

COLLUSION! IN DEFENCE OF FREE SPEECH IN SPORTS AND THE UNACCOUNTABILITY OF GLOBAL SPORTS ADMINISTRATION BODIES

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ABSTRACT

Global Sports Administrative Bodies are powerful and influential institutions. Sovereign States in their individual capacities struggle to deal with some of their rules and decisions. They also have direct jurisdictional authority over individual athletes. At the centre of their jurisdictional authority is their power to admit, suspend or expel both individual nations and athletes from participating in global sporting competitions. Athletes have to be careful about what and how to express themselves on and off the field because of restrictive rules on speech. Freedom of Speech in sports is, therefore, under serious threat because of multi-million dollar commercial interests in the form of sports sponsorships benefiting Global Sports Administrative bodies. Consequently, within the context of global sports administration some domestic constitutional freedoms such as freedom of expression rank below international rules set by these Global Sports Administrative institutions. Such conflict is not easy to resolve and it requires political rather than legal initiatives to resolve. Sovereign nations are unable to protect themselves and their athletes against some unfair decisions of global sports administrative bodies. Concerted efforts by groupings of nation states at continental or regional levels are an imperative in dealing with what appears to be administrative excesses of Global Sports Administrative Bodies.

Key Words: *Global Sports Administrative Bodies, The Fédération Internationale de Football Association (FIFA), Court of Arbitration for Sport (CAS), International Amateur Athletics Federation (IAAF), Freedom of Expression, Doctrine of Prior Restraint, Commercial Sponsorships*

INTRODUCTION

On Saturday 26 June 2010 at 09.00am there was an extensive report on the Zimbabwe Broadcasting Corporation's former SFM radio station

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morning news bulletin on Zimbabwe Football Association (FIFA)'s ban on football players who celebrate scoring goals by pulling off their shirts to show religious messages inscribed on undergarments such as vests. The most common message was "I belong to Jesus." The report went on to say that ZIFA had taken a similar measure on Evans Gwekwerere, a local football player. ZIFA imposed a ban on him for showing an undergarment vest with a similar type of message each time he scored a goal for his club, Dynamos. On 6 February 2014, a local newspaper *The Chronicle* reported that "HIGHLANDERS FC faces serious sanctions from the world soccer mother body FIFA if their coach Kelvin Kaindu continues to wear clothing with religious statements during matches. The Zambian mentor, a God-fearing man, has sometimes been spotted during official matches wearing a white shirt with the inscription, Joshua 1v5 or 'It Shall be Well'."²

The Vatican Sports Foundation was reported as having criticized FIFA for trying to ban religious expressions. According to the Catholic news agency website, the President of the John Paul II Foundation for Sports, Eddio Constantini "...severely criticised the president of the International Soccer Association Board (FIFA), Joseph Blatter, for seeking to prohibit religious speech during matches. Blatter's action came after the Brazilian national team huddled for a prayer at the conclusion of the Confederations Cup"³

The FIFA ban against any player displaying an undergarment with religious or political expressions emanate from FIFA Law 4, Clause 5, which states that "Equipment must not have any political, religious or personal slogans, statements or images. Players must not reveal undergarments that show political, religious, personal slogans, statements or images, or advertising other than the manufacturer's logo. For any offence the player and/or the team will be sanctioned by the competition organiser, national football association or by FIFA."⁴

² Skhumbuzo Moyo, "It shall NOT be well: FIFA bans clothing with religious messages" *The Chronicle*, 6 February, 2014

³ "Vatican Sports Foundation Criticises FIFA for trying to ban religious expression" 16 July 2009, www.catholicnewsagency.com Accessed on 10 August 2010

⁴ FIFA LAWS OF THE GAME 2009/2010 http://www.fifa.com/mm/document/affederation/federation/81/42/36/laws_of_the_game_en.pdf. Accessed on 10 August 2010 and the latest version is 2018/2019, http://static-3eb8.kxcdn.com/documents/661/133139_290518_LotG_18_19_EN_DoublePage_150dpi.pdf Accessed on 19 July, 2018

FIFA Law 4, Clause 5 expressly bans any form of speech on undergarments worn by footballers. It is wide in its scope of application and it *prima facie* infringes on the concerned footballers' fundamental right to freedom of expression. This law has not materially changed since the World Cup in South Africa was held even though FIFA and the International Football Association Board regularly reviews the "Laws of the Game"

THEORETICAL FRAMEWORK

The theoretical justification for supporting protection of free speech in general has been thoroughly explained in literature and there is no need to repeat it. However, the general protection of free speech has been premised mostly on protection of political speech probably because it lies at the core of the circle of protection⁵ of free speech and although one of the fundamental justifications for protection of free speech is self-fulfilment or self-realisation⁶ which is inextricably linked to individual autonomy⁷. Self-fulfilment ordinarily underpins the intrinsic value of free speech more than its instrumental value, especially in defence of free speech in professional sports which are inherently associated with the desire for team or individual achievements. Thomas Emerson makes reference to self-fulfilment in his identification of four values underpinning the importance of free speech which are as follows:

- 1) assuring individual self-fulfilment; 2) advancing knowledge and discovering truth; 3) provid[ing] for participation in decision making by all members of society; 4) achieving a more adaptable and hence a more stable community, ...maintaining the precarious balance between healthy cleavage and necessary consensus.⁸

Competitiveness in professional sports is inherently characterised by the desire for self realisation underlined by the hunger to succeed or upstage one's competitor more than for its recreational purposes. The expressions that follow in the heat of the moment especially after a contest won or a goal in football scored, regardless of whether the team is on the losing end or not, demands tolerance. Lee Bollinger

