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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 experienced stratospheric levels of commercialization i last two decades as multinational firms seek to exploi global fame of star athletes and teams to market products. While athletes participate in these sports fo sheer thrill and fun of competition, and perhaps the des be famous and adored by multitudes of fans, many equally attracted by the phenomenal wages that they earn from sports. In many ways, therefore, spo predominantly a means to a living for athletes and personnel of sports teams. The paradox is that these incentives have motivated a good number of athletes teams to cheat, thereby bringing their sports into disre Thus doping and match-fixing scandals in athletics, bas

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cycling, soccer and cricket abound (Vaerenbergh, 2005, 12). Such scandals shock the moral sensibilities of s fans, with the likelihood that they may lose interest i sport altogether, thereby jeopardizing the conti existence of the sport. For instance, the Tour de Fr which was for along time the world's premier cy competition, is now derisively termed the 'Tou Farce' (Seaton, 2006).

It has therefore become important to regulate spor order to ensure 'fair play.' Accordingly, transnational s organizations and federations have emerged to go international sport. The International Football Feder (FIFA), the International Cricket Council (ICC) and International Olympic Committee (IOC) are good exam These organizations largely operate outside the purvie national and international law, and are governed by rulebooks and constitutions as autonomous private ent While membership in these organizations is voluntary, invariably monopolize their sports because athletes compelled to become members if they want to partici These organizations are therefore extremely powerfu their decisions 'can have profound effects on the caree players' (Foster, 2003, p.1). For instance, they can sus or ban players from the sport, thereby depriving them livelihood. While such power may be necessary to en that the spirit of fair play prevails in sports, it is pat capable of being abused. Unfortunately, where such p is abused, the affected athletes are often at a deac since national courts in many jurisdictions remain relu to intervene, deeming their relationship as a private governed by contract and outside the purview of public This is the fate that befell Maurice Odumbe, a star cric and captain of Kenya's national cricket team at the ma time.

This article grapples with the question of the judicial re of this contractual private order, using the Maurice Odu application for judicial review before the High Court of K (hereinafter the *Odumbe* case) as an illustration. Odu was found guilty in an investigation authorized by the and conducted by the Kenya Cricket Association (KC having ' inappropriate conduct' with a bookmaker banned from the game for five years (Ebrahim, 2004). attempt to overturn this career-threatening ban, Odu applied for judicial review. The High Court of Kenya dec to entertain his application, reasoning that it would issue judicial review orders against the ICC and the since they are not 'public bodies or persons perfor public functions' and that his remedies lay in private la this was a contractual dispute (*Republic v. Kenya C Association(KCA)* (2006) eKLR).

The article argues that the High Court's decision in *Odumbe*case is at odds with the emerging progressive in other common law jurisdictions, where the abili private bodies to wield power that can significantly in upon the liberties and livelihoods of individuals has recognised and regulated. The dispositive considerati the courts of law should not be whether power is publi

that, irrespective of its source, it is capable of adve affecting the rights of individuals. And if it is capable of so then it ought to be subject to the democratic require of considerate decision-making. Further, the paper a that such an obligation of considerate decision-making to be imposed on international sports organizations the absence of national or international legis frameworks for the regulation of their power. Wh number of these organizations have, through regulation, incorporated principles of considerate dec making in their rules and constitutions, there remains a for judicial review of the implementation of such princip ensure that such rules are fair and that they are ap uniformly and fairly. In performing this role, how national courts should carefully define the parameters obligation of considerate decision-making in order to pr undue judicial intervention in sporting activities.

The following Sectionprovides the paper's conce framework and examines three progressive rationale the 'publicisation' of the private sphere, by which one m the imposition of public law obligations of consid decision-making on private bodies. First, power ought regulated by public law provided it is capable of adve affecting the liberties and livelihoods of individuals. Se much of global administration is today undertaken by pr bodies, which regulate important spheres of life and th a need for the national regulation of the power of bodies given the absence of international regulation. need is perhaps heightened in countries such as K which has attained international success in long-dis running and whose international image is conside enhanced by the success of her athletes. There is th public interest in the democratic governance of sport. Fi the regulation of private power can also be located i context of the debate on the horizontal applicatio constitutional rights. In particular, private bodies exercise power over significant spheres of life shou required to respect fundamental constitutional values.

