

THE FIFA RULE OF NON-INTERFERENCE: HOW IT CONTRIBUTES TO CORRUPTION AND HOW IT CONTRAVENES KENYAN LAW

Submitted in partial fulfillment of the requirements of the Bachelor of Laws Degree,
Strathmore University Law School

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January 2017

Declaration

I, KHAN WALID, 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.

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List of Abbreviations

FIFA - Fédération Internationale de Football Association

FKF - Football Kenya Federation

KFF – Kenya Football Federation

WBO – World Boxing Organisation

WBA – World Boxing Association

IBF – International Boxing Federation

ATP – Association of Tennis Professionals

WTA – Women’s Tennis Association

UEFA - Union of European Football Associations

EU – European Union

ICC – International Cricket Council

KCA – Kenya Cricket Association

List of Cases

Mohammed Bin Hammam v FIFA, CAS 2011/A/2625.

Salim Sumra & 2 others v Kipchoge Keino & 3 others. Civil Suit No. 266 of 2004.

Alfred Wekesa Sambu & 4 others v Mohammed Hatimy & 12 others. Civil suit No. 1281 of 2006.

Wilberforce Kilibwa v Mumias Sugar Company Limited [2013] eKLR. Cause Number 2052 of 2011.

Football Kenya Federation v Kenya Premier League Limited & 4 others [2015] eKLR. Civil Suit No. 69 of 2015.

Owners of Motor Vessel “Lillian S” v Caltex Oil Kenya Limited [1989] KLR 1.

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Samuel Kamau Macharia v Kenya Commercial Bank & 2 others [2011]. Civil Appeal Number 2 of 2011.

Alfred Obuya Otieno v Chairman National Nurses Association of Kenya & Another [2014] eKLR.

Peter Gichuki v Independent Electoral and Boundaries Commission [2013].

Barnard v Australian Soccer Federation (1988) 81 ALR 51.

ABSL v Bosman [1995] ECR I-4921.

List of Kenyan Statutes

Constitution of Kenya 2010.

Sports Act No. 25 of 2013.

List of non-Kenyan Statutes

Spain Law 10/ 1990.

Greece Law 789/1979.

List of International Instruments

FIFA Statutes *Regulations Governing the Application of the Statutes Standing Orders of the Congress* July 2012.

United Nations General Assembly, *Sport as a means to promote education, health, development and peace*, UN A/69/L.5 16th October 2014.

ABSTRACT

The FIFA rule of non-interference was created undoubtedly with good intention, that is, for the betterment and development of football around the world by preventing governmental and political interference in football matters. However, this rule protects corrupt football officials because they cannot be summoned by the courts or governmental institutions of their own states to answer for their malpractices. As a result, the FIFA rule of non-interference contravenes national law. This dissertation aims to discuss how the FIFA rule of non-interference contributes to corruption and how it contravenes Kenyan law.

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CHAPTER ONE

THE FIFA RULE OF NON-INTERFERENCE: HOW IT CONTRIBUTES TO CORRUPTION AND HOW IT CONTRAVENES KENYAN LAW.

1.1. Introduction

Sport has gradually established itself as a big commercial enterprise in Africa.¹ This growth is no surprise as sport throughout the world has faced notable commercialisation and estimations show that world sport now amounts to more than three per cent of world trade.² As a result of this growth, development of sports as a commercial brand has arisen. Sporting programmes and events have now come to be huge brands bringing about great economic interest. Consequently, many persons who engage in sports do so not solely for leisure or the physical wellbeing it portends but as a full-fledged career or with this aim.³ Football (soccer) is the most played sport throughout Africa.⁴ The reality is that football has become a billion-dollar industry across the world but Africa remains at the periphery of this lucrative system.⁵ Africa's problem springs from systematic and institutionalised problems associated with its football administration structures.⁶ Local clubs and leagues on the continent are predominantly run unprofessionally, with the exception of very few countries such as South Africa, and allegations of match-fixing are proliferate. Unprofessionally-run clubs and match-fixing allegations in the game complicate the situation further.⁷ African football is synonymous with corruption.⁸ The situation around the continent is reflected in Kenya where the tale of the game in the country

¹ Razano F, 'Keeping Sport out of the Courts: The National Soccer League Dispute Resolution Chamber - A Model for Sports Dispute Resolution in South Africa and Africa' (2014).

² Gardiner S; O'leary J; Welch R; Boyes S and Naidoo U: *Sports Law*, 4th edn Routledge Oxford, 2012, 210.

³ Omuojine K, 'Legal Framework for Sports Development in Nigeria' (2013).

⁴ '5 Most Popular Sports in Africa' <http://www.africaranking.com/most-popular-sports-in-africa/2/>.

⁵ Chiweshe MK, 'The Problem with African Football: Corruption and the (Under)Development of the Game in the Continent (2014).

⁶ Chiweshe MK, 'The Problem with African Football'.

⁷ Chiweshe MK, 'The Problem with African Football'.

⁸ Rukuni, C; Groenink E: *Killing Soccer in Africa*. FAIR Transnational investigation pp.2

is full of dissension and complex problems involving rigging of elections, missing funds, leaders of football unions serving for decades, substandard infrastructure and poorly paid players.⁹

Football Kenya Federation¹⁰ is the governing body of football in Kenya.¹¹ FKF has been characterized by rampant corruption since its inception. While there many definitions of corruption, it may be viewed as the abuse of public office for personal gain.¹² Serious allegations of corruption by FKF officials have been documented both locally and internationally.¹³ In 2013, it was alleged that money given to FKF by FIFA for development purposes was pocketed by FKF officials.¹⁴ In a research conducted by Transparency International in 2015,¹⁵ FKF scored zero points in a Transparency International Report for having no annual financial records, organisational charter, annual activity reports and a Code of Conduct available for public scrutiny on their website.¹⁶

The major obstacle facing Kenya from combating corruption in football is FIFA's rule on non-interference.¹⁷ The FIFA statutes state that 'each member shall manage its affairs independently

⁹ Oduor A, 'REVEALED: Why most Kenyan players now prefer Zambian clubs to any African clubs' *Soka25* (23 December 2015). <http://www.soka25east.com/revealed-why-most-kenyan-players-now-prefer-zambian-clubs-to-any-african-clubs/> See also Kwalimwa D, 'Sam Nyamwea bows out from football administration' *Daily Nation* (11 February 2016). <http://www.nation.co.ke/sports/football/Sam-Nyamweya-bows-out-from-football-administration/1102-3071174-whkb7j/index.html>

¹⁰ Herein referred to as FKF.

¹¹ <http://www.fkf.or.ke/history/>.

¹² State Secretariat for Economic Affairs, 'What is Corruption?' <http://www.seco.admin.ch/themen/00645/00657/00659/01387/index.html?lang=en>.

¹³ Ochieng' E, Ndunda E, 'Football Kenya Federation hit with claims of corruption' *Standard Media* (17 July 2007). <http://www.standardmedia.co.ke/sports/article/2000088593/football-kenya-federation-hit-by-claims-of-corruption> See also 'Kenya FA under investigation by anti-corruption agency' *BBC* (26 July 2013) <http://www.bbc.com/sport/football/23464557>

¹⁴ 'Kenya FA under investigation by anti-corruption agency' *BBC* (26 July 2013) <http://www.bbc.com/sport/football/23464557>

¹⁵ 'The Transparency International Football Governance League Table' *Transparency International* 2015.

¹⁶ Mututota M 'Kenya: Transparency International gives FKF Zero Points in Governance League' *Capital FM* (24 Nov 2015). <http://allafrica.com/stories/201511250491.html>.

¹⁷ FIFA Statutes Regulations Governing the Application of the Statutes Standing Orders of the Congress July 2012 General Provisions Section 68.2 state that. 'Recourse to ordinary courts of law is prohibited unless specifically provided for in the FIFA regulations. Recourse to ordinary courts of law for all types of provisional

and with no influence from third parties.¹⁸ This rule has been put in place to prevent political and government interference in the sport. However, this rule has been criticised for protecting corrupt officials. In 2004, Kenya was banned by FIFA for interfering with football matters after the government sacked KFF officials for corrupt activities.¹⁹ As a result, the government had to reinstate the officials.²⁰ This is an illustration of how FIFA's rule of non-intervention is "assisting" corrupt football union leaders in performing their corrupt activities. With protection guaranteed from the mother body of world football, most football union leaders engage in corrupt activities and this leads to the detriment of the game, especially in African countries (such as Kenya).²¹

This paper aims to illustrate how the FIFA non-interference rule has led to the aiding and abetting of corruption and how it contravenes Kenyan law when the issue has been taken to national courts. It also aims to provide possible solutions to the issue.

1.2. Background to the Problem

The FIFA rule of non-interference was established in order to prevent political interference.²² Political interference may be viewed as when a government tries to take direct control over the governance of football.²³ It was important for FIFA to make this rule in order to deal with issues of political interference, where the governments of different states (especially authoritarian regimes) took matters into their own hands and imposed sanctions on Football Associations as well as players and coaches.²⁴ An example of such actions taken by a

measures is also prohibited.' Also Section 13.1(g) states each association is to manage their affairs independently and ensure that their own affairs are not influenced by any third parties.

¹⁸ Farell C, 'FIFA's non-interference rule is holding back serious investigations' *HITC Sport* <http://hereisthecity.com/engb/2013/05/24/fifas-non-interference-rule-is-holding-back-serious-investigatio/>.

¹⁹ 'Kenya banned from FIFA competition' *All Africa* (2 June 2004).

²⁰ Farell C, 'FIFA's non-interference rule is holding back serious investigations'.

²¹ Chiweshe MK, 'The Problem with African Football: Corruption and the (Under)Development of the Game in the Continent' (2014).

²² Farell C, 'FIFA's non-interference rule is holding back serious investigations'.

²³ Regenass T, 'We have strong principles' *FIFA.com* (19 Oct 2011) <http://www.fifa.com/about-fifa/news/y=2011/m=10/news=regenass-have-strong-principles-1528544.html>

²⁴ The most common case of political interference is when a government perceives that the Executive Committee of the national association is not performing well enough and decides to take action. Often, because the national team is losing too many games, they decide that changes must be made and want to put someone else in charge. See Chiweshe MK, 'The Problem with African Football'.

government that necessitated the creation of this law was the detaining and torture of Iraqi players by Saddam Hussein's son after the Iraq National Team performed poorly in an international competition.²⁵

FIFA's Congress²⁶ voted in favour of enacting the non-interference rule which provides that "Recourse to any court of law is prohibited unless specifically provided in the FIFA regulations. Recourse to ordinary courts of law for all types of provisional matters is also prohibited".²⁷ Further, Section 13.1 (I) of the FIFA Statutes provide that members²⁸ are obliged to manage their affairs independently and ensure that their own affairs are not influenced by third parties. Section 13.1 (I) read together with Section 68.2 of the FIFA Statutes form the rule of non-interference. It is these two Sections read together that provide FIFA with the mandate to control football worldwide without any interference from the national governments of members or any other third parties. This mandate is assigned to the national association, to manage, control, maintain and develop football as a game. The associations are obliged to do this independently, without interference from the government or any other parties.²⁹ FIFA's position on non-interference was further supported by a United Nations resolution that "supported" autonomy of sports.³⁰ The autonomy of sport may be defined as "...the possibility for non-governmental sports organisations to:

- i. Establish, amend and interpret rules appropriate to their sport freely, without undue political or economic influence;
- ii. Choose their leaders democratically, without interference by states or third parties;
- iii. Obtain adequate funds from public or other sources, without disproportionate obligations;

²⁵ Sherwell P, 'Saddam's son tortured defeated footballers' *The Telegraph* (5th Nov 2000) <http://www.telegraph.co.uk/news/worldnews/middleeast/iraq/1373322/Saddams-son-tortured-defeated-footballers.html>

²⁶ Sec. 21 of the FIFA Statutes provides that Congress is FIFA's supreme legislative body. Every FIFA member is represented in Congress and is entitled to one vote. FIFA has 211 members.

²⁷ Sec. 68.2 of the FIFA Statutes.

²⁸ Sec 10.1 of the FIFA Statutes provide that any Association which is responsible for organising and supervising football in all of its forms in a country may become a member of FIFA.

²⁹ Regenass T, 'We have strong principles'.

³⁰ UNGA, *Sport as a means to promote education, health, development and peace*, UN A/69/L.5 16th October 2014.

- iv. Use these funds to achieve objectives and carry on activities chosen without severe external constraints;
- v. Draw up, in consultation with the public authorities, legitimate standards proportionate to the fulfilment of these objectives.”³¹

While this rule was enacted for prima facie good purposes, it has provided protection for corrupt officials, especially in Africa.³² Whenever an African country attempts to address corruption or any other transgression by their soccer associations, it is suspended by FIFA.³³ In June 2004, Kenya was banned from partaking in any international football activities because its government was accused interfering in the affairs of its football association, Kenya Football Federation (KFF) as it was known then.³⁴ The Kenyan Government refused to reinstate the Kenya Football Federation³⁵ which had been dissolved in March that year. Government officials had dissolved KFF over claims of corruption and replaced it with an interim Stakeholders Transition Committee, ahead of new elections which were then yet to be held.³⁶ The High Court of Kenya had dissolved KFF for various corruption and maladministration cases including failure to produce annual audited accounts for four years and allegations of misappropriation of funds.³⁷ FIFA took this as interference subsequently issuing Kenya with a ban.³⁸ As a result of the ban, Kenyan national football teams and clubs were no longer allowed to participate in friendly or competitive matches on the international stage.³⁹ Consequently, the Kenyan Government had to ignore its own High Court and reinstate KFF and its officials

³¹ Chappelet JL, *Autonomy of Sport in Europe*, April 2010, France.

³² Chiweshe MK, ‘The Problem with African Football’.

³³ Khumalo T, ‘Football’s rotten core must be excised’ *News24* (7th April 2013) <http://www.news24.com/Archives/City-Press/Footballs-rotten-core-must-be-excised-20150429>

³⁴ Chiweshe MK, ‘The Problem with African Football’.

³⁵ Herein referred to as KFF.

³⁶ CNN, ‘Kenya kicked into exile by FIFA’ *CNN International* (2nd June 2004) <http://edition.cnn.com/2004/SPORT/football/06/02/fifa.kenya/>

³⁷ Chiweshe MK, ‘The Problem with African Football’.

