

Kenya's Sports Governance: Finding the Middle Ground

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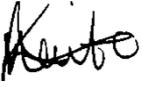
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DEDICATION

This work is dedicated to my parents, Mr and Mrs Kuria, who have worked tirelessly to ensure that the whole process to this point has been an easy journey. I will forever be grateful for your efforts and sacrifices towards my success.

DECLARATION

I, KURIA WILSON WAITA, 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: 5th August, 2021

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

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ABSTRACT

Kenya's 2013 Sports Act is among the statutes that were created just after the promulgation of the country's 2010 Constitution with the good intent to govern and consequently promote sports in Kenya. However, ever since, the Act has been facing certain hinderances in its application and a good number of these issues can be attributed to the situation of the principle of autonomy in the Act. The implementation of the Act essentially signified the country's move to intervention in terms of sports and this did not seem to sit too well with some of the major players in the country's sports sector. Despite its visible effort to allow for some amount of autonomy however, issues regarding autonomy have still arisen and have been responsible for a huge amount of the problems presently facing sports in our country. Also, the laws governing sports are no longer clear and this has resulted in some sort of conflict of laws whereby the parties to the consequent disputes are then tasked with choosing between whether to adhere to the rules of their respective sports organisations or the national laws. This project thus seeks to show that the root of the said problem is in the fact that the present amount of autonomy allowed is not sufficient and that the best solution is primarily a form of qualified autonomy.

LIST OF ABBREVIATIONS

AIBA	International Boxing Association
CAS	Court of Arbitration for Sport
CDDS	Committee for the Development of Sport
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
FIFA	Federation Internationale de Football Association
FKF	Football Kenya Federation
GDP	Gross Domestic Product
IAAF	International Association of Athletics Federations
ICAS	Court of Arbitration for Sport
ICC	International Cricket Council
ICSA	Institute of Chartered Secretaries and Administrators
IOC	International Olympic Committee
ISGB	International Sports Governing Body
ISO	International Sports Organisation
JSC	Judicial Service Commission
NOCK	National Olympic Committee of Kenya
NSO	National Sports Organisation
SANOC	South African National Olympic Committee
SDT	Settlement of Dispute Tribunal
VSO	Voluntary Sports Organisation
WADA	World Anti-Doping Agency

CHAPTER ONE

1.1 Background of the Problem

Up until the enactment of the Sports Act (hereinafter referred to as the Act) in 2013, Kenya was essentially a non-interventionist state.¹ The Kenyan government, in recognising the different political, social and economic benefits of sports, formulated the Act which gave it a more active role in the country's sports sector. The transition was meant to lead to the growth of the country's sports industry which would in turn lead to the growth of the country as a whole.² This intention is most evident in the Act's title which provides that it is supposed to, "...harness sports for development, encourage and promote drug-free sports and recreation..."³ The move however, due to the importance attached to the principle of autonomy by the various sports organisations, has proven to be more disadvantageous and less likely to achieve its intended purposes.

The Act has created bodies which include Sports Kenya⁴ and the Academy of Sports.⁵ There is also established the office of the registrar⁶ and the Settlement of Dispute Tribunal (SDT),⁷ and the Cabinet Secretary in charge of sports is granted wide powers with respect to the governance of the sector.⁸ Most of these bodies and offices, while intended to do good, have at least encountered some trouble in the course of implementing the statute's provisions.

A good example in demonstrating this claim would be the events that followed the Rio 2016 Summer Olympics which have come to be popularly known as the Rio fiasco. Following allegations of corrupt practices and mismanagement of team Kenya in the event, against the National Olympic Committee of Kenya (NOCK), the Kenyan Cabinet Secretary for Sports and Culture decided to disband NOCK and put in its place Sports Kenya, while relying on the powers granted to him by section 54 of the Act. The NOCK officials in response rejected the decision and accused the Cabinet Secretary of interference and not respecting the autonomy of the organisation. This, they warned the government, would lead to a ban from the

¹ Akech B, 'Public regulation of sport in Kenya', SSRN, February 10 2014 - <<https://ssrn.com/abstract=2423247>> on 8 July 2020.

² Kipchumba B and Jepkorir R C, 'Sports policy in Kenya: deconstruction of colonial and post-colonial conditions' 7(2) *International Journal of Sport Policy*, 2015, 310.

³ *Sports Act* (Act No. 25 Of 2013).

⁴ Section 3, *Sports Act* (Act No. 25 Of 2013).

⁵ Section 33, *Sports Act* (Act No. 25 Of 2013).

⁶ Section 45, *Sports Act* (Act No. 25 Of 2013).

⁷ Section 55, *Sports Act* (Act No. 25 Of 2013).

⁸ Section 54, *Sports Act* (Act No. 25 Of 2013).

International Olympic Committee (IOC).⁹ The ban in turn would prevent Kenya from partaking in Olympic competitions and also from sharing in the huge amounts of revenues distributed by IOC.¹⁰ This, and many other issues have caused confusion and obscurity which have consequently led to sporting activities slowing down in the country and has also encouraged corruption and dishonesty in sports governance.

1.2 Statement of the Problem

Sports have come to play important roles in our lives, both socially and commercially, and has even greatly affected the public sector today. Consequently, after much postponement since 1990¹¹, Kenya's 2013 Sports Act was enacted in an effort by the state to improve the situation of the country's sports industry which would in turn improve the situation of the country itself too.¹² The enactment as a result, led to our country turning to interventionism which has unfortunately brought with it more harm than good.¹³

This harm is largely due to the large amount of state intervention the Act is willing to allow, which is generally not acceptable especially in the legal side of the sporting world.¹⁴ Certain provisions of the Sports Act, especially those creating the above-mentioned bodies and offices, clearly do not coincide with the principle of autonomy as outlined in the charters and regulations governing the concerned sports. In the FIFA statutes, for instance, the express provision requiring the members of the FIFA organisation to manage their affairs independently¹⁵ conflict with the Act's requirement under the second schedule for the sports organisations to have the specific rules mentioned therein included in their constitutions.¹⁶ Such confusion has in turn led to a lot of the issues present in Kenya's football scene right now that have more or less brought it to halt.¹⁷ The misunderstandings mainly end up

⁹ Okeyo D, 'Rio blame game: Wario disbands NOCK, but official laughs off CS' decision' The Standard Sport - < <https://www.standardmedia.co.ke/sports/sports/2000213406/rio-blame-game-wario-disbands-nock-but-official-laughs-off-cs-decision>> on 8 July 2020.

¹⁰ Hylton J G, 'How FIFA Used the Principle of Autonomy of Sport to Shield Corruption in the Sepp Blatter Era', 136.

¹¹ Kipchumba B and Jepkorir R C, 'Sports policy in Kenya', 309.

¹² Bulinda H and Wahome P, 'Unbundling the Kenyan Sports Act: Role, challenges and opportunities in the kenyan sports act 2013' 3(10) *European Journal of Physical Education and Sport Science*, 2017, 367.

¹³ Akech B, 'Public regulation of sport in Kenya', 9.

¹⁴ Akech B, 'Public regulation of sport in Kenya', 16.

¹⁵ Article 19, *FIFA statutes*, June 2019.

¹⁶ 2nd schedule, *Sports Act* (Act No. 25 of 2013).

¹⁷ Muriithi M, 'CS Amina faces simple astute test on FIFA engagement' Citizen Digital, 14 April 2020, -< <https://citizentv.co.ke/sports/muriuki-cs-amina-faces-simple-astute-test-on-fifa-engagement-329907/>> on 20 October 2020.

requiring the National Sports Organisations (NSOs) and other stakeholders to, in many cases, disregard some of these provisions, as was seen in the NOCK case,¹⁸ making them pretty much inoperative. The provisions thus do not achieve their purposes and even become harmful.

