/1305848/Hendrickx_The_Bernard-case_110209_publishers_embargo_1_y.pdf> on 5 December 2020.

⁸⁵ *Olympique Lyonnaise v Olivier Bernard and Newcastle United UFC*, ECJ.

⁸⁶ ‘FIFA players transfer 101: Training compensation, Solidarity payment and calculations’ Mohson Parsa Inc.<
<https://www.parsalaw.com/fifa-player-transfers>> on 6 December 2020.

would be required is during subsequent international transfers of the player, the acquiring club would bear the costs.⁸⁷ Training compensation unlike the solidarity mechanism is waivable.

FIFA established the following rules in calculating training costs. Associations are instructed to divide their clubs into a maximum of four categories (with I being the highest paid to IV being the lowest paid) per the clubs' financial investment in training players. The training costs are set for each category and correspond to the amount needed to train one player for a year multiplied by an average 'player factor', which is the ratio of players who need to be trained to produce one professional player.⁸⁸

The equation used to calculate the training compensation as highlighted in the FIFA RSTP rules is as follows:

i) As a general rule, to calculate the training compensation that is due to a player's former club(s), the paying club would need to take the costs that would have been incurred by the new club if it had trained the player itself.⁸⁹

ii) Then they would need to take the training costs of the new club multiplied by the number of years of training (in principle from his 12th to his 21st birthday). For subsequent transfers, the compensation would be calculated based on the training costs of the new club multiplied by the number of years of training with the former club.⁹⁰

iii) For young players (minors) to ensure that compensation is not set at unreasonably high levels, the training costs for the players for the seasons between their 12th and 15th birthdays shall be used on the training and education costs of the category 4 clubs.⁹¹ The resulting figure represents the average costs for training one player at a club in a particular training category.⁹²

The designation of a category for a particular club is determined by how much it spends on youth development as assessed by the FIFA applicable FIFA member association. Training

⁸⁷ Article 20, FIFA RSTP, June 2020 Edition. < <https://resources.fifa.com/image/upload/regulations-on-the-status-and-transfer-of-players-june-2020.pdf?cloudid=ixztobdwje3tn2bztqcp> > on 4 December 2020.

⁸⁸ Annexe 4, FIFA RSTP, June 2020 Edition.

⁸⁹ Annexe 4, FIFA RSTP, June 2020 Edition.

⁹⁰ Annexe 4, FIFA RSTP, June 2020 Edition.

⁹¹ Annexe 4, FIFA RSTP, June 2020 Edition.

⁹² Training Compensation Calculator, FAQ. < <http://trainingcompensationcalculator.com/faq> > on 6 December 2020.

compensation can be waived and the amount to be received can be modified in the course of negotiation with the club seeking to acquire the player.⁹³

Annexe 4 of the FIFA RSTP rules highlight that training compensation is due when a player is registered for the first time as a professional. Therefore, the first requirement would be for the player to be signed as a 'professional'. When a professional is transferred between clubs of two different associations whether during or at the end of his contract training compensation will be due. The limit is to the player's 23rd birthday.⁹⁴ Training compensation will not be due if the former club terminates the player's contract without just cause without prejudice to the rights of the previous club or if the player is transferred to a category 4 club or when a professional reacquires amateur status on being transferred.

Of importance, female football players do not qualify for training compensation. Generally, these rules or principles as identified in article 20 do not apply to women's football.⁹⁵ The next section will attempt to seek the efficacy of the training compensation system.

3.4 Is the training compensation mechanism efficacious?

The mechanism was intended to serve a redistributive purpose by creating a competitive balance through better and increased redistribution between clubs. The *sine qua non* of this segment of the study would have been the analysis of quantitative data that would have served as the litmus test for whether the mechanism is a hit or miss, unfortunately, data concerning reward fees such as training compensation and solidarity mechanism is scarce as affirmed in Rhys Lenarduzzi's article.⁹⁶ This data would have aided in identifying who has paid training compensation or who did not and which confederations they belong to. From FIFA's Global Transfer Market Reports 2019⁹⁷ it is identifiable that a very small percentage of the amount of money that ought to be paid is paid. One of the major reasons for the failure of the mechanism is the reluctance of certain clubs to pay training compensation. However, Under FIFA's reform

⁹³ 'FAQ's about training compensation and solidarity payments' MLS, 18 April 2019. <<https://www.mlssoccer.com/post/2019/04/18/faqs-about-training-compensation-and-solidarity-payments>> on 7 December 2020.

⁹⁴ Annexe 4, FIFA RSTP, June 2020 Edition.

⁹⁵ Article 20, FIFA RSTP, June 2020 Edition.

