

6.9 Organised athletes: a critical voice in sports governance

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Football is at its most important juncture since the very establishment of the Fédération Internationale de Football Association (FIFA) over a century ago; and, with football at a historic juncture, so too is all of sport. Never before have so many of the game's fans and stakeholders acknowledged the need for fundamental change in the governance of the world's most popular and important sport.

In a surprise announcement on 2 June 2015 that he would 'lay down' his mandate at a to-be-convened extraordinary congress, FIFA president Sepp Blatter said: 'While I have a mandate from the membership of FIFA, I do not feel that I have a mandate from the entire world of football – the fans, the players, the clubs, the people who live, breathe and love football...' A brief statement, but one that says much about the governance issues that have plagued FIFA – and, indeed, many international sporting federations – for a number of years.

Simply put, sport's major international bodies lack the accountability needed to ensure the good governance that is essential if sport is to uphold the social, cultural and economic significance that many attach to it.

The accountability deficit and the rights of athletes

Since professional and commercial interests first entered sport in the nineteenth century, those vested with the privilege of governing sport have championed its special characteristics and even suggested that its governance should sit outside the high standards that the law applies across society. Central to this has been an intense and sustained focus on limiting the incomes and career

opportunities of professional athletes, whose human and legal rights have been subjected to vague notions such as the autonomy or specificity of sport.²

English football adopted a transfer system as early as 1891 and a maximum wage of £4 per week 10 years later. It was not until 1963 that football's governors were brought to account, by professional footballer George Eastham and future English Lord Justice Richard Wilberforce, who asserted that the law was competent to examine football's transfer system despite claims that its abolition would result in the death of professional football itself. Wilberforce considered the system

*an employers' system, set up in an industry where the employers have succeeded in establishing a monolithic front all over the world, and where it is clear that for the purpose of negotiation the employers are vastly more strongly organized than the employees. No doubt the employers all over the world consider the system a good system, but this does not prevent the court from considering whether it goes further than is reasonably necessary to protect their legitimate interests.*³

Jean Marc Bosman won a similar legal victory 30 years later with the clear statement that professional footballers, like all workers within the European Union, have the right to move freely within the Union and that the special interests demanded by sport do not sit above, nor justify a departure from, the rule of law.⁴

The positive growth and reforms to football that followed both legal cases attest to the benefits that flow to sport when it, like the rest of society, is made subject to the rule of law. The political and diplomatic skills of sport's administrators have succeeded in convincing many that not only does sport require special protection, it should also be autonomous from democratically elected governments and political institutions.

Article 165 of the Treaty on the Functioning of the European Union, which entered into force on 1 December 2009, calls on the European Union to 'take account of the specific nature of sport and the structures of sport'.⁵ In October 2014 the United Nations General Assembly passed a resolution

ostensibly about the role of sport in advancing education, health, development and peace. The resolution, passed at a time of great consternation in the governance of sport globally, ‘[s]upports the independence and autonomy of sport’.⁶ In a similar vein, the FIFA Statutes provide for the suspension of member football associations when that autonomy has been breached by possible ‘influence from third parties’.⁷ All three instruments present a threat to the rights of athletes and, in turn, the good governance of sport.

The ineffectiveness of the World Anti-Doping Agency has been condemned by athlete unions,⁸ and critical legal proceedings involving German speed skater Claudia Pechstein rightly question the independence of the Court of Arbitration for Sport and the absence of any free choice on the part of athletes to submit their very costly and often career-defining disputes to it.⁹

What needs to change

Fortunately, change is afoot.

One example is that Paraguay’s lawmakers are moving to remove the diplomatic immunity of the Confederación Sudamericana de Fútbol (CONMEBOL), which has been on the country’s statute books since 1997. With several CONMEBOL officials among those arrested as part of the May 2015 crackdown on FIFA, the counterproductive impact of the special privileges afforded international sporting bodies is finally being understood.

Such change is a small step towards the broad societal acknowledgement that is required: that, as sports are structured as cartels, they warrant not privilege and protection but enhanced scrutiny and accountability. Whether the requisite change to sport’s governance occurs in a lasting manner will largely depend on what happens at FIFA.

The Fédération Internationale des Associations Footballeurs Professionnels (FIFPro), the world footballers' association, is determined to ensure that the change is both fundamental and lasting. Honorary president Gordon Taylor OBE spoke unequivocally when addressing the FIFPro Europe General Assembly in Bulgaria in June 2015, saying that 'there has never been a better or more opportune time' for change, and that the player unions 'cannot and must not leave a vacuum in FIFA to be filled with the same toxic problems as before'.¹⁰ The failure of FIFA's own efforts to reform its governance in the wake of the decision of the FIFA Executive Committee to award the 2018 and 2022 men's football World Cups to Russia and Qatar, respectively, needs to be borne in mind. The recommendations of the Independent Governance Committee (IGC), chaired by Professor Mark Pieth of the Basel Institute on Governance and made up of critical stakeholders, including the players through then FIFPro president Leonardo Grosso, were largely ignored, resulting in the failure of the reform effort.

Some key lessons from the IGC report of 22 April 2014 are particularly relevant.¹¹ These include the roles played by the six FIFA confederations in defeating principal reforms, the uncertainty that continues to surround the awarding of the hosting rights for the 2018 and 2022 World Cups and how the reform process is to be driven if it is to succeed.