⁵ Richard Moon *The Constitutional Protection of Freedom of Expression* University of Toronto Press, Toronto, Buffalo London, p 16

⁶ Thomas I Emerson "Towards a general theory of the First Amendment" 72 *Yale Law Journal* 877 1962-1963 p 878-9

⁷ Ibid

⁸ Ibid

introduces a new debate on this concept and argues that ‘tolerance’ equates to “showing understanding or leniency for conduct or ideas...conflicting with one’s own’ rather than as the ability to endure.”⁹ Tolerance thus underlines the intrinsic value of free speech which is inextricably linked to self-fulfilment or self-realisation. Thus, the emergence of success or a win in any competitive professional sports is the pinnacle of self-realisation or self-fulfilment which is usually denoted by certain individual expressions whether involuntarily or voluntarily done in response to a momentous achievement.

Therefore, this paper argues that speech which is ordinarily expressed by footballers especially in victorious moments; including the revelation of expressions written on undergarments deserve protection due to the intrinsic value of that articulation to the individual expressing it. Further that where such speech violates other people’s rights as defined by individual domestic constitutions of the affiliate members of FIFA, appropriate legal sanctions should then be imposed *post facto* rather than imposing pre-publication bans. Thus, protection of speech in sports should be premised ordinarily on the justification of self-realisation and tolerance of speech and this is advanced here as a basis against the denial of free speech rights of athletes by global sports administrative bodies like FIFA.

FREEDOM OF EXPRESSION UNDER ZIMBABWEAN LAW

Freedom of expression is guaranteed by Section 61 (1) of the Zimbabwean Constitution, which provides that:

“Freedom of expression and freedom of the media

- (1) Every person has the right to freedom of expression, which includes-
 - (a) freedom to seek, receive and communicate ideas and other information

And section 61 (5) provides that:

Freedom of expression and freedom of the media exclude;

- (a) incitement to violence
- (b) advocacy of hatred or hate speech;
- (c) malicious injury to a person’s reputation or dignity;
- (d) malicious or unwarranted breach of a person’s right to privacy.

⁹ Bollinger Lee C. *The Tolerant Society: Freedom of Speech and Extremist Speech in America* Oxford: Oxford UP 1986

Section 61 (1) constitutionally guarantees the right to free expression whilst section 61 (5) prohibits certain forms of speech as noted above. The speech that is banned by FIFA's Law 4, Clause 5 is one that is generally protected under the Zimbabwean Constitution.

DEFINITION OF THE PROBLEM

The question that this paper seeks to answer is how then does one reconcile constitutional guarantees and the rules of sport without necessarily interfering with the efficient administration of sport? The problem with FIFA's rule is that it bans all kinds of slogans and advertising on undergarments. The rules do not categorise what is acceptable and unacceptable speech but imposes pre-publication ban of forms of expression on undergarments. It is understandable that some forms of speech may impinge on the basic rights of other people and some commercial speech may conflict with the rights of corporates with exclusive rights to advertise at FIFA organised events and tournaments. Football is a source of livelihood for many professional footballers and, as such, it is presumed that care is needed through management to ensure the protection of the investment taken by major stakeholders in the sport. Most of the financing in football comes from the sale of television and radio broadcasting rights, and team and individual sponsorship endorsements. Nevertheless, the question remains as to whether the ban should be effected prior to publication or post facto or at all. *Prima facie*, any form of pre-publication ban of speech is censorship and it must be settled by our courts as to whether such justification is reasonably justifiable in a democratic society.

PRE-PUBLICATION BAN

The pre-publication ban of undergarment speech that is created by the provisions of FIFA's Law 4, Clause 5, is drawn from the doctrine of prior restraint. This, as explained by Thomas J Emerson "...deals with official restriction imposed on speech or other forms of expression in advance of actual publication and its effect is to prevent communication from occurring at all."¹⁰ Ariel L. Bendor argues that "in practice, it is possible to restrict a right through the use of criminal law, civil law, administrative law, or a combination of both. Rights may be limited by means of physical or normative prior restraint (action taken to prevent a given act from occurring), by means of subsequent

¹⁰ Thomas J Emerson 'The Doctrine of Prior Restraint' *Law and Contemporary Problems*, Vol 20 No. 4 (Autumn 1955), p 648

sanctions (penalties imposed to create a disincentive to act in a certain way), or by combination of the two.”¹¹

Violation of FIFA’s Law 4, Clause 5 by any footballer attracts sanctions which can either be a caution (yellow card) or expulsion (red card) from the football match and, in some grave circumstances, financial penalties. Prior restraint is, therefore, a form of censorship which is not concerned with the substance or content of the speech no matter how positive or harmless it may be. John Calvin Jefferies argues that “Any system of prior restraint of expression comes to court bearing a heavy presumption against constitutional validity.”¹²

The construction of Section 61 (1) (a) of the Zimbabwe Constitution *prima facie* makes the doctrine of prior restraint illegal unless, after balancing the provisions of this section with the rights of any other people in terms of section 86 (1) of the same Constitution, it is found that the limitation of speech by way of a prior restraint was reasonable and justifiable in a democratic society. Whilst freedom of speech is the cornerstone of human liberty and dignity,¹³ this fundamental right is nevertheless not absolute.¹⁴

FIFA’s intention is to protect its commercial interests through the sale of television broadcasting rights and attracting sponsorship from various corporates. Therefore, care is taken not to permit expressions or conduct likely to hurt the interests of the sponsors.

