

Football:

## Legal aspects of FIFA politics

### Independence, normalisation committees and the FIFA Ethics Committee

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#### Introduction

FIFA, for years, has been focused on managing the world's largest international football competitions.

The development and expansion of the world's most popular sport coupled with a drastic increase in the value of commercial rights and sponsorship for its largest commercial property, the World Cup, has enabled FIFA to amass an unprecedented amount of wealth and financial security.

As of the 2019 year-end, FIFA has increased its total assets to US\$ 4,504 million which was mainly made up of cash and financial assets (82%), while retaining reserves at US\$ 2,586 million.<sup>2</sup>

The ability to accumulate so much capital has provided FIFA with the opportunity to reinvest the financial successes of the World Cup back into the development of the game. The FIFA Forward Program was established as a funding mechanism to provide financial support to all the FIFA Member Associations ("MAs") and Confederations to "strengthen and fine-tune football in all its forms".<sup>3</sup> In 2019 alone, FIFA released US\$ 247,447,000 to MAs and another US\$ 66,000,000 to the six Confederations.<sup>4</sup> These funds, of course, are provided conditionally where it is required that MAs and Confederations meet certain benchmarks.

This assistance, however, is not limited to financial support

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<sup>2</sup> FIFA Annual Report, at page 124.

<sup>3</sup> FIFA Forward Development Program Regulations, Forward 2.0, article 2.

<sup>4</sup> FIFA Annual Report, at page 204.

to develop the game only on the pitch. FIFA, through its MAs division, seeks to monitor and reform MAs and Confederation "systems of governance, management and administration in order to improve the organisation and professionalism of their operations and thereby become more efficient, transparent and independent".<sup>5</sup>

In this article, the author seeks to review the legal aspects of situations where FIFA has sought to monitor and reform MAs and Confederation systems of governance, management and administration. The author will explain the various ways FIFA has or can either take over or collaborate with MAs or a Confederation; can intervene in the electoral processes of MAs; and how FIFA exerts its influence in order to force reforms from Zurich that may not otherwise have been the result of ideas within its members.

#### Principle of independence of MAs – two competing views

Although good governance is a laudable goal, the role of FIFA in attempting to manage governance issues within MAs and Confederations has been controversial. Despite the existence of the international football pyramid with FIFA at the top, MAs and Confederations are supposed to be independent entities that manage their own legal and governance affairs. The FIFA Statutes are clear in that they specifically stipulate that "[e]ach member association shall manage its affairs independently and without undue influence from third parties".<sup>6</sup> It is important to note that a Confederation is not a "member association" as only national football associations are included in that definition.<sup>7</sup>

This independence, however, is eroded in the application of other provisions of the FIFA Statutes. One of FIFA's stated objectives is "to control every

<sup>5</sup> FIFA Forward Development Program Regulations, Forward 2.0, article 2.

<sup>6</sup> FIFA Statutes, edition 2020, art. 19(1).

<sup>7</sup> FIFA Statutes, edition 2020, Definitions (12) "Member Associations".

*type of association football by taking appropriate steps to prevent infringements of the Statutes, regulations or decisions of FIFA or of the Laws of the Game”<sup>8</sup>*

This overriding residual power is also nuanced in the sense that:

- FIFA retains the ability to takeover MAs via the deployment of a “normalisation committee” (“NC”)<sup>9</sup>, which is viewed as the most controversial and interventionist tool that FIFA can use to intervene in MAs’ domestic governance business;
- the ability of stakeholders to contest NCs through litigation and private arbitration is limited;
- FIFA has taken creative steps to establish positions not enumerated in the FIFA Statutes, such as the FIFA General Delegate for Africa deployed to the Confederation of African Football (“CAF”), to address internal governance issues;
- MAs are obligated to ratify statutes that are in accordance with the requirements of FIFA Standard Statutes<sup>10</sup> where FIFA Ethics Committee decisions have a disproportionate effect on the conduct of elections for executive positions within MAs;
- FIFA has the ultimate power to suspend or expel MAs if it considers that the MA has violated FIFA Statutes giving FIFA the ultimate bargaining chip.<sup>11</sup>

In the past 24 months, FIFA has used some of these tools to influence governance at both the MAs and Confederations levels. Prior to addressing each of them under a separate heading, it is important to note that there are two competing legal theories as to the propriety of the use of these tools tipping the scales of the balance of power in FIFA’s favour.

The first is that any meddling in any governance issues internal to MAs or Confederations is a clear violation of the independence provision embodied in art. 19(1) of the FIFA Statutes. In addition, MAs and Confederations are either a private sport association or a corporation established under domestic law of their country of residence. This would imply that domestic state law would apply to the interpretation and application of statutes.

