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The Maurice Odumbe Investigation and Judicial Review of the Power of International Sports Organizations

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ABSTRACT

This article examines whether, and the circumstances in which, national courts should review the power of International Sports Organizations (ISOs). It uses the case of Maurice Odumbe as an illustration, and argues that national courts should regulate the power of bodies such as the International Cricket Council (ICC) where such power has been exercised unreasonably, where the rules and regulations of ISOs are themselves unreasonable, and also where ISOs interpret their rules and regulations unreasonably or wrongly.

KEYWORDS

Private Bodies – Sports - Judicial Review – Kenya – Democracy

INTRODUCTION

Sports such as soccer, cricket, athletics and rugby have experienced stratospheric levels of commercialization in the last two decades as multinational firms seek to exploit the global fame of star athletes and teams to market their products. While athletes participate in these sports for the sheer thrill and fun of competition, and perhaps the desire to be famous and adored by multitudes of fans, many are equally attracted by the phenomenal wages that they can earn from sports. In many ways, therefore, sport is predominantly a means to a living for athletes and the personnel of sports teams. The paradox is that these same incentives have motivated a good number of athletes and teams to cheat, thereby bringing their sports into disrepute. Thus doping and match-fixing scandals in athletics, baseball, cycling, soccer and cricket abound (Vaerenbergh, 2005, pp.7-12). Such scandals shock the moral sensibilities of sports fans, with the likelihood that they may lose interest in the sport altogether, thereby jeopardizing the continued existence of the sport. For instance, the Tour de France, which was for along time the world's premier cycling competition, is now derisively termed the 'Tour de Farce' (Seaton, 2006). 1

It has therefore become important to regulate sports in order to ensure 'fair play.' Accordingly, transnational sports organizations and federations have emerged to govern international sport. The International Football Federation (FIFA), the International Cricket Council (ICC) and the International Olympic Committee (IOC) are good examples. These organizations largely operate outside the purview of national and international law, and are governed by their rulebooks and constitutions as autonomous private entities. While membership in these organizations is voluntary, they invariably monopolize their sports because athletes are compelled to become members if they want to participate. These organizations are therefore extremely powerful and their decisions 'can have profound effects on the careers of players' (Foster, 2003, p.1). For instance, they can suspend or ban players from the sport, thereby depriving them of a livelihood. While such power may be necessary to ensure that the spirit of fair play prevails in sports, it is patently capable of being abused. Unfortunately, where such power is abused, the affected athletes are often at a dead-end since national courts in many jurisdictions remain reluctant to intervene, deeming their relationship as a private affair governed by contract and outside the purview of public law. This is the fate that befell Maurice Odumbe, a star cricketer and captain of Kenya's national cricket team at the material time. 2

This article grapples with the question of the judicial review of this contractual private order, using the Maurice Odumbe application for judicial review before the High Court of Kenya (hereinafter the *Odumbe* case) as an illustration. Odumbe was found guilty in an investigation authorized by the ICC and conducted by the Kenya Cricket Association (KCA) of having 'inappropriate conduct' with a bookmaker and banned from the game for five years (Ebrahim, 3

2004). In an attempt to overturn this career-threatening ban, Odumbe applied for judicial review. The High Court of Kenya declined to entertain his application, reasoning that it would not issue judicial review orders against the ICC and the KCA since they are not 'public bodies or persons performing public functions' and that his remedies lay in private law as this was a contractual dispute (*Republic v. Kenya Cricket Association(KCA)* (2006) eKLR).

The article argues that the High Court's decision in the *Odumbe* case is at odds with the emerging progressive view in other common law jurisdictions, where the ability of private bodies to wield power that can significantly impact upon the liberties and livelihoods of individuals has been recognised and regulated. The dispositive consideration for the courts of law should not be whether power is public but that, irrespective of its source, it is capable of adversely affecting the rights of individuals. And if it is capable of doing so then it ought to be subject to the democratic requirement of considerate decision-making. Further, the paper argues that such an obligation of considerate decision-making ought to be imposed on international sports organizations given the absence of national or international legislative frameworks for the regulation of their power. While a number of these organizations have, through self-regulation, incorporated principles of considerate decision-making in their rules and constitutions, there remains a need for judicial review of the implementation of such principles to ensure that such rules are fair and that they are applied uniformly and fairly. In performing this role, however, national courts should carefully define the parameters of the obligation of considerate decision-making in order to prevent undue judicial intervention in sporting activities. 4

The following Section provides the paper's conceptual framework and examines three progressive rationales for the 'publicisation' of the private sphere, by which one means the imposition of public law obligations of considerate decision-making on private bodies. First, power ought to be regulated by public law provided it is capable of adversely affecting the liberties and livelihoods of individuals. Second, much of global administration is today undertaken by private bodies, which regulate important spheres of life and there is a need for the national regulation of the power of these bodies given the absence of international regulation. This need is perhaps heightened in countries such as Kenya, which has attained international success in long-distance running and whose international image is considerably enhanced by the success of her athletes. There is thus a public interest in the democratic governance of sport. Finally, the regulation of private power can also be located in the context of the debate on the horizontal application of constitutional rights. In particular, private bodies that exercise power over significant spheres of life should be required to respect fundamental constitutional values. 5

The third Section of the article critiques the ICC/KCA tribunal's decision and the High Court's decision in *Odumbe*. It argues that the ICC/KCA tribunal's decision and the rule of the ICC that Odumbe is alleged to have violated were unreasonable and should have been reviewed by the High Court. The fourth Section examines the role of judicial review in the governance of international sports organizations (ISOs) and seeks to map the parameters of judicial intervention. The fifth Section is a brief conclusion. 6

PUBLIC LAW AND THE REGULATION OF PRIVATE POWER

In common law jurisdictions, the law's relationship with power, which Oliver (1999) defines as 'the possibility of imposing one's will upon the behaviour of other persons,' has largely been governed by the ideology of liberal theory, which establishes a dichotomy between the public sphere and the private sphere. On the one hand, liberal theory explicitly recognizes the imbalances in power between public bodies and private individuals, which is then seen to justify the imposition of 'higher order duties' of fair and considerate decision-making on public bodies. Conversely, liberal theory does not sufficiently recognize power imbalances in the private domain and largely assumes that individuals are equal and are capable of resolving any instances of abuses of private power among themselves, without the need for governmental intervention. 7

However, globalization and privatization processes have resulted in the transfer of immense power to private entities. 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 8

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. The question is whether law ought to regulate the exercise of private power in both scenarios.