⁹⁶ Lenarduzzi R., 'Revisiting FIFA's Training Compensation and Solidarity Mechanism: The African Reality' Asser International Sports Law Blog, 17th November 2020. <www.asser.nl/SportsLaw/Blog/post/revisiting-fifa-s-training-compensation-and-solidarity-mechanism-part-2-the-african-reality-by-rhys-lenarduzzi> accessed on 19 May 2021.

⁹⁷ FIFA Global Transfer Market Report 2019: A review of International Football Transfers Worldwide.

package 100% of payment will be deducted from transfer fees paid and be paid to training clubs.⁹⁸

It is even worse for African countries where African clubs waive their rights to training compensation in exchange for a percentage of future sell on value which is on a take or leave basis and contingent on other various factors. For Africans, a player is not of interest if the player is not free. This, therefore, creates a hindrance effect. It leads to talented players missing opportunities based on the justification of a club's rights to training compensation which at times is not even necessary and can be waived.⁹⁹

Training compensation being a Eurocentric mechanism does not take into consideration the power imbalance that is existent in the football industry (factoring in other parts of the world). There exists the powerful and the vulnerable in the football industry (the vulnerable in this case being African football clubs) and training compensation is being used as a tool to arm-twist the vulnerable in the acquisition of cheap labour.

For Africans especially they can easily give up training compensation if they can be assured of some future benefit for example a percentage of the future sell on value. Therefore, for the African demographic the right to training compensation is not a guarantee of stable funding to support their investments in training and educating players . Thus, training compensation does not serve as an effective redistribution mechanism, and it also hinders the movement of African football players.¹⁰⁰As pointed out by Lenarduzzi, the future of development is thus shifted back to the hands of the clubs instead of being a guaranteed matter. It, therefore, raises an issue of the need for FIFA to devise a way in which clubs can claim training compensation fees without missing a transfer entirely.

At a national level, the provisions on training compensation are not binding and require that the national association provide in its internal regulations a system for rewarding compensation. The fees of which are usually much lower when compared to international

⁹⁸ Scavuzzo D ' Pros and Cons of MLS Clubs seeking training compensation and solidarity payments', Soccer Today, 25 April 2019. < <https://www.soccertoday.com/pros-cons-of-mls-clubs-seeking-training-compensation-solidarity-payments/>> on 6 December 2020.

⁹⁹ Lenarduzzi R , ' Revisiting FIFA's Training Compensation and Solidarity Mechanism: The African Reality'.

¹⁰⁰ Lenarduzzi R , ' Revisiting FIFA's Training Compensation and Solidarity Mechanism: The African Reality'.

transfers. It calls for a need for training compensation to not only cater for international transfers but national transfers as well.

As discussed earlier in the awarding of training compensation, clubs are divided into four categories reflecting the costs incurred by a given club on training and education. In the formation of these categories, FIFA only established indicative amounts of training compensation for each confederation which has remained the same till date. In the categorisation of these clubs, FIFA assumes that clubs assigned to a particular category apportion alike financial investments in training players therefore it fails to consider top training academies that invest heavily even though they belong to small federations thus obstructing them from obtaining a fair return from their investments and expertise in developing young players. Thus, they receive less training compensation. The categorisation and the costs apportioned were done generally and were not formulated in a manner that would guarantee that football clubs receive a fair return on the average investment in the development of young players. The amount can be adjusted by the DRC but only in exceptional circumstances.¹⁰¹

The rationale provided for the generalisation by FIFA is that there is a need for a level of simplification for purposes of clarity and transparency however questions are raised as to the ability of such a generalisation and abstraction to achieve the objective of motivating clubs to invest in training and education of young players. FIFA in the current times is enabled to provide a detailed categorisation that reflects the true costs borne by individual clubs to train a player, therefore this stands as a downside to the current training compensation regime.

The regime also fails to factor in countries in which clubs mainly consists of category 3 and 4 which are clubs comprising of amateurs who are precluded from training compensation. The rationale behind this would be understandable however it beats logic if the category 4 club comprises professionals, and they are precluded from training compensation.

In the conclusion of Jakub Laskowski's article, he points to the fact that the reward systems (training compensation and the solidarity mechanism) were not properly implemented nor

¹⁰¹ Laskowski J, 'Solidarity Compensation framework in football revisited' 18 *The International Sports Law Journal*, 168-169.

supported by an effective enforcement system and transparency requirements and there have not been adjustments to the changing realities of the industry since 2001.

