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**A CRITICAL ANALYSIS OF THE  
EFFICACY OF SOUTH AFRICAN LAW'S  
TREATMENT OF MATCH-FIXING IN  
SPORT**

By

Ruan Steyn

(Student Number 211556238)

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## **ABSTRACT:**

This dissertation seeks to examine match-fixing and corrupt activities related to sport and in particular analyse critically the efficacy of the present statutory provisions that aim at combating such practices. The following legislation is considered i.e. The Prevention and Combating of Corrupt Activities Act, 12 of 2004; The National Sport and Recreation Act, 10 of 1998; The Prevention of Organised Crime Act, 121 of 1998 and the National Gambling Act, 7 of 2004. The shortcomings of the aforesaid acts as well as the common law offence of fraud are also considered and the merits and demerits of the approach is viewed and found to be inadequate to deter those who want to participate in match-fixing. It is submitted that the only effective way to deter such criminal conduct would be to have one uniform piece of legislation that outlaws match-fixing specifically and any related matters.

## **Chapter 1:**

### **Introduction:**

#### **1.1 Introduction to law and sport in South Africa:**

South Africa is well known for being a sport loving nation, which is illustrated by the many major sporting events that it has held since becoming a democracy and the passion that is illustrated by fans in getting involved in such major events.<sup>1</sup> Sport is therefore embraced as an institution in South Africa and has become part of the living culture we practice.<sup>2</sup> That most South Africans either play or watch sport is an important driving force behind the fact that we are a sport loving nation. In addition, following the advent of our young democracy, many South Africans (especially politicians) have emphasised the nation-building role of sport in a country made up of a multitude of different cultures.

Sport is very diverse in the objectives it strives to achieve and these objectives can take the form of many activities spanning both amateur and professional sport. One of the main purposes of sport is to improve or maintain one's physical health through testing one's sporting ability.<sup>3</sup> Sport is also used as an educational measure in South Africa (for example, through the well-publicised 'Let's Play'<sup>4</sup> initiative, which empowers young, disadvantaged children or students). These and other facets of the importance of sport to society have also been recognised elsewhere (for example, in the provisions of Article 165 of the latest version of the European Treaty).<sup>5</sup>

In order for people to have an interest in sport and for sport to grow as a whole, it is imperative that sporting organisations and sport itself maintain a high level of integrity.

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<sup>1</sup> AM Louw *Sports Law in South Africa* 2 ed (2012) 23.

<sup>2</sup> D Bogopa 'Sports Development: Obstacles and Solutions in South Africa' (2001) 8 *The African Anthropologist* 85, 85.

<sup>3</sup> Ibid 86.

<sup>4</sup> 'Let's play' is an initiative that was introduced by SuperSport a well-known sports broadcaster in South Africa who through this initiative enables and inspires young children to live healthier lives and through the common ground of sport extinguishing the racial and social gaps in society ensuring there is a better future for all involved. Available at <http://www.supersport.com/content.aspx?id=19241>, accessed on 21 August 2013.

<sup>5</sup> Article 165 Consolidated Version of the treaty on the functioning of the European Union (2008) *Official Journal of the European Union*. Also See EU Green Paper on On-Line Gambling in The Internal Market Contribution from the professional sports committee of the French national Olympic and sports committee (CNOSF) page 1.

Although integrity in sport is dealt with in chapter 2 it is significant to mention the importance that integrity possesses in sport. According to McLaren, integrity is seen as a perception, which has to be present in order to secure the belief of the spectator that the result in a sporting competition can be classified as genuine.<sup>6</sup> The whole point of sport is that there are winners and losers (results), and therefore the integrity of the process of competition and of those results is, by definition, paramount to the value and legitimacy of the whole process. Sporting organisations should ensure a high level of integrity is maintained, which will be achieved by setting good governance standards in sport as their main objective will be regulating those who participate in sport. Thus, it is necessary to have a mechanism in place that will ensure that sport is regulated appropriately. This will have a positive impact on sport, securing the integrity and high standards that sport is played with, based on good moral values. Integrity, if lost, is extremely difficult to reclaim, making it even more important that it is safeguarded from bad anomalies like match-fixing.<sup>7</sup>