How, then, does law control power? Essentially, law seeks to protect individuals against the abuse or improper exercise of power, which includes actions and decisions that might interfere with their vital interests, such as their livelihoods and access to benefits (Oliver, 1999, p.2). It does so by insisting that the exercise of power should be democratic. That is, the exercise of power should be participatory and accountable. And in doing so, law promotes a number of values that Oliver (1999) argues are 'widely accepted as self-evidently basic and pervasive in any democratic system.' These key values – which she argues constitute moral tenets of how life in a democratic society ought to be for individuals and groups thereof – are: autonomy or freedom of action, dignity, equal respect, status and security. 9

The expectation is that those who wield power will take these values into account whenever they exercise their power. Furthermore, these values are more likely to be protected where the exercise of power is democratic – that is, participatory and accountable – than where it is not democratic. As Dahl (1989) has noted, while democracy may not be a sufficient condition for achieving these values, which in many ways reflect human beings' fundamental interests, it is nevertheless an essential means to their realization. In a democratic society, the law therefore ought to uphold the dignity, autonomy, respect, status and security of individuals and groups thereof against the abuse of power. These values also find expression in principles that public lawyers have come to refer to as 'public law values' (Taggart, 1997). In other words, adherence to the said values is expressed in certain legal standards that the exercise of power ought to conform to. The so-called public law values can all be subsumed in the phrase 'considerate decision-making.' The idea is that a body exercising power is under a duty of considerate decision-making, which mandates legality, fairness, rationality, reasonableness, accountability, participation, and the fulfilment of legitimate expectations (Oliver, 1999, p. 81). 10

While these duties have been imposed on public or governmental bodies without much controversy in most Commonwealth countries, and increasingly on private bodies exercising public or governmental functions, the idea of imposing them on purely private bodies exercising *de facto* power remains fiercely contested (Aman, Jr, 2001, p. 1498). Nevertheless, a number of public law scholars have advocated a persuasive view that provided a body, whether public or private, wields 'institutional power capable of affecting rights and interests' it ought to be subject to judicial review (Hunt, 1997, pp.32-33). According to this enlightened view, in determining whether to extend their supervisory jurisdiction to such private bodies, courts should look into factors such as the nature of interests affected by their decisions, how seriously those decisions impact on those interests, whether the affected interests have any real choice but to submit to the bodies' jurisdiction, and the nature of the context in which the bodies operate (Hunt, 1997, p.32). But the mere fact that a private body possesses institutional power 'should not lead inexorably to the conclusion that all principles of a public nature should be equally applicable to such bodies (Craig, 1997, p. 211). 11

Accordingly, the first rationale for the judicial review of the power of private bodies such as international sports organizations is that the exercise of institutional power, whether public or private, and which affects the vital interests of individuals, should accord with the principles of good administration or considerate decision-making. According to Oliver (1999), duties of fairness and rationality in decision-making are common to both public and private law, and their existence should not 'depend upon the question whether the body in question is public or private or performing public or governmental functions.' This view is further supported by Sir Stephen Sedley (1999), who asserts that 'the law's chief concern about the use of power is not who is exercising it but what the power is and whom it affects.' 12

The second rationale for the 'publicisation' of the private sphere is to be found in the emerging scholarship on what has been termed 'global administrative law.' This scholarship seeks to respond to the proliferation of international regulatory mechanisms over the last decade or so (Kingsbury, Krisch and Stewart, 2005). These mechanisms have developed out of the realisation that the 'consequences of globalised interdependence' in many areas of interaction such as security, environmental protection, banking and financial regulation, and 13

labour standards 'cannot be effectively addressed by separate national regulatory and administrative measures' (Kingsbury, Krisch and Stewart, 2005, p.4). This has resulted in a shift of many regulatory decisions from the national to the global level. The concern of global administrative law scholars is that this shift has created a democracy deficit, since the international regulatory mechanisms are not directly subject to control by national governments or domestic legal systems. Yet the international institutions and regimes that engage in global governance exercise immense powers and regulate vast sectors of economic and social life. Thus their decisions increasingly and directly affect individuals and firms, in many cases without any intervening role for national government action.

Alarmed that these global governance institutions and regimes enjoy too much de facto independence and discretion, global administrative law scholars have called for the recognition of a 'global administrative space and the establishment of a 'global administrative law,' consisting of principles, procedures and review mechanisms to govern decision-making and regulatory rulemaking by these institutions and regimes (Kingsbury, Krisch and Stewart, 2005, p. 13). 14

The regulation of global sports such as cricket and soccer should also be examined in this context. These sports are governed by international organisations that are autonomous and independent of national governments (Foster, 2003, p. 1). Indeed, these organisations claim immunity from national legal systems and international law, and instead prefer to be governed by what has been described as a '*lex sportiva*' or 'global sports law,' which constitutes a system of self-regulation (Foster, 2003, p.2). According to Foster (2003), global sports law is a 'transnational autonomous legal order created by the private global institutions that govern international sport.' It is a contractual order whose binding force comes from 'agreements to submit to the authority and jurisdiction of international sporting federations' (Foster, 2003, p.2). Its principles are 'created from transnational legal norms generated by the rules, and the interpretation thereof, of international sporting federations' (Foster, 2003, p.2). 15

The need to regulate such ISOs arises from the immense power that they wield over the athlete, leading Foster (2003) to remark that '*Lex sportiva* rests on a fictitious contract,' (because) the power relationship between a powerful global international sporting federation, exercising monopoly over competitive opportunities in the sport, and a single athlete is so unbalanced as to suggest that the legal form of the relationship should not be contractual.' 16

A question arises as to how global administrative law could respond to the need to regulate transnational governance. Stewart (2005) has suggested two ways, which might be pursued at simultaneously and which might support and reinforce each other. First, a 'bottom up' approach which extends 'domestic administrative law to assert more effective control and review with respect to the supranational elements of domestic regulation; second, a top-down strategy which develops 'a new international administrative law directly applicable to international regulatory regimes' (Stewart, 2005, p. 709-710). In the context of global sports, the bottom-up approach – which is perhaps more feasible given the likely opposition of the fiercely-independent international sports federations to submit to supranational governance – would involve national courts reviewing the decisions of bodies in deserving cases. For example, while the 'rules of the game' should as a general rule be left to self-regulation since they are constitutive of sport, national courts should arguably be free to review all other decisions such as those governing the conduct of athletes off the field of play (Foster, 2003, p. 16). 17

A final rationale for the publicisation of the private sphere is to be found in the need for the horizontal application of constitutional values, especially where private bodies control significant spheres of life. The orthodox view, which owes its existence to liberal theory, is that constitutional rights impose constitutional duties only on government and not on private actors. According to liberal theory, it is desirable to maintain 'a public-private division in the scope of constitutional rights, leaving the private sphere free from constitutional regulation'. This limitation of 'the scope of constitutional rights to the public sphere enhances the autonomy of citizens, preserving a heterogeneous private sphere free from the uniform and compulsory regime constructed by constitutional norms' (Gardbaum, 2003, pp. 394-395). 18

How, then, should constitutional law respond to the emergence of private power that is fuelled by the processes of globalisation and privatisation? The orthodox view is arguably 19

inadequate in today's world given that much power is now wielded by private as opposed to public bodies. Fortunately, a horizontal approach to constitutional rights is emerging, according to which 'constitutional rights and values may be threatened by extremely powerful private actors and institutions as well as governmental ones (Gardbaum, 2003, p. 395). The horizontal approach criticizes the vertical approach for ' automatically (privileging) the autonomy and privacy of such citizen-threateners (sic) over that of their victims' (Gardbaum, 2003, p. 395).