The major advantage of training compensation would be ‘return on investment’. Millions are poured into academies for them to provide excellent resources to their players. The costs go into providing highly trained coaches at every practice and trainers on every field plus the high cost of travel and other amenities. Therefore, is it fair that clubs spend millions to cover the costs of player development to be left at the altar?¹⁰² Training compensation enables clubs to recoup the value of that investment, especially for grassroots football clubs.¹⁰³ The penultimate objective that is achieved by the training compensation regime is the creation of a competitive balance between top tier clubs and the grassroot level clubs.

The Major League Soccer that is in charge of football in America and Canada for the past few years did not apply the FIFA RSTP. The MLS Players Association was against training compensation payment calling it a ‘tax’ levied that could scuttle potential clubs that would be interested in acquisition of players. At long last, the USA woke up from its slumber and in April 2019 MLS confirmed that the RSTP rules would also apply to the USA and Canada.¹⁰⁴

In conclusion, regardless of its ineffectiveness and the hindrance effect, the mechanism introduces the only appreciable way to protect training clubs and limits international transfers of young talented players. Thus, despite of the shortcomings highlighted above, its complete removal would lead to a lot of muscle drain.

3.5 Exclusion of women from article 20 of the FIFA RSTP

The last clause of article 20 of the FIFA RSTP rules states that the principles of training compensation do not apply to women. Its explicit exclusion of women raises concerns about the reasoning behind such a policy. The concern was raised in the European Parliament on 9 October 2020 by Antonius Manders. He presented before the parliament the urgent need to introduce training compensation in women’s football. He stated that as a member of parliament he was involved in proposing training compensation for football clubs that educate football players during the meeting that occurred in 2001.

¹⁰² Scavuzzo D ‘ Pros and Cons of MLS Clubs seeking training compensation and solidarity payments’.

¹⁰³ Lombardi P, ‘ How amateur clubs can benefit financially from the transfer of former players ’Lombardi Associates 1 October 2018 ._< <https://lombardi-football.com/news/2018-10-1-how-amateur-clubs-can-benefit-financially-from-the-transfer-of-former-players/>> on 7 December 2020.

¹⁰⁴ Lombardi P, ‘ How amateur clubs can benefit financially from the transfer of former players ’.

Antonius Manders having received a complaint that the system did not apply to women, before the parliament (in verbatim) raised the following three questions :

- i) Does the commission agree that this is disrespectful towards female football players?
- ii) Does it also agree that this constitutes discrimination and is, therefore, a violation of the non-discrimination principle laid down in article 21 of the Charter of Fundamental Rights of the European Union
- iii) If so, what steps will it take to make sure that men and women are treated equally and thus that clubs who educate female football players also receive training compensation.

Oliver Dickinson in his article states that unlike in the men's game, women's clubs in Scotland who develop players through their academies do not receive compensation when a player moves before their 23rd birthday. He states that this is not sustainable and that clubs are recognising early that they will lose their best players. He goes forth to mention players who have moved to larger clubs, for example, Lizzie Arnet and Kirsty Smith who joined Manchester United from Hibs. This gives practical evidence of the effects of the exclusion of women from training compensation in Scotland. ¹⁰⁵Whether the exclusion of women constitutes discrimination will be discussed in the next chapter.

3.6. Conclusion

The chapter has in detail explained the backstory to training compensation, which is the Olivier Bernard case, the Bosman case as well as the 2001 meeting held between UEFA, FIFA, and the European Commission which lead to the enactment of a compensation system. The chapter also expounded on the current legal framework that governs the issuance of compensation. The section discussed the regulations that are stipulated in the FIFA RSTP. It further discussed the circumstances in which a football player would qualify for compensation which was, in general, when the player registers as a professional player for the first time in a foreign country and the player's subsequent international transfer. ¹⁰⁶Having analysed the concept of training compensation the study appreciates that training compensation was meant for financial balance between clubs.

¹⁰⁵ Oliver Dickinson, 'No Reward' for developing players in women's football' STV News, 5 February 2019. <https://archive.news.stv.tv/sport/1435286-no-reward-for-developing-players-in-women-s-football.html> accessed on 31 October 2020.

¹⁰⁶ 'FIFA players transfer 101: Training compensation, Solidarity payment and calculations' Mohson Parsa Inc. <https://www.parsalaw.com/fifa-player-transfers> on 6 December 2020.