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

Public Law and the Regulation of Private Powe

In common law jurisdictions, the law's relationship power, which Oliver (1999) defines as ' the possibil imposing one's will upon the behaviour of other pers has largely been governed by the ideology of liberal th which establishes a dichotomy between the public s and the private sphere. On the one hand, liberal t explicitly recognizes the imbalances in power between p bodies and private individuals, which is then seen to j the imposition of 'higher order duties' of fair and consid

decision-making on public bodies. Conversely, liberal th
does not sufficiently recognize power imbalances in
private domain and largely assumes that individuals
equal and are capable of resolving any instances of ab
of private power among themselves, without the nee
governmental intervention.

However, globalization and privatization processes
resulted in the transfer of immense power to pr
entities. These entities now considerably influence
liberties and livelihoods of individuals. In the majority of
cases, these processes have resulted in the delegati
what may be termed 'public functions' to private ent
Public functions refer to the core functions that
considered to be the primary responsibility of the State
in other cases, while private entities may not necessari
exercising public functions, they nevertheless wield imm
powers that equally impact upon the liberties and livelih
of individuals. The question is whether law ought to reg
the exercise of private power in both scenarios.

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

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

While these duties have been imposed on publi

governmental bodies without much controversy in
Commonwealth countries, and increasingly on private b
exercising public or governmental functions, the ide
imposing them on purely private bodies exercising *de*
power remains fiercely contested (Aman, Jr, 2001, p. 1
Nevertheless, a number of public law scholars
advocated a persuasive view that provided a body, wh
public or private, wields 'institutional power capab
affecting rights and interests' it ought to be subje
judicial review (Hunt, 1997, pp.32-33). According to
enlightened view, in determining whether to extend
supervisory jurisdiction to such private bodies, courts s
look into factors such as the nature of interests affecte
their decisions, how seriously those decisions impac
those interests, whether the affected interests have
real choice but to submit to the bodies' jurisdiction, an
nature of the context in which the bodies operate (
1997, p.32). But the mere fact that a private
possesses institutional power 'should not lead inexoral
the conclusion that all principles of a public nature shou
equally applicable to such bodies (Craig, 1997, p. 211).

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

The second rationale for the ' publicisation' of the pr
sphere is to be found in the emerging scholarship on
has been termed 'global administrative law.' This schola
seeks to respond to the proliferation of internat
regulatory mechanisms over the last decade o
(Kingsbury, Krisch and Stewart, 2005). These mechan
have developed out of the realisation that
'consequences of globalised interdependence' in many
of interaction such as security, environmental protec
banking and financial regulation, and labour stan
'cannot be effectively addressed by separate nat
regulatory and administrative measures' (Kingsbury, K
and Stewart, 2005, p.4). This has resulted in a shift of
regulatory decisions from the national to the global
The concern of global administrative law scholars is tha
shift has created a democracy deficit, since the interna
regulatory mechanisms are not directly subject to contr
national governments or domestic legal systems. Ye
international institutions and regimes that engage in g
governance exercise immense powers and regulate
sectors of economic and social life. Thus their deci
increasingly and directly affect individuals and firms, in

cases without any intervening role for national govern
action.

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

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

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

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

conduct of athletes off the field of play (Foster, 2003, p.

A final rationale for the publicisation of the private sph
to be found in the need for the horizontal applicati
constitutional values, especially where private bodies c
significant spheres of life. The orthodox view, which ow
existence to liberal theory, is that constitutional r
impose constitutional duties only on government and n
private actors. According to liberal theory, it is desirab
maintain 'a public-private division in the scop
constitutional rights, leaving the private sphere free
constitutional regulation'. This limitation of 'the scop
constitutional rights to the public sphere enhances
autonomy of citizens, preserving a heterogeneous pr
sphere free from the uniform and compulsory re
constructed by constitutional norms' (Gardbaum, 2003
394-395).