This is the view that was recently recognized by the High Court of Justice of Trinidad and Tobago in determining whether the takeover of the TTFA via a NC was lawful. The TTFA is a private association established under the domestic Act of Parliament number 17 of 1982. The High Court declared that the appointment of a NC to interfere in the affairs of the TTFA is null and void and of no effect and that the NC provisions of the FIFA Statutes are inoperable, as executive elections were carried out

<sup>8</sup> FIFA Statutes, edition 2020, art. 2(d).

<sup>9</sup> FIFA Statutes, edition 2020, art. 8(2).

<sup>10</sup> FIFA Statutes, edition 2020, art. 14(f).

<sup>11</sup> FIFA Statutes, edition 2020, art. 10.

in accordance with the TTFA Constitution whereby the NC cannot displace elected officials.<sup>12</sup> This is an extreme version of the view of non-interference as it stands for the premise that, as long as MA statutes are respected, FIFA cannot intervene in governance issues.

The second and competing view is that FIFA retains the residual legal authority to intervene in domestic governance issues, as long as it relies on specific provisions of FIFA Statutes. This second view finds its theoretical roots in the principles of the interpretation of international sporting federation regulations. The CAS has explained that *“the articles of association form the contractual basis of an association – a private law institution – it can be argued that they have much in common with contracts and should therefore be interpreted through the contractual principles of the subjective intent of the parties and good faith”*.<sup>13</sup> This perspective sees sports federation regulations as a form of contract that incorporates, agrees to and accepts the provisions of other regulations. The result is that provisions contained in the FIFA Statutes, such as those concerning NCs, are lawful and applicable to internal MA governance business, even if it does not exist in the MA constitution.

It is important to note that the decision of the High Court of Justice of Trinidad and Tobago was overturned on appeal. Although the Court of Appeal allowed FIFA’s appeal on the basis that domestic courts do not retain jurisdiction to hear disputes between FIFA and MAs, the reasoning applied this second view. Both the TTFA Constitution and FIFA Statutes are clear in that such disputes “shall not be submitted to Ordinary Courts”.<sup>14</sup> These jurisdictional provisions were agreed to by both the TTFA and FIFA and the Court of Appeal ruled that the High Court was in no position to prohibit the use of the NC.

### Normalisation committees

Art. 8(2) of the FIFA Statutes allows FIFA to deploy a NC as follows:

*“Executive bodies of member associations may under exceptional circumstances be removed from office by the Council in consultation with the relevant confederation and replaced by a normalisation committee for a specific period of time.”*

The FIFA MA division can monitor and reform MA systems of governance, management and administration in several ways. An example of low-level interventionism is when the MA willingly reaches out to FIFA to assist in drafting or amending its statutes or regulations. For some, the NC is highly intrusive and

<sup>12</sup> CV2020-01208 *TTFA v. FIFA*, The High Court of Justice of Trinidad and Tobago, Justice Gobin.

<sup>13</sup> CAS 2017/A/5356 *South African Football Association v. FIFA*, Fédération Burkinabé de Football, Fédération Sénégalaise de Football & Federação Caboverdiana de Futebol, at par. 83.

<sup>14</sup> Constitution of the TTFA, art. 65(1); FIFA Statutes, edition 2020, art. 59(2).

an excess use of FIFA power for several reasons.

The starting point is that the NC completely removes the executive body of an MA. There are instances that this may be appropriate. One example that comes to mind is the use of a NC over the Egyptian Football Association (“EFA”). There, the entire executive committee of the EFA resigned during the 2019 Africa Cup of Nations, which it was hosting, when Egypt was knocked out of the tournament in round 16. In that case, FIFA had no other choice but to intervene and provide leadership as the EFA was left rudderless.

There are cases, however, where the removal of the executive may not be appropriate, and the ambiguous language of the FIFA Statutes does little to define this power.

According to FIFA Statutes, a NC can be imposed in “*exceptional circumstances*”. The only limitation is that it be carried out in consultation with the relevant Confederation, and that it must be for a specified period. Quite literally, there are no other provisions, anywhere in the FIFA Statutes restraining the power of FIFA to impose an NC. The FIFA regulations offer no examples of nor do they define “*exceptional circumstances*”. The result is that the regulations are ambiguous, leaving FIFA with an immense berth of discretion.