While the emergence of the horizontal approach to constitutional rights and values is encouraging, it should be noted that the few countries that have considered it have been reluctant to apply it directly. That is, cases of 'direct horizontal effect' as opposed to 'indirect horizontal effect' are rare. In the former case, courts govern the conduct of private actors by imposing constitutional obligations directly on them. In the latter case, they typically subject private laws to constitutional rights and require private actors to adhere to such laws. In other words, constitutional rights govern the private laws that structure the legal relations of individuals. (Gardbaum, 2006, p. 764). 20

Ireland provides an interesting exception to this trend. The Irish Supreme Court has interpreted the Irish Constitution as imposing 'a positive obligation on all state actors, including the courts, to protect and enforce the rights of individuals'. Further, it has interpreted this obligation 'to require the courts to permit an individual to invoke the constitution directly as a source of a claim against another individual'. In doing so, it has given direct horizontal effect to the freedom of association, the freedom from sex discrimination, the right to earn a livelihood, and the right to due process (Gardbaum, 2003, pp. 396-397). In the process, it has enhanced the protection of human rights in the private sphere. In this regard, it is worth quoting the dictum of Budd J in the case of *Educational Company of Ireland Ltd v Fitzpatrick (No.2)*(1961) IR 345, where he stated (at 368) that: 21

(I)f one citizen has a right under the Constitution there exists a correlative duty on the part of other citizens to respect that right and not to interfere with it. To say otherwise would be tantamount to saying that a citizen can set the Constitution at naught and that a right solemnly given by our fundamental law is valueless. 22

The Irish approach makes much sense in a world that is characterised by power imbalances that are increasingly being exacerbated by the processes of globalisation and privatization. The autonomy of the powerless should be a concern for public law just as much as that of the powerful. Indeed, even the jurisdictions that are reluctant to apply constitutional rights horizontally and directly will not countenance the perpetuation of morally reprehensible conduct, such as racial bigotry, that derail the quest for the attainment of fundamental constitutional values such as equality or equal treatment. 23

Constitutional values express the way that a society proposes to govern itself. It makes little sense for a constitution to outlaw discrimination in the public domain while it countenances such reprehensible conduct in the private domain, especially where one private actor wields considerable power over another. Furthermore, the orthodox vertical effect approach was promulgated at a time when the State was the only perceptible danger to private autonomy. Today, much power is wielded by private actors. In fact, the State has ceded much of its powers to private actors. In these circumstances, the horizontal application of constitutional values should be encouraged where power imbalances allow some private actors to deprive others of their liberties and livelihoods. 24

In the sporting context, the horizontal approach to constitutional rights would be useful in the vindication of the rights of athletes to a livelihood and due process or considerate decision-making. Both of these rights can be based on the protection of fundamental rights and freedoms that many constitutions grant individuals. Thus an athlete denied the right to earn a livelihood can base her constitutional claim on the right to life. Again, an athlete denied due process can base her constitutional claim on the right to the protection of the law. Such a claim would be considerably easier to prosecute where, as in South Africa, the constitution protects social and economic rights and recognizes a right to 'administrative justice (Asimow, 1997). 25

Taken together, the three rationales discussed above make a compelling case for the ' publicisation' of the private sphere. They all recognize that, irrespective of its source, power 26

ought to be regulated by public law provided it is capable of affecting the liberties and livelihoods of individuals. Further, they all appreciate that we live in an age where much significant private power is wielded and exercised by private actors, thanks to the processes of globalization and privatization. This development demands a re-conceptualization of the tools of public law if it is to perform its task of regulating power to preserve the liberties and livelihoods of individuals. The *Odumbe* case provides a good illustration of why public law should no longer stand aside as powerful international organizations threaten the liberties and livelihoods of individuals.

THE ICC/KCA INVESTIGATION AND ODUMBE'S JUDICIAL REVIEW APPLICATION

The ICC/KCA Investigation

The *Odumbe* case should be examined in the context of the ICC's endeavors to repair the image of the sport of cricket after Hansie Cronje, a former captain of the South African team, confessed to charges of bribery and match-fixing (Prabhakara, 2000). The ICC's attitude thereafter seems to be that of zero-tolerance for even the slightest evidence of improper conduct, for players charged with improper conduct or match-fixing are held to be strictly liable for their actions, as the *Odumbe* Investigation illustrates. 27

Subsequent to an investigation by the ICC's Anti-Corruption and Security Unit and a recommendation by its Code of Conduct Commission, the ICC required the KCA to assist it in conducting an investigation into the allegations that Maurice Odumbe had inappropriate conduct with a bookmaker and influenced the results of matches in violation of the ICC Code of Conduct for Players and Team Officials. Throughout the saga, the KCA followed the instructions of the ICC (Daily Nation, March 13, 2004). It is the ICC that is responsible for the governance of the sport and its members such as the KCA are basically required to implement its decisions. Players such as Odumbe are only permitted to participate in the sport after signing a contract with the national body. By signing this contract, the players agree to abide by the rules and regulations of the ICC. Accordingly, the ICC has a monopoly over international cricket and it thus wields immense power over players and the national affiliates. 28

The ICC appointed a former judge of the Zimbabwean Supreme Court, Justice Ahmed Ebrahim, to conduct the investigation. It is noteworthy that Odumbe was not happy with this appointment since Justice Ebrahim had sent him off during a tournament in South Africa in 2001 in which the latter was the match umpire (East African Standard, May 18, 2004). But it is not clear how the ICC handles allegations of bias levelled against investigators. Procedural fairness entitles an accused person to a fair unbiased hearing. However, the question of bias was not raised in the *Odumbe* Investigation. 29

The charge against Odumbe was that he had acted contrary to paragraph C 4 (ix) of the ICC Code of Conduct, which makes it an offence for players and team officials to receive 'any money, benefit or other reward (whether financial or otherwise) which could bring him or the game of cricket into disrepute.' The penalty for such conduct is a ban for a minimum period of two years and a maximum ban for life; a fine may also be imposed. The particulars of the charge against Odumbe were that he had associated with a known Indian bookmaker, one Jagdish Sodha and accepted the provision of hotel accommodation and received various sums of money from him. In addition, he was charged with admitting to his former wife and former girlfriends that he had received money from Jagdish Sodha and admitting to receiving money to fix a match in Zimbabwe (Ebrahim, 2004, p.2). 30

The only case against Odumbe seems to be that he associated with Jagdish Sodha, a known bookmaker. Justice Ebrahim's report does not countenance any possibility, however remote, that this association could have been innocent. According to this report, Odumbe associated with Jagdish Sodha, who paid for his hotel accommodation on various occasions and gave him various sums of money. For associating with an alleged bookmaker, the ICC is saying that Odumbe must be held strictly liable for violating the ICC Code of Conduct. Much of the evidence adduced by the prosecution to demonstrate that Jagdish Sodha is a bookmaker was arguably circumstantial. Justice Ebrahim seems to have based his conclusion that Jagdish Sodha could only be a bookmaker on the evidence of one Niranjan Virk, an employee of the ICC's Anti-Corruption and Security Unit (Report by Mr Justice Ahmed Ebrahim in the Enquiry Relating to Maurice Odumbe, 2004, pp. 15-16). Mr. Virk testified that while he was employed by the Special Crimes Division of the Indian Police force, he had interrogated Jagdish Sodha who confessed to him that he was a bookmaker. It is interesting that no evidence was 31

adduced to show that Jagdish Sodha had ever been found guilty of bookmaking, which is a criminal offence in India. Yet Justice Ebrahim was quick to conclude that 'The evidence established beyond doubt that Jagdish Sodha was or is a bookmaker' (Ebrahim, 2004, p. 26).