How, then, should constitutional law respond to
emergence of private power that is fuelled by the proc
of globalisation and privatisation? The orthodox vie
arguably inadequate in today's world given that much p
is now wielded by private as opposed to public bo
Fortunately, a horizontal approach to constitutional rig
emerging, according to which 'constitutional rights
values may be threatened by extremely powerful pr
actors and institutions as well as governmental
(Gardbaum, 2003, p. 395). The horizontal approach crit
the vertical approach for ' automatically (privileging
autonomy and privacy of such citizen-threateners (sic)
that of their victims' (Gardbaum, 2003, p. 395).

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

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

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

The Irish approach makes much sense in a world th characterised by power imbalances that are increas being exacerbated by the processes of globalisation privatization. The autonomy of the powerless should concern for public law just as much as that of the pow Indeed, even the jurisdictions that are reluctant to constitutional rights horizontally and directly will countenance the perpetuation of morally repreher conduct, such as racial bigotry, that derail the quest fo attainment of fundamental constitutional values suc equality or equal treatment.

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

In the sporting context, the horizontal approac constitutional rights would be useful in the vindication o rights of athletes to a livelihood and due proces considerate decision-making. Both of these rights ca based on the protection of fundamental rights and free that many constitutions grant individuals. Thus an at denied the right to earn a livelihood can base constitutional claim on the right to life. Again, an at denied due process can base her constitutional claim o right to the protection of the law. Such a claim wou considerably easier to prosecute where, as in South A the constitution protects social and economic rights recognizes a right to 'administrative justice (Asimow, 19

Taken together, the three rationales discussed above a compelling case for the ' publicisation' of the pr sphere. They all recognize that, irrespective of its so power ought to be regulated by public law provided capable of affecting the liberties and livelihood individuals. Further, they all appreciate that we live age where much significant private power is wielded exercised by private actors, thanks to the process globalization and privatization. This development dema re-conceptualization of the tools of public law if it perform its task of regulating power to preserve the libe and livelihoods of individuals.The *Odumbe*case provid

good illustration of why public law should no longer s
aside as powerful international organizations threate
liberties and livelihoods of individuals.

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

The ICC/KCA Investigation

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

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

The ICC appointed a former judge of the Zimbab
Supreme Court, Justice Ahmed Ebrahim, to conduc
investigation. It is noteworthy that Odumbe was not h
with this appointment since Justice Ebrahim had sent hi
during a tournament in South Africa in 2001 in whic
latter was the match umpire (East African Standard, Ma
2004). But it is not clear how the ICC handles allegatio
bias levelled against investigators. Procedural fai
entitles an accused person to a fair unbiased hea
However, the question of bias was not raised in the Odu
Investigation.

The charge against Odumbe was that he had acted con
to paragraph C 4 (ix) of the ICC Code of Conduct, w
makes it an offence for players and team officials to re
'any money, benefit or other reward (whether financ
otherwise) which could bring him or the game of cricke
disrepute.' The penalty for such conduct is a ban
minimum period of two years and a maximum ban for l
fine may also be imposed. The particulars of the cl
against Odumbe were that he had associated with a k
Indian bookmaker, one Jagdish Sodha and accepted
provision of hotel accommodation and received various
of money from him. In addition, he was charged
admitting to his former wife and former girlfriends th

had received money from Jagdish Sodha and admitti
receiving money to fix a match in Zimbabwe (Ebrahim, 2
p.2).

The only case against Odumbe seems to be tha
associated with Jagdish Sodha, a known bookmaker. Ju
Ebrahim's report does not countenance any possil
however remote, that this association could have
innocent. According to this report, Odumbe associated
Jagdish Sodha, who paid for his hotel accommodatic
various occasions and gave him various sums of money
associating with an alleged bookmaker, the ICC is s
that Odumbe must be held strictly liable for violating th
Code of Conduct. Much of the evidence adduced by
prosecution to demonstrate that Jagdish Sodha
bookmaker was arguably circumstantial. Justice Ebr
seems to have based his conclusion that Jagdish S
could only be a bookmaker on the evidence of one Nira
Virk, an employee of the ICC's Anti-Corruption and Sec
Unit (Report by Mr Justice Ahmed Ebrahim in the En
Relating to Maurice Odumbe, 2004, pp. 15-16). Mr.
testified that while he was employed by the Special C
Division of the Indian Police force, he had interrog
Jagdish Sodha who confessed to him that he w
bookmaker. It is interesting that no evidence was adc
to show that Jagdish Sodha had ever been found gui
bookmaking, which is a criminal offence in India. Yet Ju
Ebrahim was quick to conclude that 'The evic
established beyond doubt that Jagdish Sodha was or
bookmaker' (Ebrahim, 2004, p. 26).