It would appear that this limitless discretion may allow for FIFA to replace an MA executive committee in cases where it was duly elected in accordance with the MA’s constitution. This was the precise issue that the Trinidad and Tobago High Court’s decision addressed where it determined that “[t]here is no definition as to what amounts to *exceptional circumstances* [which ...] *essentially gives FIFA a free hand*”.<sup>15</sup>

FIFA performed an audit of the TTFA in 2019. These types of audits mostly concern the use of the FIFA forward funds described above. The audit revealed that the TTFA debt was US\$ 16 million in 2015 and rose to US\$ 50 million at the date of elections which were held in November 2019. FIFA subsequently sent a mission to the TTFA at the end of February 2020 and the NC was appointed three weeks later dissolving the TTFA executive committee.

The 2019 president elect of the TTFA was not the president during the period that the debt ballooned. The question many have posed, however, is what changed in the three months between the election and the FIFA delegation’s visit to Trinidad and Tobago? It is difficult to fathom that a newly formed executive committee could have ruined the TTFA’s financial situation in such a short time. If the executive committee elect was not responsible for the dire financial situation, would not justice be better served by giving properly elected representatives at least the opportunity to sort out these issues?

A less interventionist method employed by FIFA would

<sup>15</sup> CV2020-01208 *TTFA v. FIFA*, The High Court of Justice of Trinidad and Tobago, Justice Gobin, par. 37.

have been for its MAs’ division to have worked side by side with the duly elected TTFA executive to reform the TTFA’s financial situation. Instead the terms of the NC deployed specifically stated that the purpose and mandate of the NC was “*to organise and conduct elections of a new TTFA Executive Committee for a four-year mandate*”. The ambiguous nature of the circumstances that allow for the imposition of an NC can create the opportunity for what appears to be political interference. Whether the interference is perceived instead of real is irrelevant. The mere appearance of impropriety and political motive in dissolving a duly elected MA’s executive committee does little to enhance faith in the process.

The TTFA is only one example of a case where the ambiguous language of the FIFA Statutes allows for interference. The author of this article counted 14 NCs that were deployed by FIFA in the last two years, which is indicative of the highly interventionist model FIFA is adopting in the interpretation of its own Statutes.

### Private arbitration and litigation to limit NCs

According to this author, the Court of Appeal was correct in law and FIFA was accordingly successful. The TTFA Constitution clearly states that disputes shall not be submitted to ordinary state courts unless FIFA or TTFA regulations explicitly allow for such a path. There are no football regulations, either domestically to the TTFA or internationally at FIFA, that grant anyone in the football family the legal authority to commence litigation in a state court in this type of case. The CAS was and is the only appropriate forum to hear this case. These are the rules of the game to which all members of the football family have agreed.

The issue, however, is not whether the case was correctly decided by the Court of Appeal. What is correct in law is not always just in policy. The real issue is that the current state of football law leaves no room to challenge a unilateral FIFA take-over of an independent football association via the imposition of a normalization committee. Although the correct appeal route for this type of case is the CAS, the TTFA was fighting an uphill battle, rightly or wrongly, from the beginning.

Bringing an appeal against a decision to impose an NC to the CAS appears to be possible. Art. 57 of the FIFA Statutes allows for the CAS “*to resolve disputes between FIFA, member associations, confederations, leagues, clubs, players, officials, intermediaries and licensed match agents*”. Under a plain reading of this provision an executive or an MA would have standing to bring such an appeal as the opposition of a NC is a dispute in the widest sense of the term.

The issue, however, is the nebulous nature of the “*exceptional circumstances*” threshold. In such an appeal, the arbitrators would have had to determine to their comfortable satisfaction if the circumstances in the MA were “*exceptional*” with little guidance as to its meaning. Considering that the discretion appears to be unfettered, the result is seemingly predictable. Absent

blatant instances of politically motivated interference without any evidence of any wrongdoing, second guessing FIFA's unfettered discretion may prove to be difficult.

The second difficulty in opposing an NC before the CAS is that the costs are prohibitive. A CAS appeal of a governance case can range from CHF 25,000 to CHF 60,000. The appellant would have been responsible to pay 50% of that immediately or the case does not go ahead. The respondent, here FIFA, is invited to pay the remaining 50%. Under the rules of the CAS, any party being sued can refuse to pay that 50%. If they do not, the appellant must pay that remaining 50% or the case dies on the vine.

What is notable, is that it is FIFA policy to never shoulder that burden leaving appellants to bear the entire costs of the arbitration. Although it is allowed under the CAS rules, it is curious that the world governing body of football policy induces cases to be dismissed where members of the football family cannot afford access to justice. It is particularly curious because if FIFA paid 50% of the costs in such a case and it were successful in the CAS case, the party opposing the NC would have had to reimburse FIFA for those outlays.