³⁸ This decision was communicated to KFF President Maina Kariuki by FIFA General Secretary Dr Urs Linsi in a letter on 2 June 2004. See ‘FIFA bans Kenya’ *BBC* (2nd June 2004) <http://news.bbc.co.uk/sport2/hi/football/africa/3769627.stm>

³⁹ FIFA ‘FIFA suspends Kenya Football Federation’ FIFA.COM (2nd June 2004) <http://www.fifa.com/about-fifa/news/y=2004/m=6/news=fifa-suspends-kenya-football-federation-92779.html>

despite the corruption allegations levelled against them.⁴⁰ This brought about a wide range of debates concerning sovereignty of states and FIFA's sovereignty.

The question regarding whether FIFA's laws can trump national laws is pressing. FIFA and other sports federations are governed by neither national laws nor international laws. They have their own rulebooks and constitutions to govern them as private entities.⁴¹ This brings about another issue altogether, that is, whether the provisions of these rulebooks and constitutions (the FIFA Statutes in particular) can trump national law or international law. This paper will attempt to establish whether the provisions of non-interference have brought about a conflict between laws and if so, recommend solutions.

1.3. Statement of the Problem

The thinking behind FIFA's rule of non-interference (and the autonomy of sports as a whole) is undoubtedly with good intention, that is, for the betterment and development of the game around the globe. However, this rule has blanketed corrupt football officials such that they become untouchable and cannot be summoned by the courts of their own states to answer for their malpractices. This has brought about a contravention of national law by the rule of non-interference. While FIFA and sports federations should have autonomy, there should be limits to the power possessed by these sporting institutions.

1.4. Theoretical Framework

1.4.1. Global Legal Pluralism Theory⁴²

This theory stems from "*lex mercatoria*,"⁴³ the transnational law of economic transactions, is the most successful example of global law without a state".⁴⁴ It would therefore be appropriate

⁴⁰ Chiweshe MK, 'The Problem with African Football'.

⁴¹ Akech M, 'The Maurice Odumbe Investigation and Judicial Review of the power of International Sports Organisations' Independent Researcher, Nairobi.

⁴² Griffiths J, 'What is Legal Pluralism?' No. 24 1986. States "Legal Pluralism refers to the normative heterogeneity attendant upon the fact that social action takes place in a context of multiple, overlapping fields"

⁴³ the body of law that regulated the economic relations between foreigners and Roman citizens. See Goldman, B., *Forum Internationale*, Volume 3, 1983, 3.

⁴⁴ For example, non-governmental organizations often take part in international decision-making processes centred on the development and codification of international law, especially in the areas of human rights law and environmental law. This participation may involve contributing to the development of new international conventions, acting as official state delegations in treaty negotiations, and acting as a consultant for intergovernmental organizations. See Goldman, B., *Forum Internationale*, volume 3, 1983, 3.

to state that this example of transnational legal agreement be used in global sports law.⁴⁵ The prime principle that underlies the global legal pluralism theory is the self-validating and self-contained nature of global laws and agreements that are passed and entered without the influence, and not to be influenced by national governments. A theory of global pluralism will be relevant in analysing the existence, validity and autonomy of other emerging private legal orders, such as global sports law.⁴⁶

1.4.2. Liberal Theory⁴⁷

The liberal theory does not adequately acknowledge imbalances of power that are present in the private domain and predominantly presumes that parties are equal and are able to resolve any occurrences of abuses of private power among themselves, without the need for governmental intervention.⁴⁸ The same theory applies in FIFA where imbalances of power are not recognised. As a result, private entities or persons working for private entities that abuse their power cannot be held accountable because it is assumed that such abuses can be dealt with privately (without state intervention) which is not the case. This is illustrated by the 2015 FIFA corruption scandal (which will be discussed in more detail) where states such as the United States of America had to intervene in order to deal with abuse of office by FIFA officials.

1.5. Literature Review

James Tsabora states that FIFA has been steadfast on its laws of non-intervention.⁴⁹ Countries have faced bans and others have actually been banned for politically interfering in the game. Although this FIFA rule was enacted for good purposes, it has inadvertently, aided and abetted corruption.⁵⁰ The Nigerian case of 2010 is a good example. The Nigerian government through the Nigerian Sports Commission forced the Nigeria Football Federation's Secretary General Musa Amadu and other members to stand down amidst corruption allegations. This did not go

⁴⁵ Macuzzo M.F, 'Lex Sportiva: Sports Law as a Transnational Autonomous Legal Order' Published Thesis.

⁴⁶ Macuzzo M.F, 'Lex Sportiva: Sports Law as a Transnational Autonomous Legal Order'.

⁴⁷ The liberal theory is a school of thought which can be thought to revolve around three interrelated principles: 1. Rejection of power politics; 2. Accentuates mutual benefits and cooperation; 3. Implements nongovernmental actors for shaping state preferences and policy choices.

⁴⁸ Akech M, 'The Maurice Odumbe Investigation and Judicial Review of the power of International Sports Organisations' Independent Researcher, Nairobi.

⁴⁹ Tsabora J, 'Cleansing the game: Mapping and Tackling State Induced African Trends in Football'.

⁵⁰ Tsabora J, 'Cleansing the game: Mapping and Tackling State Induced African Trends in Football'.

well with FIFA and FIFA insisted that the government had to reinstate the Nigerian Football Federation officials. This meant that the government had no option but to reinstate the officials who were implicated in multi-million dollar corrupt practises. Consequently, these officials were free to continue at the helm of African football administration.

Manase Kudzai Chiweshe states that FIFA's standing statutes of non-interference have often meant corrupt leaders continuing in their positions for decades.⁵¹ He goes on to state that the major obstacle facing African states in the fight against corruption is the FIFA rule of non-interference. He states that the absence of a mechanism to find football administrators accountable for their corrupt activities is what has led to the detriment of the game. He also states that this rule has been used to circumvent the democratic process as any state which, with good intention, tries to clean up its football structure faces a ban from FIFA.

In a study prepared by Transparency International, it is stated that there is a lot of corruption in the election of sports officials, and in the elections that take place in FIFA itself.⁵² Any government intervention in these elections would be very problematic.

Meier Henk, in his article, states that the freedom and self-regulation allowed for football associations may lead to considerable monopoly over their command.⁵³ A lack of accountability and control of such institutions may have devastating effects.⁵⁴ An example of such was when the English Football Association failed to make stadium regulations. This negligence resulted in the collapse of a stadium which caused the death of hundreds of people.⁵⁵ Although this took place in the 20th Century, it was a result of the freedom and self-regulation on the part of football associations. This brings forth the argument that while the football associations should have autonomy to carry out their activities, there should be some control over them. While nowadays it is not deaths from the collapse of stadia, there is still wrong-

⁵¹ Chiweshe MK, 'The Problem with African Football: Corruption and the (Under)Development of the Game in the Continent (2014).

⁵² Bures R, 'Why Sport is not Immune to Corruption?' *Transparency International*, Strasbourg, Czech Republic 2008.

⁵³ Meier H, 'The Rise of the Regulatory State in Sport' *Paper presented at 3rd ECPR Conference in Budapest* (8-10 September 2005).

⁵⁴ Meier H, 'The Rise of the Regulatory State in Sport'.

⁵⁵ Martin J, '1 'Heads in the Sand': Football, Politics and Crowd Disasters in Twentieth-Century Britain 1' *Soccer & Society* 5, number 2, (2004), 134-151.

doing emanating from autonomy that FIFA enjoys through the rule of non-interference. An example of such is corruption.

Marios Papaloukas, in his article, states that global sports law and international sports law is different and should be severed from national law and should not be applied or interfered with in local courts.⁵⁶ However, he goes on to state that some national laws have provisions regarding these sports and some have money allocated for these sports in their national budgets.⁵⁷ This implies, to some extent, some control over sports bodies by national governments.⁵⁸

Lin Chien-Yu provides in his article that sport plays an important role in state politics including education and uniting the people of the country.⁵⁹ For some states, sports is the national identity. In his article, he states that it is important to not reduce sport to a tool of political-economic elites, but it is also as important to ensure that the government associated with its sport should enhance the sport in question. For a state to enhance any given sport, it must fight vices such as corruption which only lead to the detriment of the game. The FIFA rule of non-interferences incapacitates the state and as a result, the state cannot fight against corruption.

In his thesis, Macuzzo, states that as a result of the globalization of sport, legal regulation of the international sport system has shifted almost completely outside the jurisdiction of national legal systems and into the private sphere of international and national sport bodies and sport-specific arbitral tribunals.⁶⁰ This has allowed the international sport system to develop into a self-contained and self-reproducing system of private transnational law. With this autonomy have come fears that the international sport system is not subject to adequate legal regulation.⁶¹

⁵⁶ Papaloukas M, 'Policy, European Sports Law and Lex Sportiva' *Paper presented at 14th World I.S.A.L Congress, Athens, Greece, (November 2008)*
<http://www.peacepalacelibrary.nl/ebooks/files/Papaloukas%20European%20Sports%20Law%20and%20Lex%20Sportiva.pdf>

⁵⁷ Papaloukas M, 'Policy, European Sports Law and Lex Sportiva'.

⁵⁸ Papaloukas M, 'Policy, European Sports Law and Lex Sportiva'.

⁵⁹ Chien-Yu L, 'Theorizing the Role of the State in Sport Politics' *International Journal of Sport and Exercise Science* 1(1), 28 Dec 2008, 23-32.

⁶⁰ Macuzzo M.F, 'Lex Sportiva: Sports Law as a Transnational Autonomous Legal Order' Published Thesis.

⁶¹ Macuzzo M.F, 'Lex Sportiva: Sports Law as a Transnational Autonomous Legal Order'.

Borja Garcia and Henk-Erik Meier state in their article that FIFA has been blackmailing national governments with the non-interference rule.⁶² If a national government is sanctioned by FIFA, it is footballers and coaches who suffer the most because they are denied the opportunity to play in international matches and competitions. Additionally, since football is very popular globally, a ban from participating international football would annoy supporters who also happen to be the electorate of democratic states. A ban would therefore make electorate of these countries turn against its own government. Even where governments sought to fight corruption, these sanctions imposed by FIFA only backlashed on the government as their electorate demanded their teams to perform in international competitions.

Migai Akech, in his article, using the case of Maurice Odumbe as an illustration, argues that national courts should regulate the powers of sport bodies where these powers have been used unreasonably.⁶³ In the case of Maurice Odumbe, Odumbe had been banned from playing cricket for 5 years by the International Cricket Council (ICC) and the Kenya Cricket Association (KCA). Odumbe filed a petition seeking judicial review but the High Court of Kenya declined to entertain Odumbe's petition on the grounds that the ICC and the KCA were not public bodies thereby not subject to judicial review. Migai argues in this article that this is against the emerging common law trend that even private bodies are subject to regulation. He also argues that because of globalisation and privatisation, private entities have now received immense power. These entities now considerably influence the liberties and livelihoods of individuals. In the majority of such cases, these processes have resulted in the delegation of what may be termed "public functions" to private entities. Public functions refer to the core functions that are considered to be the primary responsibility of the State. And in other cases, while private entities may not necessarily be exercising public functions, they nevertheless wield immense powers that equally impact upon the liberties and livelihoods of individuals.⁶⁴ He therefore argues that in both scenarios, state regulation is required.

In an article by Mathew Mitten, he states that there is no consensus as to whether the rapidly developing body of laws that governs sports is a separate body of law or merely an application

⁶² Garcia B, Meier H, 'Keeping private governance private: Is FIFA blackmailing national governments?' Paper presented at 8th Sport & EU annual conference, Istanbul, Turkey 28 June.

⁶³ Akech M, 'The Maurice Odumbe Investigation and Judicial Review of the power of International Sports Organisations' Independent Researcher, Nairobi.

⁶⁴ Akech M, 'The Maurice Odumbe Investigation and Judicial Review of the power of International Sports Organisations'.

of general law.⁶⁵ He also states that in situations where there is conflict between global sports law and national law, parties may seek the court's intervention. Some courts have accepted such applications and determined cases while others have refused to apply national law. In the case of *Barnard v Australian Soccer Federation*,⁶⁶ the court recognised primacy of Australian National Law and rejected ASF's argument that it had to comply with FIFA. In his article, he also illustrates conflict of international law with global sports law as was played out in the case of *ABSL v Bosman*.⁶⁷ In this case, the European Court of Justice ruled that some of FIFA's and UEFA's⁶⁸ rules contravened the EU Treaty.

In an article by Dimitrios Panagiotopoulos, he states that the current goings-on in international sports (and uses FIFA as an example) is the validation of arbitrary and non-national power of sports federations.⁶⁹ This power guarantees international prestige to these federations and autonomy for national federations with the aim of limiting the role of central government and the role of international society, which is organized around the nation-state. Consequently, a non-national sports legal order has been established for sporting life, which constitutes a barrier to establishing a sense of justice in sporting event.⁷⁰

In an article by Timothy Davies, he recognises that while some traditional legal scholars have argued that sports law is not a field of law of its own, and others argue that sports law is on its way to becoming a field of its own, many legal scholars now see sports law as a field of its own.⁷¹ Since sports law is neither national law nor international law, its superiority over national law is questionable. FIFA can enforce its laws over national countries because it is very powerful, however, this is not legal. FIFA's rule of non-interference which ousts the jurisdiction of Kenyan courts contravenes Kenyan law which provides that the High Court of Kenya has unlimited and original jurisdiction on all criminal and civil matters.⁷²

⁶⁵ Mitten M, Opie H, "Sports Law": Implications for the development of international, comparative, and national law and global dispute resolution' *Tulane Law Review* vol. 14, 2010.

⁶⁶ (1988) 81 ALR 51.

⁶⁷ [1995] ECR I-4921.

⁶⁸ European Union of Football Associations.

⁶⁹ Panagiotopoulos D, 'International sports rules' implementation – decisions executability: The Bliamou Case' *Marquette Sports Law Review*, Volume 15, Issue 1, (2001).

⁷⁰ Panagiotopoulos D, 'International sports rules' implementation – decisions executability: The Bliamou Case'

⁷¹ Davies T, 'What is Sports Law?' *Marquette Sports Law Review* Volume 11, Issue 2, (2001).

⁷² Article 165 (3) *Constitution of Kenya 2010*.

In an article by Lorenzo Casini, he argues that decisions taken by sports federations have effects on public interest and individual rights and will therefore require regulation. He also argues that the legal and economic effects made by such institutions are vast and this calls for regulation.⁷³ In his work, he also argues that global sports law does not fall under national or international law, rather, it is in its own sphere.