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

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

Further, the prosecution did not adduce any eviden
show that Odumbe had corrupted any of his team m

Cricket is a team sport, and it is considerably difficu
influence the outcome of matches without the collusi
one's team mates. Yet Justice Ebrahim was quick to di
the evidence of Steve Tikolo, who succeeded Odumbe a
captain of the Kenyan cricket team, as self-serving. Mr.
had testified that he had questioned every member o
team, who confirmed that Odumbe had 'not approa
them or asked them to perform any improper or corru
in or with regard to any cricket match (Ebrahim, 2004, p
Justice Ebrahim's retort was that 'one would hardly e
any members of the present Kenyan cricket team to
that they were approached or were in any way involv
nefarious activities' (Ebrahim, 2004, p. 25). It appears
the honourable judge had formed an opinion on
Odumbe's teammates would testify even before he h
them.

Justice Ebrahim concluded that the evidence ag
Odumbe was 'overwhelming' and that the allega
against him had been proved 'beyond reaso
doubt' (Ebrahim, 2004, p. 30). In his view, Odumbe's co
was ' outrageously reprehensible' (Ebrahim, 2004, p.
Accordingly, he imposed a five-year ban on Odumbe. I
concluding remarks, Justice Ebrahim seems to expres
view that cricket players must all adhere to an-almost
lifestyle and that the game of cricket cannot counter
individuals who espouse a different lifestyle. Here is
Justice Ebrahim had to say:

> 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 alle
flamboyant lifestyle. It is doubtful whether many p
would agree that Odumbe's conduct was ' outrage
reprehensible.' In addition, it is excessive and unreaso
to impose such a severe career-threatening penalty o
basis of an association with a person who has not
been established to be a bookmaker by the due proce
law. Justice Ebrahim was not even willing to counter
the possibility, however remote, that Jagdish Sodha w

star-struck fan who liked to be associated with a succe
cricketer, as many sports fans typically are. Indeed, th
Code of Conduct is arguably unreasonable since it is ca
unduly strict terms: mere association with an al
bookmaker is sufficient for a player to be banned from cr
for life and thereby deprived of the means of a livel
(ICC Code of Conduct, Rule C 4 (ix)).

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

The Judicial Review Application

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

Counsel for the ICC and KCA contended that the relatio
between Odumbe and the ICC/KCA was contractual
therefore not susceptible to judicial review, and that ju
review does not apply to the ICC and KCA because the
private bodies (*R v. Kenya Cricket Association*, p.3). In m
these submissions, counsel relied on the English cas
Law v National Greyhound Racing Club(1983) All E.R. 300;
Football Association ex parte Football League(1993) 2 Al
833; and *R. v. Disciplinary Committee of the Jockey Cl*
parte Agha Khan(1993) 1 WLR 909) as authorities fo
proposition that generally courts will not interfere in
affairs of clubs or domestic affairs, except where such a
is ' directly or indirectly underpinned to an organ or ag
of the state or the state could interfere to create a p
body to perform its functions (*R v. Kenya Cricket Associ*
pp. 4 and 7). In response, Odumbe's counsel argued
the ICC 'is an international body charged with overs
administration of the sport of cricket worldwide an
decisions and activities impact the general public at
and that its activities are of a public nature' (*R v. K*
Cricket Association, p. 4). Further, he contended tha
tribunal set up to investigate Odumbe was not a domes
private entity since it exercised quasi judicial functions
Kenya Cricket Association, p. 4). In particular, counse
Odumbe urged the court to follow the English decision

v. Panel on Takeovers & Mergers ex parte Datafin P
Another(1987) All E.R. 564, which is authority for
proposition that in considering whether a body is exerc
a public function, the courts should not just look a
sources of that body's powers, but also examine the n
of such powers to determine whether they are of a p
nature. And if the court finds that the powers of the bo
question are public in nature, then it should ente
applications for judicial review of that body's decisions.