However, there seems to be some discriminatory application of the rules by FIFA and its affiliates because whilst written expressions on undergarments are prohibited, the same measure of restriction is not applied to other expressive displays such as dreadlock hair styles which may be regarded as a form of religious expression. The issue of dreadlocks is of particular importance because whilst some footballers wear them for fashion others do so as part of the Nazarene religious practice associated with the Rastafarian religious movement.¹⁵ Dianne

¹¹ Ariel L Bendor ‘Prior Restraint, incommensurability, and the constitutionalism of means’ *Fordham Law Review* Vol 68 1999, p 294

¹² John Calvin Jefferies, Jr ‘Rethinking Prior restraint’ *Yale Law Journal* Vol 92, No.3 (Jan. 183), p 409

¹³ *Cohen v California* 403 US 15, 24

¹⁴ Section 36 of the Constitution of South Africa

¹⁵ Dianne Gereluk ‘Why can’t I wear this?! Banning symbolic clothing in schools’ *Philosophy of Education* 2006 at p 107 <http://ojs.ed.uiuc.edu/index.php/pes/article/viewFile/1522/262> Accessed on 13 October 2010

Gereluk argues that Rastafarianism is a religion and some who have been sanctioned for wearing dreadlocks in school have argued against the bans on the basis of freedom of religion. The Supreme Court of Zimbabwe in *re Enoch Chikweche*¹⁶ held that the status of Rastafarianism as a religion in the wide and non-technical sense had to be accepted and the applicant's manifestation of his religion by wearing dreadlocks fell within the protection afforded by s 19(1) of the pre-2013 Constitution of Zimbabwe.¹⁷ The Court cited with approval the decision of Judge Posner in *Reed v Faulkner* 842 F 2d 960 at 962 where he held that Rastafarianism is a religious sect that originated among black people in Jamaica...¹⁸ It follows, that if wearing Rastafarian dreadlocks is regarded as a form of religious expression then why should FIFA discriminate against footballers who express their faith by wearing under-garments with religious messages printed on them?

The Tehran Times reported that FIFA attempted to ban female Iranian football players from wearing the hijab whilst playing football at the Youth Olympic Games notwithstanding their strict Islamic dress code.¹⁸ Lack of policy consistence on the part of FIFA regarding intolerance towards certain forms of expressions displays a selective ban of some forms of expression. Such bans deny both the intrinsic and instrumental values of individual forms of expression as expressed within the context of sport.

SPORTS AS A HUMAN RIGHT

A number of international instruments recognise participation in various sporting disciplines as a human right. Paragraph 4 of the Fundamental Principles of Olympism acknowledges that "The practice of sports is a human right". Article 11 of the Convention on the Elimination of All Forms of Discrimination against Women makes reference to the provision of the same opportunities to participate actively in sports and physical education. Article 1 of the United Nations Educational Scientific and Cultural Organisation (UNESCO)'s Charter of Physical Education, Physical Sport provides in Article 1.1 that "Every human being has a fundamental right of access to physical education

¹⁶ 995 (4) SA 284 (ZC)

¹⁷ Ibid at p 290 G

¹⁸ *The Tehran Times* 'FIFA ban Iranian Women from wearing the Hijab in YOG', April 4, 2010 <http://www.tehrantimes.com/PDF/10836/10836-13.pdf> Accessed on 18 October 2010

and sport, which are essential for the full development of his personality.” This proposition affirms the nature of human rights as a complex symbiotic web of social values that modern democratic states accord to all their citizens. Sport is, therefore, a medium of expression of talent, skills, intellectual art, ideas and thoughts through which successful participation brings joy and personal fulfilment to the individuals concerned. The joy may not be complete unless forms of expression are performed and any inhibition of such performances will be *prima facie* in violation of the individual footballer’s freedom of expression.

IMPORTANCE OF FREEDOM OF EXPRESSION

In re *Munhumeso & Ors*¹⁹ Gubbay CJ observed that “The importance attaching to the exercise of the right to freedom of expression and freedom of assembly must never be under-estimated. They lie at the foundation of a democratic society and are one of the basic conditions for its progress and for the development of every man.”²⁰ The judge further argued that “Freedom of expression, one of the most precious of all the guaranteed freedoms has four broad special purposes to serve; (i) it helps an individual to obtain self-fulfilment; (ii) assists in the discovery of truth; (iii) it strengthens the capacity of the individual to participate in decision making; and (iv), it provides a mechanism by which it would be possible to establish a reasonable balance between stability and change.”²¹

The Constitutional Court of the Republic of South Africa has made similar observations and acknowledgments as exhibited by O’Regan J’s views in *Fred Khumalo & Ors v Bantubonke Harrington Holomisa*²² that “Freedom of expression is integral to a democratic society for many reasons. It is constitutive of the dignity and autonomy of human beings. Moreover, without it, the ability of citizens to make responsible political decisions and to participate effectively in public life would be stifled.”²³

The value of freedom of expression is recognised in international instruments including the International Covenant on Civil and Political

¹⁹ 1994 (1) ZLR 49 (S)

²⁰ *Ibid*, at p56

²¹ *Ibid*, at p57

²² CCT 53/01

²³ *Ibid*, at para 21

Rights (ICCPR) (Article 19 (2)), the European Convention on Human Rights (ECHR) (Article 10 (1)), the American Convention on Human Rights (ACHR) (Article 13), and the African Charter on Human and People's Rights (ACHPR).

IS FREEDOM OF EXPRESSION AN ABSOLUTE RIGHT?