1.6. Objectives

1. To show the disconnect between national law and football law arising from the enactment of the non-interference rule.
2. To illustrate how FIFA's rule on non-interference has brought about the corruption in football.
3. To propose recommendations to the issue.

1.7. Assumptions and Hypothesis

- The FIFA rule on non-interference has brought about a conflict between football law and national law.
- The FIFA rule on non-intervention has brought about rampant corruption in football probably as a result of the conflict between the laws.

1.8. Methodology

The research methodology that will be used in this research will include a review of written material concerning this subject.

⁷³ Casini L, 'Sports Law: A Global Legal Order?'

1.9. Chapter Breakdown

1.9.1. Chapter One

Research proposal

1.9.2. Chapter Two

History of FIFA and the development of football law. An illustration of how the conflict between national law and football law began and how it has paved the way for corrupt activities.

1.9.3. Chapter Three

Case Study: The 2015 FIFA Corruption Scandal: A Case Study illustrating the Scale of Corruption in Football

1.9.4. Chapter Four

How the Kenyan Courts and the Kenya Sports Disputes Tribunal have dealt with corruption in football and the non-interference rule.

1.9.5. Chapter Five

Conclusion, findings and recommendations: Should the FIFA continue to have autonomy? Should checks and balances be introduced?

CHAPTER TWO

History of FIFA and the development of football law. An illustration of how the conflict between national law and football law began and how it has paved the way for corrupt activities.

2.1. Introduction

The study of transnational private governance has increased a great deal in the last twenty years.⁷⁴ Football law is governed through transnational private governance. Transnational private governance stems from transnational private authority which may be defined as “the ability of non-state actors to cooperate across borders in order to establish rules and standards of behaviour accepted as legitimate by agents not involved in the rule definition”.⁷⁵

This chapter aims to explain how FIFA, one of the oldest intergovernmental institutions, operates as a private entity with autonomy from national law.⁷⁶ In doing so, it attempts to explain the ability of FIFA to challenge the authority of sovereign (sometimes even democratically elected) states. One of the research methods to be used in explaining the arguments in this chapter will be a case study which will illustrate how FIFA has the ability to safeguard its autonomy vis-a-vis sovereign states even in cases of corruption or wrongdoing.

2.2. History of FIFA

FIFA was formed in 1904 by the associations of France, Belgium, Denmark, Netherlands, Spain, Sweden, and Switzerland.⁷⁷ Other football associations subsequently joined FIFA to make what it is comprised of today.⁷⁸ The associations that first came together to form FIFA

⁷⁴ Peters BG, Pierre J, ‘Governance without Government? Rethinking Public Administration’ *Journal of Public Administration Research and Theory: J-PART*, Volume 8, Number 2, (April 1998).

⁷⁵ Graz J, Nolke, ‘Limits to the Legitimacy of Transnational Private Governance’ Paper prepared for the CSGR/GARNET Conference “Pathways to Legitimacy? The Future of Global and Regional Governance”, University of Warwick, (17-19 September 2007).

⁷⁶ Chappelet JL, *Autonomy of Sport in Europe*, Council of Europe Publishing, April 2010, Strasbourg, France.

⁷⁷ History of FIFA – Foundation, *FIFA*. <http://www.fifa.com/about-fifa/who-we-are/history/>

⁷⁸ Associations, *FIFA*, FIFA has 211 members. <http://www.fifa.com/associations/>

did so because they wanted to set out the laws that would be used to officiate football matches. As a result, they adopted the Laws of the Game.⁷⁹ They also wanted to stage an international competition and the best way of doing so was by having one entity prepare and set up the competition.⁸⁰

2.3. Governance of FIFA

FIFA is governed through transnational private governance.⁸¹ As has been stated, transnational private governance entails the ability of non-state actors to establish rules and standards of behaviour.⁸² Non-sporting examples of transnational private governance include the International Accounting Standards Board (IASB) and the International Corporation for Assigned Names and Members (ICANN).⁸³ IASB is right at the centre of international and global accounting and it establishes the credit-worthiness of states and corporations.⁸⁴ It also provides transnational commercial arbitration.⁸⁵ ICANN is a telecommunication entity that technically regulates the internet. It is not made up of states but of internet stakeholders.⁸⁶

FIFA, like other bodies governed through transnational private governance, establishes its own rules and standards of behaviour by enacting statutes that are binding on all members. Failure to adhere to these rules or standards of behaviour result in sanctions which are passed by FIFA. An example of a rule that has been passed by FIFA is the non-interference rule. The non-interference rule basically states that members should perform their functions without interference from third parties.⁸⁷ The non-interference rule also prohibits recourse to any

⁷⁹ History of FIFA – Foundation, *FIFA*. <http://www.fifa.com/about-fifa/who-we-are/history/>

⁸⁰ History of FIFA – Foundation, *FIFA*. <http://www.fifa.com/about-fifa/who-we-are/history/>

⁸¹ Meier HE, Garcia B, 'Protecting Private Transnational Authority against Public Intervention: FIFA's Power over National Governments' *Public Administration* 93, number 4, (2015), 890-906.

⁸² Graz J, Nolke, 'Limits to the Legitimacy of Transnational Private Governance'.

⁸³ Dingwerth K, 'Private Transnational Governance and the Developing World: A Comparative Perspective' *International Studies Quarterly* 52, number 3, (2008), 607-34. <http://www.jstor.org/stable/29734253>.

⁸⁴ Dingwerth K, 'Private Transnational Governance and the Developing World: A Comparative Perspective'

⁸⁵ Dingwerth K, 'Private Transnational Governance and the Developing World: A Comparative Perspective'

⁸⁶ Lessig L, *Code: And other laws of cyberspace*, ReadHowYouWant.com, 2009.

⁸⁷ Section 13.1(g) *Regulations Governing the Application of the Statutes Standing Orders of the Congress July 2012 General Provisions* states each association is to manage their affairs independently and ensure that their own affairs are not influenced by any third parties.

courts.⁸⁸ Any violation or attempted violation of this provision may result in sanctions. There have been several cases where states have attempted to fight corrupt activities being carried out by officials of football associations of their respective countries but these efforts have been frustrated because of the non-interference rule. Basically, any such attempt by a state will lead to a suspension from partaking in any international football matches.⁸⁹ The cases of Poland, Greece and Spain, which will be discussed, clearly illustrate how FIFA has managed to strong-arm governments of sovereign states by invoking the non-interference rule. This illustrates the amount of power that FIFA has. It has so much power that it may challenge a state even in cases of misconduct. This begs the questions; how did FIFA manage to get this regulatory power? Why do states comply? What are the effects of this power?

2.4. How FIFA got regulatory power

It is argued that FIFA's regulatory power stems from historical institutionalism.⁹⁰ Historical institutionalism underlines that institutions materialise from and are fixed in specific temporal processes and a bigger socioeconomic environment.⁹¹ These institutions then retain themselves by building up incentives. They also work on institutional stability and reproduction mechanisms.⁹² According to Fioretos,⁹³ there are three fundamental basic mechanisms;

⁸⁸ FIFA Statutes *Regulations Governing the Application of the Statutes Standing Orders of the Congress July 2012 General Provisions* Section 68.2 state that. 'Recourse to ordinary courts of law is prohibited unless specifically provided for in the FIFA regulations. Recourse to ordinary courts of law for all types of provisional measures is also prohibited.'

⁸⁹ Section 13.3 states that a member may face sanctions if provisions of Section 13.1 are violated. Suspensions is one of the sanctions provided for under Section 14 of the FIFA Statutes *Regulations Governing the Application of the Statutes Standing Orders of the Congress July 2012 General Provisions*.

⁹⁰ Garcia B, Meier HE, 'The power of FIFA over national governments: a new actor in world politics?' Presented at: FLACSO-ISA Joint International Conference, Global and Regional Powers in a Changing World, (23-25 July 2014), University of Buenos Aires, Argentina.

⁹¹ Thelen K, 'Historical institutionalism in comparative politics' *Annual Review of Political Science*, (June 1999), 369-404, 2.

⁹² Pierson P, 'The path to European integration: A historical institutionalist analysis.' *Comparative Political Studies* 1996. See also Pierson P, *Politics in Time: History, Institutions, and Social Analysis*, Princeton University Press, Princeton, New Jersey, USA, 2004.

⁹³ Fioretos O, 'Historical institutionalism in international relations.' *International Organization*, 2011.

- (i) Positive feedback effects: In order to sustain current arrangements, institutions generate benefits which motivate actors to follow the rules.
- (ii) Increase returns: Occurs when positive externalities⁹⁴ increase consistently as a result of institutional designs.
- (iii) Institutional complementarity: This occurs when the existence of one institution results in the increase in the returns of another, or, the efficiency of one institution complements another institution resulting in increase in its returns.⁹⁵

Historical institutionalism applies to FIFA.⁹⁶ FIFA uses all of the mechanisms mentioned above in order to ensure perpetuity of regulation. Positive feedback effects are used to ensure that states adhere to the rules and regulations of FIFA as stipulated by the statutes. The mechanisms of *increase returns* and *institutional complementarity* are used by FIFA in the sense that it is nowadays a financial powerhouse with plenty of lucrative deals with transnational corporations such as Adidas.

FIFA has a 5-prong approach to maintain its regulatory power: monopolization, politicization, popularization, commercialization and the “principle of reciprocity”.

2.4.1. FIFA’s monopoly powers

FIFA enjoys regulatory power because it has monopolised the sport.⁹⁷ FIFA has monopolised the sport as 211 members have adhered to its requirements and laws in relation to football. It could be said that the members of FIFA act on behalf of their respective states in matters concerning football. As a result, no other institution can host a football tournament other than FIFA. FIFA managed to lure these states into becoming members because these members wanted to participate in world cups and international football competitions. Further, FIFA

⁹⁴ A positive externality is a benefit that is enjoyed by a third-party as a result of an economic transaction. Third-parties include any individual, organisation, property owner, or resource that is indirectly affected. *Economics Online*. http://www.economicsonline.co.uk/Market_failures/Positive_externalities.html

⁹⁵ Hall P, Soskice D, *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage*, Oxford University Press, England, 2001, 17.

⁹⁶ Meier HE, Garcia B, ‘Protecting Private Transnational Authority against Public Intervention: FIFA’s Power over National Governments’ *Public Administration* 93, number 4, (2015), 890-906.

⁹⁷ Meier HE, Garcia B, ‘Protecting Private Transnational Authority against Public Intervention: FIFA’s Power over National Governments’.

membership has been used by states to symbolise independence and sovereignty, for example, by Kosovo and Taiwan.⁹⁸ This, to some extent, could be considered as an incentive for the members to join FIFA. It has thus brought about a monopoly.

The rationale for having a monopoly has been a matter that has been debated widely throughout.⁹⁹ However, it is necessary to have a monopoly in football because it ensures that football players, fans, teams et cetera can participate in competitions. In the past, it was difficult to engage in football competitions because different teams played to different rules.¹⁰⁰ It was therefore important to have football played in adherence to a common set of rules in order to compete. An example of such a competition is the World Cup. The World Cup is considered to be one of the most prestigious tournaments in world sport. It is argued that a tournament as prestigious and important as the World Cup is best provided by a monopoly, such as FIFA, because a monopoly ensures that participation and rules of play are standard across the board.¹⁰¹

On the other hand, it is argued that a monopoly is not necessary in order to hold a prestigious tournament. For example, the sport of boxing sees several successful prestigious competitions being organised by competing organisations.¹⁰² There are different organisation that compete amongst themselves, that is, the World Boxing Organisation (WBO), World Boxing Association (WBA), and the International Boxing Federation (IBF). In tennis, the players became more involved in governance of the sport by taking away powers from the organisation and vesting them in their own player organisations, that is the Association of Tennis Professionals (ATP) and Women's' Tennis Association (WTA).¹⁰³ In cycling, the sponsors and

⁹⁸ Homburg H, 'FIFA and the "Chinese Question", 1954-1980: an Exercise of Statutes' *Historical Social Research/Historische Sozialforschung*, Volume 31, Number 1, (2006), 69-87.

⁹⁹ Szymanski S, 'The Economic Design of Sporting Contests' *Journal of Economic Literature*, 2003.

¹⁰⁰ 'Cambridge... The Birthplace of Football?' *BBC* (24th September 2014) http://www.bbc.co.uk/cambridgeshire/content/articles/2006/06/09/cambridge_football_rules_parkers_piece_feature.shtml

¹⁰¹ Scully GW, *The Market Structure of Sports*, University of Chicago Press, Chicago, 1995.

¹⁰² Tenorio R, 'On the Competitive Structure in Professional Boxing, or why the very best boxers seldom fight each other' *Handbook on the Economics of Sport*, (2006).

¹⁰³ Sorrentini A, Pianese T, 'The Relationship among Stakeholders in the Organisation of Men's Professional Tennis Events' *Global Business and Management Research: An International Journal* 2011 Parthenope University of Naples Italy, Volume 3 Number 2, (2011).

organisers (not the institution, that is, *Union Cycliste Internationale*) of events are the most powerful.¹⁰⁴

While some experts argue that it is important to have a monopoly in order to host important, prestigious tournaments, the illustrations of tennis, cycling and boxing that have been given show that monopolies are not particularly necessary.

2.4.2. Politicisation of the sport.

Football has become a tool for politics. After the Second World War, politicisation of sport became paramount.¹⁰⁵ For instance, the Soviet Union used the 1952 Olympics to spread its communist agenda and to show communist superiority.¹⁰⁶ Participation in sports also suggests sovereignty. States participate in international sport events in order to illustrate sovereignty and independence. It could also be an illustration of nationalism.

East Germany termed its athletes as “diplomats in suits”.¹⁰⁷ This was a move to suggest to the world that East Germany was an independent state with its own sovereignty and independence.¹⁰⁸ China also deemed any application by Taiwan to participate in international sport or any application to join any international sport federation as a form of infringement of the sovereignty of China.¹⁰⁹ When Taiwan fielded its own national football team, it was considered to play a massive symbolic role during decolonisation.¹¹⁰ One of the first moves made by Kosovo after it announced its declaration of independence was the application of

¹⁰⁴ Morrow S and Idle C, ‘Understanding change in professional road cycling’ *Department of Sports Studies, University of Stirling*, Scotland (2008).

¹⁰⁵ Tomlinson A, Young C, *National Identity and Global Sports Events: Culture, Politics, and Spectacle in the Olympics and the Football World Cup*, SUNY Press, New York, USA, 2006.

