

‘Integrity’, ‘independence’ and the internal reform of FIFA

A view from the trenches

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Introduction

If a Martian were to inspect the constitutions of say, the USSR or Poland before the fall of the Berlin Wall or other such regimes, a glowing report would be beamed back to Mars. All the right things were there, including human rights and other paraphernalia of good governance. A farce, since the principal problem was not in the formal scheme or in the written document, but in the reality of its actuation and in the political culture and institutional ethos of those polities.

It is not our intention to add to the growing literature identifying the structural problems of FIFA and the rather conspicuous failure of the 2016 Reform efforts of FIFA. Instead we want to relate to the reader, narrative style, some episodes (all one way or another part of the public record) resulting from our experience as Chair and Member of the Governance Committee that help explain why those reforms failed. As members of the Governance Committee we were part of that reform effort. We experienced how the dominant culture at FIFA was stronger than the formal institutional safeguards put in place by the governance reforms. This experience taught us that FIFA cannot adequately reform itself.

The FIFA Governance Committee

The FIFA Governance Committee had a broad remit to ensure integrity and good governance in the operation of FIFA. It was responsible, among other things, for the oversight of the elections, including deciding on the eligibility of those running for elections (for the FIFA Presidency and its Council). The latter was based on integrity tests conducted by the Review Committee, composed of three independent members of the Governance Committee. This Review Committee (in practice, part of the Governance Committee) would also conduct broader integrity tests for a variety of positions in FIFA Committees. The Governance Committee was also empowered by the new FIFA Governance rules to put forward proposals for better governance at FIFA.

The importance of the Governance Committee in the overall reform scheme was underscored by the fact that the appointment of its members was reserved to

Congress as a whole and the requirement that no less than half its members be 'independent' with no ties to the world of football (other than, perhaps, the love of the game).

Independence has a variety of meanings in the world of FIFA. It might mean the overall independence of FIFA from politics—a formal requirement when it comes to the officers of FIFA. It means, however, too, the independence of the oversight Committees such as Governance or Ethics from internal pressures from within the organisation. After all, various officers and organs of FIFA might be the object of oversight by those same committees. Interference or pressure on their decision-making process would be akin to, say, a member of the executive branch of a State government such as a Minister or senior administrator putting pressure on a judge or court of law or public prosecutor investigating a case pertaining to that very government or to anyone that may be favourable or opposed to such government.

Integrity is a broad concept which defies very precise definition. A little bit like the proverbial definition of pornography—you know it when you see it. The absence of integrity in the process of governance can take egregious forms—like the taking of bribes, but also more subtle forms of malfeasance or even simply to be in a position of conflict of interest. Given the history of FIFA the required ethos of oversight would be to err on the side of strict scrutiny as both a reflection of, and catalyst for a change of institutional culture which appeared at least tolerate corruption for decades. This history all taught, all and sundry, that 'crimes of omission'—keeping silent, averting one's eyes, looking in the other direction—can be as harmful as crimes of commission.

The 2015/2016 reforms seemed promising on paper and not only on paper. In the process of our own appointment to the Governance Committee we were impressed by the thorough background check conducted. Even more so, we were impressed by the assurances we had by the highest officers of the 'new' FIFA that this time it was 'for real'. That they were seriously interested in meaningful reform of the very institutional ethos and culture of the organisation. We were convinced by the apparent sincerity of these assurances.

The Committee initiated its role committed to its task and energised to deliver results in a short period of time. The blow suffered by FIFA reputation required it. In only a few months the Committee implemented a variety of reforms and put others in motion. It started by adopting guidelines on how it would conduct the integrity and eligibility tests. This was aimed at providing legal certainty to those subject to such tests, making it clear the Committee's commitment to the rule of law. In the past, such kind of ethical and integrity assessments had often been instrumentalised, applied selectively, and placed at the service of the powers that be. It was crucial to be transparent and consistent in the application of such tests. The Committee also adopted a series of procedural guidelines to be respected by the Confederations in their electoral processes so as to guarantee the integrity and the free and fair character of such elections. Another set of guidelines, to be further discussed below, regarded preventing gender discrimination in the elections. In addition, the Committee drafted a FIFA Human Rights

Policy and put forward a series of proposals aimed at furthering its own independence and that of the other independent Committees. The latter were expected to be discussed by the FIFA Council in the meeting that, ironically, put into question such independence and, ultimately, led to our departure from FIFA.