It has been observed in *Khumalo and Others v Bantubonke Harrington Holomisa* (Supra) that "... although freedom of expression is fundamental to our democratic society, it is not a paramount value. It must be construed in the context of the other values enshrined in our Constitution."²⁴ A court seized with the duty to construe the scope and application of a fundamental right as against the rights of others must play a balancing act that ensures the right equipoise between recognition and enforcement of the right and the respect of the rights of other citizens.

In the exercise of one's freedom of expression regard must be had to constitutional limitations. However, it must be noted that "Rights and freedoms are not to be diluted or diminished unless necessity and intractability of language dictate otherwise."²⁵ The test will not be complete unless a court answers the question whether it is reasonably justifiable in a democratic state to curtail a particular constitutional freedom as required by s86 (1) of the Constitution of Zimbabwe.

'I BELONG TO JESUS' CELEBRATION

The question which this paper attempts to answer in addition is how expressions such as 'I belong to Jesus' can be protected in international sports administered by International Sports Federations such as FIFA. Thomas Scanlon argues that "In order for any act to be classified as an act of expression it is sufficient that it be linked with some proposition or attitude which it is intended to convey".²⁶ Therefore, the exhibition of an undershirt or garment with the inscription '*I belong to Jesus*' is a religious expression acknowledging of the power of Jesus Christ which the athletes concerned probably link to their sporting success and it stands as a proposition which the footballers concerned intend to convey. Consequent upon this and on the basis of Thomas

²⁴ *Khumalo & Ors* (Supra) at para 21

²⁵ Thomas Scanlon 'Theory of Freedom of Expression' *Philosophy and Public Affairs* Vol 1 Number 2, (Winter 1972), p 206

²⁶ Ibid

Scanlon's reasoning,²⁷ this expression should be protected speech because of the intrinsic religious value it carries for some of the professional footballers.

RATIONALE FOR CENSORING EXPRESSION IN SPORT

Ray Tarnowski²⁸ argues that censorship in sport is employed because professional leagues are run like businesses and, as such, authorities running a particular professional sport such as football have particular concern for the image they portray to the public. Therefore, they would not want to alienate public support for a particular sport²⁹ which they administer. He further contends that "no sports league could prosper if its product – the athletes and coaches – offend the public."³⁰ In sports such as NBA basketball, financial penalties are imposed for breaking censorship rules even where a particular player self-criticizes or is critical of match officials. In football, a player is shown either a yellow card for minor offences or a red card for repeated or serious offences. John O. Spengler *et al*,³¹ argue that "Constitutional law usually is not applicable to professional sports for two major reasons. One, athletes in professional sports are parties to a collective bargaining agreement. When a player union agrees to a collective bargaining agreement, certain individual rights are relinquished, including freedom of expression. Secondly, professional Sports Leagues are not state actors but private entities."³² Aleck Van Vaerenburg points out two issues that make it difficult for human rights to be taken as part of the Sports Administration, namely, contractual and lack of government involvement in the administration of sport. It must be noted that the second reason proffered by Spengler *et al* relates to the application of the United States of America's Constitution which is to the effect that "The majority of the rights and protections afforded by the US Constitution and its amendments only apply to governmental or state action."³³

²⁷ Ibid

²⁸ Ray Tarnowski 'Shut Up and play: Censorship in major professional sports' April 24, 2003, <http://www.unc.edu/~tarnowsk/shut.pdf> Accessed on 16 July 2010.

²⁹ Ibid, page 2

³⁰ Ibid, page 2

³¹ John O Spengler, Paul Anderson, Daniel P Cannoughton and Thomas A Baker, *Introduction to Sports Law*, p162

³² John O Spengler, Paul Anderson, Daniel P. Cannoughton and Thomas A Baker *Introduction to Sports Law* p 162

³³ Ibid p 163

The South African position differs as argued by Jonathan Burchell that “The Constitutional Court ...has underscored the application of the Bill of Rights (Chapter 2 of the Constitution) to relationships between private individuals, as well as between State and the individual.”³⁴ The Zimbabwean position is similar to that of South Africa by virtue of the provisions of s 45 (1) and (2) of the Constitution of Zimbabwe which stipulate the scope of application of the Bill of Rights. *Prima facie*, an individual sportsman whose constitutional rights may have been violated by a sports federation (which can be a private body) can, on the basis of the violated right, seek vindication of his or her rights.

ARBITRATION CLAUSES AND WAIVER OF CONSTITUTIONAL RIGHTS

FIFA’s constitution provides for dispute resolution mechanism through arbitration and its constitution which requires the inclusion of arbitration clauses as a form of dispute resolution mechanism in the constitutions of the national football associations/federations down to the professional football clubs’ statutes of governance for as long as they are affiliated to the national association which is a member of FIFA. Consequent upon this, it is the individual footballer who suffers in the event of any violation of his or her constitutional freedoms due to the restrictions that have to be included in club contracts preventing individual footballers from suing FIFA or their national association in domestic courts. The complexity of this issue is that football tournaments are organized either by the national association or the international federation and, as such, professional footballers are made to contract themselves out of their constitutional rights whenever they take part in their sport.