The opinion of encouraging rather than discouraging the training and recruitment of young players was identified as a broad public consensus.¹⁰⁷

Despite its advantages, the study highlights the efficacy of the training compensation mechanism. Concerning training compensation achieving its intended objective, the study agrees with Weatherhill who stated that training compensation is being used as a means of covering up inequalities. In 2013 the European Commission has blown the whistle over inflated football transfer fees and lack of a level playing field. There was an emphasis on the fact that although football clubs spend around 3 billion euros a year on player transfers only very limited money, less than 2% of the transfer fee, trickle down to smaller clubs, further increasing the imbalance existing between clubs on the transfer market.¹⁰⁸ Therefore it was concluded that the level of redistribution of money in the game which should compensate for the costs of training and educating young players is insufficient to allow smaller clubs to develop and to break the stranglehold that the biggest club continues to have in the sports competitions.¹⁰⁹

Having discussed the compensation system at length the study will proceed to discuss whether the exclusion is discriminatory and if so, what ought to be the way forward.

¹⁰⁷ *Olympique Lyonnaise v Olivier Bernard*, Case C-325/08, Opinion of Advocate General Sharpston, para.46

¹⁰⁸ 'Commission blows the whistle overinflated football transfer fees and lack of level playing field' European Commission, Brussels, 7 February 2013. < https://ec.europa.eu/commission/presscorner/detail/en/IP_13_95> accessed on 6 December 2020.

¹⁰⁹ Laskowski J, 'Solidarity compensation framework in football revisited', 18 *International Sports Law Journal*, 2019, 150-184.

4.0. CHAPTER FOUR: THE DISCRIMINATORY NATURE OF ARTICLE 20 OF THE FIFA RSTP

4.1. Introduction

This chapter seeks to answer research questions two and three as espoused in chapter one of the study. The chapter will attempt to analyse whether article 20 of the FIFA RSTP is discriminatory and attempt to find a way forward for the women's game when it comes to training compensation. The findings in this chapter are informed by the broad discussion on training compensation highlighted in chapter three of the paper.

4.2. Is article 20 of the FIFA RSTP discriminatory?

Women's football is yet to be embraced by society and that would be one of the reasons that perpetuate the existence of such policies. The existence of gender discriminatory laws is often rooted in discriminatory social norms. It is no secret that female footballers have been embroiled in an eternal fight for their spot in the industry, one which is their natural right.¹¹⁰

This segment of the study in particular, just as was elucidated by the decision of the Court of Arbitration for Sport CAS in the *Spartak Subotica v FC Barcelona* case, does not tackle whether training compensation should or should not apply to women rather it attempts to prove whether the regulations(as they are) constitute direct discrimination.

Proving discrimination can be quite difficult and is highly dependent on the facts and circumstances of a particular case. However, there is a threshold that has to be met in order to conclude that a policy violates the law. First there is need to establish a prima facie case and then proceed to show that the decision was motivated by bias.

In this particular case it is an established fact that women belong to a protected class because of their gender. It is also a fact that with reference to article 20 and annex 4 of the FIFA RSTP that some women qualify for training compensation. Despite the following it is also true that while women are not entitled to training compensation men continue to benefit from training compensation.

¹¹⁰ Ray S , 'Challenge faced by female athlete in the world of sports' YourStory ,12 September 2016, <<https://yourstory.com/2016/09/challenges-female-athletes-face>> accessed on 19 December 2020.

Having established the above facts, we ought to look at whether FIFA in making its decision, to exclude women from training compensation, had a legitimate, non-discriminatory motive for its decision. It is worthy to note that FIFA has never explicitly provided grounds for excluding women therefore the study in striving to establish FIFA's motive, infers from the decisions made by FIFA's Dispute Resolution Chamber (DRC) and the Court of Arbitration for Sports (CAS) in cases that have been presented before these bodies.

FIFA's exclusion of women from training compensation was the main subject of determination in a case that was presented before the DRC between football association X and Y.¹¹¹ The claim that was presented by the club as a claimant against another club as the respondent was regarding training compensation dispute related to the transfer of player F. Football association X confirmed that female player F born on 13 October 1987 was registered with its affiliated Club S (the claimant) from April 1, 2003, until 8 August 2008 as an amateur player.¹¹²

On 1 December 2008, the claimant contacted FIFA asking for its proportions of training compensation from the respondent on the basis that the player allegedly signed her first professional contract with the respondent in 2008. This was for the season that the club had been responsible for the footballer's training. The claimant argued that the respondent belongs to category 1 (indicative amount of EUR 90,000 per year) within the FAY, while the claimant is a category 4 club (indicative amount of EUR 10,000 per year) and that the average training and education costs of the two categories would be of EUR 50,000 per season. Therefore, in total, the training compensation amount claimed is EUR 250,000 for the five seasons).¹¹³

The respondent rejected the claim and claimed that it was created in 1987 separate from the men's club even though it receives a significant amount of discretionary funding from the latter. That its finances were different from club A's, and it was just like all clubs in the ladies' game and that their finances also reflected that.¹¹⁴ It also averred that there are very few professional women players and that the costs of training and developing young female layers are not at the same level as the men's game.¹¹⁵

¹¹¹ Case 411375 , Decision of the Dispute Resolution Chamber ,Zurich , Switzerland ,7 April 2011,para. 2,3,4.

