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The application of international constitutional principles to civil society (the example of FIFA and FTF)

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Abstract: While trying to defend its autonomy, FIFA blindly defends elected bodies and the rule of majority, even if violations of the democratic principles were committed when amending the jurisdiction and elections rules by the general assembly according to the will of the majority. This article explains why the rule of majority is not systematically the equivalent of democracy, and that the judicial review by arbitral or state courts shall be recognized in order to fight dictatorship, in a way that respects the right to effective access to justice.
Keywords: FIFA – arbitration – jurisdiction – elections – respect of democratic principles – denial justice – international principles of constitutional law – state sovereignty.

Introduction

1. By its Letter addressed to the Tunisian Football Union (FTF: "*Fédération Tunisienne de Football*", in French), on 16 April 2016, the Fédération *Internationale de Football Association* (FIFA) seems to take a clear option for the conservative concept of democracy: the absolute rule of the majority and the absence of any jurisdictional assessment of the legitimacy of the legislative power.

2. In this letter, the world football organization supports the choice and the will of "*the FTF members*", expressed in their general assemblies, making of the law of majority its whole and unique constitution. This strong will of the "*FTF members*" justifies in the eyes of the drafter of the letter the exclusion of any "external" authority who may intervene in order to nullify the lest amendments of the FTF Statutes, voted in July, nullified by the CNAS in November, voted once again on 6 November 2015 and nullified for the second time by virtue of a new arbitral award pronounced by the same CNAS on 28 December 2015[(2)].

3. In an ambiguous formula, the interim secretary general of FIFA makes another allegation to the CAS-TAS (Lausanne) to whom a request for the nullification of the same amendments seems to have been made. The letter puts in the same bag different and various bodies: judicial, arbitral and private-administrative. In the eyes of the letter drafter, since the CNOT '*tends*' to consider that the amendments were null and void because they were nullified by two successive arbitral awards means undoubtedly that the CNOT is trying to interfere and impose its will on the FTF, and reminds in a very strange manner that any "*external*" and any recourse to the judicial authority "*is forbidden*"!

4. Let's first go back to the background of this dispute, which led the FTF board of directors to propose amendments of its Statutes, some months before the elections, and allowed its chairman to be reelected despite two court decisions enjoining the stay of the elective assembly procedures, one day before those elections.

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[2] CNAS Case No 264, award dated 28 December 2015, unpublished.

5. The scenario is classic: a short time before the elections date, the person in power who wants to continue in power proposes amendments of the electoral laws, in a way that allows him to be eligible and excludes his main potential competitors. The constitutional history of the modern world, mainly in Africa, Latin America and wide parts of the other continents shows that this tactic was frequently used by the unarguable dictators, who, more, used also to make constitutional amendments in order to delete and abrogate conditions that they can no longer fill, such as the maximum age...

6. Since 1999, certain thinkers called to the establishment of an **International Constitutional Court** (ICCo), which shall be empowered to pronounce the nullity and voidance of such amendments. This idea came from Tunisian thinkers and human rights activists, mainly Moncef Marzouki[3] and Yadh Ben Achour[4]. During the last years, it acquired the support of global constitutional law specialists from all the countries, such as: Tom Ginsburg, Sujit Choudry, Paulo Ferreira Da Cunha, Henri Pallard, Hassan Ouazzani Chahdi, Zaid Al-Ali, Ahmed Mahiou, Slim Laghmani...

7. Others expressed doubts as to the feasibility or legal basis of this initiative, such as James Crawford, without being completely opposed to it [5].

8. Without pretending that this idea made the unanimity of scholars, the writer of this article wants just to explain that the principles of constitutional law, in their international dimension, which became undeniable since the promulgation of the African Charter on Democracy, Elections and Governance in 2007, shall apply to "private" legal persons playing a key role in the political life, mainly political parties and civil society organizations, where democracy shall be taught and enshrined. I do think that if these kinds of organizations do not internally obey to the democratic principle, democracy has no chance to prevail and prosper in the state as a whole.