In fact, the disabuse was rapid. Within less than a year in mid-2017 the Chair of the Governance Committee was not 'reappointed' (that was the official term, on what was, for all purposes, a 'sacking'). This led to the departure of a majority of the Committee independent members that resigned.

The letter of resignation of Navi Pillay (2017) speaks for itself:

Such a trenchant statement coming from a distinguished South African judge

Email from Navi Pillay to Fatma Samoura, Secretary General, FIFA, 17 May 2017

Dear Secretary General of FIFA, Thank you for your call to me, sharing some of your thoughts on the termination of membership of the chair of the GC. I indicated my dissatisfaction with the reasons you gave; but promised to consider my continued membership seriously. I have now done that. As you know, all of us, holding office in FIFA, including you and me, were required to complete the online course on Ethics. I wish to draw your attention to the prohibition, in the rules, of improper interference, exercise of influence or pressure, and the need to disclose these approaches, if we had been subjected to them, rather than maintaining secrecy. In compliance with this regulation, the facts of undue influence exerted on the Chair to change a recommendation made by the GC, were made known to me. As a judge and former UN High Commissioner of Human Rights, I adhere to principled conduct at all times; and cannot countenance serving in an Institution, whose officials violate the norms and standards of good conduct, that they themselves adopted. I remain concerned that the GC's independent functioning will not be respected. Kindly accept my resignation from the Governance Committee of FIFA.

Navi Pillay (Ms)

and the former UN High Commissioner for Human Rights is self-explanatory.

But as lawyers know, it is the human detail, the narrative, which gives law and high principles (such as independence and integrity) or the lack thereof real life and meaning. And that is the purpose of the following short tales of commission and omission: To give life to the stories behind the collective resignation of the majority of independent members of FIFA's Governance Committee less than a year after their appointment. They are only examples. Several others could be given from only a few but intense months immersed in FIFA's governance culture.

The Vitaly Mutko affair

Vitaly Mutko at the time Minister of Sport and Deputy Prime Minister of the Russian Republic was put forward to UEFA as a candidate in the elections for a position on the FIFA Council. Mutko achieved notoriety for his alleged

involvement as Minister of Sport in the International Olympic Committee (IOC) doping scandal, allegations which he strenuously denied. His appointment required a *Nulla Osta* from the Governance Committee as regards his 'eligibility' in accordance with the various regnant standards. The Governance Committee decided that questions of proof and due process aside the matter of his involvement or otherwise in the doping scandal was moot since he failed egregiously the test of the Duty of Neutrality in accordance Article 14 of the Code of Ethics (FIFA 2018): "(...) Persons bound by this Code shall ... remain politically neutral, in accordance with the principles and objectives of FIFA(...)".

This reflects the general principle of political neutrality enshrined in FIFA's Statute. FIFA has applied such principle to suspended national football associations on several occasions. Kuwait was suspended in October 2016 because FIFA claimed that new national legislation meant that the country's football association would no longer be able to carry out its activities in full independence. FIFA has claimed such political interference even with respect to decisions issued by courts. The Nigerian Football Federation (NFF) was also suspended in 2014 after a court ordered the minister of sports to appoint a civil servant to run the federation. The NFF was later reinstated, but only after the court order was revoked. There are multiple other cases, many where the threat of suspension was enough. A recent case involved Spain when the National Independent Sports Council order the repetition of the elections for the Spanish FA, following formal charges of corruption and fraud on the incumbent President and suspicions of electoral fraud. FIFA accused the Spanish State of political interference and threaten to exclude the country from the World Cup.

You would think that with such an assertive use by FIFA of the principle of political neutrality to suspend Football Associations, whenever the legislator or courts attempt to regulate them, holding political office, while being a FIFA official, would be an easy case, open and shut: How could a serving deputy Prime Minister and Minister of Sport claim to be politically neutral?