As South Africa has only quite recently been re-admitted into the international sporting arena, the development of sports law in South Africa is still considered to be in its primary stages.<sup>8</sup> The potential problems from a lack of a well-established legal framework specifically relating to sport are exacerbated by the hosting of major sport events which brings with it major potential risks that can undermine sport in its entirety. People participating in such events might engage in match-fixing in order to derive some financial gain or benefit for themselves or others, which might be one of the major risks. Either way, such conduct will jeopardise the results of the specific sport they are involved in. Sporting events could not only be influenced by match-fixing per se (i.e. where illicit conduct is aimed at affecting the outcome of a competition) but also by spot fixing and point shaving (i.e. attempts to manipulate certain part of matches or competitions which are not necessarily outcome-determinative). The meaning of point shaving and sport fixing will be discussed below to give some clarity as to what these terms encompass. These are easier methods of manipulating what happens on the field of play when compared with match-fixing as they do not involve many participants to achieve the desired result, which is ultimately to derive some financial gain by manipulating the game. It is professional sport which holds the key to the understanding of match-fixing and corrupt activities in sport as most money is found in the professional game.

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<sup>6</sup> RH McLaren 'Corruption: Its Impact on Fair Play' (2008-2009) 19 *Marquette Sports Law Review* 15, 15.

<sup>7</sup> Ibid.

<sup>8</sup> Louw (Note 1 above) 25 & 32.

Spectators and even players involved in sport always assume that there is uncertainty of outcome<sup>9</sup> of a match or a sporting event because of the unpredictability of sport.<sup>10</sup> This is one of the fundamental pillars of sport as an entertainment industry, distinguishing it from other forms of entertainment, such as film and television, which are scripted entertainment products ensuring a predetermined outcome.<sup>11</sup> However, in practice this has often proved to be untrue in recent years as many matches are influenced by match-fixing or other corrupt activities involving betting syndicates. The entertainment factor is so overpowering and overwhelming in sport now that it can be said that it is solely entertainment.<sup>12</sup> Match-fixing and corrupt activities are not merely influenced by corrupt financial incentives per se, as those involved are sometimes uneducated about these activities and are often easily influenced by others (especially vulnerable people such as young sportsmen and women; in the modern age elite athletes are often young). Whether match fixing and related corrupt activities should be regarded as a crime, criminal or not, is the problem that we are faced with in this research paper.

Many sporting organisations, such as FIFA,<sup>13</sup> the ICC<sup>14</sup> and the IRB,<sup>15</sup> have disciplinary codes or ethical codes that have to be adhered to and if any participant transgresses these rules, it would result in disciplinary action taken against such a party. None of these codes specifically provide that conduct like match-fixing is a crime with criminal sanctions. Therefore, sport stars often receive a life ban if involved in match-fixing, which might be viewed as a slap in the face for the law and the public, as the growing concern amongst the public is that players involved in the conduct of match-fixing are getting away with a crime.<sup>16</sup> More detail will be provided in the forthcoming chapters about the specific codes of the sporting organisations mentioned above and what conduct is prohibited and what penalties can be imposed on conduct that does not fall within the scope of such sporting codes. Sport betting and match-fixing are closely related in that this is how illicit betting syndicates make

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<sup>9</sup> See B Soebbing & D Mason 'Protecting integrity in professional sport leagues: Preserving uncertainty of outcome' (2008) North American Society for Sport Management Conference. Uncertainty of outcome is defined as follows: 'a situation where a given contest within a league structure has a degree of unpredictability about the result and, by extension, that the competition as a whole does not have a predetermined winner at the outset of competition' 223, 223.

<sup>10</sup> McLaren (Note 6 above) 15.