It is true that FIFA's refusal to pay those costs is within the rules. Perhaps, however, the rules should be changed. FIFA CAS cases that involve disciplinary matters, such as ethics cases or appeals of player suspensions of more than four matches, are free and the costs are borne by the CAS administration. Perhaps the rules concerning the costs of governance cases should be changed accordingly giving members of the football family access to affordable justice to resolve football political disputes where there are real legal issues.

Domestic Swiss courts would not have offered the TTFA or other MAs any relief either. FIFA is a private association under Swiss law. Swiss law is clear in that private associations are free to make their own rules as they see fit, and the FIFA Statutes definitively exclude recourse to domestic courts. Moreover, the CAS is also established under Swiss law and is recognized as an international arbitration tribunal, which, in Swiss legal culture, is widely recognized as a legitimate arbiter of disputes. It is likely that a Swiss court would have had less of an appetite to accept to hear this type of case than any other domestic legal system.

The only way a Swiss court could be used is if a CAS decision is appealed to the Swiss Federal Tribunal ("SFT"). In addition, the likelihood of the SFT overturning a decision of the CAS is low. This is because the SFT does not hold a retrial reviewing the correctness of the decision but will only intervene if a fundamental principle of justice has been violated. As long as the CAS follows its own rules, which it usually does, an appeal will not be successful. Finally, although fees for Swiss lawyers vary, it may cost up to CHF 25,000 to retain an attorney, which is considerably high in comparison to other parts of the world.

## FIFA General Delegate for Africa and the CAF

A second example of FIFA interventionism in governance issues is the unprecedented and creative step to appoint the FIFA Secretary General as the FIFA General Delegate for Africa deployed to the CAF to address internal governance issues.

The background behind this action was an audit, carried out by PriceWaterhouse Coopers ("PwC"), which found that:

- CAF's accounting was "unreliable and not trustworthy";
- some 35 of 40 large payments, totalling US\$ 8.3 million, were "unusual" or had "little or no supporting documentation";
- CAF is "understaffed" with an "overworked" and "demotivated" workforce;
- CAF's presidential office was "directly involved" in the controversial decision to employ Tactical Steel, a little-known gym equipment manufacturer, to become a key supplier of sportswear; (and)
- the audit highlighted transactions totalling more than US\$ 20 million (£ 15.4 million) which either have "little or no supporting documentation" or were considered "higher risk".<sup>16</sup>

On 5 June 2020, the CAF President was detained in Paris for questioning by police with respect to the Tactical Steel issue. Appearing to have lost patience with this situation, FIFA proposed that it deploy its General Secretary Fatma Samoura as FIFA General Delegate for Africa to the CAF. The proposal, which included a delegation of FIFA employees seconded to the CAF headquarters, outlined several areas of reform from the complete review and audit of the CAF's finances to the oversight and change to competition regulations, which are usually the exclusive domain of a federation.

What is of note is that the FIFA General Delegate for Africa is not a position that exists in either the FIFA or CAF Statutes. To make such an appointment both the CAF and FIFA Statutes would have had to have been amended or the CAF executive committee or general assembly would have had to vote and agree to such oversight. The CAF held two executive committee meetings in June and July of 2020 where this proposal was discussed. What is unclear is whether the CAF executive committee took a vote in accepting FIFA intervention. Some members of the executive committee, including Mr. Musa Bility, the former President of the Liberian Football Association and a member of the executive committee, who was present at both of those meetings, dispute that an actual vote was taken and that FIFA intervention was not agreed to by the CAF. FIFA and the CAF administration claim that the executive committee did ratify the appointment.

At the subsequent general assembly, the President of FIFA and the President of the CAF signed a "road-map" outlining the terms of the appointment for a renewable

<sup>16</sup> Piers Edwards, *African football body Caf in disarray, audit reveals*. BBC Sport Africa, 13 February 2020, available at <https://www.bbc.com/sport/africa/51478837> (accessed 27 November 2020).

period of six months. Mr. Bility then filed an appeal to the Court of Arbitration for Sport (CAS), alleging that the appointment of the FIFA General Delegate for Africa was not made in accordance with the CAF and FIFA Statutes. The appointment was opposed on a procedural basis, because it was alleged that neither the executive committee nor the general assembly agreed, as well as on a substantive basis where it was alleged that this appointment fundamentally eroded the powers of the CAF afforded to it under its Statutes. As the appeal progressed through the various procedural stages of the CAS proceeding, FIFA employees were working in the CAF head office under what FIFA described as cooperation.