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

The judge then observed that the ICC's Guidelines o
Principles of Natural Justice are permissive and m
provide that an accused person who is dissatisfied wit
decision of a tribunal set by ICC may seek review o
hearing and decision in court (*R v. Kenya Cricket Associ*
p. 8). The judge emphasized that being guideline
opposed to rules of the ICC Code or Articles of Associa
these provisions did not give the applicant a right to ju
review (*R v. Kenya Cricket Association*, p. 8). The judge
inferred from this line of reasoning that judicial review w
not be available since this was a private arbitration w
the rules governing membership of the ICC and KCA
Kenya Cricket Association, p. 8). Put another way, sinc
rules of the ICC Code or Articles of Association did
specifically provide for judicial review of the decisions
tribunals, this remedy had been precluded by the applic
contract with the ICC.

Counsel for the respondents had also contended
Odumbe had exhausted his remedies, having 'invoke
alternative remedy whereby at the behest of the applic
counsel an official enquiry was carried out and it render
decision (which) was ratified by the International Cr
Council Executive Board (*R v. Kenya Cricket Association*,

The position in Kenya is that the existence of altern remedies is not a bar to the grant of judicial review o where the applicant seeks to enforce a public right (*Mugo t/a Manyatta Auctioneers v. R*, .Nairobi Court of Ap Civil Application No. 265 of 1997). But in this case the decided that Odumbe had exhausted his private r under the contract with the ICC and therefore coul apply for judicial review orders. The judge reasoned tha ICC's 'post-decision processes are meant to be checks balances to ensure the affected parties' rights are protected' (*R v. Kenya Cricket Association*, p. 9).

As we have seen, the report of an official inquiry such a one conducted by Justice Ebrahim is typically forward the ICC Code of Conduct Commission for review.H pursued this post-decision process albeit unsuccess Justice Wendoh thought that Odumbe had exhauste rights under the contract (*R v. Kenya Cricket Associatio* 9). Accordingly, the High Court denied Odumbe's applic for judicial review on the ground that 'Having submitt the code of conduct and its rules the applicant is bou these rules and the rules were sufficient to determin case and it being a private right cannot be enforced u public law'(*R v. Kenya Cricket Association*, p. 9). But the acknowledged that even though Odumbe had no reme public law, he could still 'seek other private law remedi *v. Kenya Cricket Association*, p. 9). This is how Odu pursuit of justice ended.

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

In Scotland, the decisions of sports governing bodies individual clubs are amenable to judicial review(*St John FC v Scottish Football Association*, 1965 SLT 171; *Gunst Scottish Women's Amateur Athletic Association*, 1987 SLT *Dundee United FC v Scottish Football Association*, 199

1244; *Lennox v British Show Jumping Association, Sc*
Branch(1996) SLT 353). Two recent cases attest to
progressive approach taken by courts in Scotland. In
Irvine v Royal Burgess Golfing Society of Edinburgh(2004)
386, the petitioner sought judicial review of a decision o
respondent to suspend him, challenging it on the gr
that it was made contrary to the rules of natural ju
Although Lady Smith agreed with the respondents
courts should be slow to interfere with the proceedings
golf club, she thought that there was no ' recog
principle that the court should refrain from exercising
power of judicial review where the body whose decisi
under attack is a sporting body (*Irvine*, p. 9-10 of transc
In particular, Lady Smith thought that the petitioner
much to lose were the decision of the respondent t
allowed to stand. In her view, the petitioner woul
deprived of the benefit of over half of the amount o
membership fee, which is significant (*Irvine*, p. 1
transcript). Further, as the managing director of a p
limited company that provides financial services to a nu
of clients who are also members of the golf club
petitioner's business would be adversely affected(*Irvi*
10 of transcript). Accordingly, the judge appreciated tha
respondent had power that was capable of adve
affecting the interests of the petitioner. Having consi
these circumstances, the Court of Session held tha
suspension of the petitioner was 'determined upon
manner which contravened the rules of na
justice' (*Irvine*, p. 17 of transcript).