Louis M Benedict argues that “... *the broad truth is that within the international system States are much less important...*”³⁵ mainly because they compete against each other on platforms established by private international bodies such as FIFA and the International Amateur Athletics Federation (IAAF). He further contends that “... *these major international bodies operate at a level of coherent global*

³⁴ Jonathan Burchell ‘The legal protection of privacy in South Africa: A transplantable hybrid’ *Electronic Journal of Comparative Law* Vol. 13.1 (March 2009) <http://www.ejcl.org> Accessed on 6 August 2010, p 4

³⁵ Louis M Benedict ‘The global politics of sports: The role of global institutions in sports’ p 1-2.

power unknown to the aspirants in the field such as... human rights."³⁶ The resultant effect is the emergence of States that are weaker in their ability to protect the civil rights of their citizens against such international sports bodies as FIFA and the IAAF. Attempts by some countries like Nigeria and Greece to interfere with the authority of some of these global sports administrations like FIFA have been vigorously resisted and taken as political interference in sport³⁷. In respect of actions by Nigeria and Greece respectively, FIFA threatened to ban Nigerian football teams from all international tournaments that are organized by FIFA and suspended the Greek Football Association's FIFA membership. As FIFA is an internationally recognized global football administration body and there is political leverage to be gained from participating in FIFA organized football events, particularly because of their popularity with the majority of the electorate, the threats of FIFA sanctions weakens a State's ability to protect the civil liberties of its citizens. The popularity of the World Cup may be epitomized by an estimated audience of 700 million people who watched the FIFA World Cup Final in Johannesburg, South Africa in July 2010.³⁸

Consequently, if the State is weak and athletes are also weak, the latter become commercial objects with little or no basic freedoms sacrificed on the altar of commercialisation of sports. These athletes are huge assets on their clubs' balance sheets, not free to disengage themselves from their contracts and gagged from speaking to the media without authorisation for fear of antagonizing their sponsors or risking huge financial losses in penalties or loss of personal sponsorships. Athletes are required to conduct themselves in ways that do not alienate their leagues from their sponsors. Ethan Yale Bordman notes that "... in an effort to curb player comments about the game several years ago Cincinnati Bengals added an addendum to all contracts, allowing the team to terminate performance bonuses for players who criticise team mates, team managers, or game

³⁶ Ibid.

³⁷ 'World Cup 2010: FIFA threatens Nigeria with ban over team's suspension' www.telegraph.co.uk Accessed 4 October 2010

³⁸ Graham Dunbar *Associated Press*, 'FIFA expects 700 million to watch World Cup Final' 11 July 2010, <http://www.thejakartapost.com/news/2010/07/11/fifa-expects-700-million-watch-world-cup-final.html>. Accessed on 5 October 2010.

officials.”³⁹ Sports leagues are run as businesses and, to prevent any possibilities of financial losses by way of sponsorship withdrawals, national leagues and global sports administrations are always quick to impose sanctions against ‘delinquent’ sportsmen.⁴⁰ Ray Tarnowski argues that “playing a professional sports is a privilege and to enjoy this privilege you must follow the rules but how does one reconcile this with the internationally recognized right to take part in sports if it is a privilege.”⁴¹ It appears that the assertion that playing professional sports is a privilege is the basis upon which basic human rights are trammelled. This weakens a player’s ability to speak out and stand against any violations of basic human rights in the management of sport because of the fear of losing very lucrative professional contracts. The downside of this assertion is that it pays little attention to the athletes’ natural talents and abilities which in many cases attract sponsorships for the sports by creating platforms for commercial advertising due to the large audience, particularly for football, which is targeted by commercial sponsors. There is therefore an imbalance of value between the natural talents that attract lucrative sports sponsorships and the commercial rights on one part and the inherent basic rights of the athletes on the other.

Global sports administrations are sponsored by international businesses that are keen to preserve the sanctity of their global images by dropping certain leagues or individual sports personalities who may have conducted themselves in ways perceived to be offensive to some sections of the global community. For instance, the news of Tiger Woods’ infidelity led to withdrawal of his personal sponsorships by a number of commercial enterprises such as AT&T⁴² and Accenture. Stephanie Rice, an Australian swimmer, lost her Jaguar sponsorship for tweeting anti-gay sentiments⁴³. Therefore, the most prudent way of protecting the commercial interests of global sports administrative

³⁹ Ethan Yale Bordman ‘Freedom of speech and expression in sports’ *Michigan Bar Journal* September 2007, p 37

⁴⁰ Note 9 (above) p 3

⁴¹ *Ibid*

⁴² ‘AT&T drops sponsorship deal with Tiger Woods’ <http://www.abs-cbnnews.com/business/01/01/10/att-drops-sponsorship-deal-tiger-woods> Accessed on 10 October 2010

⁴³ ‘Gay slur costs Stephanie Rice Jaguar sponsorship deal’ September 07, 2010 12:00AM <http://www.heraldsun.com.au/entertainment/confidential/gay-slur-costs-stephanie-rice-jaguar-sponsorship-deal/story-e6frf96x-1225914998070> Accessed on 6 October 2010

bodies is by punishing what is perceived to be dishonorable conduct or speech with potential to alienate sponsors from the sport, regardless of the individuals' constitutional rights.

It does not matter whether or not the speech/expression is offensive, for as long as it is perceived to be potentially harmful to the pecuniary interests of the global sports administration such speech will be banned. In fact, as noted above, FIFA exercises pre-publication censorship regardless of the nature of the content intended to be published thus, from simple birthday dedications to strong religious and political views, all have no place on soccer platforms convened by FIFA and its affiliates. The fact is that undergarment free speech lags subserviently to commercial interests.