¹¹² Lenarduzzi R , 'Revisiting FIFA's training compensation and solidarity mechanism-part 3: The curious non-application of training compensation to women's football' .

¹¹³ Lenarduzzi R , 'Revisiting FIFA's training compensation and solidarity mechanism-part 3: The curious non-application of training compensation to women's football' .

¹¹⁴Case 411375 , Decision of the DRC, para. 5-10.

¹¹⁵Case 411375 , Decision of the DRC , para. 11

The respondent claimed that the imposition of such training compensation would significantly hamper the development of the ladies' game more widely. Ladies' clubs simply could not afford to award players with professional contracts due to them the cost of training compensation which they would then be required to pay.¹¹⁶ That this would threaten the existence of a large number of ladies teams and the ladies game in general. The claimant argued that rules agreed by all participating football associations are gender-neutral and not specific to men's football.

In this particular case the chamber's reason for upholding the policy was that women's football was still in a 'developing phase'. The DRC stated that the regulations that were established were to serve the reality of professional men's football and that the costs, budgets, and expenses differed from the men.¹¹⁷ The chamber concluded that at least for the time being the system cannot be applied to women's football. It acknowledged that the claimant's argument that the women's game has undisputedly made important progress in recent times and its development is in constant rise however the grade of professionalism in women's football is still to be qualified as being at its beginnings only. Only a few associations have clubs affiliated to them where teams engage professional female players.

To some extent, there is a grain of truth to the chamber's ruling given that during the meeting held by FIFA, UEFA, and the European Commission in 2001 (to come up with training compensation regulations) the only stakeholders that were consulted were men and only their budgets and costs were taken into consideration. However, despite the DRC's ruling, the first question that the study asks is, why was it that women were not involved in the discussion for their opinions to be considered (considering women had started playing at the time)? If the answer to the previous question would be that the women's game was still in a developing phase then the next question that the study asks is, how long would it take to get out of that 'developing phase' before the system applies to women? These are important issues that the chamber failed to address in its ruling.

The study appreciates that the costs and budgets between men's and women's football might differ. The study also agrees that if women were to use the indicative amounts that are used to determine compensation in the men's game, it 'might do more harm than good' because to some extent some of the women's clubs cannot afford to pay high amounts of training

¹¹⁶ Case 411375 , Decision of the DRC, para. 12

¹¹⁷ Case 411375 , Decision of the DRC, para.9,10 and 27.

compensation when a majority of the clubs are still developing and some of them depend on support. However, how large is the marginal difference in the costs of training a male versus a female football player? In *Spartak Subotica v Barcelona FC*, a case that was brought before the Court of Arbitration for Sports, the president of Spartak Subotica men's and women's club, Mr Zoran Arcic, stated that the costs of training men and women were almost the same.¹¹⁸ This serves as evidence, as was elucidated in Matthijs Lambregts's article, that the 'reality argument does not hold water especially if it is gender-based.'¹¹⁹ Therefore, in light of the counter argument that there is no vast difference in the costs of training men and women, the justification of 'differing realities fails'

Matthijs Lambregts provided an analogy that the study would like to borrow. Lambregts stated that the financial reality of men's football in developed countries is incomparable with the reality of developing countries but men's clubs from poorer and less developed regions are not exempt from paying or receiving training compensation.¹²⁰

The analogy above prompts the study to question the applicability of the system to men's football clubs in category IV or in men's clubs that are 'poor', how come the application of the system to such clubs is not considered to 'do more harm than good? There are female football clubs in England such as Manchester United Women's Football Club (FC) that are top tier compared to a football club such as Ushuru FC in Kenya, but the female football club is excluded from training compensation because it is in a 'developing phase' and that training compensation would do harm. At one point the men's game was also developing but training compensation was used as a tool to help the game survive.¹²¹ Therefore why is it that the same energy is not reciprocated to the women's game? For female players that make out of grassroots football clubs, clubs at the top of the pyramid paying training compensation to such grass-root clubs would strengthen the game by incentivising investments.

From the above arguments it is evident that the justifications provided by FIFA are not satisfactory.

4.3 Justification for direct discrimination

¹¹⁸ Lenarduzzi R , 'Revisiting FIFA's training compensation and solidarity mechanism-part 3: The curious non-application of training compensation to women's football'.

¹¹⁹ Matthijs L, 'No training compensation for female players'.

¹²⁰ Matthijs L, 'No training compensation for female players'.