A similar petition was sought in *Stuart Crocket v Tantallo*
Club(2005) CSOH 37. Although this petition was denied,
Reed made the important observation that unlike Eng
judicial review remedies are available in Scotla
proceedings against public authorities as in procee
against private individuals' (*Crocket*, p. 14 of transc
Thus, irrespective of whether the body in question is p
or private, the primary consideration for courts in Sco
seems to be that such a body has the power to
decisions that will affect the rights or interests of
persons (*Crocket*, p. 17 of transcript). Accordingly, even
relationship between an individual and a club is governe
contract, the Scottish courts will not allow the club t
'contrary to law' (*Crocket*, p. 15 of transcript). For exa
irrespective of what such a contract says, the club mus
do 'something so prejudicial to a fair and imp
investigation of the question to be decided as to amou
a denial of natural justice' (*Crocket*, p. 17 of transcript).

In Northern Ireland, the courts have held that the deci
of private societies are amenable to judicial review '
the decision at issue has characteristics that impo
element of public law' (Anderson, p.188). In determ
whether an element of public law is present, these c
have reasoned that 'a matter may be one of public law
having a specific impact on an individual in his *per*
capacity' (*Re McBride's Application* (1999) NI 299, at p. 31
Kerr J). It is therefore conceivable that a member of a
whose interests, for instance his livelihood, have
adversely affected by a decision of his club will be gra

standing by the courts in Northern Ireland to appl judicial review.

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

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

The Australian courtsare perhaps the most radical in endeavours to regulate private power. They have adop policy of intervening where economic interests are aff (Anderson, p. 186). Thus in *Forbes v NSW Trotting Limited* (1979) 143 CLR 242, the High Court of Australia that the decision of the defendant was amenable to ju review since its function was to control a 'public activity applicant in this case was a professional gambler. Fu whereas Australian courts will defer to 'the decision-m competences of sporting or social clubs,' they will inte in 'compelling circumstances of unfairness (Anderso 186).

In the sporting context, the Australian courts will standing to disgruntled athletes who have been discip

by the bodies governing their sports in four circumsta
where the body has breached an express rule; or wher
body has applied un unfair rule; or where the body
breached the implied obligation to act fairly; or wher
body has acted unreasonably or disproportionately (Du
2003).

But even in England there have been exceptions. Ha
dug deep enough, counsel for Odumbe would have
across the old English case of *Lee v. Showmen's Gu*
Great Britain(1952) 1 All E.R. 1175. In *Lee*, the plaintiff s
judicial review of the decisions of a domestic tribunal
committee of the Showmen's Guild, for being ultra vire
void. The question before the court was the extent to
the courts will examine the decisions of domestic trib
on points of law. The English Court of Appeal held tl
'had jurisdiction to examine any decision of the comm
which involved a question of law, *including one o*
interpretation of the rules' (*Lee*, p. 1175). The basis fo
decision was that domestic tribunals such as the Showr
Guild 'wield powers as great, if not greater, than
exercised by the courts of law' (*Lee*, p. 1181 per
Denning). Lord Justice Denning, who was evidently
ahead of his time, observed that such power 'can depr
man of his livelihood' (*Lee*, p. 1181). And while
relationship between domestic bodies and their men
are in theory based on contract, Lord Denning quest
the fairness of such contracts, observing that 'The m
supposed to have contracted to give them these
powers, but in practice he has no choice in the matter.
is to engage in the trade, he has to submit to the
promulgated by the committee' (*Lee*, p. 1181). *Lee*is a
useful authority on the scope of judicial review in such
since the court was here stating that it had the author
review the interpretation given by the Showmen's Gu
its own rules. Outside England, *Lee*has constitut
significant authority for courts to interfere with the int
decisions of domestic tribunals in the recent past (*Gary*
v. Selwyn Persad & Others, High Court of Justice CV
2006, Trinidad & Tobago). In Canada, *Lee*'precipita
radical change' in the courts' approach of non-interfere
the affairs of private tribunals (Findley and Corbett, 20
110). The case 'is viewed as a starting point
considering the legal context for decision-making
sport organizations' (Findley and Corbett, p.110).