9. I do think also that the changes of the FTF Statutes are contrary to the democratic principles, and that the blind support of FIFA to those changes and to the elections based on them express a strange (but not surprising) will to fight for anti-democracy. I think FIFA must also demonstrate more respect to the judicial authorities of the states and to the right of people to access to justice, expressed in the international charters and conventions, and detailed in the 2014 Tunisian Constitution. This does not bar the sports community or the football community from establishing its own dispute settlement system, in the limits allowed by international standards and national constitutions and laws, who are deliberately liberal and permit the establishment of arbitral bodies in most fields including sports. Nevertheless, this arbitral system shall remain under the control of state courts, in the limits provided in the international standards as conceived by the UNCITRAL Model Law on International Commercial Arbitration (21 June 1985,

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[3] Moncef MARZOUKI: "*Le mal arabe: entre dictature et intégrismes. La démocratie interdite* », l'Harmattan eds, Paris 2004 (article published in 1999 in the French newspaper « *Libération* »), republished in the ICCo Book, « *Project for the establishment of an International Constitutional Court* », edited by the Presidency of the Republic of Tunisia, 2013, p. 81 et seq.

[4] Yadh BEN ACHOUR, Course givern in the Interational Academy of Constitutional Law, 2006. See, ICCo Book, « *Project for the establishment of an International Constitutional Court* », edited by the Presidency of the Republic of Tunisia, 2013, p. 65 et seq.

[5] James CRAWFORD: "A new international treaty", paper presented in the Conference organized by the Presidency of the Republic of Tunisia on 3 May 2013: "*The establishment of an International Constitutional Court as a means to prevent the capturing of democratic institutions*", unpublished.

as subsequently amended in 2010)[6]. FIFA may never become an autonomous sovereignty and does not have the right to protect its failing reputation by punishing people and associations who use their legitimate right to access to justice, and may not, especially, become a refuge for those who violate democratic principles in order to stay in power. It has to learn more on democracy and to show it to the rest of the world. Otherwise, its autocracy may be the first factor of its own destruction.

I. Background

10. In 2010, the *Comité National Olympique Tunisien* (CNOT) amended its Statutes and inserted a new Chapter, by virtue of which it established an arbitral body specialized in sports disputes, called CNAS (*Comité National d'Arbitrage Sportif*)[7]. This amendment was followed by the amendment of the Statutes of all the sport federations and unions in Tunisia, including the FTF who adopted a CNAS arbitration clause. The new Article 56 of the FTF Statutes as amended in 2009 reads:

> *"1) Le Comité National d'Arbitrage Sportif (CNAS)*
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> *Sur le plan national, les décisions rendues par la Commission Nationale d'Appel peuvent faire l'objet d'un recours en arbitrage ad hoc auprès du Comité National d'Arbitrage Sportif (CNAS), prévu par les statuts du Comité National Olympique Tunisien.*
>
> *2. Tribunal Arbitral du Sport*
>
> *Sur le plan international et conformément aux statuts de la FIFA, tout appel interjeté contre une décision définitive et contraignante sera entendue par le Tribunal Arbitral du Sport (TAS) à Lausanne (Suisse).*
>
> *Le TAS ne traite pas les recours relatifs à la violation des lois du jeu, à une suspension inférieure ou égale à quatre matches ou trois mois, ou à une décision d'un tribunal d'une association ou d'une confédération indépendant et régulièrement constitué".*

11. In February 4, 2015, the Chairman of the Board of Directors of the FTF, Dr. Waddi El-Jari, was suspended by the disciplinary body of the CAF (*Confédération Africaine de Football*) for contempt of the referee of a match of the Tunisian National football team versus Guinea[8].

12. According to the Statutes of the FTF, Mr. Wadii El-Jari became *illico presto* ineligible to the next elections, which should have to occur in March 2016[9].

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[6] Let's recall here that the main international standard concerning the judicial review of arbitral awards is the absence of review on the merits of the dispute. See article 36 of the 1985 UNCITRAL Model Law. See also, Vincent CHANTEBOUT: *"Le principe de non révision au fond des sentences arbitrales »*, Doctorate thesis, Paris II, 2007.

[7] Article 51 of the Statutes of the CNOT reads : *« Les fédérations sportives nationales prévoiront dans leurs statuts l'obligation de recourir pour les litiges sportifs, en dernier ressort, au CNAS en sa qualité d'autorité arbitrale suprême en matière sportive à l'échelle nationale »*.