¹²¹ Lenarduzzi R , 'Revisiting FIFA's training compensation and solidarity mechanism-part 3: The curious non-application of training compensation to women's football' .

Borrowing from the American jurisprudence, the Equality Act of the USA states that discrimination can be justified if the person who is discriminating against you can argue that it's a proportionate way of achieving a legitimate aim. In the case of *Hoover v Meiklejohn* Judge Matsch provides a criterion that can be used to determine whether a discriminatory decision is justified.

In *Hoover v Meiklejohn*, the plaintiff had filed a class action against the defendants in which she claimed that the school's rule that limited the sport of soccer to members of the male sex was unconstitutional. The justification provided for the exclusion was that it was in a bid to protect the health, safety and welfare of the female students. The court ruled that protection of females from harm due to their physiological differences from men was an irrational reason especially if they had not considered men that were weaker than women.¹²²

In light of this case, I would like to borrow Judge Matsch three-part test in determining whether an exclusion is justified.

He first evaluated the importance of the opportunity being unequally denied or burdened. He provided that if the opportunity is unimportant then restrictions on it would more easily survive judicial scrutiny. Therefore, he questioned the importance of playing soccer. To which he established that soccer played significant roles that female students should not miss.

Applying this limb of the test to this particular study, the question becomes whether training compensation is of any importance. As highlighted in chapter three of this study, despite the shortcomings of the training compensation mechanism it is regarded as an important tool especially considering the reason for its inception. Training compensation is regarded as the most appreciable way in which training can be incentivised and it also serves the purpose of preventing 'muscle drain'.

The second limb of the test was assessing the significance of the state interest in denying such an opportunity to girls. If the rationale were strong the policy would likely survive. In this case, FIFA's interest in excluding women from training compensation is ambiguous. FIFA has never explicitly stated its aim in excluding women from training compensation. However, from its DRC decision it can be inferred that FIFA was aiming at protecting the women's game which is still developing. However, as highlighted above there are men's football clubs from third world countries that are still developing and cannot be compared to football clubs participating

¹²² *Hoover v Meiklejohn*, U.S District Court for the District of Colorado, 1977.

in the champion's league. Some of these male football clubs are still developing but they are not exempted from paying or receiving training compensation because they are still developing. It begs the need for FIFA to explain why these third world country football clubs that are not exempt from paying or receiving training compensation are not exclude from training compensation in order to protect them. Therefore, the argument comes off as irrational.

It is indeed true that for a long period of time the women's game had stagnated that indeed the speed at which men and women play may be different due to slight physical differences but other than that there is no other major difference that would warrant a non-application. When it comes down to costs as established earlier the costs in training a female and male player at the grassroot level is not gross.

It would indeed need to be justified by stronger justifications other than costs and the fact that the game is in a developing phase (which is really irrelevant). So, despite the shortcomings of training compensation there is need for separate but equal protection. In addition to this, FIFA has history of discriminating against women despite the institution of various non-discrimination policies such as article 2,4,22 and 23 of the FIFA statutes and article 22 FIFA Code of Ethics. Non-discrimination on FIFA's side remains on paper. To conclude on the analysis the study shall briefly look into the 2011 *Spartak Subotica v FC Barcelona* case presented before the CAS.

4.4 *Spartak Subotica v FC Barcelona*: The 2011 CAS case

The explicit exemption of women has not always been the case, an unpublished Court of Arbitration for Sports(CAS) award may have played a fundamental role in the explicit exemption of women.¹²³The CAS, in the case of *Spartak Subotica v FC Barcelona*, might be regarded as FIFA's motive for explicitly adding a clause that excluded women from training compensation in the FIFA RSTP 2017 edition(the clause amended article 20 of the RSTP 2012).¹²⁴

The award was contrary to the decision of the DRC explained above. The arbitration panel made it clear that its task was not to consider whether training compensation should apply to

¹²³ Lenarduzzi R , 'Revisiting FIFA's training compensation and solidarity mechanism-part 3: The curious non-application of training compensation to women's football' Asser International Sports Law Blog,10 December 2020. < <https://www.asser.nl/SportsLaw/Blog/post/revisiting-fifa-s-training-compensation-and-solidarity-mechanism-part-3-the-curious-non-application-of-training-compensation-to-women-s-footb>> On 5 January 2021.

¹²⁴ Lenarduzzi R , 'Revisiting FIFA's training compensation and solidarity mechanism-part 3: The curious non-application of training compensation to women's football'.

women but whether it does apply to women.¹²⁵It concurred with Spartak Subotica's interpretation of the 2012 RSTP as inclusive of women's football considering that other articles within the same regulations had not made a discriminatory distinction between the genders. The 2012 regulations did not explicitly exclude women.