In Scotland, *Lee*was relied on in the case of *Ian Wi*
Others v Bothwell Castle Golf Club(2005) CSOH 108, w
the respondent had expelled the petitioners from the
club. The petitioners asked the court to quash
respondent's decision on the grounds that it
unreasonable, was arrived at upon inclusion of irrel
considerations and in a manner that was procedurally u
and contrary to the rules of natural justice' (*Wiles*, p.
transcript). In essence, the petitioners were asking the
to interpret the rules of the golf club. The court di
disappoint them, asserting that whether or not
petitioners were in breach of the rules of the golf club
'matter ultimately for the court' (*Wiles*, p. 11 of transc
After examining the rules which the applicants were al

to have breached, the court found that the conduct and
of the petitioners that formed the basis of the respond
decision were not 'susceptible to the disciplinary jurisdi
of the respondent's committee on disciplinary matters (
p. 12 of transcript). In doing so, the court observed tha
fact that many members of the club 'will have shaped
social, sporting and (possibly) business lives ar
membership… is not lightly to be taken away' (*Wiles*, p.
transcript). Further, the court thought that 'It woul
unlikely that members would readily agree that there s
be no limit on the power of the Committee to exp
suspend from membership' (*Wiles*, p. 11 of transcript).

These cases should have helped counsel for Odumb
dispense with the threshold question of whether the
Court of Kenya should have entertained his applicatio
judicial review.Having done that, counsel would still
faced a considerable task in his substantive applicatio
my estimation, the ICC/KCA decision might have
challenged successfully on grounds of unreasonable
not only the ICC Code of Conduct but also the manner
application in the Odumbe investigation were arg
unreasonable.

As a ground for judicial review, unreasonablen
otherwise known as irrationality or abuse of power –
the question 'whether the power under which the deci
maker acts, a power normally conferring a broad discre
has been *improperly exercised*' (De Smith, Woolf and Jo
p. 549). The leading English authority on unreasonable
is the case of *Associated Provincial Picture Houses*
Wednesbury Corporation(1948) 1 K.B. 223, where
Greene defined unreasonableness as including 'bad
dishonesty, attention given to extraneous circumsta
disregard of public policy, wrong attention given to irrel
considerations, and failure to take into account ma
which are bound to be considered' (*Wednesbury*, pp.
230). Arguably, decisions that are not proportional t
targeted misconduct or that are in any case oppressiv
equally unreasonable (De Smith, Woolf and Jowell, pp.
552).

Imposing a five-year ban on an athlete who derive
livelihood from the sport of cricket on the simple bas
associating with an alleged bookmaker wi
demonstrating that this association caused him to co
the sport is arguably unreasonable. There was no evic
that Odumbe had corrupted any specific match. In any
cricket is a team sport and in the absence of sp
evidence to the contrary it is hardly persuasive that Od
would have influenced the outcome of matches wi
colluding with other players. In addition, it is quite ev
that Justice Ebrahim accorded undue attention to irrel
considerations in making his decision. First, Justice Eb
seems to have convicted Odumbe of the non-exi
offence of 'discussing match-fixing with approval' (Repo
Mr Justice Ahmed Ebrahim in the Enquiry Relating to Ma
Odumbe, 2004, p. 18). Second, Justice Ebrahim's concl
that Odumbe's conduct was 'outrageously reprehen
was clearly based on his disapproval of Odumbe's alle

flamboyant lifestyle. Nevertheless, this was an irrel consideration which should not have influenced his dec It cannot be the case that only pious individuals should cricket. Finally, the penalty imposed on Odumbe oppressive. For simply associating with and receiving m from an alleged bookmaker, Odumbe's career was vir brought to an end.

In the circumstances, the five-year ban arguably imp excessive hardship on Odumbe since it was much more was necessary to punish his act of associating wit alleged bookmaker.The case of *Katrin Zimmerman Kra Deutscher Leichtathletik Verband (DLV) & Interna Amateur Athletic Federation (IAAF)* (de La Rochefouc 2002, p. 32) offers a useful comparison. Katrin Krabbe accused of unsporting behavior after a urine sample gave in a drug test revealed the presence of a ba substance. She was found guilty and the IAAF suspende her for three years. She appealed to the Munich Cou Appeal on the ground that this sentence was excessive Court agreed, noting that 'it was generally accepted t four-year suspension usually meant the end of an ath career' (de La Rochefoucauld, 2002, p. 33). Odumbe's year ban thus seems unreasonable by this convent wisdom. In Odumbe's case it is also quite apparent tha ICC Code of Conduct imposes strict liability on playe such cases, and it is difficult to distinguish cases of m fixing from lesser cases of misconduct. Accordingly, th Code of Conduct itself is arguably unreasonable.