[8] According to the official information provided by the CAF, the national football team of Tunisia was punished because of : *« le comportement des joueurs et remplaçants de l'équipe - insultant l'arbitre de la rencontre et essayant de l'agresser physiquement -, le comportement regrettable du président de la Fédération tunisienne de football M. Wadi Jarii, entrant sur l'aire de jeu et critiquant vivement l'arbitre ainsi que la CAF ; et les actes de vandalisme de certains joueurs cassant une porte dans la zone des vestiaires ainsi qu'un réfrigérateur"*.

[9] Article 29 of the FTF Statutes.

13. In July 2016, the Board of Directors of the FTF called for an extraordinary meeting of the FTF Assembly, in order to approve two kinds of amendments to the FTF Statutes: the transfer of a part of the jurisdiction of the CNAS to the CAS-TAS (Lausanne, Switzerland), except two (2) kinds of matters, including those relating to the review of the candidatures to the elections, which remained within the jurisdiction of the CNAS, on the one hand, and the conditions for being candidate to the elections.

14. Those amendments were accepted by the majority of the FTF members. Nonetheless, a minority requested to the CNAS to nullify them for several reasons. On 01 October 2015, the CNAS nullified most of the resolutions of the assembly [(10)]. The board of directors of the FTF called for a new extraordinary assembly on 6 November 2015 in order to deliberate on the adoption of the same reform, with a total transfer of the jurisdiction of the CNAS to the CAS-TAS in Lausanne. The new assembly was subject to two CNAS awards: the first ordered the annulment of the convocation procedures and the cancellation of the assembly [(11)], and the second, made *ex post*, declared the voidance of all its resolutions. The new award, made on 28 December 2015[(12)] nullified all the resolutions of the 6 November assembly.

15. Instead of requesting the setting aside of this award, pursuant to Articles 42 et seq. of the 1993 Arbitration Code, the FTF preferred to ignore it for the reason that it made its own choice to leave the CNAS system before the claim was made.

16. On 5 January 2016, the CNOT decided to suspend the membership of the FTF in the CNAS.

17. In February 2016, the FTF board of directors called to an elective general assembly to be held on 18 March 2016. This call generated a judicial saga, since *Grombalia Sports* and other clubs challenged this convocation before the Administrative Court and requested an interim measure from its *Premier Président*. In parallel, the same claimants brought a second claim before the CNAS and requested interim measures of protection. The FTF resisted and maintained the elections date, despite the huge polemic lead by the dissidents, who hoped to exclude Dr. Al-Jarii from the sprint and to delay the elections in order to be readier.

18. In 6 March 2016, upon request of *Grombalia Sports* and the other plaintiffs, the CAS-TAS Secretary General sent a letter to the plaintiffs by which he declared the manifest lack of jurisdiction of the CAS-TAS to hear their claim. In this letter, the Secretary General mentions in clear words the resolutions of the 6 November 2015 assembly, but considers that there is no valid arbitration clause granting jurisdiction to the CAS-TAS. The "administrative" decision was based on Article R 52 of the Code of Arbitration for Sports which subparagraph 1 reads:

> *"R52 Initiation of the Arbitration by the CAS*
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> *Unless it appears from the outset that there is clearly no arbitration agreement referring to CAS, that the agreement is clearly not related to the*

[10] Award No. 251, *unpublished*.
[11] Award dated 5 November 2015, case No. 262. This award was rendered one day before the assembly, but was ignored by the FTF without any request for setting aside or stay decision from the competent court, while subparagraph 1 of Article 43 of the Arbitration Code provides :
"The setting aside action shall not suspend the enforcement of the award".
[12] Award No. 264, *unpublished*.

dispute at stake, or that the internal legal remedies available to the Appellant have clearly not been exhausted, CAS shall take all appropriate actions to set the arbitration in motion..."

19. The CAS-TAS Secretary General asked *Grombalia Sports* to provide him with its bank details in order to reimburse the arbitration fees.

20. A new polemic followed, on the legal nature and effects of this letter: was it an arbitral award? Does it have equivalent legal effects as an award? The FTF denied any legal effect to this letter, made without respecting its right to be heard.