Justice Ebrahim seems to have been saying that because Odumbe associated with a person whom other people consider to be a bad man in cricket circles, Odumbe must be guilty of violating the ICC's strict Code of Conduct. In the estimation of Justice Ebrahim, it suffices that 'there was substantial contact between Jagdish Sodha and Mr Odumbe' (Ebrahim, 2004, p. 23). 32

Apart from the evidence that he associated with Jagdish Sodha, there was no evidence to show that this association could only have been for the purpose of fixing matches or otherwise influencing the outcome of cricket matches. For example, one of Odumbe's former girlfriends testified that Odumbe told her he was going to Zimbabwe to make US\$5000 for match-fixing (Ebrahim, 2004, p. 17). It is not apparent from the evidence which matches in Zimbabwe Odumbe sought to influence. In his analysis of the evidence of this particular witness, Justice observes that 'I am well aware that Mr. Odumbe does not face the charge of 'match-fixing,' but one cannot ignore the fact that he involved himself in discussing 'match-fixing' and did so with approval (Ebrahim, 2004, p. 18). Odumbe's offence, then, is discussing match-fixing with his former girlfriend. It is as if cricket players must be so morally upright as not to even think about, let alone discuss, match-fixing; and to do so with approval is, in the view of Justice Ebrahim, an offence of the highest magnitude. 33

Further, the prosecution did not adduce any evidence to show that Odumbe had corrupted any of his team mates. Cricket is a team sport, and it is considerably difficult to influence the outcome of matches without the collusion of one's team mates. Yet Justice Ebrahim was quick to dismiss the evidence of Steve Tikolo, who succeeded Odumbe as the captain of the Kenyan cricket team, as self-serving. Mr. Tikolo had testified that he had questioned every member of the team, who confirmed that Odumbe had 'not approached them or asked them to perform any improper or corrupt act in or with regard to any cricket match (Ebrahim, 2004, p.25). Justice Ebrahim's retort was that 'one would hardly expect any members of the present Kenyan cricket team to state that they were approached or were in any way involved in nefarious activities' (Ebrahim, 2004, p. 25). It appears that the honourable judge had formed an opinion on how Odumbe's teammates would testify even before he heard them. 34

Justice Ebrahim concluded that the evidence against Odumbe was 'overwhelming' and that the allegations against him had been proved 'beyond reasonable doubt' (Ebrahim, 2004, p. 30). In his view, Odumbe's conduct was 'outrageously reprehensible' (Ebrahim, 2004, p. 31). Accordingly, he imposed a five-year ban on Odumbe. In his concluding remarks, Justice Ebrahim seems to express the view that cricket players must all adhere to an-almost pious lifestyle and that the game of cricket cannot countenance individuals who espouse a different lifestyle. Here is what Justice Ebrahim had to say: 35

Far from shouldering this responsibility (as captain of the Kenyan cricket team and also one of its most senior and highly respected players), Mr Odumbe has shown himself to be dishonest and devious in his behaviour in relation to the game of cricket. He has been callous and greedy in the way he has conducted himself. There is no suggestion that he was in desperate straits and in dire need of money because of some serious difficulty which may have befallen him. The evidence, if anything, shows him living a lifestyle of pleasure and irresponsibility. Far from taking heed of the warnings of the dire consequences which would follow such behaviour that the ICC has spread across the cricket world, through such organisations as the AC&SU, cricket referees, etcetera, Mr Odumbe chose to thumb his nose at all these warnings and continued his dishonest ways (Ebrahim, 2004 p. 31).

Clearly, Odumbe was being punished for his allegedly flamboyant lifestyle. It is doubtful whether many people would agree that Odumbe's conduct was 'outrageously reprehensible.' In addition, it is excessive and unreasonable to impose such a severe career-threatening penalty on the basis of an association with a person who has not even been established to be a bookmaker by the due process of law. Justice Ebrahim was not even willing to countenance the possibility, however remote, that Jagdish Sodha was a star-struck fan who liked to be associated with a successful cricketer, as many sports fans typically are. Indeed, the ICC Code of Conduct is arguably unreasonable since it is cast in unduly strict terms: mere association with an alleged bookmaker is sufficient for a player to be banned from cricket for 36

life and thereby deprived of the means of a livelihood (ICC Code of Conduct, Rule C 4 (ix)).

Once the investigator has given his recommendations in proceedings of this nature, the ICC 37 requires the national association to consider it. It is said that many associations have a history of 'standing by their own players in such difficult situations' (Berry, 2004). Unfortunately for Odumbe, the KCA basically left him to fend for himself. The KCA approved Justice Ebrahim's sanctions. Following the rules and regulation of the ICC, Justice Ebrahim's report was forwarded for review to the ICC Code of Conduct Commission, to determine whether the process followed was sufficient and whether the sanction imposed was appropriate. Thereafter, the recommendations of the Code of Conduct Commission were forwarded to the ICC Executive Board for ratification. The matter was brought to an end when the Executive Board gave its blessings.

The Judicial Review Application

Dissatisfied with the outcome of the ICC/KCA Investigation, Odumbe sought judicial review of 38 Justice Ebrahim's decision before the High Court of Kenya. In his application, Odumbe sought the order of certiorari to quash the decision of Justice Ebrahim and a subsequent decision of the ICC and KCA denying him the right to appeal against the former decision. Further, he sought the order of prohibition against the ICC and KCA to stop them from suspending him from playing cricket.

Counsel for the ICC and KCA contended that the relationship between Odumbe and the 39 ICC/KCA was contractual and therefore not susceptible to judicial review, and that judicial review does not apply to the ICC and KCA because they are private bodies (*R v. Kenya Cricket Association*, p.3). In making these submissions, counsel relied on the English cases of *Law v National Greyhound Racing Club*(1983) All E.R. 300; *R. v. Football Association ex parte Football League*(1993) 2 All E.R. 833; and *R. v. Disciplinary Committee of the Jockey Club ex parte Agha Khan*(1993) 1 WLR 909 as authorities for the proposition that generally courts will not interfere in the affairs of clubs or domestic affairs, except where such a body is 'directly or indirectly underpinned to an organ or agency of the state or the state could interfere to create a public body to perform its functions' (*R v. Kenya Cricket Association*, pp. 4 and 7). In response, Odumbe's counsel argued that the ICC 'is an international body charged with overseeing administration of the sport of cricket worldwide and its decisions and activities impact the general public at large and that its activities are of a public nature' (*R v. Kenya Cricket Association*, p. 4). Further, he contended that the tribunal set up to investigate Odumbe was not a domestic or private entity since it exercised quasi judicial functions (*R v. Kenya Cricket Association*, p. 4). In particular, counsel for Odumbe urged the court to follow the English decision of *R. v. Panel on Takeovers & Mergers ex parte Datafin PLC & Another*(1987) All E.R. 564, which is authority for the proposition that in considering whether a body is exercising a public function, the courts should not just look at the sources of that body's powers, but also examine the nature of such powers to determine whether they are of a public nature. And if the court finds that the powers of the body in question are public in nature, then it should entertain applications for judicial review of that body's decisions.