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

JUDICIAL REVIEW AND NATIONAL GOVERNANCE INTERNATIONAL SPORTS ORGANIZATIONS

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

But while judicial review may be a desirable and usefu for the national governance of ISOs, a question arises what the scope of review should be. Further, apart reviewing the decisions of ISOs, should national c review the rules of such organizations, for instance, w they are unreasonable? It is important to carefully se the parameters of judicial review so that national cour not unduly interfere with the management of spo activities. After all, 'competition in the courtroom is a substitute for competition in the sports arena' (Nafzig

148). To put the matter differently, when should na
courts have jurisdiction over ISOs? An additional pro
likely to arise is that of enforcement of the decisio
national courts against ISOs: how can national c
ensure that ISOs respect their decisions?

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

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

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

The ethical principles of the sport consist of moral prin
that seek to ensure fair play in the conduct of sport.
ensure fair play by preserving a key element of s
namely 'the uncertainty of outcome'. These principles g
matters such as 'fairness, integrity, sportsmanship, an
character of the game. Examples are rules that pr
players and officials from betting on games or taking m
from bookmakers in exchange for inside information

those engaging in them will be charged with the offen
'bringing the game into disrepute'(Foster, 2006, p. 5).
activities are prohibited because they threaten the inte
of sports. Foster argues that, as a general rule, the e
principles of sport should equally be outside the revie
national courts since 'the nuance of what is broadly c
'the spirit of the game' is best treated as a tech
question.' However, he contends that national courts sl
intervene if the 'arbitrary or irrational decisions' of
cause economic damage (Foster, 2006, p. 16). Ir
Odumbe case, for example, one could plausibly argue
the decision was irrational since the Investigation di
establish that Odumbe took money from Jagdish Sod
exchange for inside information. First, it was not concl
established as a matter of law that Sodha is or w
bookmaker. Second, causation was not established; th
there was no evidence that he took the money to give i
information regarding any cricket match in particular.

Foster's other categories raise two essential questions:
is there such a thing as an international sports law v
courts can apply in their endeavours to regulate IS
second, should courts interfere with the decisions of
when these organizations have applied their ow
sportiva? In the context of the latter question, an addi
concern is whether courts can question the reasonable
of such *lex sportiva*.

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

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

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

Table 1 provides an overview of what should be consi the ideal scope of judicial review of the rules and deci of ISOs.

ISO Decision / Rule / Regulation	Scope of Judicial Review	Level of Judi Deference
Rules of the Game	Rules are arbitrary/ illegal/violate general principles of law	
Ethical Principles	Rules are arbitary/ irrational; decisions of ISOs cause economic damage	
	Interpretation of ISO rules - whether reasonable/ adhere to general	

Lex Sportiva	principles of law, e.g., considerate decision making
International Sports Law	Whether *lex sportiva* incorporates international sports law

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

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

CONCLUSION

Our world has changed remarkably over the last two decades, thanks to the processes of globalization privatization. One significant feature of this transform has been the acquisition of significant institutional pow private transnational bodies. The exercise of this powe dire consequences for the liberties and livelihood

individuals. Unfortunately, public law has been mar
slow to appreciate the need to regulate this power. W
foundation that is deeply rooted in classical liberal th
public law has predominantly directed its attention to p
power, while perceiving private power to be benign. A
as public law is concerned, any power imbalances in
private sphere are capable of redress through contract.

But the power imbalances in today's private sphere
immense and necessitate the' publicisation' of this sp
As we have seen in the case of ISOs, which exerc
monopoly over competitive opportunities in their sp
private power is equally capable of being abused to
detriment of the liberties and livelihoods of individuals. T
is thus an urgent need to regulate the exercise of
power. Provided that power, be it public or privat
capable of affecting the vital interests of individua
should be regulated to ensure that it is exercised
manner that respects the principle of considerate dec
making. Especially at the national level, such regulati
necessary because there is no international legal regim
the regulation of transnational regulatory bodies suc
ISOs. As we have also seen, private bodies may
implicate the constitutional rights of individuals whe
they exercise their power. Where that happens, there
strong case for the imposition of constitutional obliga
on such bodies.

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

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