21. On 16 March 2016, i.e. two days before the elections date, the *Premier Président* of the Administrative Court ordered the stay of the assembly proceedings. On 17 March 2016, the Tunis Court of First Instance granted enforcement to an interim relief decided by the CNAS Conseil d'Arbitrage du Sport, ordering the cancellation of the assembly. Surprisingly, in spite of those two enforceable court decisions, the assembly was held under the supervision of a FIFA and CAF representatives.

22. On 15 April 2015, the FIFA interim Secretary General sent a letter to the FTF, by which he threatens to take retaliatory measures against the FTF itself and urges it to take the adequate repressive measures against the clubs who initiated the proceedings before the different forums. The wording is so wide that it seems to target any club who seized the CNAS and any state court in Tunisia. The Secretary General seems to consider that the CAS-TAS is the only body that may be seized by football disputes in Tunisia, whereas the Statutes' amendments were nullified by any jurisdictional forum and the assembly banned by interim relief ordered by competent courts.

23. By taking such an attitude, the FIFA does not only defend its independence or try to avoid the resort to state courts. The 15 April letter shows a strong will to maintain the results of the elections and to bar any jurisdictional body from nullifying them. I consider that this attitude ignores the democratic principles (II) and the right to an effective access to justice (III). Moreover, it raises the classical problem of the respect of state sovereignty (IV).

II. The necessary respect of democratic principle

24. Modern democracy is not the same as imagined by Montesquieu and the other founding fathers. Besides to the three traditional powers, sharing the political game, new decision-makers emerged, especially the independent bodies and commissions, and the constitutional courts. These latters are entitled to nullify the decisions voted by the legislative power, supposed to express the will of the people. In the traditional theory, the popular will is the source of any legitimacy. The constitutional court, while it is not elected by the people and having no political role, may declare the voidance of a law agreed on by the majority.

25. This gave democracy a new dimension: the supremacy of the court decisions.

26. The word "court" traditionally refers to national constitutional courts. Nonetheless, with the new global trend, inaugurated by Tunisian dissidents, it shall refer also to an international court which has to be empowered to rule on the domestic violations of a *corpus* of international constitutional rules.

27. Those rules are not defined with full clarity and precision. They are evolutionary, but do have a central principle: the real will of the people, which may not be just

synthesized in a flat way in the majority principle. Besides to majority, there are certain substantive rules that have to be respected in any case, and their violation shall be censured, even if it is decided by the sovereign body, the Parliament.

28. Yet, modifying electoral laws in order to allow a person to stay in power may be lawful if it is not proven that the new regulation is fitting only the person in power, and especially where it is clear that it is tailored in a way to exclude most of the competitors of the person in power. This was the main case for which the initiators of the idea of establishing an international constitutional court based their analysis and arguments. The main cases stated are those of Zine El-Abidine Ben Ali, Bashar Al-Assad, Saddam Hussein and other dictators from all over the world, who skipped the democratic rules by just modifying the constitutions before every election, in order to prepare their "*eternal 99%*"!

29. Let's recall here that the *Premier Président* of the Administrative Court held in his decision dated 16 March 2016 that:

> *"in light of the mandatory principles that have to be respected by virtue of Decree-Law No. 2011-88, consisting of Rule of Law, democracy, pluralism, equality, transparency, human rights, banning legal or de fact discrimination, and non-limitation of the right to belong to associations, the conditions for being candidate and to participate to the elections of the FTF, added to the FTF Statutes in its 29 July and 6 November 2015 Assembles have an impact on the course of the elections because they seem to be excessive, disproportionate and exclusive, in a way that they may have influence on the starting of the elective process, including the freedom of being candidate".*

30. Without mentioning the 2014 Constitution, this summary decision invokes the international constitutional principles. I think the same analysis would have been made by most courts in the world, and this allows me to affirm that those principles became common to the legal community in the entire world. With or without an International Constitutional Court, the democratic principle is becoming a real international standard.

III. The duty to respect the right to effective access to justice

31. The right of effective access to justice is threatened by denial of justice in its various forms. The lack of a court to which one may bring its claims is the most traditional and "pure" form. However, this form does not exist nowadays. Most litigations are attributed to a court, established somewhere in the world, which is entitled to rule on it. The modern form of denial of justice is different: it consists of the existence of a court which legally has jurisdiction, but to which an effective access is very hard, due to high costs, administrative barriers or difficulties to reach the seat of the court.