¹⁰⁶ Allison L, Monnington T, ‘Sport, Prestige and International Relations’ *Government and Opposition Journal*, Volume 37, Number 1, (2002).

¹⁰⁷ Balbier U, *Kalter Krieg auf der Aschenbahn: Der deutsch-deutsche Sport 1950-1972: Eine politische Geschichte*, Schöningh Paderborn, 2005.

¹⁰⁸ Balbier U, *Kalter Krieg auf der Aschenbahn: Der deutsch-deutsche Sport 1950-1972: Eine politische Geschichte*.

¹⁰⁹ Homburg H, ‘FIFA and the "Chinese Question", 1954-1980: an Exercise of Statutes’ *Historical Social Research/Historische Sozialforschung*, Volume 31, Number 1, (2006) 69-87.

¹¹⁰ Darby P, *Africa, football, and FIFA: Politics, colonialism, and resistance*, Psychology Press, Frank Cass Publishers, London, United Kingdom, Volume 23, 2002.

membership of FIFA and UEFA. It has also been argued that in the post-colonial era of the Arab world, an integral role of nation-state formation has been played by sport.¹¹¹ In Bosnia, football has been used as a political platform and a form of political manipulation.¹¹²

The Hillsborough Disaster¹¹³ was heavily politicised.¹¹⁴ It brought about plenty of police criticism (for example, after the Disaster, the police were termed as inhuman) and some form of police reform.¹¹⁵ It also resulted in plenty of criticism of Margaret Thatcher and her government for her dogmatic pursuit of free markets. In this context, football saw itself play a major role in the criticism of economics ideologies of the Conservative government of Margaret Thatcher.¹¹⁶ The Hillsborough disaster also brought about plenty of stadia reform in the United Kingdom.¹¹⁷

Hosting of international competitions is also a political affair. Qatar intends to use the 2022 FIFA World Cup in order to become an international political and business scene before and after the games.¹¹⁸ The 2014 Russia Olympics games were also used politically by the Russian

¹¹¹ Amara M, 'The Politicisation of Sport in the Arab World' *International Centre for Sports Security Journal* Vol 1 Issue 1, Doha, Qatar, (March 2013).

¹¹² Armstrong G, Vest E, 'Mirror to the State: Politicisation of Football Clubs in the History of Bosnia Herzegovina' *World' International Centre for Sports Security Journal* Vol 1 Issue 1, Doha, Qatar, March 2013.

¹¹³ The Hillsborough disaster was a stadium disaster caused as a result of a stampede by fans at Hillsborough football stadium in Sheffield, England, UK, on 15 April 1989, during the 1988–89 FA Cup semi-final game between Liverpool and Nottingham Forest. With 96 fatalities and 766 injured, it is the worst disaster in British sporting history and remains one of the worst recorded football disasters worldwide. See '1989: Football fans crushed at Hillsborough' *BBC* 15 April 1989 Accessed on 06/12/2016 http://news.bbc.co.uk/onthisday/hi/dates/stories/april/15/newsid_2491000/2491195.stm See also Edwards P, 'Lima 1964: The world's worst stadium disaster' *BBC* 23 May 2014 <http://www.bbc.com/news/magazine-27540668>

See also 'How the Hillsborough Disaster Unfolded' *BBC* 26 April 2016, <http://www.bbc.com/news/uk-19545126> Accessed on 6/12/2016.

¹¹⁴ Wade R, 'The Politicisation of the Hillsborough Disaster' *Estro, The University of Essex Student Journal* Volume 1:1.

¹¹⁵ Wade R, 'The Politicisation of the Hillsborough Disaster'.

¹¹⁶ Wade R, 'The Politicisation of the Hillsborough Disaster'.

¹¹⁷ Wade R, 'The Politicisation of the Hillsborough Disaster'.

¹¹⁸ Mahfoud A, *Sport, Politics and Society in the Arab World*, Palgrave Macmillan, Basingstoke, United Kingdom, 2012.

leadership to show the world (particularly the West) that Russia was an economic powerhouse with significant military strength.¹¹⁹

The politicisation of football has made FIFA very powerful. Given that football is now being used as a political tool and FIFA possesses a monopoly in the football market, states must abide by FIFA's rules in order to get their political and economic agenda across.

2.4.3. Global popularity of football

Football is the most popular sport in the world.¹²⁰ FIFA has 211 members. This is more than the number of independent states in the world and more than the number of members in the United Nations.¹²¹ The popularity of football is also illustrated by the great number of viewers and followers of the FIFA World Cup.¹²² The 2014 FIFA World Cup was followed by over 3 Billion people worldwide.¹²³

It is argued that football is popular because of its simple character and the little infrastructure it requires.¹²⁴ It could also be argued that football is very popular since it originated from the United Kingdom and was very popular during the British dominion over the world.¹²⁵ Its relationship with media outlets and new markets has also played a role in enhancing its popularity.¹²⁶

¹¹⁹ Orttung R, Zhemukhov S, 'The 2014 Sochi Olympic Mega Project and Russia's Political Economy' *East European Politics Journal* Volume 30, Issue Number 2, (05 February 2014).

¹²⁰ Giulianotti R, 'Football' *The Wiley-Blackwell Encyclopaedia of Globalization* (2012).

¹²¹ Eisenberg C, 'FIFA 1975-2000: The Business of a Football Development Organisation' *Historical Social Research / Historische Sozialforschung*, (2006), 55-68.

¹²² Pielke R, 'How can FIFA be held accountable?' *Sport management review*, Volume 16, Issue 3, (2013), 255-267.

¹²³ See 'The 2014 World Cup reached 3.2 Billion viewers, one billion watched the final' *FIFA*, 16 Dec 2015 <http://www.fifa.com/worldcup/news/y=2015/m=12/news=2014-fifa-world-cuptm-reached-3-2-billion-viewers-one-billion-watched--2745519.html>

¹²⁴ Giulianotti R, *Football: A Sociology of the Global Game*, Cambridge: Polity, 1999.

¹²⁵ Guttman A, *Games and empires: modern sports and cultural imperialism*, Columbia University Press, New York, USA, 1994.

¹²⁶ Giulianotti R, Robertson R, 'Mapping the Global Football Field: A sociological Model of Transnational Forces within the World Game' *British Journal of Sociology*, Volume 63, Issue 2, (2012), 216-240. See also Cowie C, Williams M, 'The economics of sports rights' *Telecommunications Policy*, Volume 21 Issue 7 (1997), 619-634.

2.4.4. Commercialisation of football

Football, and modern sports in general, has become much commercialised.¹²⁷ It is argued that the commercialisation of football began with Joao Havelange.¹²⁸ Havelange served as the seventh president of FIFA from 1974 to 1998.¹²⁹ He used the ideology of commercialising football as one of his campaign strategies to get elected as FIFA president.¹³⁰ After getting elected as FIFA president, he embarked on commercialising football.¹³¹ This was done over a long period of time. The most significant way in which football was commercialised was by entering long-term contracts with transnational corporations such as McDonald's, Coca Cola, Adidas et cetera.¹³²

FIFA made immense amounts of money from these contracts. In the past, FIFA would rely on contributions from its member associations. After commercialisation, FIFA did not require its members to contribute to it. Instead, FIFA started distributing funds to its member associations through distribution policies.¹³³

¹²⁷ Slack T, *The Commercialisation of Sport*, Published by Routledge, University of Alberta, New York, 2004.

¹²⁸ Sugden J, Tomlinson A, *FIFA and the contest for world football: who rules the people's game?* Polity Press, Cambridge, United Kingdom, 1998.

¹²⁹ See 'Joao Havelange' *FIFA* <http://www.fifa.com/about-fifa/the-president/joao-havelange.html> See also 'Joao Havelange, FIFA President – obituary' *The Telegraph* 16 August 2016 <http://www.telegraph.co.uk/obituaries/2016/08/16/joo-havelange-fifa-president--obituary/>

¹³⁰ Sugden J, Tomlinson A, 'Power and Resistance in the Governance of World Football Theorizing FIFA's Transnational Impact' *Journal of Sport & Social Issues*, Volume 22, Issue 3, (1998), 299-316.

¹³¹ Sugden J, Tomlinson A, 'Power and Resistance in the Governance of World Football Theorizing FIFA's Transnational Impact'.

¹³² Homburg H, 'Financing World Football: A Business History of the Fédération Internationale de Football Association (FIFA)' *Zeitschrift für unternehmensgeschichte*, Volume 53 Issue 1, (2008), 33-69.

¹³³ Eisenberg C, 'Der Weltfußballverband FIFA im 20. Jahrhundert. Metamorphosen eines „Prinzipienreiters“ (The World Football Association FIFA during the 20th century. Metamorphoses of a Strongly Principled Organisation)' *Vierteljahrshefte für Zeitgeschichte*, (2006) 209-230.

2.4.5. The “principle of reciprocity”¹³⁴

Once FIFA became heavily commercialised, the principle of reciprocity became the norm in the governance of football.¹³⁵ FIFA started using money for vote-buying.¹³⁶ It is argued that FIFA officials strong-arm member associations by threatening to stop funding them. The funds given to the member associations are not much but are definitely significant to developing countries, such as Kenya.¹³⁷ These funds are used as a means to ensure loyalty of developing countries to FIFA.¹³⁸

2.5. Effects of FIFA’s Power

The effects of FIFA’s power become evident when a state attempts to make football regulations of its own. One of such effects is the suspension of states for interference. Whenever any form of regulation, whether legislative or judicial, is taken up by a state, FIFA deems this as interference and sanctions the state. One of the most effective means of sanctions used by FIFA is suspension or a threat of suspension. Suspensions seem to be effective because the amount of time between a suspension and a lift is very small. For example, Nigeria’s suspension only lasted four days.¹³⁹ El Salvador’s, Belize’s and Cameroon’s suspensions lasted for less than a month.¹⁴⁰ Further, only two suspensions have been confirmed, that is, those of Yemen and

¹³⁴ The “principle of reciprocity” may be viewed as the exchange of favours, privileges or otherwise for mutual benefit.

¹³⁵ Darby P, ‘Africa, the FIFA Presidency, and the Governance of World Football: 1974, 1998, and 2002’, *Africa Today* Volume 50, Issue 1, (2003), 14.

¹³⁶ Tomlinson A, ‘Lord, Don’t Stop the Carnival Trinidad and Tobago at the 2006 FIFA World Cup’ *Journal of Sport & Social Issues*, Volume 31 Issue 3, (2007), 259-282.

¹³⁷ Pielke R, ‘How can FIFA be held accountable?’

¹³⁸ Eisenberg C, ‘Der Weltfußballverband FIFA im 20. Jahrhundert. Metamorphosen eines „Prinzipienreiters“ (The World Football Association FIFA during the 20th century. Metamorphoses of a Strongly Principled Organisation)’.

¹³⁹ Nigeria’s suspension commenced on the 4th of October 2010 only to be lifted on the 8th of the same month. See Meier HE, Garcia B, ‘Protecting Private Transnational Authority against Public Intervention: FIFA’s Power over National Governments’ *Public Administration* 93, number 4, (2015), 890-906.

¹⁴⁰ Meier HE, Garcia B, ‘Protecting Private Transnational Authority against Public Intervention: FIFA’s Power over National Governments’.

Brunei Darussalam.¹⁴¹ Suspensions are effective because the electorate of states that elected the government also wants to watch its country participate in international competitions. Therefore, when a country is suspended from participating in international competitions by FIFA, the electorate protests. This subsequently makes the government adhere to FIFA's demands in order to avoid being voted out.

Associations are usually considered as the representatives of governments. These associations are supposed to represent states as their agents, however, FIFA challenges the states' power as the principals of the agents (member associations).¹⁴²

In order to explain the effects of FIFA's power, we examine three cases. The cases of Greece, Spain and Poland illustrate how FIFA exercises its power over sovereign states.

2.5.1. The case of Greece

Greece had been in a long tussle with FIFA. In 1979, the Greek government passed its first football regulations.¹⁴³ The Hellenic Football Federation did not object to these laws because they provided public funding to the Federation.¹⁴⁴ From the 1990's onwards, there was a proliferation in match-fixing in the league and cup matches in Greece.¹⁴⁵ In 1993, the government proposed legislation to change the method of referee nomination and to create a sports court.¹⁴⁶ The Hellenic Football Federation rejected the proposed amendments. As the Greek government pushed to have the bill passed, the Hellenic Football Federation involved FIFA. FIFA took the Federation's side and threatened to suspend Greece from international

¹⁴¹ Meier HE, Garcia B, 'Protecting Private Transnational Authority against Public Intervention: FIFA's Power over National Governments.

¹⁴² Henry I, Ko L-M, 'European Models of Sport: Governance, Organisational Change and Sports Policy in the EU' In *Handbuch Sportpolitik*, ed. Walter Tokarski and Karen Petry, Schondorf (Germany): Hofmann-Verlag, at page 30-35, (2009).

¹⁴³ Law 789/1979.

¹⁴⁴ Anagnostopoulos C, 'The Battlefield of Greek Football: Organising Top-Tier Football in Greece' *The Organisation and Governance of Top Football across Europe*. Abingdon: Routledge, (2011), 211-2. See also Dimitropoulos PE, 'The accounting and tax legislation of the Greek Football clubs' *Choregia*, 2, (2006), 56-57.

¹⁴⁵ Meier HE, Garcia B, 'Protecting Private Transnational Authority against Public Intervention: FIFA's Power over National Governments' *Public Administration* 93, number 4, (2015), 890-906.

¹⁴⁶ Panagiotopoulos D, Mourniakos J, 'Suspension of Governing Bodies: Analysis' *World Sport Law Report* 4(7), (2006), 8-11.

football matches. It also threatened to exclude Greece from the 2002 World Cup. The government abandoned the proposed piece of legislation to avoid the repercussions.¹⁴⁷ That was only the first dispute between FIFA and Greece.

Another dispute between the Greek government and FIFA arose in 1999. In 1999, the Greek government attempted to make new laws with more oversight in football matters.¹⁴⁸ The proposed legislation was to establish a disciplinary committee, new regulations for elections of the Hellenic Football Federation and executive state powers to dismiss the federations' corrupt board members.¹⁴⁹ The federation was against the bill and involved FIFA. FIFA threatened to suspend Greece from partaking in any international matches and threatened to exclude Greece from the 2002 World Cup. The government negotiated with the federation and FIFA. They subsequently agreed on regulations but these regulations left the structures of the federation and Greek football unaltered.¹⁵⁰ This was not the last of disputes between FIFA and Greece.