Well, think again. Despite a unanimous decision by the Independent Members of the Governance Committee, the FIFA steamroller went into action. Huge pressure was brought to bear on the Chairman of the Governance Committee starting with the President of FIFA and downwards. Letters were written, emissaries were sent, including surreal meetings. No serious argument of principle was put before the Committee in these attempts to make it change its decision. It was politically unacceptable. It would derail the Moscow Mundial et cetera.

The Committee stood its ground. Its view was that, at the minimum, the position of member of government is structurally in conflict with the duty of neutrality with respect to government institutions since, by definition, a government member cannot be neutral with respect to the government of which he or she is a member. The Committee considered the possibility that he or she might recuse himself or herself from any decision affecting his or her country. However, this possibility would not provide a viable solution since the political interests of a government are not restricted to matters directly involving their

country but also on many matters involving other States. Having a Government Minister that is at the same time a FIFA official can, additionally both directly affect the relations between FIFA and such government and indirectly entangle FIFA in unrelated controversies associated with this or that government. The Committee also considered that other political functions might be incompatible but decided to proceed gradually, starting with the clearest cases, involving cabinet members.

The Committee was well aware of the political sensitivity of such a decision on the verge of the Russian World Cup but it had to make clear that, contrary to the past culture, the application of the rules could not depend on their political opportunity and/or the power of those affected them. But the dissatisfaction of the FIFA hierarchy with the Committee and its Chair was palpable and enduring. We suspected that at some point payday would arrive. But we had a small hope that maybe this could be the defining moment in which the shift in culture would occur. We had conveyed the message we were there to introduce a real rule of law culture and would not waver under pressure. Maybe the message would be heard. It probably was heard, but definitely not accepted.

The irony cannot escape you. Not only were we asked to throw out the principle of political independence of football governance, but in doing so the independence of the Committee from internal pressure was called into question. A few months later, when payback time arrived, it was definitely thrown out of the window too.

Special elections of CAF in May 2017

In May 2017 just before the FIFA Congress the African Football Confederation (CAF) held a special election for one seat on the FIFA Council. There were eventually two candidates: An Egyptian and a Cameroonian. As is the Custom, the Governance Committee sends two Election Supervisors to guarantee the integrity of the elections. In the lead up to the election the Cameroonian candidate approached the Governance Committee election supervisors with serious allegations. He alleged that in the week before the election all CAF voting delegates were invited to three-day 'Victory Party' (celebrating the victory of the newly elected President of CAF) in Cairo held by the Egyptian FA of which the Egyptian candidate for the FIFA Council chaired. This was a five star all expenses paid shindig according to the allegations. Subsequently, the delegates who attended were flown directly from Cairo to Bahrain in a private jet.

Until proven allegations are just that—allegations. But if proven, it would be hard not to conclude that the integrity of the election (which the Egyptian won by a vote of 50/4) would be seriously called into question. After all, presents in kind might be just as nefarious as envelopes stuffed with cash. The electoral supervisors informed, in real time, the Secretary General of FIFA of the allegations. They agreed that the elections should take place pending an investigation of the allegations.

To our knowledge no such investigation was conducted or at least none was reported and if such did take place, no report was made public. The matter was buried. Since four of the independent members of the Governance Committee resigned shortly afterwards, we do not know of any action taken by the Governance Committee. The matter was subsequently reported to the Investigative Chamber of the Ethics Committee but it seems that it was buried there too.

There are two ‘take aways’ from this tale. If true, it is an indication of an institutional culture which would allow the delegates of a confederation to accept such an invitation organised by a Member standing for election by those very participants.

Institutionally speaking, this is a telling story of “crimes of omission”. If as we suspect the matter was never fully investigated—and if it were, why should such be conducted *in camera*—nurturing a culture of secrecy, shutting one’s eyes and making a mockery of procedures put in place, on paper at least, to ensure the integrity of governance in general and elections in particular.

Gender discrimination and the 2019 AFC (Asian Football Confederation) elections—The scene and behind the scene

On January 21, the Court of Arbitration for Sport (CAS) announced its decision in the appeal of Marian Mohamed (CAS 2021). CAS found, *inter alia*, that the procedure adopted in the elections for a position on the Executive Committee of AFC violated the prohibitions on Gender discrimination mandated both by FIFA and AFC Statutes.