Andre J Lang argues that

...the problem with the emergence of various global administrative bodies is that their rules, procedures and internal organizations generally do not correspond with the procedural and substantive standards that have been developed for the exercise of power within the liberal -democratic nation states.⁴⁴

There is lack of accountability on the part of global sports administrations as

[t]he global administrative space is characterized by lack of accountability towards individuals. In particular the rules and decisions adopted by GABs often do not observe the standards of fundamental rights protection that is required within the nation state.⁴⁵

Therefore, there is a serious conflict between the interests of democratic States to protect the fundamental rights of their citizens and the commercial interests of global sports administrations that compromise the basic freedoms of footballers and other athletes.

The challenges are, therefore, how to hold the global sports administrations accountable for violation of free speech rights of sports people and how to create the right equipoise between protection of commercial interests and the right to free speech of professional players. The scales are currently tilted in favour of commercial

⁴⁴ Andre J Lang 'Global administrative law in domestic courts. Holding global administrative bodies accountable' p 4

⁴⁵ Ibid p 4

interests because of the huge pecuniary interests that global sports administrations have in different sporting disciplines. Most football, athletics and cycling clubs are no longer social clubs but incorporated commercial enterprises. Businesses exist to make money for the investors and anything likely to hinder good returns is regarded as anathema to the business' reason for existence. In this context, where finance is paramount, fundamental rights including free speech become secondary concerns.

STATUS OF FIFA

The status of FIFA makes it difficult if not impossible for the individual rights of football players to be protected or enforced against FIFA because according to Rule 64 (2) of FIFA Statute 2009, "*Recourse to ordinary courts of law is prohibited unless specifically provided for in FIFA regulations.*"⁴⁶ FIFA is a voluntary association of football administrations responsible for organising football in their countries⁴⁷. Membership to FIFA is on a voluntary basis and as such FIFA emphasises independence from political interferences in football thus steering away from accountability to any nation. Member Associations including football players and their agents are barred from suing each other in domestic courts which are mandated to interpret and enforce constitutional rights and freedoms derived from national constitutions.

To ensure that this requirement is implemented, Member Associations are obliged by FIFA Statutes to include

[a] clause in their statutes or regulations stipulating that it is prohibited to take disputes in their Association or disputes affecting Leagues, member leagues, clubs, players, officials and other Association officials to ordinary courts of law...⁴⁸

These provisions thus incapacitate footballers from seeking to vindicate their rights against violations by FIFA and its affiliates. Ordinarily, individuals vindicate their basic constitutional rights in ordinary courts of law. FIFA and its affiliates or member associations are empowered to "*impose sanctions on any party that fails to respect this requirement and ensure that any appeal against such sanctions shall likewise be strictly submitted to arbitration, and not to ordinary*

⁴⁶ Rule 64 (2) FIFA Statutes August 2009

⁴⁷ Ibid, Rule 10(1)

⁴⁸ Ibid, Rule 64 (3)

courts of law”⁴⁹ When a sportsman elects to be a professional footballer under FIFA or its affiliate members’ organised leagues they effectively contract themselves out of some of their basic human rights. The scheme of arbitration provided for in FIFA Rules is intended only to apply in the enforcement of FIFA regulations and football laws.

This places FIFA in the position of being an independent and unaccountable global sports administrative body. The challenge, therefore, is how to hold FIFA and other like sports federations accountable for their actions in accordance with the dictates of some domestic laws of their individual member association. FIFA may be calling for consistency in their decision making process and the rules that bind them but athletes should not be forced to sacrifice their basic constitutional rights in the service of the commercial interests of sports federations.

WAY FORWARD

Andre J Lang argues that “[i]t should be the role of domestic courts to establish accountability mechanism towards those sports regimes whose internal rationality is focused on cleanliness and economic prosperity of sports.”⁵⁰ However, the difficulty with Lang’s contention is one of enforcement of the decisions of the court because most sports competitions are arranged under the auspices of the global administrative bodies. FIFA has powers under its statutes to ban, expel or suspend any member association which violates its statutes or whose national government interferes with the administration of football in that country. For instance, FIFA suspended the Greek Football Association’s membership after the Greek Government refused to pass a law that guaranteed that football matters could only be decided by the Greek Football Association.⁵¹ Thus, whilst a domestic court may vindicate an individual footballer’s constitutional rights, that footballer or the national association of the footballer’s country may either be banned or expelled from participating in competitions arranged by FIFA. Therefore, Lang’s argument may not be sustainable as FIFA statutes render decisions of domestic courts ineffective especially relating to enforcement against a non-resident international body.

⁴⁹ Ibid

⁵⁰ Andre J Lang (ibid at note 43) p 24

⁵¹ Gabriel Marcotti ‘Is football still above the law?’ <http://www.timesonline.co.uk/tol/sport/football/article621061.ece> Accessed on 11 August 2010

Perhaps, the best route is to learn from how the European Union reacted to the FIFA stance on one occasion. The European Commission took a unified stance against FIFA when it sought to introduce a rule that would potentially infringe on the freedom of movement and protection against discrimination within the European Community. In this regard, the European Commission in 2008⁵² rejected a proposal by FIFA relating to the 6 + 5 Rule which entailed that “...*that 6 of the 11 football players on the pitch have to be of the nationality of the country of the football club...*”⁵³ The position of the European Commission was that professional footballers are workers, and therefore the right to free movement and the principle of non-discrimination applies to them. The 6+5 Rule would constitute a direct discrimination of the grounds of nationality.⁵⁴ The European Commission further stated that European Member States were bound by the European Treaty and if any of the member states were to allow the enforcement of this rule in their country then the European Commission would take the Member States to court. This stance caused FIFA to stand down on its proposals. The action by the European Union indicates that if continental bodies such as the African Union are prepared to stand together and defend the basic rights that they have all agreed to protect through the African Charter of human Rights, then FIFA and other related Global Sports Administration bodies will be forced to revise some of their restrictive rules that infringe on basic human rights.