In 2004, another conflict between FIFA and Greece arose. The government of Greece attempted to make new football regulations that would see the incumbent Hellenic Football Federation chair lose his seat.¹⁵¹ The dispute carried on until 2006. The government's persistent refusal to undo the legislation saw FIFA suspend Greece. Eight days after the suspension, the government got rid of the amendment and the suspension was lifted.¹⁵²

2.5.2. The case of Spain

Spanish laws relating to football are very specific and intrusive. As a result, a conflict with FIFA was inevitable.¹⁵³ The conflict particularly arose when the Spanish Sports Act¹⁵⁴ saw the sports minister given extra powers to issue decrees and orders to the Royal Spanish Football Federation. The conflict specifically arose in 2008 when the federation failed to follow a

¹⁴⁷ Panagiotopoulos D, Mourniakis J, 'Suspension of Governing Bodies: Analysis'.

¹⁴⁸ Proposed National Sports Act Law 2725/1999.

¹⁴⁹ Panagiotopoulos D, Mourniakis J, 'Suspension of Governing Bodies: Analysis'.

¹⁵⁰ Panagiotopoulos D, Mourniakis J, 'Suspension of Governing Bodies: Analysis'.

¹⁵¹ Anagnostopoulos C, 'The Battlefield of Greek Football: Organising Top-Tier Football in Greece'.

¹⁵² Anagnostopoulos C, 'The Battlefield of Greek Football: Organising Top-Tier Football in Greece'.

¹⁵³ García B, Palomar A, Pérez C, 'Spain: Parochialism or Innovation?' In *The Transformation of European Football: Towards the Europeanisation of the National Game*, ed. Arne Niemann, Borja García and Wyn Grant. Manchester: Manchester University Press, (2011), 134- 151.

¹⁵⁴ Law 10/ 1990.

ministerial order to conduct elections.¹⁵⁵ FIFA was involved in this matter and threatened to suspend Spain from partaking in any international football competitions. The Spanish government had to give in. As a result, the elections were held in accordance with the mode that the Royal Spanish Football Federation saw fit and the incumbent president, Angel Villar, was re-elected without any opposition.¹⁵⁶

2.5.3. The case of Poland

One of the major problems that has faced Polish football is corruption. Over a hundred people have been charged with corruption in football including Polish Football Association dignitaries.¹⁵⁷ As a result of widespread corruption allegations, the Polish government suspended the Polish Football Association board and replaced it with an interim management committee. FIFA and UEFA were involved in the matter and threatened to suspend Poland. UEFA also threatened that it would not consider Poland's candidature for hosting the 2012 European Championship.¹⁵⁸ The government yielded to FIFA and reinstated the board.

Match-fixing and corruption continued to be prevalent in Poland. Once Poland had secured its position as the hosts of the 2012 European Championship, the government attempted to intervene to deal with matters of match fixing and corruption.¹⁵⁹ In doing so, the government created a supervisory post to watch over the Polish Football Association.¹⁶⁰ FIFA and UEFA got involved again and refused to recognise the supervisor. They threatened the Polish

¹⁵⁵ Expósito J, 'Lissavetzky responde a Blatter' *El Mundo*, 19, (2008). Mateo JJ, 'Blatter: El gobierno debe comprender el riesgo que corre [Blatter: Spanish government must understand the risks]' *El País*, (2008), 65. See also Mateo JJ, 'Blatter: El Gobierno español debe dejar de ejercer presión [Blatter: The Spanish Government should stop its pressure]' *El País*, (2008), 55.

¹⁵⁶ Meier HE, Garcia B, 'Protecting Private Transnational Authority against Public Intervention: FIFA's Power over National Governments' *Public Administration* 93, number 4, (2015), 890-906.

¹⁵⁷ Kędzior M, Szczepanik M, 'Poland: new shape, old problems' *The transformation of European football: towards the Europeanisation of the national game*, 204-219, (2011). Włoch R, 'UEFA as a New Agent of Global Governance A Case Study of Relations Between UEFA and the Polish Government Against the Background of the UEFA EURO 2012' *Journal of Sport & Social Issues*, Volume 37 Issue 3, (2013), 297-311.

¹⁵⁸ Kędzior M, Szczepanik M, 'Poland: new shape, old problems'.

¹⁵⁹ Włoch R, 'UEFA as a New Agent of Global Governance A Case Study of Relations Between UEFA and the Polish Government Against the Background of the UEFA EURO 2012'.

¹⁶⁰ Włoch R, 'UEFA as a New Agent of Global Governance A Case Study of Relations Between UEFA and the Polish Government Against the Background of the UEFA EURO 2012'.

government and Poland risked losing hosting of the European Championship.¹⁶¹ The Polish government had to adhere to FIFA and UEFA and undo the regulation.

2.6. Discussions

The cases of Greece, Spain and Poland suggest that FIFA can challenge the sovereignty of a state. FIFA has become so powerful that it can make a state review its laws. Even in cases where states intervene and make regulations for the betterment of football, such as, by fighting corruption or other malpractices, FIFA takes the side of its member associate and threatens the state. States must comply because they risk suspension.

2.7. Conclusion

FIFA has been using the very effective means of suspension or threat of suspension to exert its power over states. This illustrates the immense power that FIFA possesses. It can even force states to change its policies and legislation. This power emanates from the fact that it controls access to football. For a state's national team to perform in the international stage, it must comply with FIFA rules. Any suspension or threat of suspension may result in a public outcry which risks a government's chances of getting re-elected. The power possessed by FIFA enables it to challenge the authority and sovereignty of states and has paved the way for corrupt activities because states cannot use their own machinery (including laws and judicial authority) to fight corruption in football.

¹⁶¹ Kędzior M, Szczepanik M, 'Poland: new shape, old problems'.

CHAPTER THREE

The 2015 FIFA Corruption Scandal: A Case Study illustrating the Scale of Corruption in Football

3.1. Introduction

This chapter discusses the amount and the magnitude of corruption in football. In doing so, it explains the various instances of corruption that have taken place in the football world generally and in FIFA particularly. This chapter will begin by discussing corruption as a general term and how it takes place in football and particularly in FIFA. Thereafter, it discusses the various instances of corruption within FIFA. The 2015 FIFA Corruption Scandal is a stark example. This chapter will attempt to discuss what transpired in May 2015 when FIFA's executive members were arrested in a hotel in Zurich for allegedly committing fraud, money laundering and bribery. Other cases that will be discussed in this chapter include the Mohammed Bin Hammam case.

3.2. What is Corruption?

Corruption is a term that has not been clearly defined. This stems from the fact that scholars have failed to agree on a definition of the term. Any proposed definition of corruption does not meet all categories as required by scholars throughout the world. The definition that has been most generally agreed upon is "the abuse of public power for personal gain". For the crimes of theft, fraud and bribery to amount to corruption, there must be abuse of public office.¹⁶² In the previous chapter, it was established that FIFA is a transnational private organisation which performed public functions. As a result, members of FIFA are considered to hold an office for the benefit of the public and any such action that they perform may amount to corruption.

¹⁶² Jain AK, 'Corruption: A review' *Journal of Economic Surveys* (2001).

3.3. Why is corruption prevalent in FIFA?

The latter parts of this chapter discuss corruption cases in detail and illustrate how FIFA has been permeated with corruption. This section attempts to discuss why FIFA has faced this problem.

3.3.1. Lack of accountability

One of the problems is lack of accountability. FIFA does not answer to any sovereign country or authority. While FIFA exists because it is constituted by associations (which are representatives of the different 211 countries in the world), FIFA is not answerable to any of these associations. No country can stand up to FIFA claiming that its executives are engaging in corrupt activities. Any such attempt would result in sanctions by FIFA for interference. An example of such a sanction would be a suspension of its national team or of some of its clubs.

Another issue is that FIFA is incorporated in Switzerland under Swiss law.¹⁶³ Switzerland has the power to hold FIFA to account for any of its actions premised on the fact that it has been incorporated in Switzerland.¹⁶⁴ However, very little has been done in terms of accountability by Switzerland, particularly before May 2015.¹⁶⁵ The only evident form of accountability was in May 2015 when FIFA officials were arrested in a hotel in Zurich and this was only after being pressured to do so by the United States of America's Department of Justice.¹⁶⁶ It could be argued that Switzerland failed to supervise FIFA and hold it to account because it feared being suspended for interference.¹⁶⁷

3.3.2. Lack of regulation and enforcement

It could also be argued that FIFA is riddled with corruption because of lack of regulation and enforcement. Lack of adequate channels to regulate FIFA through national law may be one of the reasons FIFA is plagued with corruption. However, even where there are present avenues of regulation, lack of enforcement may be the reason. An example of such is Switzerland which has had the ability and capacity to regulate FIFA premised on the fact that FIFA is incorporated in Switzerland. FIFA must give its annual financial report to the government of Switzerland

¹⁶³ Boudreaux CJ, Karahan, G, Coats RM, "Bend it like FIFA: corruption on and off the pitch", *Managerial Finance*, Volume 42 Issue 9, (2016), 866 – 878.

¹⁶⁴ Boudreaux CJ, Karahan, G, Coats RM, "Bend it like FIFA: corruption on and off the pitch".

¹⁶⁵ Boudreaux CJ, Karahan, G, Coats RM, "Bend it like FIFA: corruption on and off the pitch".

¹⁶⁶ 'Swiss Authorities hand over FIFA corruption case evidence to U.S.' *ESPN FC* (30 December 2015).

¹⁶⁷ 'Swiss Authorities hand over FIFA corruption case evidence to U.S'.

and it is also subject to audit, however, this has not been done. FIFA's financial records remain undisclosed.¹⁶⁸ It could be argued that Switzerland has refrained from regulating FIFA because it fears being suspended from partaking in football activities. It could also be argued that Switzerland has refrained from regulating FIFA because of the benefits that arise from being the home of FIFA. Many sports organisations including FIFA, UEFA and the International Olympic Committee have chosen Switzerland as the host for their offices because they receive tax breaks and favourable legal terms which enable them to govern their own affairs autonomously.¹⁶⁹ On the other hand, Switzerland benefits from hosting these offices because it is a source of prestige which enhances their reputation for neutrality and tolerance.¹⁷⁰

The capture theory as put out by Boudreaux, Karahan and Coats explains this issue best.¹⁷¹ The capture theory basically states that a regulator will refrain from regulating an institution that it is supposed to regulate because it is not in its interest to do so.¹⁷² Switzerland will refrain from regulating FIFA because it is not in its interest to do so. Switzerland wants to continue being the home of FIFA and wants to continue to participate in football activities, things that may be risked by regulating FIFA.

3.3.3. Free-riding

It is argued that corruption is rampant in FIFA because every country waits for the next one to make a move. Basically, every country in the world knows that there are malpractices in FIFA because there have been widespread accusations of corruption in FIFA for a very long time.¹⁷³ However, no country has decided to act (at least not until the USA and Switzerland in 2015).

¹⁶⁸ 'FIFA Financial Report 2010, 61st FIFA Congress. Geneva, Switzerland: Federation Internationale de Football Association' *FIFA* (2011) http://www.fifa.com/mm/document/affederation/administration/01/39/20/45/web_fifa_fr2010_eng%5B1%5D.pdf2011

¹⁶⁹ Mathew A, 'Is FIFA Scandal an Own Goal for Switzerland?' *Schweizer News-Weltweit* (21 October 2010).

¹⁷⁰ Mathew A, 'Is FIFA Scandal an Own Goal for Switzerland?'

¹⁷¹ Boudreaux CJ, Karahan, G, Coats RM, "Bend it like FIFA: corruption on and off the pitch".

¹⁷² Stigler GJ, 'The theory of economic regulation' *The Bell journal of economics and management science*, (1971).

¹⁷³ Gibson O, Gayle D, 'FIFA Officials arrested on corruption charges as World Cup inquiry launched' *The Guardian* (27 May 2015) <https://www.theguardian.com/football/2015/may/27/several-top-fifa-officials-arrested>

It could be argued that this is because every country had been waiting for another country to act.¹⁷⁴ Countries were waiting for a joint coalition to be formed so that action could be taken.¹⁷⁵

This concept could also be explained in the sense that the current model of FIFA fitted the politicians and elite members of the public. Therefore, the people with the power to bring an end to these malpractices refrained from doing so because it served their interests best.¹⁷⁶

The three problems explained above boil down to one issue, that is, non-interference. There has been lack of accountability because the bodies (for example, the Swiss Government) tasked with holding FIFA accountable have refrained from doing so because they fear being suspended from partaking from football activities for interference. The same applies as regards lack of regulation and enforcement as well as free-riding.

3.4. Corruption in FIFA

Given that corruption has been defined and the factors that have enabled corruption to be so prevalent in FIFA have been discussed, this section now attempts to discuss the cases of corruption in FIFA. Corruption in football is rampant throughout the world. The previous chapter illustrated that corruption is ripe in Polish football. As a matter of fact, almost every football association in the world has been accused of corruption.¹⁷⁷ It would therefore be unfeasible to explain every instance of corruption in football. That being the case, this section will attempt to discuss the stark examples of corruption in football. The 2015 FIFA corruption scandal is one. This scandal illustrated that FIFA is corrupt from the very top and as the allegorical Turkish proverb goes, “the fish starts rotting from the head down”, it is no surprise that member federations are also riddled with corruption.¹⁷⁸

3.5. The 2015 FIFA Corruption Scandal

On May 27th 2015, fourteen top FIFA officials who were members of the FIFA executive committee were arrested on the belief that they engaged in tax evasion, bribery, fraud and money-laundering. It is alleged that they engaged in these activities in order to secure their own

¹⁷⁴ Boudreaux CJ, Karahan, G, Coats RM, "Bend it like FIFA: corruption on and off the pitch".

¹⁷⁵ Boudreaux CJ, Karahan, G, Coats RM, "Bend it like FIFA: corruption on and off the pitch".

¹⁷⁶ Boudreaux CJ, Karahan, G, Coats RM, "Bend it like FIFA: corruption on and off the pitch".