To get rid of this problem, our national legal system should identify a way of incorporating the principle of autonomy of sport to the extent possible. This research thus attempts to determine a way through which the Act can cooperate with the ISOs in formulating policies around the principle that can avoid such inconsistencies accompanying government intervention and as a result promote a better performing sports sector.

1.3 Purpose of the Study

This study is meant to identify a solution that would enable the provisions of the Act affecting government intervention to become more operational and more likely to achieve their purpose. The solution will be essentially to allow for reasonable adherence to the principle of autonomy. This will be achieved through:

- i. Determining the role the issue of government interference has played in preventing the functioning of the Act and in promoting the resultant issues.
- ii. Determining whether returning to non-intervention would be a viable solution.
- iii. Identifying what should change to make the specific laws more operational if we were to remain an interventionist country.

1.4 Research questions

- i. What role has the issue of government interference played in preventing the functioning of the Act and promoting the resultant issues?
- ii. Would return to non-intervention be a viable solution to the whole issue?
- iii. What should change to make the specific laws more operational if we are to remain an interventionist country?

¹⁸ Okeyo D, 'Rio blame game: Wario disbands NOCK, but official laughs off CS' decision' The Standard Sport - <https://www.standardmedia.co.ke/sports/sports/2000213406/rio-blame-game-wario-disbands-nock-but-official-laughs-off-cs-decision> on 8 July 2020.

1.5 Hypotheses

The research is based on the following hypothesis:

That the issue of government interference has prevented the functioning of the Act and has caused the resultant social, political, and legal inconveniences through its insufficient adherence to the principle of autonomy in some of its laws. This however does not mean that a return to non-intervention would be the solution to this problem, especially for our country, mostly due to the benefits sports bring and the country's social and legal setting. Instead, the country should maintain a sort of balance through ensuring any reasonable incorporation of the principle of autonomy in the legislation.

1.6 Justification

In dealing with the conflict between the national sports laws and the laws of the various NSOs and their ISOs, we will be able to attain a more operational Act. Also, the legal framework guiding the country's sports sector will become clearer and more predictable. This could lead to a reduction of corruption cases and the commercial growth and development of the industry and ultimately the whole country, as was targeted. The study will be mainly beneficial to Kenya as I intend to focus on the country's Sports Act but could also be applied to other countries and even internationally to a certain extent.

1.7 Scope and limitations of the study

This research intends to cover the issue of autonomy in sports governance in Kenya. It will look at the relevant legal provisions and their sources addressing the issue including the national statutory instruments (mainly the 2013 Act), the charters and statutes of the different sports organisations, international law and the relevant case laws. For the Act, there will be more focus on the specific provisions that more directly affect the principle as shall be illustrated as the discussion progresses. These are the provisions creating the already mentioned bodies and offices and those under its second schedule. As for limitations, there is the issue of few scholarly works in this field particularly for our country. There will thus be reliance, through deduction, on works on different other countries in the discussion.

1.8 Definition of terms

Global sports law: a transnational autonomous legal order created by the private global institutions that govern international sport.

International sports law: the principles of international law applicable to sport.

Interventionist state: A country that has ‘specific legislation on the structure and mandate of a significant part of the sports movement’.

Lex ludica: These can be termed the sporting law, or rules of the game.

Lex specialis: A Latin phrase which means “law governing a specific subject matter”.

Lex sportiva: The general principles that can be extracted from the diverse practice of sports federations and the codes by which they govern themselves.

Non-interventionist state: The regulation of sports federation is under the general private law associations thus the federations are allowed greater freedom from state interference but makes them less accountable

Principle of autonomy: The independence of sports organisations all over the world to run their own activities without fear, and free from manipulation and interference from outside.

Small country: For the purposes of the discussion in this study, a small state will usually have a population below 10 million and a microstate a population below 1.5 million.

Sports organisation: A sports governing body.

Sports Registrar: The officer in charge of keeping and maintaining a register of the registered sports organizations and such other particulars relating to the registered sports organizations as may be prescribed as established under section 45 of the Sports Act.

1.9 Literature Review

The issue of government intervention in the sports sector has for some time now attracted, though not so much, the attention of legal scholars. In Kenya, owing to the growth and development of the sector and also the legal issues that have arisen in the field especially after the enactment of the 2013 Sports Act, various Kenyan lawyers and scholars have attempted to determine the place and appropriateness of the principle of autonomy in our country's current sports legal regime. There have also been developments and subsequent writings on the principle in the international scene that have also heavily affected its application in Kenya.

Overall, the principle of autonomy has always been regarded to be of high importance, but the industry has grown and evolved such that it has become almost impossible to avoid the governments' involvement in its activities. This involvement however, especially for Kenya, has brought with it a lot of unexpected controversies and misunderstandings among the different stakeholders. The literature reviewed in this section looks into such issues and their effects and also the possible solutions to the whole problem. To this end, these works will be analysed in accordance with the outline of the purpose of this study.

In his article, Ben Akech¹⁹ provides an analysis of the general situation of the legal status of Kenya's sports sector. He looks into the regulation of sport in Kenya both before and after the enactment of the Sports Act and the country's move to an interventionist model of regulation. He also looks at the key issues in regulation of sport that arose as result of the enactment of the Sports Act. Among these issues are the effects of the move on the independence and autonomy of sports organisations such as how any attempt to exercise the powers given to the CS would put the country at logger heads with the ISOs. This article thus enables us to determine the difficulty in implementing the rules allowing for intervention in answering the first question.

The article by Kipchumba and Jepkorir²⁰ also plays an almost similar role in this work. Their paper examines the extent to which the general social and political trends in colonial and post-colonial Kenya were reflected in the sport policy. Through identifying the different ways through which both the colonial and post-colonial governments used sports to achieve their political motives, and their consequent role in the development of the industry, the work

¹⁹Akech B, 'Public regulation of sport in Kenya'.

²⁰ Kipchumba B and Jepkorir R, 'Sports policy in Kenya: deconstruction of colonial and post-colonial conditions' 7(2) *International Journal of Sport Policy and Politics*, 2015.

shows us just how much the Kenyan government is and has been involved in the running of sports in the country. In doing so, they get to also highlight the issues that this involvement has caused which will aid in our discourse on the role of intervention in the inapplicability of the Act.

In the case of *Republic v The Cabinet Secretary Hassan Wario Arero and another Ex-Parte Kipchoge Keino & 2 others*,²¹ the officials of NOCK had brought in a case against the government after Wario's decision to disband the organisation. Among the contentions by the claimants here, was that the Cabinet Secretary had no right to transfer their powers to Sports Kenya, a government agency, as it is not a recognised organ under the Olympic Charter. Though the court did not address this issue, it is clear from the case that these sports organisations are very much willing to go against the provisions of the Act that in any way contravene the requirements listed in the constitutions of their parent organisations.

Elvis Majani and Nick Osoro²², however, put it plainly that despite the requirement of autonomy of sport, the sports fraternity cannot be expected to be fully self-sustainable. Other than mentioning the various ways through which the government supports sports, they also speak of the roles the sports play in developing our nation. Among these roles are the international recognition caused by our athletes, their contribution in the country's revenue and also the acts of mediation by certain sports personalities in times of conflict. It would thus be absurd to expect the government to not be involved in sports at all. To further illustrate ways through which sports have been assisting governments to perform their functions, Douglas Booth²³ shows us how the South African sports boycotts were useful in the fight against apartheid in the country.