Like the respondents in the dispute before the DRC, FC Barcelona used commercial differences as an argument.¹²⁶They also relied on the futsal argument just as was in the DRC case, however, the arbitration panel, unlike the DRC chamber, described the comparison as inappropriate because unlike futsal that FIFA had explicitly excluded women the 2012 RSTP rules had not made a distinction.¹²⁷

Spartak in its arguments relied on the 'General Provisions' section of the RSTP 2012 which stated that "terms referring to natural persons apply to both genders". As elucidated in Rhys Lenarduzzi's article, the provisions favoured Spartak and the burden was on FC Barcelona to provide a contrary interpretation by providing additional context, history, or intention. However, FC Barcelona relied heavily on the 2011 DRC decision and did not provide enough evidence.¹²⁸The panel suggested more light would have been shed had FIFA accepted the invitation to join the panel.¹²⁹

In conclusion, the CAS was uncomfortable with the claim that training compensation should not apply to women's football and described the reasoning of the DRC as flawed due to inadequately addressing the arguments of the applicant. Lenarduzzi suggests that the FIFA circular number 1603 that amended the 2012 RSTP can be considered as a response to the CAS case. The amendment reflected the 2011 DRC decision. The circular stated that FIFA was working on a specific concept to be applied to the women's game in consultation with the various stakeholders. Lenarduzzi points out the fact that the CAS case was not public, therefore FIFA did not have the pressure it may have otherwise had to explain its regulatory amendment

¹²⁵ Lenarduzzi R , 'Revisiting FIFA's training compensation and solidarity mechanism-part 3: The curious non-application of training compensation to women's football'.

¹²⁶ Lenarduzzi R , 'Revisiting FIFA's training compensation and solidarity mechanism-part 3: The curious non-application of training compensation to women's football'.

¹²⁷ Lenarduzzi R , 'Revisiting FIFA's training compensation and solidarity mechanism-part 3: The curious non-application of training compensation to women's football'.

¹²⁸ Lenarduzzi R , 'Revisiting FIFA's training compensation and solidarity mechanism-part 3: The curious non-application of training compensation to women's football'.

¹²⁹ Lenarduzzi R , 'Revisiting FIFA's training compensation and solidarity mechanism-part 3: The curious non-application of training compensation to women's football'.

that was contrary to the CAS decision. FIFA failed to address fundamental questions that were raised in the CAS decision. The CAS award was coincidentally kept confidential.¹³⁰

4.5. Inequality as a ramification of exclusion

The study, therefore, argues that the exclusion of female football players would serve to widen the existing inequalities. If currently there is very little investment that goes into the women's game the situation would be worsened if investors training female players were demoralised by the lack of training compensation. Football, in reality, is not just a tool that unites society, but it is a business as well. Football club owners, as well as stakeholders, invest a lot of money into the game and a return on investment would incentivise them to continue training the youth. The fact that the society we live in today is very capitalistic, therefore means, there are very few that would train for free for the sake of society. A case in point is Scotland where the women's game has been affected due to lack of compensation.

Therefore, you find that investors are willing to put in a lot of money to train male players because of the prospect of recouping the investments. This then means that male and female football players will never be on the same level. This is not to say that training compensation is the only way in which investments for women can be gathered there are other ways, but the study emphasises that training compensation is an important method as well. Whether training compensation can achieve the intended objective is a different subject of discussion.

4.6. Conclusion

This chapter has attempted to prove that article 20 of the FIFA RSTP is discriminatory towards women. This section has also discussed the effects of the exclusion which in this case is the creation of inequalities as well as disincentivising investors from investing in the women's football club. The next chapter will conclude the study and make a recommendation. In terms of granting both sexes an equal opportunity. The law should treat similarly situated people the same. FIFA ought to provide a compelling reason for the exclusion of women from training compensation.

¹³⁰ Lenarduzzi R , 'Revisiting FIFA's training compensation and solidarity mechanism-part 3: The curious non-application of training compensation to women's football'.

5.0. CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS

5.1. Introduction

The onset of this study, chapter one, was a brief introduction into the research which was preceded by chapter two that touched on the theories of equality and discrimination. Chapter three provided the origins of training compensation and the legal framework governing training compensation in a bid to better understand what training compensation is. Through chapter three, the study was able to appreciate the nuances of training compensation and in detail analysed the efficacy of training compensation. Through this chapter the study was also able to inquire into whether the training compensation, despite its deficiencies, should be applicable to women. This was followed by a hefty discussion, in chapter four, on whether article 20 is discriminatory, whether the discrimination is justified and its ramifications. The conclusions are based on key findings which are discussed in detail within chapters three and four of this paper.