As framed by Justice Wendoh, the presiding judge, the main question before the court was 40 'whether the Kenya Cricket Association or International Cricket Council are public bodies because judicial review orders will only issue against public bodies or persons performing public functions' (*R v. Kenya Cricket Association*, p. 5). Having considered the authorities and arguments submitted by counsel, the honourable judge came to the conclusion that 'the respondents herein in disciplining the applicant have not performed any duty of a public nature nor were the consequences of the performance of their duty of a public nature' (*R v. Kenya Cricket Association*, p. 7). In the opinion of the judge, *Datafin* did not therefore apply in this case since 'Cricket is a sport and depends on individual interest,' and 'the Respondent's duty to the applicant was strictly within their terms and conditions of membership of the club and did not involve the public' (*R v. Kenya Cricket Association*, p. 7). The judge also considered that the ICC and KCA are not funded by the public, and get their funding from their own activities, including tournaments, levies, competitions and sponsorships (*R v. Kenya Cricket Association*, p. 7). Following this analysis, the judge thought that the 'respondent's source of power, nature of duty and its impact do not amount to performance of public functions' (*R v. Kenya Cricket Association*, p. 8).

The judge then observed that the ICC's Guidelines on the Principles of Natural Justice are 41 permissive and merely provide that an accused person who is dissatisfied with the decision of

a tribunal set by ICC may seek review of the hearing and decision in court (*R v. Kenya Cricket Association*, p. 8). The judge emphasized that being guidelines, as opposed to rules of the ICC Code or Articles of Association, these provisions did not give the applicant a right to judicial review (*R v. Kenya Cricket Association*, p. 8). The judge then inferred from this line of reasoning that judicial review would not be available since this was a private arbitration within the rules governing membership of the ICC and KCA (*R v. Kenya Cricket Association*, p. 8). Put another way, since the rules of the ICC Code or Articles of Association did not specifically provide for judicial review of the decisions of its tribunals, this remedy had been precluded by the applicant's contract with the ICC.

Counsel for the respondents had also contended that Odumbe had exhausted his remedies, having 'invoked an alternative remedy whereby at the behest of the applicant's counsel an official enquiry was carried out and it rendered its decision (which) was ratified by the International Cricket Council Executive Board (*R v. Kenya Cricket Association*, p. 8). The position in Kenya is that the existence of alternative remedies is not a bar to the grant of judicial review orders where the applicant seeks to enforce a public right (*David Mugo t/a Manyatta Auctioneers v. R.*, Nairobi Court of Appeal, Civil Application No. 265 of 1997). But in this case the judge decided that Odumbe had exhausted his private rights under the contract with the ICC and therefore could not apply for judicial review orders. The judge reasoned that the ICC's 'post-decision processes are meant to be checks and balances to ensure the affected parties' rights are well protected' (*R v. Kenya Cricket Association*, p. 9). 42

As we have seen, the report of an official inquiry such as the one conducted by Justice Ebrahim is typically forwarded to the ICC Code of Conduct Commission for review. Having pursued this post-decision process albeit unsuccessfully, Justice Wendoh thought that Odumbe had exhausted his rights under the contract (*R v. Kenya Cricket Association*, p. 9). Accordingly, the High Court denied Odumbe's application for judicial review on the ground that 'Having submitted to the code of conduct and its rules the applicant is bound by these rules and the rules were sufficient to determine his case and it being a private right cannot be enforced under public law' (*R v. Kenya Cricket Association*, p. 9). But the judge acknowledged that even though Odumbe had no remedy in public law, he could still 'seek other private law remedies' (*R v. Kenya Cricket Association*, p. 9). This is how Odumbe's pursuit of justice ended. 43

With respect to Odumbe's counsel, perhaps a better line of argument would have been that although the ICC and the KCA are private bodies, they wield immense power and that in imposing a five-year ban on Odumbe they abused this power and in the process unreasonably denied Odumbe the right to a livelihood. Odumbe's ground for seeking judicial review would therefore have been unreasonableness in the exercise of power. Further, while doing so counsel for Odumbe ought to have attacked the reasonableness of the ICC Code of Conduct. Had he done that, he would have put the right question before the court, which is whether private bodies exercising de facto power but which adversely impacts upon the livelihood of an individual are amenable to judicial review. There is sufficient case law in other common law jurisdictions to support such a view, and counsel for Odumbe should not have limited himself to a consideration of the decisions of English courts, in which 'the existence of a contractual relationship will always make it difficult to establish that the body is amenable to judicial review' (de Smith, Woolf and Jowell, 1995, p. 185). Compared to other common law jurisdictions, English Courts have been unduly conservative in their approach to the judicial review of private power (Anderson, 2006, p. 173). Courts in countries such as Scotland, Northern Ireland, the United States and Australia have adopted a more progressive approach. 44

In Scotland, the decisions of sports governing bodies and individual clubs are amenable to judicial review (*St Johnstone FC v Scottish Football Association*, 1965 SLT 171; *Gunstone v Scottish Women's Amateur Athletic Association*, 1987 SLT 611; *Dundee United FC v Scottish Football Association*, 1998 SLT 1244; *Lennox v British Show Jumping Association, Scottish Branch* (1996) SLT 353). Two recent cases attest to the progressive approach taken by courts in Scotland. In *Yuill Irvine v Royal Burgess Golfing Society of Edinburgh* (2004) SCLR 386, the petitioner sought judicial review of a decision of the respondent to suspend him, challenging it on the ground that it was made contrary to the rules of natural justice. Although Lady Smith agreed with the respondents that courts should be slow to interfere with the proceedings of a golf club, she thought that there was no 'recognized principle that the court should refrain from exercising the power of judicial review where the body whose decision is under attack is a sporting body (*Irvine*, p. 9-10 of transcript). In particular, Lady Smith thought that the 45

petitioner had much to lose were the decision of the respondent to be allowed to stand. In her view, the petitioner would be deprived of the benefit of over half of the amount of the membership fee, which is significant (*Irvine*, p. 10 of transcript). Further, as the managing director of a public limited company that provides financial services to a number of clients who are also members of the golf club, the petitioner's business would be adversely affected (*Irvine*, p. 10 of transcript). Accordingly, the judge appreciated that the respondent had power that was capable of adversely affecting the interests of the petitioner. Having considered these circumstances, the Court of Session held that the suspension of the petitioner was 'determined upon in a manner which contravened the rules of natural justice' (*Irvine*, p. 17 of transcript).

A similar petition was sought in *Stuart Crocket v Tantallon Golf Club* (2005) CSOH 37. 46
Although this petition was denied, Lord Reed made the important observation that unlike England, judicial review remedies are available in Scotland 'in proceedings against public authorities as in proceedings against private individuals' (*Crocket*, p. 14 of transcript). Thus, irrespective of whether the body in question is public or private, the primary consideration for courts in Scotland seems to be that such a body has the power to make decisions that will affect the rights or interests of other persons (*Crocket*, p. 17 of transcript). Accordingly, even if the relationship between an individual and a club is governed by contract, the Scottish courts will not allow the club to act 'contrary to law' (*Crocket*, p. 15 of transcript). For example, irrespective of what such a contract says, the club must not do 'something so prejudicial to a fair and impartial investigation of the question to be decided as to amount to a denial of natural justice' (*Crocket*, p. 17 of transcript).

In Northern Ireland, the courts have held that the decisions of private societies are amenable 47
to judicial review 'when the decision at issue has characteristics that import an element of public law' (Anderson, p.188). In determining whether an element of public law is present, these courts have reasoned that 'a matter may be one of public law while having a specific impact on an individual in his *personal capacity*' (*Re McBride's Application* (1999) NI 299, at p. 310 per Kerr J). It is therefore conceivable that a member of a club whose interests, for instance his livelihood, have been adversely affected by a decision of his club will be granted standing by the courts in Northern Ireland to apply for judicial review.