Key athlete-driven organisations, such as FIFPro and UNI World Athletes, insist that fundamental reform is required at the global and continental levels as well as in many countries. Knowledge and principle must drive the reform agenda. The conduct, governance and structure of FIFA, all confederations and complicit national football associations must be fully examined to properly inform the change process. Other key stakeholders, such as players, leagues, clubs, fans, corporate partners, governance and human rights lobbies and governments, must unite around the key planks of reform; otherwise they will face defeat through fragmentation against the football establishment, which will aim to secure its hegemony.

The key governance principles that must be embraced are well known, and include:

- a fundamental dedication to advancing the essence of sport, and a commitment to avoid compromising it for commercial or political purposes;
- subrogation to, and respect for, the rule of law;
- an independent governing board with the requisite skills and diversity to provide the necessary leadership and quality of decision-making; appropriate electoral rules, including term limits, should be clearly provided for;
- accountability of the governing board to the game's key stakeholders, which must include the right to elect and remove members of the board;
- the separation of powers between the regulatory, executive and dispute resolution functions;
- standards of transparency and disclosure in keeping with public companies, particularly regarding the finances of sporting organisations, the making of critical decisions, such as the right to host mega-events, and the conduct of elections; these should all be subject to independent audits and public disclosure;
- an obligation to uphold international and national law and standards regarding human rights and the environment in relation to the conduct of sport, including major events; and
- the recognition and involvement of the athletes, especially through independent athlete associations and collective bargaining agreements negotiated at arm's length and in good faith.

History and the prevailing culture at FIFA both suggest that such change cannot be achieved from within. The IGC report acknowledges this problem, and concludes by stating: 'In order to promote genuine cultural change, the IGC believes that some outside independent body should continue to work with FIFA to ensure that the road to reform is completely finished. This outside body can be small but must be adequately resourced to do the work.'¹²

Recent revelations demonstrate that a much more substantial external effort is required. In particular, this effort cannot succeed without organised athletes acting through independent trade unions. As Taylor said in Bulgaria: ‘Our record is one of transparency not opaqueness, accountability not of obfuscation. We adhere to rules or change them openly through negotiations or by the law of the land. We believe in monitoring, appraising and assessing the projects we set out to deliver from start to finish.’ Above all else, he emphasised: ‘A game for players about players has NOT been run by players and we are now seeing the results.’¹³

Notes

¹ Brendan Schwab is Vice President of the Fédération Internationale des Associations Footballeurs Professionnels and the newly appointed Head of UNI World Athletes, a global collective of 85,000 athletes through major player associations including FIFPro, the Federation of International Cricketers’ Associations, the International Rugby Players’ Association, EU Athletes, the US National Basketball Players Association, the US National Football League Players Association, the National Hockey League Players Association (United States and Canada), the Japanese Baseball Players Association and the Australian Athletes’ Alliance. He is the former General Secretary of the Australian Athletes’ Alliance and Chief Executive of Professional Footballers Australia.

² See, for example, Braham Dabscheck, ‘Sport, Human Rights and Industrial Relations’, *Australian Journal of Human Rights*, vol. 6 (2000).

³ *Ibid.*

⁴ *The Wall Street Journal* (US), ‘Bosman still struggling with ruling that rewards soccer’s free agents’, 2 July 2014, www.wsj.com/articles/the-jean-marc-bosman-ruling-benefited-soccers-free-agents-but-the-man-himself-is-still-struggling-1404327335.

⁵ See article 165 of the Treaty of Lisbon, at www.lisbon-treaty.org/wcm/the-lisbon-treaty/treaty-on-the-functioning-of-the-european-union-and-comments/part-3-union-policies-and-internal-actions/title-xii-education-vocational-training-youth-and-sport/453-article-165.html.

⁶ International Olympic Committee, ‘Historic milestone: United Nations recognises autonomy of sport’, 3 November 2014, <http://www.olympic.org/news/historic-milestone-united-nations-recognises-autonomy-of-sport/240276>

⁷ FIFA Statute Article 13.1(i)

http://www.fifa.com/mm/Document/AFFederation/Generic/02/58/14/48/2015FIFAStatutesEN_Neutral.pdf

⁸ *The Sydney Morning Herald* (Australia), ‘Why Australian sports must cut ties with WADA’, 15 June 2014, www.smh.com.au/sport/why-australian-sports-must-cut-ties-with-wada-20140615-zs8k1.html#ixzz34ION5nPL.

⁹ Asser International Sports Law, ‘The Pechstein ruling of the Oberlandesgericht München: time for a new reform of CAS?’, 19 January 2015, www.asser.nl/SportsLaw/Blog/post/the-pechstein-ruling-of-the-oberlandesgericht-munchen-time-for-a-new-reform-of-cas.

¹⁰ Professional Footballers’ Association (UK), ‘Taylor addresses FIFPro European congress’, 11 June 2015, www.thepfa.com/news/2015/6/11/taylor-addresses-fifpro-european-congress.

¹¹ Independent Governance Committee, *FIFA Governance Reform Project: Final Report by the Independent Governance Committee to the Executive Committee of FIFA* (Basel: Basel Institute on Governance, 2014).

¹² *Ibid.* p. 15.

¹³ PFA (11 June 2015).