5.2. Conclusions

As identified in chapter three, the training compensation mechanism was created to rectify an existing ill in the football industry. The problem the mechanism was meant to address was the power imbalance between amateur and top tier football clubs and the lack of incentive to invest in training clubs for the youth. However, from the findings of the research, the study arrives at the conclusion that the training compensation mechanism is laden with inefficiencies.

Some of the challenges include refusal of certain clubs to pay training compensation, huge training compensation debts being owed to training clubs, African training clubs forfeiting training compensation due to power imbalance, the indicative amounts not reflecting the true costs of training just to mention but a few.

Despite the existence of these deficiencies the study concludes that training compensation still remains as the most appreciable way to incentivise training clubs and prevent ‘muscle drain’ by top tier clubs, therefore, the study deduces that training compensation remains to be essential. Based on the experience of the men’s game and as was highlighted in the Bernard case, training compensation has been an instrumental tool in incentivising investment in training of youth at the grass-roots level. FIFA has also stated that investment in training would occur only if a training compensation system were introduced. Therefore, scrapping off the

system entirely is not an option instead the inefficiencies identified above need to be addressed in entirety in order to make the system more efficient.

Having established the above facts, it begs the question of whether such a problematic system should or should not be applied to the women's game. There are scholars who are of the school of thought that a system that was meant to cater to the men's game should not apply to women at all while some are of the thought that the system should not be directly transposed to the women's game it should therefore be modelled in a way that suits the needs and interest of the women's game. The study in its conclusion agrees with the later.

As elucidated in chapter three Judge Matsch in *Hoover v Meiklejohn* stated that when it comes to football males and females should have separate but equal protection. Therefore, borrowing from this precedent, the study concludes that training compensation being an important concept should apply equally but separately to male and female football players. In applying the system separately, it would enable the system to be adjusted to the needs and interests of female footballers. It would enable the costs to be adjusted to reflect the reality of the women's game as well as other aspects to be adjustable to the women's game.

The next major issue that was addressed in the findings was establishing whether the current training compensation framework that excludes women is discriminatory. As was clarified at the onset of chapter 4, when discussing this particular issue, it is not about whether the system should or should not apply to women rather it is about whether the policy as it is constitutes discrimination.

Upon using a test that was established in the case of *Hoover v Meiklejohn*, the study concludes that FIFA fails to provide justifiable reasons for the express classification in article 20 of the FIFA RSTP. The difference in financial realities between the men's and the women's game does not suffice as a justification if the same training compensation mechanism is applicable to men's training clubs in third world countries who are also at a developing phase and their ability to pay training compensation is also questionable. If the difference in financial realities were to be used as an argument, then it would mean that poor third world country football clubs that train men should have been exempted as well. If the purpose of excluding women from training compensation was to protect the women's game as it is still in a developing phase, then it raises numerous questions as to why the protection is not extended to poor men's football clubs. This signifies double standards on FIFA's part. The differing financial reality argument

is also flawed because, at the grassroots level, which is the subject of training compensation, the costs of training are often similar within nations and across genders.

FIFA as well as the DRC fails to adequately address these questions and till date has not explicitly and adequately addressed why women were excluded from training compensation whereas in 2001 when the mechanism was born the committee steering its inception did not explicitly state that women were to be excluded. Following these findings, the study finds flaws in the justification of excluding women from the scope of article 20 of the FIFA RSTP and thus concludes that article 20 of the FIFA RSTP is discriminatory.

In conclusion, though the study admits to the fact that there is very little statistical data that can assert this claim, the study opines that the non-application of training compensation to female players broadens the existing inequalities.

5.3. Recommendations

i)Based on the conclusions above this research recommends that the current exclusionary clause article 20 of the FIFA RSTP be scrapped owing to the justifications that it not only discriminates against female football players but also increases the existing inequalities between the men and the women's game.

ii)Secondly the study recommends that either FIFA implements a gender-inclusive training compensation system that would also apply to women. In a bid to ensure equal but separate protection, the training system should be implemented to cater to the needs and interests of the women's game instead of being directly transposed.

iii)Finally, though training compensation has, without doubt, aided the development of the men's game, however, as a mechanism that ought to serve a redistributive function it is yet to achieve that purpose, therefore, the paper calls for the inefficiencies in the training compensation mechanism to be revisited.

In conclusion a future area of research that should be exploited is whether there exists an alternative mechanism that can replace the current training compensation system to serve the intended objectives of redistribution of revenue and incentivisation of training clubs. For now, a reformed training compensation system that is gender inclusive will suffice.

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