In the United States, courts are generally reluctant to interfere with the internal decisions of 48
sports organizations on the basis that courts of law are ill-equipped to handle conflicts involving the interpretation of the rules of such organizations (*Crouch v National Association for Stock Car Auto Racing, Inc.*, 845 F. 2d 397 (sd Cir. 1988); *Koszela v. National Association of Stock Car Auto Racing, Inc.*, 646 F.2d 749 (1981). Nevertheless, US courts will intervene where the applicant alleges that the organization has acted in bad faith, or has departed from its own prescribed procedures, or its actions are in total violation of its own rules and regulations (*Axel Schulz v. U.S. Boxing Association* 105 F 3d 127 (3d Cir. 1997). The basis for judicial intervention in such cases is 'to protect the property and other substantial interests' of those who are subject to the rules of such organizations (*Schulz*, p. 127). The US Courts are therefore concerned that these organizations are not simply voluntary social associations, but are profit-making corporations that wield substantial economic power over the careers of athletes (*Rutledge v. Gulian*, 93 .J. 113, 459 A. ed 680 (N.J. 1983)). In addition, the US courts intervene since the public's trust and confidence in these organizations is undermined where they flout their own rules (*Schulz*, p. 135).

The case of *Souleymane M'baye v World Boxing Association* 429 F. Supp. 2d 660 (U.S. District 49
Court) (2006) is instructive. M'baye alleged that the World Boxing Association (WBA) had breached its own rules governing the ranking of fighters and the sanctioning of bouts, to his detriment. On three occasions the WBA bypassed M'baye and sanctioned championship bouts involving fighters who were ranked much lower than M'baye. On these facts, the court held that the WBA had acted in bad faith and agreed to hear the case. In doing so, the court considered how the WBA's actions were adversely affecting M'baye, and observed that 'he is thirty-one years old, a relatively advanced age for a professional boxer. Any further delay would only hinder his opportunity for a title shot and increase the risk that he would lose a fight (and, hence, his ranking) in the interim, as he must engage in other bouts to make a living' (*M'baye*, pp. 669-670).

The Australian courts are perhaps the most radical in their endeavours to regulate private 50

power. They have adopted a policy of intervening where economic interests are affected (Anderson, p. 186). Thus in *Forbes v NSW Trotting Club Limited* (1979) 143 CLR 242, the High Court of Australia held that the decision of the defendant was amenable to judicial review since its function was to control a 'public activity.' The applicant in this case was a professional gambler. Further, whereas Australian courts will defer to 'the decision-making competences of sporting or social clubs,' they will intervene in 'compelling circumstances of unfairness (Anderson, p. 186).

In the sporting context, the Australian courts will grant standing to disgruntled athletes who have been disciplined by the bodies governing their sports in four circumstances: where the body has breached an express rule; or where the body has applied an unfair rule; or where the body has breached the implied obligation to act fairly; or where the body has acted unreasonably or disproportionately (Duthie, 2003). 51

But even in England there have been exceptions. Had he dug deep enough, counsel for Odumbe would have come across the old English case of *Lee v. Showmen's Guild of Great Britain* (1952) 1 All E.R. 1175. In *Lee*, the plaintiff sought judicial review of the decisions of a domestic tribunal, the committee of the Showmen's Guild, for being ultra vires and void. The question before the court was the extent to which the courts will examine the decisions of domestic tribunals on points of law. The English Court of Appeal held that it 'had jurisdiction to examine any decision of the committee which involved a question of law, including one of the interpretation of the rules' (*Lee*, p. 1175). The basis for this decision was that domestic tribunals such as the Showmen's Guild 'wield powers as great, if not greater, than any exercised by the courts of law' (*Lee*, p. 1181 per Lord Denning). Lord Justice Denning, who was evidently well ahead of his time, observed that such power 'can deprive a man of his livelihood' (*Lee*, p. 1181). And while the relationship between domestic bodies and their members are in theory based on contract, Lord Denning questioned the fairness of such contracts, observing that 'The man is supposed to have contracted to give them these great powers, but in practice he has no choice in the matter. If he is to engage in the trade, he has to submit to the rules promulgated by the committee' (*Lee*, p. 1181). *Lee* is also a useful authority on the scope of judicial review in such cases since the court was here stating that it had the authority to review the interpretation given by the Showmen's Guild to its own rules. Outside England, *Lee* has constituted a significant authority for courts to interfere with the internal decisions of domestic tribunals in the recent past (*Gary Hunt v. Selwyn Persad & Others*, High Court of Justice CV 1538-2006, Trinidad & Tobago). In Canada, *Lee* precipitated a radical change' in the courts' approach of non-interference in the affairs of private tribunals (Findley and Corbett, 2002, p. 110). The case 'is viewed as a starting point when considering the legal context for decision-making within sport organizations' (Findley and Corbett, p.110). 52

In Scotland, *Lee* was relied on in the case of *Ian Wiles & Others v Bothwell Castle Golf Club* (2005) CSOH 108, where the respondent had expelled the petitioners from the golf club. The petitioners asked the court to quash the respondent's decision on the grounds that it 'was unreasonable, was arrived at upon inclusion of irrelevant considerations and in a manner that was procedurally unfair and contrary to the rules of natural justice' (*Wiles*, p. 5 of transcript). In essence, the petitioners were asking the court to interpret the rules of the golf club. The court did not disappoint them, asserting that whether or not the petitioners were in breach of the rules of the golf club was a 'matter ultimately for the court' (*Wiles*, p. 11 of transcript). After examining the rules which the applicants were alleged to have breached, the court found that the conduct and acts of the petitioners that formed the basis of the respondent's decision were not 'susceptible to the disciplinary jurisdiction' of the respondent's committee on disciplinary matters (*Wiles*, p. 12 of transcript). In doing so, the court observed that the fact that many members of the club 'will have shaped their social, sporting and (possibly) business lives around membership... is not lightly to be taken away' (*Wiles*, p. 11 of transcript). Further, the court thought that 'It would be unlikely that members would readily agree that there should be no limit on the power of the Committee to expel or suspend from membership' (*Wiles*, p. 11 of transcript). 53

These cases should have helped counsel for Odumbe to dispense with the threshold question of whether the High Court of Kenya should have entertained his application for judicial review. Having done that, counsel would still have faced a considerable task in his substantive application. In my estimation, the ICC/KCA decision might have been challenged successfully on grounds of unreasonableness: not only the ICC Code of Conduct but also the manner of its 54

application in the Odumbe investigation were arguably unreasonable.