Another issue that greatly discourages the idea of complete autonomy is that of mismanagement of office and corruption scandals linked to officials in the sports organisations. Mr Hylton²⁴ through his article on Sepp Blatter corruption scandal is very efficient in getting this point home. He, for example, speaks of how the threat of sanction due to violation of the principle of autonomy made Sepp Blatter and others in the FIFA leadership

²¹ *Republic v The Cabinet Secretary Hassan Wario Arero and another Ex-Parte Kipchoge Keino and 2 others* (2017) eKLR.

²² Majani E and Osoro N, 'Sports management and government interference in Africa' 6(1) *Sports Law and Policy Centre*, 2013.

²³ Booth D, 'Hitting apartheid for six? The politics of the South African sports boycott' 38(3) *Journal of Contemporary History*, 2003.

²⁴ Hylton J G, 'How FIFA Used the Principle of Autonomy of Sport to Shield Corruption in the Sepp Blatter Era' 32(1) *Maryland Journal of International Law* 1, 2017.

immune from any sought of investigation that could expose their corrupt ways. The article thus goes on to validate the need for at least a limit on the implementation of this principle which would in turn warrant government intervention.

The fact that Kenya is a small and developing country also builds a case for the need for government involvement. Barrie Houlihan and Jinming Zheng²⁵ identify ways through which small states have been excluded from analyses of international politics on sport policy and how they are under-researched by academics mostly due to them being seen, due to their perceived lack of capability, as mere irritants in great power politics or as part of the supporting chorus of major sports-power politics. This goes on to show how their concerns are under-represented in the international forum on which it is meant to solely depend if government intervention were not allowed. Complete autonomy thus cannot be a practical solution at the time, at least for Kenya.

Ken Foster²⁶ also agrees that sports organisations cannot be left completely on their own. He claims that the present global sports law has not yet attained the requisite standards to be a trans-national legal order that can be respected by national courts. These pre-conditions include a global constitutive body, a global forum for dispute resolution and transnational and unique norms. For the present situation, he divides the laws governing sports into four groups: the rules of the game, the ethical principles of sport, international sports law and global sports law. Out of these only the first two can be left to self-regulation. This work thus helps in identifying the extent to which local governments should be involved in the governance of sport which aligns with our ultimate goal.

Geeraert, Mrkonjic and Chappelet²⁷ are also really helpful in identifying possible solutions to the issue being addressed in this research. To achieve an understanding of the present concept of autonomy, they first of all deconstruct its multiple definitions and conceptualizations to which they come up with the legal autonomy, political autonomy, financial autonomy and pyramidal autonomy. They show how the International Sports Governing Bodies (ISGBs) have ceded certain aspects of each of these areas of autonomy and under which circumstances exactly. By proving to us that sporting autonomy is a dynamic and intrinsically diverse

²⁵ Houlihan B and Zheng J, 'Small states: sport and politics at the margin' 7(3) *International Journal of Sport Policy and Politics*, 2015.

²⁶ Foster K, 'Is there a Global sports law?' 2(1) *Entertainment Law*, 2003.

²⁷ Geeraert A, Mrkonjic M and Chappelet J L, 'A rationalist perspective on the autonomy of international sport governing bodies: towards a pragmatic autonomy in the steering of sports' 7(4) *International Journal of Sport Policy and Politics*, 2015.

concept, they assert that the loss of a governing monopoly does not imply that ISGBs are being hollowed out since they still play a paramount role in sports governance.

The Institute of Chartered Secretaries and Administrators (ICSA) also provides a report that suggests solutions to the issues of autonomy in sports, in the present time. It begins by acknowledging and validating the reasons for which there exists the principle of autonomy but also goes on to recognise the immense change in the sports sector as a result of which we now cannot avoid government intervention. They thus go on to provide possible answers to the dilemma such as the concept of qualified autonomy which is essentially requiring the sports organisations to justify their deserving of the autonomy through sound governance and principled leadership.²⁸ Such contribution in this discussion will no doubt be essential in coming to our final standing.

The resources used in this research are mostly cognisant of the importance of sport autonomy. However, a good number of them, in recognising the current status quo and the changes that have taken place in the industry in the recent years, suggest the need for government involvement. This position however could very easily be misinterpreted to it being a suggestion that the principle of autonomy should be completely disregarded, and this could have been the idea in the enactment of the Act which leaves very little space for autonomy. As a result, the functioning of Kenyan sport has been quite problematic mostly due to the global nature of sports. Finding a solution to this will thus be helpful in contributing towards a working notion of autonomy.

1.10 Research Methodology

In undertaking this research, there will be applied a qualitative method of research. This will take the form of a holistic case study of Europe as a continent and its standing with regards to the issue of autonomy of sport. We shall get to see how the principle has been addressed by its laws, which include the European conventions, decisions by the European Court of Human Rights (ECtHR) and also the general principles of international law.²⁹ In investigating just how operational this particular laws on sport are, there will be a look into the attitude of Europe towards the principle of autonomy and the issue of third party intervention, and how much intervention they allow and also how they go on to carry out the intervention. The

²⁸ ICSA, *The Future of sports governance – Beyond autonomy*, May 2019.

²⁹ Zaidah Z, Case study as a research method, 3.

resultant effective functioning of the system will then help prove the importance of finding a middle ground in this issue.

1.11 Chapter summary

Chapter 1: Introduction

This part simply seeks to introduce the problem being dealt with, which is the issue of autonomy, outline how the study will be undertaken and also provide the purpose of the study.

Chapter 2: Theoretical framework

Here, the theory used in approaching the problem question is analysed and discussed in detail.

Chapter 3: Sports Autonomy in the 2013 Sports Act

The presence of the principle of autonomy is evaluated and we get to see just how much the issue has affected the country's sports sector.

Chapter 4: The Unsuitability of Non-interference

We get to see that moving back to a system of non-interference is not really the solution for this problem.

Chapter 5: Case study

The situation of sports in Europe is analysed with regard to the principle and I attempt to determine how their practice can be incorporated into our country's legal system.

Chapter 6: Conclusion and Recommendations

This chapter provides the final standing of the whole study and gives suggestions on what the Kenyan government should consider in developing better policies for the sports sector.

CHAPTER TWO: THEORETICAL FRAMEWORK

The aim of this paper is to ultimately identify a way through which a balance can be attained in observing the principle of autonomy while at the same time allowing, at least to a certain extent, for government intervention in sports matters. To get to this, however, one has to first recognise the importance and role of the national government in sports governance and administration, and this could be very well illustrated by the public interest theory. Public interest has been held to be, “the best possible allocation of scarce resources for individual and collective goods.”³⁰ The theory thus provides that the efficiency of resources allocation can be achieved through government regulation.

The theory, being mostly used in economic discussions, provides that governments are have the ability to correct market failures through regulation. This theory came to be the cornerstone of modern public economics, as well as the bible of socialist and other left-leaning politicians and has been used to justify much of the growth of public ownership and regulation over the twentieth century.³¹ However, it has been criticised from several points of view such as the fact that usually market mechanism itself is able to compensate for any of its inefficiencies and that government regulation can be ineffective.³²

This thus brings us to a more refined Enforcement theory of regulation. The theory suggests four strategies, which are not mutually exclusive, if, for example, ‘the society’ wishes to control business to pursue a socially desirable end. These include market discipline, private litigation, public enforcement through regulation and state ownership, which are ranked by the growing degree of public control over economic activity. The basic premise of the theory is that all of these strategies for social control of business are imperfect, and that to attain the optimal institutional design one must choose from these imperfect alternatives. This choice is in turn basically a trade-off between two social costs of each institution: disorder and dictatorship.³³

Andrei Shleifer gives an example of social control of securities issues:

“Suppose that the society has an interest in having broad and liquid securities markets and, to this end, deems it desirable that firms issuing equity disclose accurate information about their

³⁰ Hertog J, ‘Public and private interests in regulation: Essays in the law and economics of regulation’ Published PhD Thesis, University of Utrecht, 2003, 9.