The facts are simple enough. Among the reforms adopted in 2016 was a requirement for each member confederation to elect *at least* one woman to the FIFA Council.¹ It clear that this requirement is a minimum, and it is certainly not a maximum number of female representatives. If it were to be a maximum, it would serve not to promote female representation in FIFA, but to limit such representation and discriminate against women. It became apparent to the Governance Committee, however, that certain confederations had adopted, or were intending to adopt, electoral procedures that were discriminatory against women by creating a specific female position to which all female nominees were candidates. This transformed a rule that was aimed at guaranteeing that at least one woman was elected into a rule that limited women to a single position. In order to facilitate and guarantee the requirement that *at least one* female serve on the Executive Committee of the various confederations, while making it possible for more than one woman to serve, the Governance Committee provided guidelines for electoral procedures to ensure just that. AFC failed to implement such guidelines in fact ensuring that only one female candidate would be elected rather than ‘at least’ one.

One could be forgiven for thinking that the villains in this story were only the election officials of the AFC which undermined the progressive policy of FIFA of striving towards gender equality in the governance of football at the

confederation and FIFA levels. That is true. But here, too, there is a behind the scene narrative which clouds that black and white image.

Already in 2016/17 the Governance Committee noted the discrepancy between its guidelines and their implementation by the electoral procedures of the AFC. It actually had to threaten not to recognise the eligibility of any of the officials elected by AFC under such discriminatory electoral procedures, leading AFC to cancel its elections in 2016. After the departure of the majority of the independent members of that Governance Committee, AFC continued, however, with its discriminatory practice against women in the elections. A practice that has now been clearly disavowed and censured by CAS.² What is sad is that a recent article by the New York Times reveals that FIFA and the current Governance Committee not only did not identify anything wrong with the elections, but actually intervene in the case on behalf of AFC (Panja 2021).

The only signs of hope in this case come from the CAS decision (albeit claiming it cannot provide any effective remedy to Ms Mohamed) and the courage of Ms Mohamed, herself. As the facts proved in the case demonstrate she was subject to all kinds of pressures but persevered in standing for what she believed, and knew, was right. This is rare because, in football, anyone that challenges the powers that be becomes a pariah. This is why it was so important for the Governance Committee to preserve its independence and exercise its role forcefully in protecting the integrity of the electoral process. And that's probably, also, why that was not allowed to happen.

Conclusion: A not so happy ending

As we have written somewhere else, our experience at FIFA taught us that the latter is not reformable from within (Pillay, Maduro & Weiler 2017). FIFA works as a political cartel with a high concentration of power at the top. Such power requires checks and balances. This is supposed to be the role of independent committees. But how can their independence survive being dependent on those whom they are supposed to control?

As a judge and former UN High Commissioner of Human Rights, I adhere to principled conduct at all times; and cannot countenance serving in an Institution, whose officials violate the norms and standards of good conduct, that they themselves adopted.

One of the central planks of the 2016 Reform was to be the enhanced role of independent oversight committees within FIFA governance. They failed because the dominant culture at FIFA was stronger than the institutional safeguards put in place by those reforms. You now have some detail behind Navi Pillay's poignant letter of resignation (2017).

In what the Financial Times called the Night of the Long Knives FIFA demonstrated its limited tolerance of true independence and oversight replacing three chairs of the most critical oversight committees (Ahmed 2017). The human condition being what it is, one cannot but rue the chilling effect that this must have on the current committees: The real and present danger of dismissal if independence goes too far.

And as an epilogue, as if to give some credibility to this fear of chilling effect, these and similar incidents were reported in a formal complaint to the Investigative Chamber of the Ethics Committee to be buried without trace.

Notes

1. Article 22(3)(b) of FIFA Statutes (FIFA 2019); Article 70.3 of the FIFA Governance Regulations (FIFA 2016).
2. Full disclosure: both of us participated as expert witnesses, on behalf of Ms Marian Mohamed, in the CAS proceedings.

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