The argument from the European Commission was premised on potential violations of the basic rights to free movement and the right not to be discriminated against. These basic human rights fall into the same category as the right to freedom of expression. As has been argued above, there is no basic human right that assumes greater value than others and as such the right to free speech must be protected in equal manner to the right to free movement or the right against discrimination.

Pre-publication censorship of speech by FIFA should not be permitted. Sanctions should only be imposed on offending footballers if the speech is likely to incite violence, terrorism, war, or hatred among different

⁵² Commissioner Vladimir Spidal ‘The Commission shows red card to the 6+5 rule proposed by FIFA’ 28 May 2008, <http://ec.europa.eu/social/main.jsp?langid=en&catid> Accessed on 11 August 2010

⁵³ Ibid

⁵⁴ Ibid

people or groups of people in a particular country or region or if it promotes discrimination among different people on the basis of religion, colour, creed and such other associated factors *post facto*.

Ordinarily, international bodies intervene in countries where there are human rights violations on the premise that international peace and order are sustained better in an international system that consists of countries respectful of human rights. This proposition should, therefore, form the basis of continental intervention to defend the basic human rights of sport personalities. Only in circumstances where an athlete makes speech or other forms of expressions such as those prohibited should they be sanctioned by either FIFA or the National Association or the organizers of a competition that is run under the auspices of global administrative body. Whilst Global Sports Administrations have no national identity, they have significant influence in countries where they operate especially through their affiliate member bodies such as ZIFA or the appropriate body dealing with human rights violations complaints in a particular country such as the Zimbabwe Human Rights Commission.

The vigor with which international communities such as the EU and the UN speak out against human rights violations should be with the same strength demonstrated to engage FIFA and other related International Sports Federations to ensure their respect for fundamental human rights. Sponsorship withdrawals must not be used to muzzle sports personalities. If, as argued by David Kinley and Sarah Joseph, multi-national corporations such as Nike, Adidas and Coca Cola can sometimes be economically stronger than the State in which they are operating – particularly in developing countries – then mechanisms must be in place to ensure that both legal and quasi legal duties are imposed on them to ensure that they will always act in ways that seek to protect human rights⁵⁵ and not to indirectly promote violations of basic human rights by threatening sports sponsorship withdrawals.

Some US courts have held that they have jurisdiction over particular international sports administrative bodies as in the matter of *Harry L. Reynolds, Jr v International Amateur Athletic Federation & Ors*⁵⁶

⁵⁵ David Kinley and Sarah Joseph 'Multinational Corporations and Human Rights' *Alternative Law Journal* Vol (27) No.1, February 2002 at p 9

⁵⁶ 841 F. Supp.1444 (1992)

where the issue before the court was whether or not the US court concerned could exercise personal jurisdiction over the IAAF. Using the Ohio long arm statute in the Ohio Revised Code which sets out the ground upon which a non-resident defendant may be sued in the Ohio courts⁵⁷ the court found that it could exercise personal jurisdiction over the IAAF. The court noted that in *Flight Devices*, 466f.2d at224-25 that the Ohio long arm statute was construed to extend the jurisdiction of Ohio courts to the constitutional limits.

Individual countries may need to formulate similar legislation in order to have jurisdiction over bodies such as FIFA in order to enforce judgments in areas where it has both direct and indirect activities.

CONCEPT OF PROPORTIONALITY

Whatever the methods employed to force FIFA and other global sports administrations to respect basic freedoms, the guiding factor in ensuring the proper interpretation and application of the scope of the basic freedom of expression should always be the concept of proportionality. This principle entails that the decisions of officials should be judged not just against the criteria of legality and rationality, but against a benchmark which maintains that limitations on the fundamental rights must be necessary to meet a legitimate end in a democratic society, and must not infringe a basic right to a greater extent than is required to achieve that end.⁵⁸

The issue here is whether impugning of the fundamental rights such as the right to freedom of expression in sports is necessary to achieve a legitimate end? If so, what is the legitimate end? FIFA Statutes do not seem to set out the mischief aimed at by banning such forms of expressions and religious practices but one would assume that it may be to ensure orderliness in the administration of football. If that is the argument, then how does FIFA justify acceptance of certain forms of expression and discriminate against others when their objectives are similar. For instance, the dreadlocks associated with Rastafarianism are accepted whereas taking off a shirt to show religious expressions is prohibited. Some football teams gather together to do their war cries before the start of matches, yet praying together as the Brazilians national football team did after winning the Confederations cup was

⁵⁷ Ibid, p 1449-50

⁵⁸ 'Note on the legal doctrine of proportionality' *Children's Rights Alliance* February 2007

prohibited⁵⁹ as was the wearing of T-shirts with religious or political messages⁶⁰. FIFA does not seem to have a problem with footballers of catholic faith who are allowed to perform the crucifixion as a sign of celebrating their victories but the Iranian women were banned from playing football wearing the hijab⁶¹ until they forcefully pleaded with FIFA for this permission.

In English law, the test for proportionality was set out in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* in which the Privy Council set out a three pronged test to the following effect; whether:

The legislative objective is sufficiently important to justify limiting a fundamental right;

The measures designed to meet the legislative objective are rationally connected to it;

And the means to impair the right or freedom are no more than is necessary to accomplish the objective.⁶²

The first issue is whether the objective of FIFA in restricting undergarment messages is sufficiently important to justify the limitation of freedom of speech. There is no evidence available on record to show that a player or players were hurt or harmed for expressing their religious or political opinions. The majority of football violence emanates from hooliganism perpetrated mostly by drunken football fans. The determination of appropriate thresholds or proportions of speech would therefore guide FIFA and any other country as to what is permissible speech in a particular society and avoid sanctioning footballers and other athletes for expressing speech that may not have any effect on sporting interests or commercial interest.