³¹ Shleifer A, ‘Understanding regulation’ 11(4) *European Financial Management*, 2005, 440.

³² Hertog J, ‘Public and private interests in regulation: Essays in the law and economics of regulation’, 18.

³³ Shleifer A, ‘Understanding regulation’, 442.

circumstances. The society has four choices. It can rely on the reputational incentives of the issuers themselves, or of their underwriters, to disclose the truth about the securities; it can rely on private suits by buyers of securities who feel that they had been cheated, under the general doctrines of contract or tort; it can create a regulatory agency which mandates what should be disclosed by security issuers, inspects these disclosures, and penalises issuers and underwriters who fail to conform to the regulations and finally, the government can nationalise all security issuance, so its own agents make representations and sell stocks.³⁴”

Applying the theory to the subject of this research, in identifying the proper system for the governance of our sports sector, the Kenyan government ought to select the most appropriate strategies from the four. We could leave the industry to be completely autonomous, let the national courts be involved only in cases of contractual issues or tortious claims, enact specific laws to only regulate the sector, or completely discard of the idea of autonomy and have the government take full control of the sports sector. This paper seeks to show that our current strategy is somewhere between the third and the fourth and that it has, for various reasons, not been functioning efficiently so far. However, it also asserts that the first strategy, which was our initial strategy, is not necessarily an option for us and that the answer instead lies somewhere between the second and the third strategy.

³⁴ Shleifer A, ‘Understanding regulation’, 443.

CHAPTER THREE: SPORTS AUTONOMY IN THE 2013 SPORTS ACT

3.1 Introduction

Pierre de Coubertin, the founder of the IOC, had stated that, “the goodwill of all the members of any autonomous sport grouping begins to disintegrate as soon as the huge, blurred face of that dangerous creature known as the state makes an appearance.”³⁵ Autonomy has, in many cases, been held to be a very important element of sports which occurs in more than just one of its areas. There has been held to exist its: political autonomy, legal autonomy, financial autonomy and pyramidal autonomy.³⁶ Traditionally, the sports bodies have relied on various legal principles for the justification of this principle but the main claim has been that they are private organisations and therefore are beyond the law’s purview.³⁷ The other major claim has been that the autonomy allows for the preservation of values of sport and the integrity of competition which in turn gives the participants and volunteers motivation.³⁸

This principle is provided for and heavily emphasised in the constitutions and statutes of the different international sports organisations. The Olympic Charter for instance, which governs the Olympic movement together with the affairs of the IOC,³⁹ instructs its members to not accept from governments, organisations, or other parties, any mandate or instructions which could interfere with the freedom of their action and vote.⁴⁰ It further provides that NOCs must preserve their autonomy and resist all pressures of any kind, including but not limited to political, legal, religious or economic pressures which may prevent them from complying with the Olympic Charter.⁴¹

The FIFA statutes also expressly provide that each of FIFA’s member association should manage its affairs independently and without undue influence from third parties.⁴² Having been mentioned as an obligation, failure of a member to adhere to the provision will warrant sanctions, even if the third-party influence was not the fault of the member association concerned.⁴³ The other organisation that puts emphasis on the principle would be the

³⁵ Chappelet J, Global Corruption Report: *Sport, Autonomy and governance: necessary bedfellows in the fight against corruption in sport*, 3.

³⁶ Geeraert A, Mrkonjic M and Chappelet J L, ‘A rationalist perspective on the autonomy of international sport governing bodies’, 474.

³⁷ Foster K, ‘Global sports law revisited’ 17(4) *Entertainment and Sports Law Journal*, 2019, 1.

³⁸ Majani E and Osoro N, ‘Sports management and government interference in Africa’, 67.

³⁹ Introduction to the Olympic Charter, *Olympic charter*, 17 July 2020.

⁴⁰ Chapter 2, Rule 16(1.5), *Olympic charter*, 17 July 2020.

⁴¹ Chapter 4, Rule 27(6), *Olympic charter*, 17 July 2020.

⁴² Article 19, *FIFA statutes*, June 2019.

⁴³ Article 14, *FIFA statutes*, June 2019.

International Cricket Council (ICC). Its rules bar the governments from influencing, directly or indirectly, and among other things, the day-to-day decisions of the administration, the staging of cricket matches, the dates of such matches, and the process or outcome of any disciplinary enquiries.⁴⁴

This being the case, it becomes a bit troublesome to implement some of the provisions of the Kenyan Act that in one way or another hinders the preservation of the principle of autonomy. Among these provisions are the following:

3.2 Settlement of Disputes

Disputes arising in Kenya's sports are to be handled as per the provisions under Part VII of the Act. There is established the Sports Disputes Tribunal.⁴⁵ The members of the tribunal, who are appointed by the Judicial Service Commission (JSC) in consultation with the NSOs,⁴⁶ are to determine: appeals against decisions made by national sports organizations or umbrella national sports organizations, whose rules specifically allow for appeals to be made to the Tribunal in relation to that issue; other sports-related disputes that all parties to the dispute agree to refer to the Tribunal and that the Tribunal agrees to hear; and appeals from decisions of the Sports Registrar.⁴⁷ The greatest issue with the SDT is the fact that it appears to be a part of the Judiciary as opposed to being an independent sports body. This is especially considering the role of the JSC in its appointments and also the fact that the Chief Justice is the one in charge of making the rules governing the practice and procedure of the Tribunal.⁴⁸

The Act in turn seems to deal with this issue by giving the relevant parties the ability to choose whether or not they will take their disputes to the tribunal, unless they are appeals from the decisions of the Registrar, as is already mentioned. However, despite the clear requirement for the Tribunal to only deal with cases whose parties have voluntarily agreed to take to it, a lot of these disputes, which usually happen to have a link to the office of the registrar, will still end up in the tribunal. The issues will then be dealt with without their

⁴⁴ Majani E and Osoro N, 'Sports management and government interference in Africa', 69.

⁴⁵ Section 55(1), *Sports Act* (Act No. 25 of 2013).

⁴⁶ Section 55(2), (3), *Sports Act* (Act No. 25 of 2013).

⁴⁷ Sec 58, *Sports Act* (Act No. 25 of 2013).

⁴⁸ Sec 61, *Sports Act* (Act No. 25 of 2013).

express consent. This being the case, a party to the dispute may refuse to adhere to the SDT's decisions.

This could be seen in FIFA's reaction to the SDT's decision to, for the second time, cancel FKF elections and order that the federation's National Executive Committee vacate office and a normalisation committee be appointed to run football matters in the country.⁴⁹ This issue, though being primarily about certain individuals being denied candidacy in FKF's elections, was brought to the SDT because FKF had been denied registration due to its electoral regulations.⁵⁰ FIFA in response rejected the decision while stating that, "...the FKF statutes do not expressly recognize the jurisdiction of the SDT as being the ultimate arbitration forum at national level. Moreover, we note that the SDT is not a national arbitration tribunal in the sense of FIFA circular 1010 dated 20 December 2005."⁵¹ The confusion that has come amid this case has more or less brought the country's football scene to a standstill.

3.3 The Second Schedule

The Act's second schedule provides for matters that must be addressed by the sports organisations' constitutions. It requires that elections in the different organisations be held at regular intervals after a period of between two and four years. The chairperson should hold office for not more than four years, but can be re-elected for one more term and any other official should hold office for a term not exceeding four years, but can be re-elected for one more term.⁵² Following this provision, a lot of the NSOs will have to include changes in their electoral provisions mostly because there has in fact been an unwritten rule in the world of sports that heads of sporting organizations can head the organizations as long as their members want them at the helm.⁵³

FIFA's Sepp Blatter had been at the helm since 1998, just after Jean-Marie Faustin Goedefroid "João" de Havelange, who was at the helm from 1974 to 1998. Also, in IOC, Juan Antonio Samaranch headed Committee from 1980 – 2001 before being succeeded by Jacques Rogge from 2001–2013. The case has been no different for Kenya. The head of Athletics

⁴⁹ -< <https://allafrica.com/stories/202004030229.html>> on 5 October 2010.