32. The significant examples were provided the field of maritime and air transport, and confirmed in 2005 by the French *Cour de Cassation* and the Manouba Court of First Instance in Tunisia.

In the field of maritime and air transport, international conventions neutralize any clause in the contract which gives jurisdiction to a court established in a country which may be difficultly reached by the claimant. Arbitral clauses are null and void

when inserted in contracts on the transport of persons. Article 33 of the 1999 Montreal Convention[13] provides:

> *"1. An action for damages must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before the court of the domicile of the carrier or of its principal place of business, or where it has a place of business through which the contract has been made or before the court at the place of destination.*
>
> *2. In respect of damage resulting from the death or injury of a passenger, an action may be brought before one of the courts mentioned in paragraph 1 of this Article, or in the territory of a State Party in which at the time of the accident the passenger has his or her principal and permanent residence and to or from which the carrier operates services for the carriage of passengers by air, either on its own aircraft, or on another carrier's aircraft pursuant to a commercial agreement, and in which that carrier conducts its business of carriage of passengers by air from premises leased or owned by the carrier itself or by another carrier with which it has a commercial agreement"*[14].

33. It is also to be highlighted that French courts do not recognize any arbitral agreement concerning the rights of players, coaches, trainers and staff members. It considers that arbitration may not present enough guarantees to those specific categories of "workers".

34. Concerning arbitration, the French *Cour de Cassation* held on 1 February 2005 that the *de facto* impossibility for a legal or natural person to access to justice is a kind of denial of justice which shall lead the French court to recognize its jurisdiction in all disputes of this kind when they have an objective tie with France:

> *«... L'impossibilité pour une partie d'accéder au juge, fût-il arbitral, chargé de statuer sur sa prétention, à l'exclusion de toute juridiction étatique, et d'exercer* ***ainsi un droit qui relève de l'ordre public international*** *consacré par les principes de l'arbitrage international et* ***l'article 6. 1, de la Convention européenne des droits de l'homme****, constitue un* ***déni de justice*** *qui fo****nde la compétence internationale du président du tribunal de grande instance de Paris****, dans la mission d'assistance et de coopération du juge étatique à la constitution d'un tribunal arbitral, dès lors qu'il existe un rattachement avec la France ; que l'arrêt attaqué ayant relevé que la société NIOC était, en l'état de la jurisprudence de la Cour suprême d'Israël, dans l'impossibilité de saisir les tribunaux israéliens ou iraniens pour nommer un arbitre à la place d'Israël qui s'y refusait, dès lors que cet Etat avait expressément déclaré ne pas reconnaître leur compétence respective pour y procéder, que cette impossibilité était générale et durable, et, enfin, que le lien avec la France, même s'il était ténu, comme résultant du choix par les parties du président de la CCI de Paris pour une désignation éventuelle d'un troisième arbitre, était le seul dont la société NIOC pouvait utilement se prévaloir pour assurer la réalisation de leur commune volonté de recourir à l'arbitrage, la cour d'appel en a exactement déduit que cet*

[13] Convention For The Unification Of Certain Rules For International Carriage By Air, done in Montreal on 28 May 1999.
[14] See also Articles 21 and 22 of the 1978 Hamburg Convention on the international carriage of goods by sea.

état de fait constituait, pour la société NIOC, un déni de justice justifiant la compétence internationale du juge français ; qu'en jugeant que le président du tribunal de grande instance, en se déclarant incompétent pour statuer, avait méconnu l'étendue de ses pouvoirs et commis ainsi un excès de pouvoir négatif, la cour d'appel a légalement justifié sa décision. Rejette»[(15)].

35. In the present case, the transfer of jurisdiction from a local arbitral institution to an international one established in the Shengen space makes a high barrier for small and poor clubs in Tunisia, who cannot afford the costs of a CAS-TAS procedure, with side costs (travelling costs, lawyer's fees...). Moreover, those clubs' directors, as well as most of players, coaches and staff members, will not easily get the visa to Switzerland in order to defend their interests.