As a ground for judicial review, unreasonableness – otherwise known as irrationality or abuse of power – asks the question ‘whether the power under which the decision-maker acts, a power normally conferring a broad discretion, has been *improperly exercised*’ (De Smith, Woolf and Jowell, p. 549). The leading English authority on unreasonableness is the case of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1948) 1 K.B. 223, where Lord Greene defined unreasonableness as including ‘bad faith, dishonesty, attention given to extraneous circumstances, disregard of public policy, wrong attention given to irrelevant considerations, and failure to take into account matters which are bound to be considered’ (*Wednesbury*, pp. 229-230). Arguably, decisions that are not proportional to the targeted misconduct or that are in any case oppressive are equally unreasonable (De Smith, Woolf and Jowell, pp. 551-552). 55

Imposing a five-year ban on an athlete who derives his livelihood from the sport of cricket on the simple basis of associating with an alleged bookmaker without demonstrating that this association caused him to corrupt the sport is arguably unreasonable. There was no evidence that Odumbe had corrupted any specific match. In any case, cricket is a team sport and in the absence of specific evidence to the contrary it is hardly persuasive that Odumbe would have influenced the outcome of matches without colluding with other players. In addition, it is quite evident that Justice Ebrahim accorded undue attention to irrelevant considerations in making his decision. First, Justice Ebrahim seems to have convicted Odumbe of the non-existent offence of ‘discussing match-fixing with approval’ (Report by Mr Justice Ahmed Ebrahim in the Enquiry Relating to Maurice Odumbe, 2004, p. 18). Second, Justice Ebrahim’s conclusion that Odumbe’s conduct was ‘outrageously reprehensible’ was clearly based on his disapproval of Odumbe’s allegedly flamboyant lifestyle. Nevertheless, this was an irrelevant consideration which should not have influenced his decision. It cannot be the case that only pious individuals should play cricket. Finally, the penalty imposed on Odumbe was oppressive. For simply associating with and receiving money from an alleged bookmaker, Odumbe’s career was virtually brought to an end. 56

In the circumstances, the five-year ban arguably imposed excessive hardship on Odumbe since it was much more than was necessary to punish his act of associating with an alleged bookmaker. The case of *Katrin Zimmerman Krabbe v Deutscher Leichtathletik Verband (DLV) & International Amateur Athletic Federation (IAAF)* (de La Rochefoucauld, 2002, p. 32) offers a useful comparison. Katrin Krabbe was accused of unsporting behavior after a urine sample she gave in a drug test revealed the presence of a banned substance. She was found guilty and the IAAF suspended her for three years. She appealed to the Munich Court of Appeal on the ground that this sentence was excessive. The Court agreed, noting that ‘it was generally accepted that a four-year suspension usually meant the end of an athlete’s career’ (de La Rochefoucauld, 2002, p. 33). Odumbe’s five-year ban thus seems unreasonable by this conventional wisdom. In Odumbe’s case it is also quite apparent that the ICC Code of Conduct imposes strict liability on players in such cases, and it is difficult to distinguish cases of match-fixing from lesser cases of misconduct. Accordingly, the ICC Code of Conduct itself is arguably unreasonable. 57

The Odumbe case illustrates the need for national governance of international sports organizations, whose governance mechanisms are not always fair to the powerless athletes. In particular, it raises a question as to when national courts should intervene in the decision-making processes of ISOs to protect the liberties and livelihoods of athletes and sports officials. 58

JUDICIAL REVIEW AND NATIONAL GOVERNANCE OF INTERNATIONAL SPORTS ORGANIZATIONS

As the Odumbe case demonstrates, ISOs wield immense power that is capable of being abused to the detriment of athletes and other persons who earn a living from sport. Evidently, sport has acquired such a significant socio-economic importance in society that its administration should no longer be left to the whims of self-governing ISOs (Nafziger, 1996, p. 147). This development should provide a sufficient justification for judicial review of the decisions and rules of ISOs. 59

But while judicial review may be a desirable and useful tool for the national governance of 60

ISOs, a question arises as to what the scope of review should be. Further, apart from reviewing the decisions of ISOs, should national courts review the rules of such organizations, for instance, where they are unreasonable? It is important to carefully set out the parameters of judicial review so that national courts do not unduly interfere with the management of sporting activities. After all, 'competition in the courtroom is a poor substitute for competition in the sports arena' (Nafziger, p. 148). To put the matter differently, when should national courts have jurisdiction over ISOs? An additional problem likely to arise is that of enforcement of the decisions of national courts against ISOs: how can national courts ensure that ISOs respect their decisions?

As far as establishing the parameters of judicial review is concerned, Foster (2006) has offered 61 a useful analytical framework that would enable national courts to distinguish deserving cases from the less deserving ones. Foster classifies the rules that are applied to sport into four categories. First, are the technical rules and laws of the game'. These rules are 'the constitutive core of the sport' and are 'unchallengeable in the course of the game'. For example, the referee's decision to award a penalty in the game of soccer, however erroneous, is not open to challenge by anyone. Second, Foster talks of the 'ethical principles of sport' which 'govern issues of fairness and integrity' both on and off the field of play. This category covers rules that are otherwise known as 'the spirit of the game' (Foster, 2006, p. 4).

While the first two categories deal with non-legal rules that govern the sport on and off the 62 field of play, the other categories deal with rules of law which courts can apply to sports governance generally, or which have been incorporated by ISOs as mechanisms for self-regulation. Thus the third category consists of 'international sports law,' by which Foster means 'general principles of law that are automatically applicable to sport.' Such principles include basic protections such as due process and the right to a fair hearing. Foster's final category is 'global sports law' or *lex sportiva*, which as we have seen refers to the 'principles that emerge from the rules and regulations of international sporting federations as a private contractual order' (Foster, 2006, p. 4). Essentially, *lex sportiva* constitutes 'a claim of immunity from national law': it is a claim by ISOs to be left alone since they have incorporated sufficient principles of considerate decision-making in their internal rules and regulations (Foster, 2006, p. 2).

According to Foster(2006), courts should not – as a general rule – interfere with the rules of 63 the game. In his view, for instance, 'If the laws of football say that a goal at football is scored in a certain way, or that a try at rugby is worth four points, this is an area of regulation that cannot be legally challenged' (Foster, 2006, p. 4-5). Nevertheless, he accepts that there are limited situations where even the application of the rules of the game may be amenable to judicial review. Thus courts may review the rules of the game where they are 'arbitrary' or 'illegal' or violate 'social rules or the general principles of law' (Foster, 2006, p. 5).

The ethical principles of the sport consist of moral principles that seek to ensure fair play in 64 the conduct of sport. They ensure fair play by preserving a key element of sport, namely 'the uncertainty of outcome'. These principles govern matters such as 'fairness, integrity, sportsmanship, and the character of the game. Examples are rules that prohibit players and officials from betting on games or taking money from bookmakers in exchange for inside information, and those engaging in them will be charged with the offence of 'bringing the game into disrepute'(Foster, 2006, p. 5). Such activities are prohibited because they threaten the integrity of sports. Foster argues that, as a general rule, the ethical principles of sport should equally be outside the review of national courts since 'the nuance of what is broadly called 'the spirit of the game' is best treated as a technical question.' However, he contends that national courts should intervene if the 'arbitrary or irrational decisions' of ISOs cause economic damage (Foster, 2006, p. 16). In the Odumbe case, for example, one could plausibly argue that the decision was irrational since the Investigation did not establish that Odumbe took money from Jagdish Sodha in exchange for inside information. First, it was not concretely established as a matter of law that Sodha is or was a bookmaker. Second, causation was not established; that is, there was no evidence that he took the money to give inside information regarding any cricket match in particular.

Foster's other categories raise two essential questions: first, is there such a thing as an 65 international sports law which courts can apply in their endeavours to regulate ISOs?; second, should courts interfere with the decisions of ISOs when these organizations have applied their own *lex sportiva*? In the context of the latter question, an additional concern is whether

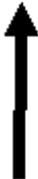
courts can question the reasonableness of such *lex sportiva*.