⁵⁰ Olobulu T, 'FIFA overturns tribunal ruling on FKF polls' Capital Sports, 25 March 2020, -< <https://www.capitalfm.co.ke/sports/2020/03/25/fifa-overturns-tribunal-ruling-on-fkf-polls/>> on 20 October 2020.

⁵¹ Circular no. 1010, FIFA, 20 December 2005.

⁵² 2nd schedule, *Sports Act* (Act No. 25 of 2013).

⁵³ Akech B, 'Public regulation of sport in Kenya', 21.

Kenya, the governing body for the sport of athletics (track and field) Isaiah Kiplagat has been at the helm since 1992.⁵⁴ Therefore, despite the change seeming positive through its incorporation of the principles of democratic governance in sports organisations, it does go against the principle of autonomy. This fact was the source of the dispute between the FKF and the SDT which held that the FKF electoral rules were unlawful and unconstitutional thus making the election process that had just taken place invalid. FIFA however defended FKF stating that there had been no objections from the relevant officials during the formulation of the said regulations.⁵⁵

3.4 Sports Registrar

The Act also provides that a body shall not operate as a sports organization unless it is registered under it.⁵⁶ This is done by a Sports Registrar whose office is established by Section 45 of the Act.⁵⁷ The Registrar's functions include: "the registration and regulation of sports organizations and multi-sports bodies representing sports organizations at the national level; the licensing of professional sports and professional sports persons; and the arbitration of registration disputes between sports organizations, all in accordance with the provisions of the Act."⁵⁸ Other than the fact that the Registrar is the one essentially determining the existence of a sports organisation, the office could be easily used to force the NSOs to adopt a rule or provision contrary to the principle of autonomy.

In the already mentioned dispute between the FKF and SDT, the whole issue was triggered by the Registrar's refusal to register the FKF for claims of it not satisfying the conditions required for its registration. The Registrar's threat to stop the election due to issues surrounding conforming to the Sports Act led to the FKF officials moving to the Tribunal in search of a recourse.⁵⁹ This became the beginning of the whole dispute regarding the FKF's constitution and electoral rules.

3.5 Cabinet Secretary

⁵⁴ Akech B, 'Public regulation of sport in Kenya', 22.

⁵⁵ Muriithi M, 'CS Amina faces simple astute test on FIFA engagement' Citizen Digital, 14 April 2020, -<
<https://citizentv.co.ke/sports/muriuki-cs-amina-faces-simple-astute-test-on-fifa-engagement-329907/>> on 5
October 2020.

⁵⁶ Sec 46(1), *Sports Act* (Act No. 25 of 2013).

⁵⁷ Sec 45(1), *Sports Act* (Act No. 25 of 2013).

⁵⁸ Sec 45(2), *Sports Act* (Act No. 25 of 2013).

⁵⁹ Olobulu T, 'FIFA overturns tribunal ruling on FKF polls' Capital Sports, 25 March 2020, -<
<https://www.capitalfm.co.ke/sports/2020/03/25/fifa-overturns-tribunal-ruling-on-fkf-polls/>> on 5 October 2020.

The Act also enables the Cabinet Secretary in charge of sports to initiate an inspection to be made by any person authorized by the Registrar of any sports organization, branch, sub-branch, organ, or any person associated with any sports organization, and of its or his books, accounts and records⁶⁰ to investigate any breach or non-compliance with the requirements of this Act.⁶¹ The registrar is then supposed to give the sports organisation recommendations if any fault is found with which it should comply.⁶² Where the sports organisation fails to comply, the Cabinet Secretary has the power to appoint any person or committee to assume the management, control and conduct of the affairs of a sports organization if it has been unable to conduct its affairs in a proper manner; or remove any official of a sports organization who, in his or her opinion, has caused or contributed to any contravention of any provision of this Act.⁶³

The exercise of these immense powers by the Cabinet Secretary, so far, cannot be said to have been beneficial. In the NOCK case, the Cabinet Secretary had decided to disband NOCK due to allegations of corrupt practices during the 2016 Rio Olympics. The officials however failed to heed to the instructions.⁶⁴ Other than failure to follow the proper procedure as laid out in the Sports Act, the refusal was mainly due to the claim that NOCK being a national sports organisation could only answer to its parent international organisation, the IOC. The case was however decided in favour of NOCK, but this was only due to the procedural technicalities and not because of the issue of autonomy.⁶⁵ A similar issue also occurred even more recently whereby the Cabinet Secretary caused AIBA and IOC to threaten exclusion of Kenya's boxing team from the upcoming Tokyo Olympics after he suspended the existing officials at the time and appointed his own.⁶⁶

3.6 Conclusion

Borrowing from experience, ignoring the principle could only lead to chaos. The more popular ISOs are especially known to very easily suspend the nations that allow for third

⁶⁰ Sec 52(1), *Sports Act* (Act No. 25 of 2013).

⁶¹ Sec 52(4), *Sports Act* (Act No. 25 of 2013).

⁶² Sec 53, *Sports Act* (Act No. 25 of 2013).

⁶³ Sec 54(1), *Sports Act* (Act No. 25 of 2013).

⁶⁴ Okeyo D, 'Rio blame game: Wario disbands NOCK, but official laughs off CS' decision' *The Standard Sport* - <<https://www.standardmedia.co.ke/sports/sports/2000213406/rio-blame-game-wario-disbands-nock-butofficial-laughs-off-cs-decision>> on 5 October 2020.

⁶⁵ *Republic v The Cabinet Secretary Hassan Wario Arero and another Ex-Parte Kipchoge Keino and 2 others* (2017) eKLR.

⁶⁶ <http://www.xinhuanet.com/english/africa/2018-11/26/c_137632939.htm> on 22 July 2021.

party interference, including Kenya.⁶⁷ The suspended teams could also stand to lose the opportunity to share in revenues coming from the international organisations which are usually quite substantial and liberally distributed.⁶⁸ Such consequences, combined with the even more issues arising due to the confusion caused after the stakeholders are faced with the task of choosing which rules to follow, go on to show us just how important the issue of autonomy is.

CHAPTER FOUR: THE UNSUITABILITY OF NON-INTERFERENCE

4.1 Introduction

The recommendations by this work, however, are not that our country should allow for an unconditional autonomy, not giving any regard to the present circumstances and the changes that have occurred and have been occurring in the sports sector. This is, in fact, in line with a recent definition of legal autonomy as the private autonomy of an ISGB to fulfil its primary function with a legal impact at national or at international level, determined and confined by the legal framework imposed by public authorities.⁶⁹ Moving back to a form of sports governance that does not tolerate any form of government interference will, without doubt, not be possible. There are numerous reasons backing this claim and among them are those discussed below.

4.2 The Role Played by Sports

Sports have come to acquire very important roles in the present day society and in its various spheres. In the political sphere, it is evident that sports have been used to propagate political notions even in times as early as the 1950s where the third world countries, through the Olympics, were brought into the issues between the Soviet and the Western blocs occurring at the time.⁷⁰ Sports have been even more involved in politics in Africa, mainly due to the countries' demands for rapid change and the limited institutional development in them.⁷¹ This

⁶⁷ Akech B, 'Public regulation of sport in Kenya', 16-18.