36. This is exactly the case contemplated by the Manouba Court of First Instance in 2005. In this case, a Tunisian lady wanted to sue her spouse who definitively left the country and chose to reside in Europe. The claimant failed to get the visa in order to travel to Europe in order to search for a lawyer and bring a claim. Moreover, it was clear that she was poor and could not afford the costs. The Manouba Court disregarded the provisions of the 1998 Private International Law Code which provide that the competent court is the one established in the country of the defendant or the court of the common domicile of the couple, and declared itself competent. This decision was justified by the objective of avoiding denial of justice [(16)].

37. The commentators approved this solution, and considered that it is consistent with human rights and constitutional law principles.

38. Applied to the Tunisian football case, this case law has to lead to the unconstitutionality of the amendment of the rules on jurisdiction which obliged all the football actors to bring their claims before the CAS-TAS, since the right to an effective access to justice is not ensured for all of them. At least, the nullity of this reform shall be declared concerning amateur clubs, players and coaches. Maintaining this provision is also a violation of international constitutional principles.

39. The author wants to remark that in France, until now, a large part of sports disputes is within the exclusive jurisdiction of state courts. Doesn't FIFA know that in France, labour disputes are not arbitrable and that the common interpretation of this rule applies to athletes, trainers and coaches, and other sportive and medical

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[15] Decision No. 404 of 1 February 2005, Cour de Cassation – First Civil Section, challenge No. 01-13.742 et 02-15.237, published in the *Civil Bulletin*; *https://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/02_15.237_635.html ; https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007052101* . Annotated mainly in *Rev. Crit. DIP* 2006, p. 140, note Thomas CLAY, *Rev. Arb*. 2005, p. 693, note H.MUIR WATT, Dalloz 2005, p. 2727, note S.HOTTE, *Gazette du Palais* 27-28 May 2005, p. 37, note F.-X. TRAIN ; *French International Arbitration Law Reports*: 1963-2007.

[16] Judgment No 34, dated 13 January 2004. *Cf*., Sami BOSTANJI : « Vers la consécration d'un nouveau chef de compétence internationale des tribunaux tunisiens : le for de nécessité » (Commentaire de la décision n° 34 du Tribunal de 1ère instance de Manouba en date du 13 janvier 2004, (en langue arabe)), in *La Passion du Droit-Mélanges Mohamed El Arbi HACHEM*, CPU, Tunis, 2006, pp. 214 et seq. ; *adde*, in French, observations under this décision in *JCP*, édition Générale, 2/2/2005, Chron. Droit international et européen, pp. 110 et seq., especially. pp. 213-214.

staff of clubs and national teams [17]? This seems not to disturb FIFA. It becomes a serious concern when the country in question is a "small" one like Tunisia. Hypocrisy is manifest and shocking.

40. Let's honestly recall that in 2010, when the President of France declared that the chairman of the French Football Association has no choice but to resign, and when the results of the French national football team were debated in the Parliament, FIFA warned the French authorities that France may be suspended! Then, nothing happened.

41. FIFA considers that a local arbitral institution, CNAS, as much as the local state courts, whatever the laws are, are "*external bodies*", which are "*forbidden*" from intervening in the field of football disputes[18]. In this letter, one can understand that probably, if the CAS-TAS does not recognize the jurisdiction it was granted by the will of the majority, expressed in the general assembly, it may also be considered an "*external body*" which shall be banned. This is most likely the case because FIFA should have been informed that the CAS-TAS Secretary General said in the 9 March 2016 letter that CAS-TAS *"manifestly lacks jurisdiction"*.

42. Who else is allowed to rule on this dispute?

43. The CAS-TAS Secretary General denied the jurisdiction of CAS-TAS in this dispute, by virtue of a letter addressed to *Grombalia Sports* on 9 March 2016. Yet, only CNAS or a Tunisian state court may rule on disputes relating to football in Tunisia. Barring justiciables from bringing their claims before those forums is a case of denial of justice.

IV. What about state sovereignty ?

44. The issue seems to be odd and old-fashioned. Talking of state sovereignty versus FIFA and other mega sports organizations appears to be a closed issue, since the whole world has admitted that FIFA, IOC, UEFA, CAF… are strong global organizations that impose their rules and standards to states...

45. Nonetheless, one may ask the following question: if it admissible that corporations and specific bodies and professions may have the right to choose

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[17] Cf., Frédéric BUY, Jean-Michel MARMAYOU, Didier PORACCHIA and Fabrice RIZZO : « *Droit du sport* », LGDJ eds, Paris 2006, pp. 167-168. See, Cass. Soc. (fr.), 9 Oct. 2001, *Revue de l'Arbitrage* 2002, p. 347, note by Thomas CLAY.