The decision to appoint the FIFA General Delegate for Africa was quite controversial. The deployment of NCs only applies to MAs and not to Confederations. Whether there were “*exceptional circumstances*” as required in art. 8(2) of the FIFA Statutes is irrelevant as that tool was not available to FIFA to dissolve the CAF executive committee. What FIFA could not accomplish, via an existing tool in its Statutes, it attempted to do so by creating this position through a decision of the FIFA Council. That an appeal was lodged opposing the appointment, by someone who was present at the executive committee meetings, demonstrates that this intervention was not wholeheartedly welcomed.

In any event, this form of governance intervention ended when the CAF executive committee refused to renew the terms of the road map after six months. As the issue was moot, Mr. Bility withdrew the CAS appeal.

This level of governance intervention, from a legal perspective, was unprecedented. Despite the governance and corruption issues in South America where CONMEBOL executives were facing criminal prosecution in the United States, FIFA did not intervene in such a manner. Elections for the CAF executive committee are currently set for March 2021 and perhaps this issue will be raised in the coming months.

### **FIFA Standard Statutes, Ethics Committee decisions and MA executive elections**

The third way the author of this article identifies FIFA interventionism in domestic governance issues is through the application of the FIFA Standard Statutes. FIFA Statutes dictate that MAs must “*ratify statutes that are in accordance with the requirements of the FIFA Standard Statutes*”.<sup>17</sup> There is room for MAs to implement statutes that may deviate from these standards, as long as they are reasonable and justified and/or tailored to the needs of the particular MA.

One consistent provision in the FIFA Standard Statutes is that members standing in elections for positions within the executive committee of an MA must undergo an integrity check. This is not only uncontroversial, but necessary to ensure good governance. What is notable is that the FIFA Standard Statutes apply a provision that

declares anyone, who has previously been convicted by a final decision of any offence corresponding to a violation of the rules of conduct set out in part II section 5 of the FIFA Code of Ethics, ineligible from standing in an election for a position of an MA executive committee position.

Although this type of intervention may not be intrusive as the MA would ultimately have to ratify its own constitution, the substance of this eligibility criteria appears to contravene principles of fundamental justice.

Part II section 5 of the FIFA Code of Ethics enumerates the types of conduct that are prohibited. It ranges from more minor offences, such as the duties of confidentiality and the duties to report and cooperate, from more serious offences, such as offering and accepting a gift and benefits, the protection of physical and mental integrity and bribery and corruption. In addition, depending on the alleged conduct, the sanctions available to the FIFA Ethics Committee range from a warning or reprimand all the way to a life ban from taking part in football related activities.<sup>18</sup> This necessarily implies that in most MAs an individual, who committed a minor Code of Ethics infraction, will be ineligible to stand for election, no matter the actual sanction imposed. A person who received a ten-year ban for corruption and bribery would be treated in an integrity check as someone who received a reprimand for divulging confidential information.

This type of outcome flies in the faces of principles of fundamental justice and proportionality for obvious reasons. It is also noteworthy that the FIFA Code of Ethics itself requires that an appropriate sanction should account for “*all relevant factors in the case, including the nature of the offence; the substantial interest in deterring similar misconduct; the offender’s assistance to and cooperation with the Ethics Committee; the motive; the circumstances; the degree of the offender’s guilt; the extent to which the offender accepts responsibility; and whether the person mitigated his guilt by returning the advantage received*”.<sup>19</sup> Treating all Code of Ethics violations identically for the purposes of election eligibility vitiates these principles.

Some may argue that such a person would only be prohibited from one type of job in the football world and that this type of treatment is not a breach of fundamental justice. Perhaps a more proportionate response would be to have persons, who have breached the more serious provisions of the FIFA Code of Ethics, or who have received bans of one year or more, to be prohibited from standing in elections. Even most national domestic governments do not prohibit politicians from standing in elections for minor ethical breaches.

### **Conclusion: FIFA powers of suspension**

The fact of the matter is that FIFA holds the ultimate bargaining chip in that it can suspend MAs and Confederations for breaches of the FIFA Statutes. Pursuing

<sup>17</sup> FIFA Statutes, edition 2020, art. 14(f).

<sup>18</sup> FIFA Code of Ethics, edition 2020, art. 11.

<sup>19</sup> FIFA Code of Ethics, edition 2020, art. 9(i).

a domestic court injunction against the deployment of an NC or to suspend an election for irregularities in an election eligibility case could be a cause for suspension. Moreover, FIFA can threaten the suspension before domestic litigation reaches such an advanced stage.

A suspension can have serious consequences where FIFA funding will be cut off and the national teams cannot compete in international competitions. A suspension effectively pushes MAs outside the football world rendering the ability to fulfil its basic functions impossible. This is FIFA's real power of intervening in local FA governance business which may put the principle of independence between institutions severely at risk.