⁶⁸ Hylton J G, 'How FIFA Used the Principle of Autonomy of Sport to Shield Corruption in the Sepp Blatter Era', 136.

⁶⁹ Geeraert A, Mrkonjic M and Chappelet J L, 'A rationalist perspective on the autonomy of international sport governing bodies, 475.

⁷⁰ Charitas P and Kemo-Keimbou D, 'The United States of America and the Francophone African countries at the International Olympic Committee: Sports aid, a barometer of American imperialism? (1952-1963)' 40(1) *Journal of Sport History*, 2013, 71.

⁷¹ McHenry D, 'The use of sports in policy implementation: The case of Tanzania' 18(2) *The Journal of Modern African Studies*, 1980, 237.

was most evident in the threatened boycott in 1968 by African nations which forced the IOC to withdraw SANOC's invitation to Mexico, and the consequent expulsions and suspensions of South Africa by other international federations due to the policy of apartheid in the country.⁷²

Sports have also been just as active in the economic sphere. The globalisation of the sport economy, having been made possible by the breakthrough of sports broadcasting followed by the dismantling of public broadcasting monopolies in Europe in the 1980's which fostered competition in the industry, has had huge economic impacts.⁷³ The economics could be found in the jobs created, money spent by the patrons attending games (e.g., ticket sales, team merchandise, parking, and concessions), transportation costs, and entertainment expenditures prior to and after the game, just to mention a few.⁷⁴ In Kenya too, sports have contributed quite significantly in the growth of the country's economy. This is especially through sports betting which has boosted the country's GDP and has also provided employment opportunities.⁷⁵

The one other sphere in which sport has contributed majorly is the cultural sphere. In our country, sports have existed even in the pre-colonial period where Kenyan Africans had their own indigenous sport activities that were part and parcel of people's livelihoods and served as part of the fabric of society. This importance was attributed to its ability to promote the development of cultural identity and enhance children and youth's acquisition of cognitive, social and physical skills critical to adult existence.⁷⁶ Its role in culture has gone on to exist to date where we see the Sports, Culture and the Arts sector contributing to the overall national development through, among others, promotion and exploitation of Kenya's diverse culture for peaceful co-existence.⁷⁷ Therefore, having sports play such important roles in our country, it would be only reasonable to have the government at least use them in the attainment of the country's different goals.

⁷²Booth D, 'Hitting apartheid for six? the politics of the South African sports boycott', 480.

⁷³ Mrkonjic M, 'Sports organisations, autonomy and good governance' *Swiss Federal Institute of Sport Magglingen*, 2013, 137.

⁷⁴ - <<https://www.dodgersnation.com/economic-impact-professional-sports-franchises-cities-je1083/2017/05/09/>> on 14 October 2020.

⁷⁵ Gitau V, 'The problem of sports betting in Kenya: striking a balance between private profit and public good' *Strathmore Law Review*, 2018, 87.

⁷⁶ Kipchumba B and Jepkorir R, 'Sports policy in Kenya: deconstruction of colonial and post-colonial conditions', 302.

⁷⁷ Weldon K, 'Impact of sports on economic development in Kenya' 3(5) *International Journal of Advanced Research*, 2015, 1434.

4.3 The Need to Deal with Governance Issues

One of the chief reasons for the intervention into the traditional self-governance model of sports organisations has to do with the fact of the painfully exposed governance failures such as organisational corruption which have accompanied the commercialisation of sport.⁷⁸ The principle of autonomy has in fact been held to be a major help in encouraging such deeds. The former president of FIFA, Sepp Blatter, and his predecessor, Brazilian Joao Havelange, have been implicated in significant acts of corruption which had severally been covered up through invoking the principle.⁷⁹ Also, in the already mentioned NOCK scandal, the organisation had admitted that it was responsible for the misappropriation of the funds meant for the participants in the 2016 Rio Olympics and the mistreatment of the participants.⁸⁰ Intervention is therefore necessary if we are to maintain effective sports governance.

4.4 The Contributions by Third Parties

The sports organisations, in one way or another, will have to look to third parties, especially the national governments, for support in the conducting of its activities. Other than the self-government, sport finance is also composed of state, sponsorship, personal sponsorship and gambling.⁸¹ In Kenya, the Act had established the National Sports Fund⁸² and its Board of Trustees⁸³ which were meant to essentially control the funding of the Kenyan sport.⁸⁴ However, in 2019, through the Sports (Amendment) Act, the provisions in the 2013 Act were repealed and were replaced by the Sports, Arts and Social Development Fund established under the Public Finance Management (Sports, Arts, and Social Development Fund)

⁷⁸ Mrkonjic M, 'Sports organisations, autonomy and good governance', 133.

⁷⁹ Hylton J G, 'How FIFA used the principle of autonomy of sport to shield corruption in the Sepp Blatter era', 135.

⁸⁰ Mutota M, 'At last, at long last: NOCK apologise for shameful Rio 2016 Olympics scandal' Sportpesa Scores and News, 20 February 2019 - <<https://www.sportpesanews.com/ke/posts/post/At-Last--At-Long-Last--NOCK-Apologise-For-Shameful-Rio-2016-Olympics-Scandal/17857>> on 14 October 2020.

⁸¹ Becsky-Nagy P, Dékán T, Szóke R and Bács Z, 'The relevance of sports financing' 9(1-2) *Applied Studies in Agribusiness and Commerce*, 2015, 19.

⁸² Sec 12, *Sports Act* (Act No. 25 of 2013).

⁸³ Sec 13, *Sports Act* (Act No. 25 of 2013).

⁸⁴ Sec 12(2), *Sports Act* (Act No. 25 of 2013).

Regulations.⁸⁵ In this year's budget, the government allocated up to 5.3 billion shillings to the new fund, thirty five percent of which was set aside for sports.⁸⁶

National governments are also needed in the formulation of some of the regulations affecting sports and also in the implementation of some of the rules provided by the sports organisations. In sports betting, for example, the Kenyan government has put in place taxation measures to assist in dealing with the negative effects of gambling accompanying it.⁸⁷ The government also assists in the implementation of certain sports laws. It has, for example, partnered with WADA's Intelligence and Investigations (I&I) Department to understand the doping practices of Kenyan athletes and to better tackle Kenyan doping.⁸⁸ These are all issues that the ISOs cannot deal with without the assistance or, at least, the cooperation of national governments.

4.5 Other Reasons

There are other factors that cause the need for intervention. Among them is the issue of absence of sufficient representation in the ISOs due to European and American hegemony in the sports industry. Claims of the interests of small states being considered only when they pose a threat to the interests of major powers⁸⁹ (a good example being that the IAAF hyperandrogenism rules seem to only affect the women from the global south participating in international athletics competitions)⁹⁰ go on to show that countries like Kenya cannot expect the international organisations to always have their best interest at heart. Other issues were mentioned by Foster. He stated that there should not be allowed an independent *lex sportiva* since there is still not a harmonisation of the rules from the different ISOs, the CAS is not globally comprehensive, and the norms of global sports law are not unique.⁹¹

⁸⁵ Regulation 3, *Public Finance Management (Sports, Arts, and Social Development Fund) Regulations* (No. 18 of 2012).

⁸⁶ Ayodi A, 'Government increases allocation to Sports Fund' Nation Media Group, 12 June 2020 - <<https://nation.africa/kenya/sports/other-sports/government-increases-allocation-to-sports-fund-653722> > on 14 October 2020.

⁸⁷ Gitau V, 'The problem of sports betting in Kenya', 90

⁸⁸ <<https://www.wada-ama.org/en/media/news/2018-09/wada-partners-with-kenya-anti-doping-agency-and-athletics-to-present-findings>> on 14 October 2020.