[18] Article 68 of the FIFA Statutes provides that:

"68 Obligation

1. the Confederations, Members and Leagues shall agree to recognise CAS as an independent judicial authority and to ensure that their members, affiliated Players and Officials comply with the decisions passed by CAS. The same obligation shall apply to intermediaries and licensed match agents.

2. Recourse to ordinary courts of law is prohibited unless specifically provided for in the FIFA regulations. Recourse to ordinary courts of law for all types of provisional measures is also prohibited.

3. The Associations shall insert a clause in their statutes or regulations, stipulating that it is prohibited to take disputes in the Association or disputes affecting Leagues, members of Leagues, Clubs, members of Clubs, Players, Officials and other Association Officials to ordinary courts of law, unless the FIFA regulations or binding legal provisions specifically provide for or stipulate recourse to ordinary courts of law. Instead of recourse to ordinary courts of law, provision shall be made for arbitration. Such disputes shall be taken to an independent and duly constituted arbitration tribunal recognised under the rules of the Association or Confederation or to CAS.

The Associations shall also ensure that this stipulation is implemented in the Association, if necessary by imposing a binding obligation on its members. The Associations shall impose sanctions on any party that fails to respect this obligation and ensure that any appeal against such sanctions shall likewise be strictly submitted to arbitration and not to ordinary courts of law".

arbitration in order to settle their "*internal*" disputes, does it mean that they are entitled to "*forbid*" recourse to state courts? Do they have the right to punish any person who prefers to resort to his "*natural judge*", i.e. the state court? And what kinds of sanctions are acceptable?

46. I think there is a risk to go too far. Respecting the arbitration clause and the legal and convention duty to respect agreements and contracts does not allow a private organization to "*forbid*" or "*ban*" any recourse to state courts, especially where their national constitutions do not allow arbitration in certain kinds of disputes. The choice of the words is also important.

47. Let's mention here the decision of the *Premier Président* of the Tunisian Administrative Court dated 16 March 2016, in which he interprets Article 116 of the 2014 Constitution as banning arbitration in all sports disputes, having regard to their administrative nature[19]. This is a serious matter that may not be solved by the forcing people to admit the FIFA system. It is certain that this decision is arguable and seems to me not to be the good one. I do think sports disputes shall be arbitrable, but I am also shocked to see a corporation "*forbidding*" the recourse to a state court, and punishing a member for making such a choice whereas he had no other serious alternative at the time where he brought his claim. I would not be surprised if a CAS-TAS arbitral tribunal rules that he lacks jurisdiction because arbitration is not allowed by the Tunisian Constitution in administrative matters, including sports issues[20].

48. Clearly, it has to be said that state sovereignty has to be respected, without affecting the right to choose a conventional dispute settlement mechanism. How to find the ideal equilibrium between the two, this is the question.

Conclusion

49. FIFA is a justiciable and not a "*justicier*". Its hegemony in the world of football does not allow it to impose to its members a duty to accept directors elected through procedures manifestly violating "international constitutional principles". By systematically defending elected bodies, it may find that it is defending certain sophisticated forms of dictatorship.

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[19] Article 116 of the 2014 Constitution provides :
"The administrative judiciary is composed of the Supreme Administrative Court, administrative courts of appeal, and administrative courts of first instance.
The administrative judiciary has jurisdiction over any abuse of power by the administration as well as all administrative disputes. The administrative judiciary shall exercise consultative functions, in accordance with the law.
The Supreme Administrative Court shall prepare a general annual report which it submits to the President of the Republic, the Speaker of the Assembly of the Representatives of the People, the Head of Government, and the President of the Supreme Judicial Council. This report is published.
The law regulates the organization of the administrative judiciary, its mandate, procedures, as well as the statute of its judges".