International sports law would consist of general principles of international law applicable to sport, which have been 'drawn from a comparative or common denominator reading of various legal systems' (Foster, 2006, pp. 6-7). These 'include clear unambiguous rules, fair hearings in disciplinary proceedings, no arbitrary or irrational decisions, and impartial decision-making' (Foster, 2006, p. 2). According to Foster national courts should apply these principles where they are 'not expressly incorporated into the rules or practice of international sporting federations.' He argues further that ISOs cannot exclude these general principles even by express agreement and that courts must declare any such attempts void (Foster, 2006, p. 16). 66

What of cases where an ISO has voluntarily incorporated these general principles in its *lex sportiva*? Should it be immune from interference by national courts? The power imbalance that characterizes the application of *lex sportiva* to athletes provides an important rationale for courts to police their implementation. As Foster (2006) recognizes, '*Lex Sportiva* rests on a fictitious contract' In his estimation, 'The power relationship between a powerful global international sporting federation, exercising a monopoly over competitive opportunities in the sport, and a single athlete is so unbalanced as to suggest that the legal form of the relationship should not be contractual' (Foster, 2006, pp. 15-16). Accordingly, national courts should not be content where ISOs claim that they have established their own *lex sportiva*. They must determine whether the rules and regulations that make up such *lex sportiva* adhere to the general principles of international law, such as considerate decision making. 67

There is thus a case for national courts to review the interpretation of the rules and regulations of ISOs. The progressive approach adopted in *Lee* and the recent judicial decisions in several common law jurisdictions that have followed it provide a sound foundation for national courts to play such an arguably intrusive role. As we saw in Section three, the English Court of Appeal held in *Leeth* that it had jurisdiction 'to examine any decision of the committee (of the Showmen's Guild) which involved a question of law, including one of the interpretation of the rules' (*Lee*, p. 1175). In his judgment, Lord Denning thought that a domestic tribunal should not be the sole judge of its own rules and that the court will not permit it to interpret its rules wrongly (*Lee*, p. 1181). Further, Lord Denning stated that the role of the court goes beyond ensuring that the rules of the domestic tribunal are interpreted correctly. In addition, he contended that it is the role of the court to ensure that the facts adduced before the tribunal are 'reasonably capable of being held to be a breach of the rules' (*Lee*, p. 1182). That is, the court must establish whether the correct rules were reasonably applied to the facts in the particular case (*Lee*, p. 1182). *Lee* is therefore authority for the proposition that the court should interfere with the decision of a domestic tribunal where there was no evidence to support its finding. It also provides a reasonable basis for the judicial review of the reasonableness of the rules and regulations of ISOs. In the *Odumbe* Investigation, it is arguable that the rule he is alleged to have violated was not only irrational and unduly punitive, but was also not reasonably applied to the facts. 68

Table 1 provides an overview of what should be considered the ideal scope of judicial review of the rules and decisions of ISOs. 69

ISO Decision/ Rule/Regulation	Scope of Judicial Review	Level of Judicial Deference
Rules of the Game	Rules are arbitrary/ illegal/violate general principles of law	

Ethical Principles	Rules are arbitrary/ irrational; decisions of ISOs cause economic damage	
<i>Lex Sportiva</i>	Interpretation of ISO rules - whether reasonable/ adhere to general principles of law, e.g., considerate decision making	
International Sports Law	Whether <i>lex sportiva</i> incorporates international sports law	

Table 1: The Scope of Judicial Review of Rules and Decisions of ISOs

The foregoing analysis should give national courts enough ammunition to review the rules and decisions of ISOs. But how can national courts enforce their decisions against ISOs? And why should ISOs submit to the jurisdiction of national courts? It is fortunate that the ISOs typically have national affiliates. Without these affiliate bodies, ISOs cannot effectively carry out their activities. National courts can therefore direct their orders to these affiliates. As Justice Wendoh observed in the *Odumbecase*, for example, the ICC is subject to Kenyan law since it carries out its operations in Kenya through the KCA (*R. v Kenya Cricket Association*, p. 10). Conversely, it is in the interests of ISOs to submit to the jurisdiction of national courts for the simple reason that it enhances their legitimacy. ISOs are likely to lose a considerable measure of legitimacy where sports fans perceive their decisions to be unfair, or where they are seen to be discriminating against certain players or teams. Thus in the *Odumbe Investigation*, the ICC was perceived by some Kenyan cricket fans to be 'giving preferential treatment to Test players and discriminating against developing nations' (Daily Nation, August 18, 2004). In such cases, it is likely that fans will lose interest in the sport in question. This would have an adverse impact on the sport, given that sports derive much of their revenue from advertising; commercial firms are likely to withdraw their adverts if the fan base dwindles considerably. In addition, commercial firms which value their image and practice corporate social responsibility will not want to associate with ISOs which do not respect the rights of athletes and sports officials. Finally, unfair administration threatens the very existence of sport. This is especially the case with sports such as cricket, which are still developing. Thus banning a crucial player such as Odumbe, who could be an ambassador for the sport and impart skills to younger generations, is not in the best interests of the development of the sport.

CONCLUSION

Our world has changed remarkably over the last two or so decades, thanks to the processes of globalization and privatization. One significant feature of this transformation has been the acquisition of significant institutional power by private transnational bodies. The exercise of this power has dire consequences for the liberties and livelihoods of individuals. Unfortunately, public law has been markedly slow to appreciate the need to regulate this power. With a foundation that is deeply rooted in classical liberal theory, public law has

predominantly directed its attention to public power, while perceiving private power to be benign. As far as public law is concerned, any power imbalances in the private sphere are capable of redress through contract.

But the power imbalances in today's private sphere are immense and necessitate the 'publicisation' of this sphere. As we have seen in the case of ISOs, which exercise a monopoly over competitive opportunities in their sports, private power is equally capable of being abused to the detriment of the liberties and livelihoods of individuals. There is thus an urgent need to regulate the exercise of this power. Provided that power, be it public or private, is capable of affecting the vital interests of individuals, it should be regulated to ensure that it is exercised in a manner that respects the principle of considerate decision-making. Especially at the national level, such regulation is necessary because there is no international legal regime for the regulation of transnational regulatory bodies such as ISOs. As we have also seen, private bodies may also implicate the constitutional rights of individuals whenever they exercise their power. Where that happens, there is a strong case for the imposition of constitutional obligations on such bodies. 72

Judicial review provides an important tool for the national regulation of the exercise of the power of ISOs. National courts should not only intervene where the power of ISOs has been exercised unreasonably but also where the rules and regulations of these organizations are unreasonable. But courts should draw the parameters of intervention carefully to ensure that they do not unduly interfere with the management of sport. They should strive to intervene only where the rules and regulations of ISOs are arbitrary, irrational, illegal, or violate general principles of law, and cause economic damage to individuals. In addition, courts should intervene where ISOs interpret their rules and regulations unreasonably or wrongly. Thus ISOs should not be allowed to be the sole interpreters of their rules and regulations. In the *Odumbe* case, for instance, there was sufficient justification for the High Court of Kenya to interfere with the decision of the ICC/KCA tribunal. The rule *Odumbe* is alleged to have violated was not only unreasonable and unduly punitive, but its application to the facts was equally unreasonable. One can only hope that when similar cases arise in the future national courts will be bold enough to intervene and stop private transnational organizations from abusing their power. 73

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