⁸⁹ Houlihan B and Zheng J, 'Small states: sport and politics at the margin', 4.

⁹⁰ Bavington L, 'Sex Control in Women's Sport: A History of the Present Regulations on Hyperandrogenism in Female Athletes' 2018, 2.

⁹¹ Foster K, 'Is there a Global sports law?', 17.

CHAPTER FIVE: FINDING THE BALANCE

5.1 Case Study: Intervention in Europe

5.1.1 Introduction

As has already been mentioned, to determine the amount or level of intervention by the Kenyan government in sports governance required to enable a properly functioning system, we shall consider Europe's standpoint. This shall be achieved through, first of all, analysing the continental laws that affect the principle of autonomy in sports to determine the general attitude towards it, which will in turn give way to the reasoning behind the present rules regarding the operation of the principle. There will also be a look at recent cases to illustrate the effectiveness of the continent's system.

5.1.2 The recognition of the autonomy

The autonomy of sport is recognised at the European level due to the idea of specificity of sport. This basically refers to the inherent characteristics of the sector that differentiates it from other economic and social activities and that justify accommodation by, or even exclusion from, European law.⁹² The specificity is addressed in Article 165(1) of the Treaty on the Functioning of the European Union which provides that it acknowledges the 'specific nature of sport, its structures based on voluntary activity and its social and educational function', even when areas of European law are being applied to sport.

This special treatment has been established through decisions and publications of the European Commission and the rulings of the European Court of Justice (ECJ).⁹³ These started taking place at the end of 1980s specifically at meetings by the Council of Europe's Committee for the Development of Sport (CDDS).⁹⁴ The concept first came up in 1992 in Article 3 of the European Sports Charter (based on the principles of the 1975 Sport for all Charter) which provides that VSOs have the right to establish autonomous decision making processes within the law and both governments and sports organisations should recognise the need for a mutual respect of their decisions.

⁹² ICOSA, *The Future of sports governance – Beyond autonomy*, 8.

⁹³ ICOSA, *The Future of sports governance – Beyond autonomy*, 9.

⁹⁴ Chappelet J, Bousigue A and Cohen B, *The autonomy of sport in Europe*, Strasbourg: Council of Europe Publishing, 2008, 9.

In 1995, the Bosman ruling by the ECJ declared illegal the football players transfer sporting rules in the EU and forced FIFA to change its transfer rules for footballers.⁹⁵ The sports movement saw the ruling as interference in their affairs which led it to ask the governments to recognise the ‘specific nature of sport’.⁹⁶ The issue was later discussed at the 9th European Sports Forum in Lille, in 2000, under the supervision of the European Commission, attended by all the European sports organisations and the public authorities concerned. Among its conclusions were that there should be more focus on what constitutes the uniqueness of sport and on the consequences of this uniqueness. This essentially meant acknowledging the autonomy of sport for all non-economic rules.⁹⁷

At the end of 2000, after the submission of the European Commission's report on sport to the European Council, the Heads of State and Government of the EU gathered in Nice under the French presidency and adopted a declaration on the theme of sport.⁹⁸ In the declaration, it was held that sporting organisations have the role of organising and promoting their particular sport, in line with their objectives, with due regard for national and Community legislation and on the basis of a democratic and transparent method of operation. They are independent and they have the right to organise themselves.⁹⁹

The issue of autonomy was also discussed in Chapter 4 of the European Commission's White Paper on Sport, published in July 2007 and the European Parliament too in its report on the White Paper, published in April 2008, expressed its full support for respect of the autonomy of sport and of its representative bodies.¹⁰⁰ This, as a result, led to their adoption of a Resolution (No. 1602) which discussed the need to preserve the European sport model.

5.1.3 The provisions for intervention

Not too long ago, the European Commission, had to acknowledge that it was “unrealistic to try to define a unified model of organisation of sport in Europe”. This was in an attempt to rectify their labelling the pyramidal sports governance structure as the “European Model of

⁹⁵ *Jean Marc Bosman v. Union Royale Belge Sociétés de Football Association*, [1995] ECR I4921.

⁹⁶ Chappelet J, Global Corruption Report: Sport, *Autonomy and governance: necessary bedfellows in the fight against corruption in sport*, 2015, 4.

⁹⁷ Chappelet J, Bousigue A and Cohen B, *The autonomy of sport in Europe*, 9.

⁹⁸ Chappelet J, Bousigue A and Cohen B, *The autonomy of sport in Europe*, 11.

⁹⁹ Declaration of Nice (2000).

¹⁰⁰ Chappelet J, Bousigue A and Cohen B, *The autonomy of sport in Europe*, 12.

Sport”.¹⁰¹ It became apparent to them that it would be practically impossible to have the sports sector have complete autonomy. This is what consequently led to the idea of “responsible autonomy”. The IOC president first mentioned the idea in front of the General Assembly of the United Nations in New York in 2013, and it is now the IOC doctrine. The idea essentially provides that sports organisations ought to respect national laws which are not targeted against sport and its organisations alone, sometimes for chiefly political reasons.¹⁰²

Although the ECJ delivered two judgments dealing with sports issues during the 1970s, it was not until the 1990s that the EU began actually intervening in sport. This was after it had started gaining economic benefits.¹⁰³ A high number of sport-related cases were brought before the European or national courts and many of them were decided in favour of the sports organisations, but there were a number in which there was called into question certain sports rules for which the federations complained and regarded as encroaching on their autonomy.¹⁰⁴ Later on in 2007, The European Commission White Paper on Sport provided that though governance is mainly the responsibility of sports bodies, the Member States and social partners should also be involved, and also most challenges can be addressed through self-regulation respectful of good governance principles.¹⁰⁵

In December 2017, the Parliamentary Assembly of the Council of Europe passed a draft resolution that acknowledged the principle of autonomy, but it also asserted that the sports movement cannot be left to resolve its failures alone. This position was further developed in December 2018, when the Council’s Committee of Ministers held that the legitimacy and autonomy of the sports movement is dependent on them upholding the highest principles of ethical behaviour and good governance.¹⁰⁶

As for case law, the Bosman judgment of 1995 was the first major act of intervention by a European international body in sports.¹⁰⁷ The ruling, as is mentioned above, had declared illegal the football players transfer sporting rules in the EU and forced FIFA to change

¹⁰¹ Garcia B and Madsde Wolff, *European law and the governance sport*, 6.

¹⁰² Chappelet J, *Global Corruption Report: Sport, Autonomy and governance: necessary bedfellows in the fight against corruption in sport*, 6.

¹⁰³ Chappelet J, Bousigue A and Cohen B, *The autonomy of sport in Europe*, 3.

¹⁰⁴ Chappelet J, Bousigue A and Cohen B, *The autonomy of sport in Europe*, 3.

¹⁰⁵ ICSA, *The Future of sports governance – Beyond autonomy*, 10.

¹⁰⁶ ICSA, *The Future of sports governance – Beyond autonomy*, 9.

¹⁰⁷ Garcia B and Madsde Wolff, *European law and the governance sport*, 7.

them.¹⁰⁸ Later on, in 2006, although the ruling in Meca-Medina case was in favour of the sports organisations, the court held that: ‘If the sporting activity in question falls within the scope of the (European) Treaty, the conditions for engaging in it are then subject to all the obligations which result from the various provisions of the Treaty.’¹⁰⁹ An almost similar scenario took place recently in the Pechstein case where though the decision favoured the CAS, there was a holding that the international principles concerning the public nature of hearings in civil cases were valid for the ordinary courts and also for the professional disciplinary bodies.¹¹⁰

5.1.4 Effectiveness of Europe’s system

From the above analysis, it is evident that Europe attempts to ensure a balance between the respect for sports autonomy and necessary intervention. This has, as a result, led to positive impact on European sport in various forms. Among them is the ensuring of good governance. As has been evident, the EU has had a longstanding interest in furthering good governance in sport organisations, and for various reasons.¹¹¹ In February 2008, there was the introduction of the ‘basic universal principles for good governance of the Olympic and sports movement’(BUPs), which eventually became obligatory for the Olympic Movement. This was a direct result of the 2007 EU White Paper on sport already mentioned above.¹¹² This and similar other instances are the result of having good governance as a condition for the self-regulation of sport organisations.