[20] French scholars and case law consider that the administrative nature of sports disputes is not arguable. *Cf*., Frédéric BUY and others, p. 179 et seq. Article R311-2 of the French Code of Administrative Judiciary (Abrogated by Decree No. 2010-164 dated 22 February 2010, Article 1 :
"*Par dérogation aux dispositions du 4° de l'article R. 311-1, les décisions individuelles, prises à l'encontre d'une personne physique ou morale par une fédération sportive dans l'exercice de ses prérogatives de puissance publique, sont portées, nonobstant toute disposition contraire, devant le tribunal administratif* ».
Since 2010, the prerogatives of the CNOSF as a conciliation and arbitration body were widened, but the administrative courts still have jurisdiction over certain kinds of sports disputes, mainly relating to doping.

50. The analysis of the FTF crisis allows us to detect at least three principles of international constitutional law that shall apply to governmental authorities and also to civil society organizations and political parties:

a. Majority is not democracy, or, democracy is not only majority;

b. Substantive principles of international constitutional law imply the refusal of non-democratic changes of electoral rules, made in the aim of eternalizing governing people in their positions or excluding competitors from the right to run for elections;

c. The respect of court decisions is part of the Rule of law. The executive power is not allowed to ignore court decisions nullifying their decisions or those taken by the deliberating bodies. They have either to request for their review or acquiesce to them.

FIFA
For the Game. For the World.

FACSIMILE
Fédération Tunisienne de Football
Mr Wadii Jary
Président

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Zurich, 15 avril 2016
ASG/pco

Recours en annulation des assemblées générales de la Fédération Tunisienne de Football

Cher Président,

Nous accusons réception de votre courrier daté du 8 avril 2016 au sujet des différents recours visant à annuler les dernières assemblées générales de la Fédération Tunisienne de Football (FTF) et nous vous en remercions.

Nous comprenons que trois clubs de la FTF ont saisi la justice ordinaire et qu'un d'entre eux a également fait appel au Tribunal Arbitral du Sport (TAS) afin d'annuler les assemblées générales de la FTF du 29 juillet 2015, du 6 novembre 2015 et du 18 mars 2016. Nous prenons note aussi de l'apparente volonté du Comité Olympique Tunisien de considérer que le Comité National d'Arbitrage Sportif (CNAS) est compétent pour statuer sur de tels sujets et que ce dernier s'apprêterait à annuler l'Assemblée Générale du 18 mars 2016.

Nous tenons à vous rappeler que selon les articles 13 et 17 des statuts de la FIFA, toutes les associations membres sont tenues de gérer leurs affaires de façon indépendante et sans l'ingérence d'aucun tiers. Dès lors, toute décision imposée unilatéralement à la FTF, comme cela semble pouvoir être le cas selon votre description, sera considérée comme une interférence violant les obligations susmentionnées et le cas sera soumis aux organes compétents de la FIFA pour prise de sanction, pouvant aller jusqu'à la suspension de la FTF.

La FIFA et la CAF ont suivi de près la situation de la FTF ces derniers mois, à l'image de la présence de représentants lors des assemblées générales du 6 novembre 2015 et du 18 mars 2016. Les amendements des statuts de la FTF adoptés lors de l'assemblée générale du 6 novembre 2015, notamment le choix des membres de la FTF de ne plus recourir au CNAS, avaient fait l'objet d'une correspondance envoyée par la FIFA le 25 septembre 2015 dans laquelle nous soulignions que l'important était que les membres de la FTF puissent bénéficier d'une procédure d'arbitrage et que cette condition était remplie par le fait que les statuts de la FTF permettaient le recours au Tribunal Arbitral du Sport (TAS). La saisie du TAS par deux clubs en est d'ailleurs une bonne illustration.

Quant à l'apparente saisie de la justice ordinaire par les trois clubs mentionnés dans votre courrier, nous vous rappelons que selon l'article 68 des statuts de la FIFA, le recours à la justice ordinaire est interdit. De même, les associations doivent s'assurer que leurs membres respectent cette obligation et qu'à défaut, ils peuvent être sanctionnés. Nous vous recommandons ainsi d'informer les clubs en conséquence.

Nous vous remercions de nous tenir informés de l'évolution de la situation et nous espérons que nous éviterons une détérioration de la situation malvenue alors que plusieurs importantes compétitions internationales sont en cours ou sur le point de débuter.

FEDERATION INTERNATIONALE
DE FOOTBALL ASSOCIATION

Markus Kattner
Secrétaire Général par intérim

cc: CAF

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