¹⁷⁷ Booker J, 'Corrupt behaviour has become endemic in football's culture' *The Guardian* (29 September 2016) <https://www.theguardian.com/football/2016/sep/29/football-corruption-agents-concerns-fa-fifa>

¹⁷⁸ Boudreaux CJ, Karahan, G, Coats RM, "Bend it like FIFA: corruption on and off the pitch".

interests regarding marketing and media rights as well as locations for the world cup.¹⁷⁹ It is estimated that the total estimated value of the money that exchanged hands through corruption in this scandal was more than \$150 million.¹⁸⁰ Some journalists claim that this is only the tip of the iceberg.¹⁸¹ The arrests were made by Swiss Police on behalf of the Federal Bureau of Investigation¹⁸² of the United States of America which had been investigating this issue for over three years.¹⁸³ The United States Department of Justice wanted the Swiss to have the FIFA officials extradited and charged in the United States of America with the abovementioned crimes.¹⁸⁴ The Swiss authorities also raided the respective FIFA banks as well as FIFA headquarters and gathered electronic data and documents.¹⁸⁵ It is argued that the FBI investigation and the subsequent arrests were instigated by the awarding of hosting rights to Russia for the 2018 World Cup and Qatar for the 2022 World Cup.¹⁸⁶ Soon after these arrests, the football world saw Sepp Blatter (the then FIFA president) and Michel Platini (the then UEFA president) investigated. They were subsequently banned from participating in any football matters for eight years.

The events leading up to the 2015 corruption scandal are as follows. In December 2010, it was determined that the 2018 and 2022 World Cups were to be hosted in Russia and Qatar respectively.¹⁸⁷ In February 2011, two FIFA executive committee members were banned in relation to the awarding of the world cups to Russia and Qatar.¹⁸⁸ In March 2011, Mohammed

¹⁷⁹ Gibson O, Gayle D, 'FIFA Officials arrested on corruption charges as World Cup inquiry launched' *The Guardian* (27 May 2015) <https://www.theguardian.com/football/2015/may/27/several-top-fifa-officials-arrested>

¹⁸⁰ Miller ME, Barbash F, 'US indicts world soccer officials in alleged \$150 million FIFA bribery scandal' *The Washington Post* (27 May 2015) https://www.washingtonpost.com/news/morning-mix/wp/2015/05/27/top-fifa-officials-arrested-in-international-soccer-corruption-investigation-according-to-reports/?utm_term=.532ad630b244

¹⁸¹ Miller ME, Barbash F, 'US indicts world soccer officials in alleged \$150 million FIFA bribery scandal'.

¹⁸² Hereinafter referred to as FBI.

¹⁸³ Gibson O, Gayle D, 'FIFA Officials arrested on corruption charges as World Cup inquiry launched' *The Guardian* (27 May 2015) <https://www.theguardian.com/football/2015/may/27/several-top-fifa-officials-arrested>

¹⁸⁴ Gibson O, Gayle D, 'FIFA Officials arrested on corruption charges as World Cup inquiry launched'.

¹⁸⁵ Gibson O, Gayle D, 'FIFA Officials arrested on corruption charges as World Cup inquiry launched'.

¹⁸⁶ Gibson O, Gayle D, 'FIFA Officials arrested on corruption charges as World Cup inquiry launched'.

¹⁸⁷ 'Russia and Qatar will host the 2018 and 2022 World Cups' *BBC* (2 December 2010) <http://news.bbc.co.uk/sport2/hi/football/9250612.stm>

¹⁸⁸ 'Ethics Committee bans football officials' *FIFA* (23 July 2011) <http://www.fifa.com/about-fifa/news/y=2011/m=7/news=ethics-committee-bans-football-officials-1479068.html>

Bin Hammam declared his bid for presidency but he was banned for life later in June for his role in corrupt activities.¹⁸⁹ In July 2012, Michael J Garcia was asked by FIFA to prepare a report on corruption in FIFA.¹⁹⁰ He submitted his report between September and December 2014 and that is when the pandemonium began.¹⁹¹ In May 2015, FIFA officials were arrested and investigations began. Blatter was elected for another four-year term.¹⁹² Investigations showed that the money that exchanged hands was in the tens of millions of US dollars. In July 2015, Platini stated that he would run for FIFA presidency. However, in September 2015, investigations of Blatter began and they showed that he made a disloyal payment to Platini. As a result, Blatter and Platini were suspended as FIFA president and UEFA president for ninety days. Upon further investigation, allegations arose that the German Football Association was involved in securing the 2006 World Cup which was held in Germany. Even Blatter hinted that the World Cup was awarded to Germany because of bribery.¹⁹³ More investigations were done on Blatter and Platini. In December 2015, Blatter and Platini were suspended from partaking in any football activity for eight years.¹⁹⁴ Blatter and Platini appealed this decision by the FIFA Ethics Committee but their bans were only reduced to six years by the FIFA Appeals Chamber.¹⁹⁵ Sepp Blatter appealed again at the Court of Arbitration for Sport (CAS) but the six year ban was upheld by the court.¹⁹⁶

¹⁸⁹ 'The rise and fall of Mohamed Bin Hammam – timeline' *The Guardian* (1 June 2014) <https://www.theguardian.com/football/2014/jun/01/mohamed-bin-hammam-timeline>

¹⁹⁰ Gibson O, 'Michael Garcia quits FIFA ethics committee over handling of report' *The Guardian* (17 December 2015) <https://www.theguardian.com/football/2014/dec/17/michael-garcia-resigns-fifa-ethics-committee>

¹⁹¹ Gibson O, 'Michael Garcia's report into Russia and Qatar World Cups suffers new delay' *The Guardian* (17 June 2015) <https://www.theguardian.com/football/2015/jun/17/michael-garcia-report-russia-qatar-world-cups>

¹⁹² Gibson O, 'Sepp Blatter elected as FIFA president for fifth term' *The Guardian* (29 May 2015) <https://www.theguardian.com/football/2015/may/29/sepp-blatter-reelected-fifa-president-fifth-term>

¹⁹³ 'Germany Furious at World Cup Corruption Claims' *Spiegel Online* (16 July 2012) <http://www.spiegel.de/international/germany/germany-rejects-blatter-claims-that-2006-world-cup-was-bought-a-844619.html>

¹⁹⁴ 'FIFA: Sepp Blatter and Michel Platini get eight-year bans' *BBC* (21 December 2015) <http://www.bbc.com/sport/football/35144652>

¹⁹⁵ 'Sepp Blatter, Michel Platini bans reduced to six years by FIFA' *ESPN FC* (24 February 2016) <http://www.espnfc.com/blog/fifa/243/post/2814374/fifa-cuts-sepp-blatter-and-michel-platini-bans-to-6-years>

¹⁹⁶ 'Sepp Blatter: Former FIFA President's six year ban upheld after appeal to Cas' *BBC* (5 December 2016) <http://www.bbc.com/sport/football/38205918>

All those arrested on May 27th 2015 had a connection to the United States of America or South America.¹⁹⁷ It is for this reason that the FBI reached out to the Swiss officials to arrest them. The FBI investigations into FIFA's officials was heavily boosted by Chuck Blazer. Blazer was once a member of FIFA's executive committee.¹⁹⁸ He became an FBI witness after being investigated by FIFA for tax evasion and corruption.¹⁹⁹ The FBI commenced investigations on him as a result of his lavish lifestyle in New York where he owned two apartments in Trump Tower, one of which was rumoured to have been for his cat.²⁰⁰ Blazer became an FBI witness and gave the FBI information pertaining to corruption in FIFA, of which he participated.²⁰¹ It is as a result of this that the FBI and the United States Department of Justice decided to go after the FIFA officials in Zurich.

3.6. Legal basis for the action taken by the United States of America to arrest FIFA officials in 2015

The United States of America invoked their national criminal law to effectuate the arrest of the FIFA officials. The United States Department of Justice argued that these officials violated the United States laws of money laundering, racketeering and wire fraud.²⁰² It therefore contacted Swiss police to arrest the officials and asked Switzerland to extradite them to the United States of America in accordance with the US-Switzerland extradition agreement.²⁰³

¹⁹⁷ Apuzzo M, Clifford S, Rashbaum WK, 'FIFA Officials Arrested on Corruption Charges; Blatter Isn't Among Them', *New York Times* (26 May 2015), <http://www.nytimes.com/2015/05/27/sports/soccer/fifa-officials-face-corruption-charges-in-us.html>

¹⁹⁸ Assael S, Forrest B, 'THE FBI VS. FIFA: The exclusive account of how a small band of federal agents and an outsized corrupt official brought down the sports world's biggest governing body.' *The ESPN Magazine* (16 February 2016).

¹⁹⁹ Gibson O, Lewis P, 'FIFA informant Chuck Blazer: I took bribes over 1998 and 2010 world cups' *The Guardian* (3 June 2015).

²⁰⁰ Gibson O, Lewis P, 'FIFA informant Chuck Blazer: I took bribes over 1998 and 2010 world cups'

²⁰¹ Assael S, Forrest B, 'THE FBI VS. FIFA: The exclusive account of how a small band of federal agents and an outsized corrupt official brought down the sports world's biggest governing body.

²⁰² United States Department of Justice, 'Nine FIFA Officials and Five Corporate Executives Indicted for Racketeering Conspiracy and Corruption' *Office of Public Affairs* (27 May 2015) <https://www.justice.gov/opa/pr/nine-fifa-officials-and-five-corporate-executives-indicted-racketeering-conspiracy-and>

²⁰³ McCan M, 'How will indicted FIFA executives defend against corruption charges?' *Sport Illustrated* (28 March 2015). <http://www.si.com/planet-futbol/2015/05/27/fifa-corruption-arrests-legal-analysis>. See also

The FBI investigated FIFA for corrupt activities for about three years before the arrests.²⁰⁴ On the 27th of May 2015 when the arrests were carried out, they were performed by Swiss police upon instruction by the FBI. The Swiss police had every legal right to perform the arrest given that the officials were in Switzerland.

It could also be argued that the United States of America were in a position to commission the arrests because of the vast resources, size, wealth and extensive experience of the United States Department of Justice particularly in prosecuting complex white-collar crimes.²⁰⁵ Additionally, two of the fourteen indicted FIFA officials were United States of America citizens, one was a United States permanent resident and three owned residences in the United States of America. Furthermore, most of the officials were actively involved in CONCACAF²⁰⁶ which is the federation which governs North American football and is located in Miami, Florida.

The United States of America invoked its own national law to commission the arrest of the FIFA officials. This action, albeit revolutionary in football law, it is not unprecedented in other circumstances. For instance, the United Kingdom has invoked the Bribery Act in other jurisdictions, so have the Canadians with the Secret Commissions Act.²⁰⁷

3.7. The Mohamed Bin Hammam case

In June 2011, Hammam²⁰⁸ announced that he would run for FIFA presidency.²⁰⁹ This would see him challenge the incumbent Sepp Blatter.²¹⁰ In order to boost his chances in the race, he set up a meeting with the Caribbean Football Union.²¹¹ After his speech at the meeting, he left

United States Department of Justice, 'Nine FIFA Officials and Five Corporate Executives Indicted for Racketeering Conspiracy and Corruption'.

²⁰⁴ Gibson O, Gayle D, 'FIFA Officials arrested on corruption charges as World Cup inquiry launched'.

²⁰⁵ Deming SH, 'Misunderstood: The FIFA scandal and the extraterritorial reach of US law' *American Politics and Policy Blog* (2015).

²⁰⁶ Confederation of North, Central American and Caribbean Association Football.

²⁰⁷ Deming SH, 'Misunderstood: The FIFA scandal and the extraterritorial reach of US'.

²⁰⁸ Mohammed Bin Hammam was Qatari football administrator and the president of the Asian Football Confederation from 2002 to 2011. He challenged Sepp Blatter for FIFA presidency but he stepped down after corruption claims. See 'The Rise and fall of Mohammed Bin Hamman – timeline' *The Guardian* (21 June 2014).

²⁰⁹ Scott M, 'Mohamed Bin Hammam Confirms Intention to Run for FIFA Presidency', *The Guardian* (18 March 2011) <http://www.theguardian.com/football/2011/mar/18/mohamed-bin-hammam-fifa-president>

²¹⁰ Scott M, 'Mohamed Bin Hammam Confirms Intention to Run for FIFA Presidency'.

²¹¹ *Mohammed Bin Hammam v FIFA*, CAS 2011/A/2625.

the room and gave each national representative a “gift”. The gift was a brown envelope which contained \$40,000 cash. This was a tactic to bribe the Caribbean federations to vote for him in the then upcoming presidential elections. The FIFA Ethics Committee began investigating Hammam and as a result, he withdrew his candidature.²¹² The FIFA Ethics Committee found Hammam guilty and banned him for life.²¹³ Hammam appealed at the FIFA Appeals Chamber but he failed and his lifetime ban was still in force.²¹⁴ He then appealed at the Court of Arbitration for Sports (CAS) where he won the appeal and the life-ban was reversed and the decision to ban him for life was quashed.²¹⁵ Despite this initial success, FIFA brought a further action against Hammam for corruption which he lost at both FIFA and CAS level.²¹⁶

3.8. Discussion and Conclusion

This chapter has attempted to discuss corruption in FIFA. It has discussed corruption as a concept in football, the factors that have enabled corruption to prevail in FIFA (with the rule of non-interference being one of the main factors if not the main factor) and the various instances of corruption within FIFA as an entity and as the governing body of football. Given that FIFA is the governing body of football and controls football throughout the planet, if it is corrupt, corruption will trigger down to its member federations as well. This chapter has attempted to outline that corruption in FIFA is no longer a matter of accusations and defamation but it is ripe within football generally.

²¹² ‘FIFA: Mohamed Bin Hammam of Qatar Ends Presidential Bid’, *BBC* (29 May 2011), <http://www.bbc.co.uk/news/world-middle-east-13587449>

²¹³ ‘Ethics Committee Bans Football Officials’, *FIFA* (23 July 2011), <http://www.fifa.com/aboutfifa/organisation/bodies/news/newsid=1479068/index.html>.

²¹⁴ ‘Appeal Committee Confirms Ethics Committee Decision on Bin Hammam’, *FIFA* (15 September 2011), <http://www.fifa.com/aboutfifa/organisation/bodies/news/newsid=1511253/>.

²¹⁵ ‘Mohamed Bin Hammam Wins Appeal Against FIFA Ban’, *BBC* (19 July 2012), <http://www.bbc.com/sport/0/football/18901316>.

²¹⁶ Agence France-Presse, Court of Arbitration for Sport Turns Down Mohamed Bin Hammam’s Appeal, *NDTV SPORTS* (31 October 2012), <http://sports.ndtv.com/football/news/198688-court-ofarbitration-for-sport-turns-down-mohamed-bin-hammams-appeal>.