This balance has also enabled cooperation between European organisations and the sports organisations in developing the sports sector. Such cooperation is necessary to host a major sports event or even to organise the fight against violence in sport or match-fixing. It has been especially important in combating doping in sports through multilateral cooperation and compliance with agencies from WADA. It was held by the EU Expert Group on Good Governance that sporting bodies can no longer deal with the threat and challenges to sporting integrity alone. They require the assistance of regulators, national governments, other state

¹⁰⁸ *Jean Marc Bosman v. Union Royale Belge Sociétés de Football Association*, [1995] ECR I4921.

¹⁰⁹ *David Meca-Medina and Igor Majcen v Commission of the European Communities*, (2006), ECLI:EU:C, 492.

¹¹⁰ *Mutu and Pechstein v. Switzerland* (2018), ECHR 40575/10 and 67474/10.

¹¹¹ Garcia B and Madsde Wolff, *European law and the governance sport*, 13.

¹¹² Chappelet J, *Global Corruption Report: Sport, Autonomy and governance: necessary bedfellows in the fight against corruption in sport*, 5.

institutions and law enforcement agencies, alongside appropriately structured relationships with betting operators.¹¹³

This balance has also played a major role in coming up with better sports regulations. For example, it has been observed that application of EU sports law over the years has slowly overturned the traditional pyramidal structure of sport governance which put governing bodies firmly at the top while athletes were left at the bottom of the structure without a major say in strategic decisions.¹¹⁴ Also, while the Pechstein case was pending before the ECtHR, ICAS, the governing body of CAS, had been regularly reviewing its own structures and rules in order to strengthen their independence and efficiency. ICAS is now composed of legal experts, a large majority of whom come from outside the membership of sports organizations and has achieved an equal representation of men and women. The list of arbitrators has been increased and the privilege reserved to sports organizations to propose the nomination of arbitrators on the CAS list has been abolished.¹¹⁵

5.2 The Solution for Kenya

Borrowing from Europe's case, our country ought to be more accommodating to the idea of sport's autonomy. The idea should be that as long as the basic conditions of due process and fairness are observed, then sport should be granted a relative autonomy from legal intervention as an area organised by private entities that can be trusted to govern their own affairs.¹¹⁶ This entails that, first of all, the general principles of the rule of law, as was held by Foster, cannot be excluded even by express agreement.¹¹⁷ While referring to this statement, Migai Akech also concluded that the power imbalance that characterizes the application of *lex sportiva* provides an important reason for courts to police their implementation.¹¹⁸ Other than that, the other types of sports rules (the rules of the game and the ethical principles of sport), as classified by Foster, could be considered autonomous and outside the review of national courts, unless unreasonable.¹¹⁹

¹¹³ ICASA, *The Future of sports governance – Beyond autonomy*, 12.

¹¹⁴ Garcia B and Madsde Wolff, European law and the governance sport, 18.

¹¹⁵ <<https://www.lawinsport.com/topics/item/cas-statement-on-the-echr-decision-in-the-case-pechstein-mutu-and-switzerland>> on 7 September 2020.

¹¹⁶ Foster K, 'Global sports law revisited', 6.

¹¹⁷ Foster K, 'Is there a Global sports law?' 16.

¹¹⁸ Akech M, 'The Maurice Odumbe investigation and judicial review of the power of international sports organizations' 6(2) *The Entertainment and Sports Law Journal*, 2008, par 67.

¹¹⁹ Foster K, 'Is there a Global sports law?' 16.

CHAPTER SIX: CONCLUSION AND RECOMMENDATIONS

6.1 Conclusion

It is the conclusion of this research that the principle of autonomy is a highly regarded principle by sports organisations and many other stakeholders in the industry. Therefore, if the Kenyan government would like to use sports to perform certain functions, it will have to, at the very least, respect the principle. This however does not mean that the government should leave the sector to be completely independent as that will be neither practical nor beneficial to either party, especially considering the interdependence between the two. The Sports Act has without doubt made some effort to incorporate the principle but as has already been proven, the amount of autonomy allowed is not enough to ensure the proper running of the sector. This issue of autonomy has in fact been responsible for a lot of the numerous problems in sports in our country recently.

Therefore, the overall results of my research are that, first of; the fact that Kenya's Sports Act does not give enough attention to the principle of autonomy has caused a lot of commotion regarding the application of the respective provisions of the Act. This has consequently evolved into more unforeseen issues that have greatly derailed the growth of the industry. There is thus the need to make changes in the respective provisions. This means that the government should: change the structure and functioning of the Sports Dispute Tribunal such that it aligns properly with the principle, have less control over the electoral processes of the different organisations, and also ensure that the offices of the Cabinet Secretary and the Sports Registrar are not granted any powers that may end up gravely infringing on the principle.

As for whether returning to non-intervention is a possible solution, the research implies that doing so would only cause more complications, mainly due to the fact that the sports sector hugely depends on the Kenyan government. There are other reasons such as the fact that sports have come to acquire important roles in the general society and also that the *lex sportiva* has not yet acquired the characteristics required for it to be independent and free from any intervention from national governments. The better way of going about the issue would instead be through the state making an effort to ensure as much incorporation as is practical of the principle in its sports policies. This being the case, neither the state nor the sports organisations and its members will feel disadvantaged by the system. This in turn ensures cooperation between the two and their development as is evident in Europe.

6.2 Recommendations

The Kenyan government is therefore tasked with the responsibility of including in its laws, provisions that allow enough independence for the sports organisations to avoid their current allegations against its interference. As is evident in some of its African counterparts, there is no specific way of doing this. Ghana, for example, which was among the first countries in Africa to enact a sports legislation, had to amend the sections in their 1976 Sports Act which were inconsistent with the IOC Charter's rules on the autonomy of sports associations of member countries to avoid their suspension from the IOC.¹²⁰ South Africa on the other hand amended the 2007 South African Sports Act to allow the government to intervene in matters of sports management.¹²¹ It is therefore up to the individual country to decide on the best way forward.

However, deriving from the findings of this research, Kenya could attain the balance through the use of the idea of responsible autonomy in the relevant sections of the Act. This includes, first of all, altering the provisions on the SDT. Part VII of the Sports Act could be amended to include provisions similar or even closer to the rules governing and establishing the CAS. They could, for instance, be adherent to the requirements of the FIFA circular 1010. This will, as a result, make it easier for the NSOs to include the body in their regulations and also to actually refer their issues to it. At the same time, this part of the Act can also provide for issues relating to violation of the general principles of the rule of law to be referred to the Kenyan courts through appeals.

The same could be applied in the case of the laws in the second schedule dealing with elections in NSOs. The organisations should be left to conduct their elections according to their own rules and principles unless there is clear evidence of unfairness and unreasonableness. The specific rules provided by the Act may not be necessary and thus should be repealed. As for the two offices, it should be provide by the Act that only in the event of the contravention of the basic rule of law that the registration of the organisations should be disallowed or that the Cabinet Secretary can intervene.

¹²⁰Bulinda H and Wahome P, 'Unbundling the Kenyan Sports Act', 369.

¹²¹Bulinda H and Wahome P, 'Unbundling the Kenyan Sports Act', 369.

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