The proportionality principle is part of the European Court jurisprudence and in *David Meca-Medina and Igor Majcen v Commission of the European Communities*⁶³ sport was deemed to be subject to

⁵⁹ Note 2 above

⁶⁰ Salvatore Landolina, 'World Cup 2010: FIFA ban Brazil players from displaying religious t-shirts' June 12, 2010, <http://www.goal.com/enus/news/3296/brazil/2010/06/12/1972668/world-cup-2010-fifa-ban-brazil-players-from-displaying-religious-> Accessed on 22 October 2010

⁶¹ Note 7 above

⁶² [1999] 1 AC 69 at p80 also referred to in *Regina v Secretary for the Home Department* ex parte. Daly at para 25 per Lord Steyn

⁶³ C-519/04P

community law in so far as it constitutes an economic activity and the judgement goes on to state that the courts will not intervene to interfere with rules that concern purely sporting interests.⁶⁴ The task would be to come up with an appropriate equipoise that will ensure a balance between the protection of the interests of FIFA or any other international sports administrative body and the individual fundamental rights of the athletes as protected under the domestic laws of the country of domicile of the club or the athlete.

Alec Van Vaerenburg identifies two key issues that restrain domestic courts from intervening in sports disputes even where human rights issues have been violated. Regrettably most of the instances arise from doping cases. He noted that "... the sports regime only establishes a contractual relationship or at best regulates private matters between individuals"⁶⁵ and does not normally involve the State. The court decision reached in *Gundel v I EF* was that "a penalty prescribed by doping regulations is one of the forms of penalty fixed by contract and therefore based on party autonomy".

The reasoning was that parties to a contract are assumed by law to have equal bargaining power and as such are autonomous. This assumption may not be correct because the nature and structure of FIFA does not establish a platform for negotiation on its rules by individual football professional. The bargaining power of the individual players is weak as correctly noted by Van Vaerenburgh that

[a]thletes are forced to subscribe to the statutes of a private body if they want to compete. Those accession agreements lack the even handedness and arm's length bargaining of ordinary contracts.

Professional football players cannot negotiate directly with FIFA regarding any football rules. Members of FIFA are football federations/ association that administer football in different countries. In the domestic scenario it may either be a professional league that will be affiliated to the national administrator or the football club that will be affiliated to the national association. FIFA rules and regulations are implemented and enforced by the national association. Again, the football players come at the tail end and have no right of audience

⁶⁴ Ibid. Press Release dated 18 July 2006

⁶⁵ Alec Van Vaerenburg 'Regulatory Features and Administrative Law Dimensions of the Olympic Movement's Anti-doping Regime' *Global Administrative Law Series*, IILJ Working Paper 2005/11 p 13

at the national association.

Thus to contend that human rights issues in sports cannot be addressed in sports governance is to ignore the fact that the contract that enables a party to compete as a professional footballers does not permit direct negotiations with the rule makers and it is not autonomous as assumed in the matter of *Gundel v IEF*⁶⁶. Thus if footballers are unable to autonomously negotiate their contracts and are constrained in their conduct on the field including what expression may be exercised by them then they start their negotiations from a very weak position. Domestic courts must find some grounds for intervening particularly where human rights are violated with the justification that State funds are sometimes used to fund the construction of stadiums – particularly in the under-developed world – and they are not private venues where speech may be restricted. Thus the fact that FIFA and its affiliates use public resources in pursuing their objectives must encourage domestic courts to intervene whenever there is a call against potential human rights violations by FIFA and other international sports federations.

Timothy Zick argues that “...speech and spatiality cannot be completely severed from one another”⁶⁷ Football is played for enjoyment of fans and the cheering expressions of the fans are regarded as part of public discourse. However, footballers are banned from exhibiting either religious or political speeches on the same platforms. Implicit in and essential to freedom of expression is the need for adequate physical space in which speech can be without restraint.⁶⁸

Whilst FIFA resents political intervention in the administration of football, it has itself taken political positions regarding certain political dispensations. It banned South Africa from participating in international football during the apartheid era until after 1994. FIFA’s position with regard to players exhibiting free speech of either political or religious nature may be construed as hypocrisy. In any case, the very nature of FIFA’s structures and operations is largely political. For instance, one of the essential pre-condition for a country to host the World Cup is that the bidding federation must secure government guarantee for its

⁶⁶ Swiss Federal Supreme Court, March 15, 1993.

⁶⁷ Timothy Zick ‘Space, Place, and Speech: The Expressive Topography’ (2006). *Faculty Publications Paper 276*. <http://scholarship.law.wm.edu/facpubs/276> or *George Washington Law Review* Vol 74, 2006 p441

⁶⁸ *Ibid*

bid. It is, therefore, not surprising that the huge contribution of funds needed to support the preparation for the hosting of the World Cup tournaments are drawn from the national government treasuries of the hosting countries.

CONCLUSION

The importance of free speech in sports cannot be over emphasised. The administration of professional sports should not place unchecked prominence over fundamental human rights. What FIFA and other global sports administrative bodies may be avoiding is being held to account for their actions by national governments. Now is therefore the time for continental political bodies to confront FIFA head on and ensure that mechanisms are put in place to hold them accountable for human rights violations.