CHAPTER FOUR

How the Kenyan Courts and the Kenya Sports Disputes Tribunal have dealt with corruption in football and the non-interference rule

4.1. Introduction

Very little has been determined by Kenyan courts concerning issues of corruption in football particularly in relation to the FIFA rule of non-interference. Kenyan courts have not really encountered an issue of corruption which it has had to (or refused to) deal with based on FIFA's rule of non-interference. As a result, this chapter will attempt to discuss one of the issues that this thesis aims to explore, that is, how the FIFA rule of non-interference contravenes Kenyan law.

This chapter aims to discuss the position taken by Kenyan courts when matters concerning non-interference or corruption were brought before them. While the Sports Disputes Tribunal is a fairly new body thus has created little jurisprudence in all matters sport,²¹⁷ the Kenyan courts have received quite a number of cases before it, particularly concerning non-interference. The cases illustrate that the non-interference rule has brought about a lot of questions concerning the jurisdiction of courts to hear matters concerning football. This chapter will attempt to discuss these cases, their facts and findings and try to analyse the findings of the courts vis-à-vis the legality of FIFA law and FIFA's power over national governments as discussed in previous chapters, particularly, chapter two.

4.2. Kenyan Cases

4.2.1. *Salim Sumra & 2 others v Kipchoge Keino & 3 others. Civil Suit No. 266 of 2004*

In this case, the plaintiff argued that FIFA had no powers to control football activities in Kenya. In his determination, the current Chief Justice of the Republic of Kenya, David Maraga (he was then a judge of the High Court of Kenya) stated in his dictum that if it was indeed true that

²¹⁷ The Sports Disputes Tribunal was established under Section 55 of the *Sports Act* of 2013 [Act No. 25 of 2013].

FIFA had no powers to control football activities in Kenya, FIFA would not have banned the Kenyan national football team from participating in world cup qualifying matches. The judge premised his argument on a ban imposed by FIFA on Kenya from participating in world cup qualifiers in 2004.²¹⁸

The determination by the judge that FIFA had power to control football activities in Kenya was not established by interpreting a particular provision of any law. The learned judge did not invoke any statute to establish that FIFA had the power to control football activities in Kenya. He premised his argument on a political truth. The political truth being that despite there being no Kenyan statute or Kenyan law allowing FIFA to control football in Kenya, FIFA still possessed the power to determine how football affairs would be run in the independent republic.

This political power stems from the arguments made in this dissertation particularly in the second chapter. The fact that FIFA monopolises football and is the only available avenue for states to compete on the global stage gives FIFA immense power to control football activities. The power is so great that FIFA can cite it and use it to trump national law. Sovereign states that are supposed to be independent cannot use their own state machinery and their own state laws to defeat malpractices, such as corruption, in football. Any such attempt would result in a ban.

4.2.2. Alfred Wekesa Sambu & 4 others v Mohammed Hatimy & 12 others. Civil suit No. 1281 of 2006

In this case, the plaintiffs were aggrieved by a decision of the National Executive Committee of the Kenya Football Federation (KFF) to remove them from office. They argued that they were removed from office illegally and that their removal was null and void.

The defendants argued that the plaintiffs, being former employees of (KFF), ought to have sought remedies through proper channels as stipulated by the KFF constitution. They argued that the KFF constitution provided that, by virtue of Article 46 and 47 of the constitution, it was mandatory for such a dispute to be resolved through arbitration. The defendants further averred that the FIFA Statutes provided that recourse to ordinary courts is prohibited thus

²¹⁸ 'FIFA bans Kenya' *FIFA* (2 June 2004). <http://news.bbc.co.uk/sport2/hi/football/africa/3769627.stm>

praying that the court refer the matter to arbitration as required by the KFF constitution and the FIFA Statutes.²¹⁹

The case was presided over by Justice Visram. According to the learned judge, the parties submitted themselves via their agreement to be bound by the KFF constitution and the FIFA Statutes. Therefore, the means of dispute resolution would be determined by the means stipulated by the agreements that they were bound by. The court ruled that the case was to be referred to arbitration in accordance with the KFF constitution and FIFA Statutes.

In this case, the court determined that it had no jurisdiction to hear the matter. The court found in favour of the defendants who argued that the FIFA statutes and the KFF constitution required the parties to resolve their disputes in accordance with the laws of FIFA and KFF. It could be argued that the court was reluctant to hear the matter because it feared that sanctions would be imposed on Kenya by FIFA for interference. This argument is pedestalled on the fact that the defendants argued that FIFA statutes prohibited recourse to ordinary courts and any such violation would bring about sanctions by FIFA.

4.2.3. *Wilberforce Kilibwa v Mumias Sugar Company Limited [2013] eKLR.*²²⁰

Wilberforce Kilibwa was a footballer who played for Mumias Sugar football team. While playing for the club, he got injured. As a result of heavy medical expenses to treat his injury, Wilberforce sought compensation from his former employers, albeit ten years later.

It was held that Mumias Sugar Company was liable to pay Wilberforce. In making its determination, the learned judge invoked FIFA law which required every club to insure its players and cover for its players' medical affairs.²²¹

²¹⁹ FIFA Statutes *Regulations Governing the Application of the Statutes Standing Orders of the Congress July 2012 General Provisions* Section 68.2 state that. 'Recourse to ordinary courts of law is prohibited unless specifically provided for in the FIFA regulations. Recourse to ordinary courts of law for all types of provisional measures is also prohibited.'

²²⁰ *Wilberforce Kilibwa v Mumias Sugar Company Limited [2013] eKLR Cause Number 2052 of 2011.*

²²¹ Article 2 of FIFA Statutes on *Regulations on the Status and Transfer of Players* provides: "The club with which the player concerned is registered shall be responsible for his insurance cover against illness and accident during the entire period of his release. This cover must also extend to any injuries sustained by the player during the international match (es) for which he was released."

In this case, the court did not invoke any local law to make its determination. It made its determination based on FIFA law in spite of the fact that Kenya has its own employment and labour laws. This case therefore suggests that FIFA law can be applied in Kenyan courts.

4.2.4. *Football Kenya Federation v Kenya Premier League Limited & 4 others* [2015] eKLR.²²²

This case was a result of a lengthy tussle between Football Kenya Federation and Kenya Premier League limited et al. The two parties quarrelled over fixtures and dates of the premier league and moved to court to have it resolved. The defendants argued that the court had no jurisdiction to hear the matter by invoking the FIFA statute which provides that recourse to ordinary courts is prohibited.²²³ The defendants further averred that the court ought to refer the matter to the proper channels as stipulated by FIFA statutes.

This case brought about a huge debate over jurisdiction. Given that the FIFA statutes prohibited recourse to ordinary courts, and as has been argued in this paper that this particular provision of the FIFA statutes read together with section 13.1 of the same statute give rise to the FIFA rule of non-interference, this case becomes massively important to discuss.²²⁴

The court carefully analysed the arguments presented before it and made its decision. The honourable judge presiding over the matter was Lady Justice Roselyn Ekirapa Aburili and it is important to follow the judge's chain of thought in coming to her decision.

The judge first cited the case of *Owners of Motor Vessel Lillian "S" v Caltex Oil Kenya Ltd.*²²⁵ In this case, it was held that jurisdiction is the most important factor in determining a matter. Where a court establishes that it has no jurisdiction, it has no option but to down its tools.

The judge went on to cite *Patel v Dhanji & others*.²²⁶ In *Patel*, Miller J stated that courts can entertain suits in matters of natural justice but must be slow in intervening in matters

²²² *Football Kenya Federation v Kenya Premier League Limited & 4 others* [2015] eKLR Civil Suit Number 69 of 2015.

²²³ Section 68.2 FIFA Statutes *Regulations Governing the Application of the Statutes Standing Orders of the Congress July 2012 General Provisions*.

²²⁴ Section 13.1(g) *Regulations Governing the Application of the Statutes Standing Orders of the Congress July 2012 General Provisions* states each association is to manage their affairs independently and ensure that their own affairs are not influenced by any third parties.

²²⁵ *Owners of Motor Vessel "Lillian S" v Caltex Oil Kenya Limited* [1989] KLR 1.

²²⁶ *Patel & another v Dhanji & 4 others* [1975] EA 301.

concerning club affairs. Club affairs should be left in the hands of the members. The judge cited this case in order to show that courts can interfere if matters are of natural justice. Further, where the members or the parties can solve the matter out of court, the court should enable them to do so.

The judge went on to cite the case of *Kenya Medical Practitioners & Dentist Union v Transitional Authority v Council of Governors* which was a case that heavily relied on the case of *Speaker of the National Assembly v Karume*.²²⁷ In this case, it was stated that where there is an obligation created by statute and a remedy is provided by that particular statute, the person seeking a remedy is deprived of any other means of enforcement except as provided for by the statute. This basically means that if the FIFA statutes and the FKF constitution provide for a particular remedy for a failure to perform an obligation, the person seeking a remedy has no option but to follow what the FIFA statutes and the FKF constitution provide. The FIFA statutes and FKF constitution provide for arbitration as the sole method of dispute resolution.

From what has been established above, it is clear that FIFA statutes and the FKF constitution have ousted the jurisdiction of Kenyan courts. However, the learned judge went on. She cited the case of *R V Public Procurement Administrative Review Board* which stated that ouster clauses are effective as long as they are not unconstitutional, consistent with the main objective of the said Act and pass the test of reasonableness and proportionality. Therefore, according to Lady Justice Aburili,

“...jurisdiction may be precluded or restricted by legislative mandate but if such an ouster clause leaves no room for remedy, it can be struck down for unreasonableness...”

The judge went on in her analysis to cite the case of *Safmarine Container NV of Antwerp v Kenya Ports Authority* where it was held that jurisdiction can only be limited or conferred by the Constitution.²²⁸ This argument can be backed up by the case of *Samuel Kamau Macharia v Kenya Commercial Bank & 2 others* where the Supreme Court of Kenya established that jurisdiction flows from the constitution or from legislation or both.²²⁹

From the above case law, it is clear that in order to oust jurisdiction, one must invoke a legislative ouster or a constitutional provision. According to the learned judge, the Sports Act

²²⁷ *Speaker of the National Assembly v Karume* [2008] 1 KLR 426.

²²⁸ *Safmarine container NV of Antwerp v Kenya Ports Authority* Number 263 of 2010.

²²⁹ *Samuel Kamau Macharia v Kenya Commercial Bank & 2 others* Civil Appeal Number 2 of 2011.

does not expressly oust the jurisdiction of the High Court. Further, the Sports Act and the Sports Tribunal were still in transition period and were still finding ground. She also alluded to the fact that sports organisations had not yet properly adhered to the Sports Act.

The learned judge went on to give reasons as to why it would be absurd for the FIFA statutes and the FKF constitution to oust the jurisdiction of the High Court of Kenya. First, the High Court of Kenya is given its jurisdiction by the Constitution of Kenya and Kenyan statutes and not by a body's constitution. Second, according to Article 165(3) of the Constitution of Kenya, the High Court has unlimited and original jurisdiction on all criminal and civil matters. The constitution, however, provides an ouster. According to Article 165 (5), the High Court will not have jurisdiction in respect of matters reserved for the exclusive jurisdiction of the Supreme Court and matters falling within the jurisdiction of the Environmental and Land Court.²³⁰

Third, the High Court has supervisory jurisdiction over subordinate courts and any authority or body exercising a judicial or quasi-judicial function but for a superior court.²³¹ Fourth, Article 94 (5) of the Constitution of Kenya provides that no body other than Parliament has the power to make laws unless as provided for in the Constitution of legislation. The judge also stated that it was her humble view that subsidiary legislation cannot oust the jurisdiction of the High Court. In making this assertion, the judge cited the case of *Alfred Obuya Otieno v Chairman National Nurses Association of Kenya & another*.²³² In this case, Asago J stated that societies' constitutions cannot oust the jurisdiction of a court of law. This opinion may be backed up by the case of *Peter Gichuki v Independent Electoral and Boundaries Commission* where it was also held that a society's constitution cannot oust the jurisdiction of a court.²³³

Fifth, the honourable judge stated that it was not proved that FIFA statutes were ratified as treaties or conventions. What was presented to him by the parties did not illustrate any form of ratification of FIFA statutes. It is indeed a fact that FIFA statutes have not been ratified in Kenya. Therefore, it would be risible to refer to FIFA law as international law. The judge went on to give her sixth reason to refuse to acknowledge FIFA statutes and the FKF constitution as an ouster of High Court jurisdiction. The sixth reason was that if in the said case it was proven that FIFA law was indeed considered a treaty, it would still not be above the Constitution and

²³⁰ Article 165 (5) *Constitution of Kenya 2010*.

²³¹ Article 165 (6) *Constitution of Kenya 2010*.

²³² *Alfred Obuya Otieno v Chairman National Nurses Association of Kenya & Another* [2014] eKLR.

²³³ *Peter Gichuki v Independent Electoral and Boundaries Commission* [2013].

Kenyan statutory law. She premised her argument on the argument that treaties should be implemented in utmost good faith, that is, *pacta sunt servanda*.

The seventh and final reason she gave was that a determination ousting the court's jurisdiction would be in violation of Article 48 of the Constitution which provides that every person has a right to access justice.²³⁴ She premised this assertion on the fact that while courts should encourage out-of-court dispute settlement, when this matter was taken to FIFA they did not help much in resolving the dispute. For the seven reasons given and the arguments presented above, the court ruled that it had the jurisdiction to hear the matter.

4.3. Discussion

The cases discussed in this chapter have shown that there is indeed a conflict between FIFA laws and Kenyan national law. The conflict may be summed up as follows. The Constitution of Kenya provides, under Article 165, that the High Court has unlimited jurisdiction on all civil and criminal matters.²³⁵ Further the Constitution states that it is the supreme law of the land and that any law that is inconsistent with the Constitution is void to the extent of inconsistency.²³⁶ The FIFA rule of non-interference ousts the jurisdiction of Kenyan courts (including the High Court of Kenya) by stating that recourse to ordinary courts of law is prohibited. From the case law discussed in this chapter, it has been established (particularly from the findings and analysis of Lady Justice Aburili in *Football Kenya Federation*) that the FIFA rule of non-interference cannot oust the jurisdiction of Kenyan courts, particularly, that of the High Court because it has been granted by the Constitution as unlimited and original. The FIFA rule of non-interference, therefore, contravenes Kenyan law.

The conflict is further fuelled from the fact that FIFA possesses immense power to implement its own laws. If a court of law makes a ruling against a certain football association, FIFA can simply ban that country from participating in football activities. As has been discussed severally in this paper, every country must adhere to the FIFA rule of non-interference in order to avoid being banned. It is therefore clear that FIFA is strong-arming states into following its rules in spite of the fact its rules cannot legally trump national law.

²³⁴ Article 48 *Constitution of Kenya 2010*: "The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice."

²³⁵ Article 165 (3) *Constitution of Kenya 2010*.

²³⁶ Article 2 (1) and (4) *Constitution of Kenya 2010*.

The question of whether international law trumps national law is not relevant in this context. This assertion is made premised on the fact that FIFA law is not international law. Kenya has not ratified any treaty in relation to the FIFA statutes.²³⁷

4.4. Conclusion

Kenyan courts have faced the issue of non-interference before them. In all the cases, it has been an issue of contention. Some judges have ruled in favour of the FIFA rule of non-interference and others have questioned its legality to oust the jurisdiction of Kenyan courts. That said, from the jurisprudence established in the cases discussed above, it is clear that the FIFA rule of non-interference contravenes Kenyan law.

²³⁷ See the Kenya Law Treaties and Agreements Database at <http://kenyalaw.org/treaties/>

CHAPTER FIVE

Conclusion, Findings and Recommendations

5.1. Introduction

This chapter aims to sum up the discussions in the previous chapters. In doing so, it shall conclude on whether the FIFA rule of non-interference has brought about corruption and whether it has contravened Kenyan national law. It shall also propose recommendations that may assist in curbing this conundrum.

5.2. Findings

In an attempt to fight corruption in football in Kenya, one of the hurdles that the state may face is the FIFA rule of non-interference. As a result of the provisions of the FIFA rule of non-interference, the Kenyan Republic cannot use its own state machinery to defeat the evil malpractice.²³⁸ Any sort of attempt to do so will result in a ban by FIFA. A state cannot risk being banned by FIFA because it may turn the electorate against the ruling government.²³⁹ The electorate would want to see its national team play international competitions and any move by the government that would jeopardise that would risk it being voted out in the next general election.²⁴⁰

The FIFA rule of non-interference has brought about corruption. The cases that have been discussed illustrate that the non-interference rule has brought about corruption by blanketing

²³⁸ FIFA Statutes *Regulations Governing the Application of the Statutes Standing Orders of the Congress July 2012 General Provisions* Section 68.2 state that. 'Recourse to ordinary courts of law is prohibited unless specifically provided for in the FIFA regulations. Recourse to ordinary courts of law for all types of provisional measures is also prohibited.' Also Section 13.1(g) states each association is to manage their affairs independently and ensure that their own affairs are not influenced by any third parties.

²³⁹ Meier HE, Garcia B, 'Protecting Private Transnational Authority against Public Intervention: FIFA's Power over National Governments' *Public Administration*, Number 4 (2015), 21.

²⁴⁰ Meier HE, Garcia B, 'Protecting Private Transnational Authority against Public Intervention: FIFA's Power over National Governments', 21.

football officials. An example of these cases is that of Poland.²⁴¹ As discussed in chapter 2, Polish football is marred with corruption.²⁴² When the government of Poland attempted to take action, the Polish National Football Team was banned from participating in international football qualifiers. Poland also risked losing the hosting of the 2012 UEFA Euro Championship.²⁴³ The FIFA rule of non-interference has also protected individual persons working in FIFA itself, for example, the FIFA Executive Committee members. This was evidenced in the third chapter of this paper. For a long time, FIFA officials had been accused of being corrupt, however, no action was taken until 2015.²⁴⁴ One of the main reasons as to why no action was taken against the FIFA officials prior to 2015 was because of the FIFA rule of non-interference. States were basically avoiding to take action because any action would be deemed to interference.²⁴⁵ Further, no state wanted to be in FIFA's bad books because there was plenty at stake. For instance, states would receive less money from FIFA through the principle of reciprocity. FIFA, now a very rich and commercialised entity, with plenty of funds at its disposal, gives countries various amounts of funds based on the loyalty they show to the persons who pull the strings in FIFA.²⁴⁶

The FIFA rule of non-interference contravenes Kenyan national law. This assertion is based on the analysis of various Kenyan constitutional provisions, statutory pieces of legislation and case law. The FIFA rule of non-interference ousts the jurisdiction of Kenyan courts (including the High Court) in matters concerning football.²⁴⁷ According to the Constitution, the High

²⁴¹ Kędzior M, Szczepanik M, 'Poland: new shape, old problems' *The transformation of European football: towards the Europeanisation of the national game*, (2011), 204-219.

²⁴² Kędzior M, Szczepanik M, 'Poland: new shape, old problems' *The transformation of European football: towards the Europeanisation of the national game*, 204-219, (2011). Włoch R, 'UEFA as a New Agent of Global Governance A Case Study of Relations Between UEFA and the Polish Government Against the Background of the UEFA EURO 2012' *Journal of Sport & Social Issues* (2013), 297-311.

²⁴³ Kędzior M, Szczepanik M, 'Poland: new shape, old problems'.

²⁴⁴ Gibson O, Gayle D, 'FIFA Officials arrested on corruption charges as World Cup inquiry launched'.

²⁴⁵ Boudreaux CJ, Karahan, G, Coats RM, "Bend it like FIFA: corruption on and off the pitch", *Managerial Finance*, (2016) 866 – 878.

²⁴⁶ Darby P, 'Africa, the FIFA Presidency, and the Governance of World Football: 1974, 1998, and 2002', *Africa Today*, (2003), 14.

²⁴⁷ FIFA Statutes *Regulations Governing the Application of the Statutes Standing Orders of the Congress July 2012 General Provisions* Section 68.2 state that. 'Recourse to ordinary courts of law is prohibited unless specifically provided for in the FIFA regulations. Recourse to ordinary courts of law for all types of provisional measures is also prohibited.'

Court has unlimited and original jurisdiction on all criminal and civil matters. According to case law, for a certain provision to oust the jurisdiction of a court, it must be constitutional or statutory.²⁴⁸ The FIFA rule of non-interference is neither statutory nor constitutional.²⁴⁹ It is not even international law because FIFA statutes have not been ratified as treaties or conventions.²⁵⁰ From this analysis, the High Court has the capacity and the jurisdiction to hear matters concerning football. This is premised on the argument that the High Court has been granted unlimited jurisdiction to hear any civil or criminal matter by the supreme law of the land.²⁵¹ Corruption in football definitely falls within this criteria.

Despite it being illegal for FIFA's rule of non-interference to oust the jurisdiction of the High Court, it may do so successfully. This is because FIFA enjoys immense power which stems from monopolising the sport and strong financial muscle. It could manipulate sports into following its orders by using money or it could strong-arm states into following their rules by threatening to ban or by banning them from performing at the international level. This brings about an issue of FIFA having the autonomy to have its own rules which it can impose on sovereign states at the expense of their national laws.

5.3. Recommendations

The importance of having sports autonomy is unquestionable. Excessive political interference has stressed the importance of autonomy of sports tremendously. Instances of torture of football players by an authoritarian regime and the detainment of athletes who perform poorly have illustrated the need for sports affairs to be governed independently and with autonomy.²⁵² However, this autonomy has been abused. An example of such an abuse is when football officials are blanketed by the FIFA rule of non-interference. While autonomy should be protecting footballers, fans and all football stakeholders from adverse actions particularly by authoritarian regimes, it has also protected corrupt football officials. Such occurrences have

²⁴⁸ *Samuel Kamau Macharia v Kenya Commercial Bank & 2 others Civil Appeal Number 2 of 2011.*

²⁴⁹ *Football Kenya Federation v Kenya Premier League Limited & 4 others Civil Suit No. 69 of 2015.*

²⁵⁰ See the Kenya Law Treaties and Agreements Database at <http://kenyalaw.org/treaties/>

²⁵¹ Article 165 (3) *Constitution of Kenya 2010.*

²⁵² An example of such an instance is when it was alleged that Saddam Hussein's son tortured Iraqi footballers after a poor showing in an international football match. See Sherwell P, 'Saddam's son tortured defeated footballers' *The Telegraph* (5th Nov 2000) <http://www.telegraph.co.uk/news/worldnews/middleeast/iraq/1373322/Saddams-son-tortured-defeated-footballers.html>

been copious and a few examples include, Kenya, Nigeria, Poland and the 2015 FIFA corruption scandal.²⁵³ One of the ways of dealing with this issue is by having negotiated autonomy.

5.3.1. Negotiated Autonomy

Negotiated autonomy was a phrase coined by Jean-Loup Chappelet.²⁵⁴ In his book, Chappelet discusses examples of successful negotiated autonomy systems in sport.²⁵⁵ A system of negotiated autonomy basically ensures orderly structural and balanced relations between public authorities and sports federations at the national level.²⁵⁶

Successful systems of negotiated autonomy in sport are mainly European. An example of such is the Council of Europe's formation of the Enlarged Partial Agreement on Sport (EPAS).²⁵⁷ EPAS was formed in order to assist sports associations and public authorities to have discussions on sports matters in order to ensure fairer, healthier and better sports governance.²⁵⁸ The Council of Europe has also formed the Parliamentary Assembly of the Council of Europe (PACE). PACE basically appeals for extensive co-operation between public authorities and sports federations. The United Kingdom has followed suit and formed its own All-Party Parliamentary Football Group whose main focus is to prepare policy on football matters particularly in relation to good governance.²⁵⁹

The European Union has also attempted to create systems of negotiated autonomy. The European Union created the European Sports Forum which had its first meeting in Brussels in

²⁵³ FIFA 'FIFA suspends Kenya Football Federation' FIFA.COM (2nd June 2004) <http://www.fifa.com/about-fifa/news/y=2004/m=6/news=fifa-suspends-kenya-football-federation-92779.html>, on 7 January 2017.

See also Chiweshe MK, 'The Problem with African Football: Corruption and the (Under)Development of the Game in the Continent' (2014). And Kędzior M, Szczepanik M, 'Poland: new shape, old problems'.

²⁵⁴ Mrkonjic M, 'Measuring the governance of international sport organisations: Democracy, transparency and responsibility as key attributes' *The 21st EASM Conference. Sport Management for Quality of Life* (2013).

²⁵⁵ Chappelet JL, *Autonomy of Sport in Europe*, Council of Europe Publishing, April 2010, Strasbourg, France, See generally 53-64.

²⁵⁶ Chappelet JL, *Autonomy of Sport in Europe*, 53.

²⁵⁷ The *Council of Europe* is the continent's leading human rights organisation.

²⁵⁸ Chappelet JL, *Autonomy of Sport in Europe*, 53.

²⁵⁹ Register of all Party Groups, United Kingdom Parliament. See <http://www.publications.parliament.uk/pa/cm/cmallparty/register/football.htm>

1991.²⁶⁰ Sports federations, sports ministries, the European Parliament, the Council of Europe, the International Olympic Committee et cetera have been involved in the forum. While this forum is mainly advisory, it has contributed a great deal to understanding and dialogue among stakeholders in sports.²⁶¹ Its recommendations have also been taken up by the European Commission which prepares sport policy.²⁶²

The European Union has also created the Social Dialogue in Sports Centre. It was created by the 2007 European Union White Paper on Sport. It was introduced for football and it mainly advocated for social dialogue between public authorities and sports federations. It has been very successful as it has resulted in the drafting of a common code of conduct and its successes have been echoed by other sports as they want a similar system for dialogue.²⁶³ Chappelet also cites the meeting and negotiations between the World Anti-Doping Agency and the Council of Europe as successful negotiated autonomy. He states that the Council of Europe was unhappy with certain rules in the World Anti-Doping Code on the “whereabouts rule” in relation to human rights.²⁶⁴ The two parties set up a meeting whose recommendations were approved unanimously by the World Anti-Doping Agency Committee.²⁶⁵

Chappelet also gives the examples of individual countries such as France and Germany.²⁶⁶ In France, the state is the sole power in matters related to sport. It exercises this power through sports federations which must sign agreements with the government in order to agree on and set the limits of power of both parties.²⁶⁷ Every year, public officials representing the government and the sports federations meet to discuss ways of improving sports in the country. During this meeting, the federations also report to the state on any progress relating to sport.²⁶⁸ While the government recognises the autonomy of its federations, it ensures that the federations do not get out of hand by ensuring that these laws and requirements are adhered to. In Germany, the body in charge of all sports in the country is known as German Olympic Sport

²⁶⁰ EU Sport Forum http://ec.europa.eu/sport/events/2016/sport-forum_en

²⁶¹ Chappelet J-L, *Autonomy of Sport in Europe*, 54.

²⁶² Chappelet J-L, *Autonomy of Sport in Europe*, 54.

²⁶³ Chappelet J-L, *Autonomy of Sport in Europe*, 55.

²⁶⁴ Chappelet J-L, *Autonomy of Sport in Europe*, 56.

²⁶⁵ Chappelet J-L, *Autonomy of Sport in Europe*, 56.

²⁶⁶ Chappelet J-L, *Autonomy of Sport in Europe*, See generally 58-60.

²⁶⁷ Chappelet J-L, *Autonomy of Sport in Europe*, 58.

²⁶⁸ Chappelet J-L, *Autonomy of Sport in Europe*, 58.

Confederation (DOSB).²⁶⁹ It is autonomous. It has, however, signed contracts with the government setting out the rights, powers and obligations of both the government and the DOSB. Both France and Germany fund their sports federations. It could be argued that this is a tool of luring them to sign the contracts.²⁷⁰

These examples of negotiated autonomy illustrate that a state can discuss with its respective sports federations on sports matters. The Kenyan government can negotiate with the FKF and set out obligations, rights and powers of each party in a manner that will ensure accountability and transparency in football.

5.4. Conclusion

This dissertation has attempted to illustrate that the FIFA rule of non-interference has contributed to corruption. It has also illustrated that the FIFA rule of non-interference contravenes Kenyan law. By doing so, it has demonstrated the ability of FIFA to enforce its rules by virtue of it being a very powerful entity. This dissertation has also attempted to recommend solutions to the problem, that is, the Kenyan government should work towards having a system of negotiated autonomy.

²⁶⁹ Chappelet J-L, *Autonomy of Sport in Europe*, 59.

²⁷⁰ Chappelet J-L, *Autonomy of Sport in Europe*, 60.

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