<sup>11</sup> Ibid. See also Soebbing & Mason (Note 9 above) 223.

<sup>12</sup> S Dasgupta 'Match Fixing: Threat to Indian Sport's Integrity' page 1 available at <http://ssrn.com/abstract=2261311>, accessed on 15 August 2013.

<sup>13</sup> Fédération Internationale de Football Association.

<sup>14</sup> International Cricket Council.

<sup>15</sup> International Rugby Board.

<sup>16</sup> S Gardiner 'Should more matches end in court?' (2005) 155 *The New Law Journal* 1, 1.

their money: by fixing a match and placing bets on the specific match that is being fixed. Sport betting is not considered to be illegal (in most countries) and to prosecute a person for a criminal offence will be difficult to prove. Therefore this paper will be focusing on legislation from South Africa and comparing the act of match-fixing with specific criminal legislation to establish whether South Africa has effective legislation to deal with the problem, and whether there are mechanisms that can be introduced that will assist in the combatting of this problem. More specific mention will be made later of the statutes that will be discussed in this paper. Other jurisdictions might be a helpful guide to South Africa and might give us guidance as to whether match-fixing should be considered to be a crime in South Africa and subjected to the same punishment as other corrupt activities under our governing legislation.

Sport has increasingly become commercialised, with the prevalence of match-fixing also increasing significantly. Although there are currently no recent official statistics available, match-fixing and money are considered very strongly connected. However, according to a study done by PriceWaterhouseCoopers in 2009, match-fixing was worth an estimated \$141,000,000,000.<sup>17</sup> Therefore, commercialisation of sport has definitely had an impact on the increasing prevalence of match-fixing as illustrated by many match-fixing scandals. Sport has become akin to the other major entertainment industries; participants in sport get paid substantial amounts to partake in sporting events and companies sponsor these events to derive some financial gain or further their business.<sup>18</sup> Thus, there is a lot of investment in sport because it can be used as a platform to reach the wider public and consumers in the marketing of brands. It is recognised, for example, that sports mega-events (such as the Olympic Games or Football World Cup event) are some of the biggest marketing platforms for modern brands.<sup>19</sup> The problem is that match-fixing has the potential to cloud the public's perception of sport because sporting events are compromised by the loss of integrity of results. This has the potential to impact on the commercial business, namely sponsors, no longer showing interest in providing funds or being associated for the wrong reasons. In fact, such a potential loss of interest in sport could potentially also significantly impact the single biggest source of revenues for sports organisations and athletes, namely the sale of

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<sup>17</sup> S Gorse & S Chadwick 'The Prevalence of Corruption in International Sport: A Statistical Analysis' Report for the Remote Gambling Association and their Partners, the European Gaming and Betting Association and the European Sports Security Association, Centre for the International Business of Sport, Coventry University Business School.

<sup>18</sup> Louw (Note 1 above) 33.

<sup>19</sup> AM Louw *Ambush Marketing and the Mega-Event Monopoly: How Laws are Abused to Protect Commercial Rights to Major Sporting Events* (2012) ch 3.



broadcasting rights.<sup>20</sup> The spectre of reputational damage to sponsors threatens the sports sponsorship industry.<sup>21</sup> Sport as stated earlier is intended to be an institution with a high level of integrity based on a good moral standard of ‘fair play’. Match-fixing, in this respect, poses just as significant risk for the sports industry as does the phenomenon of illicit sports doping. Any organisation involved has a substantial interest in ensuring that such standards of fair play are adhered to and maintained. In Chapter 4 below there will be a discussion and an examination of the important role of sports governance and regulation in the context of the phenomenon of match-fixing.

## **1.2 What is Match-Fixing?**

There are many definitions of match-fixing and it is important to look at a number of them to provide a holistic understanding of the actions or conduct that can be classified as match-fixing. The term “match-fixing” can be used in many contexts, referring to different types of conduct. The core meaning of the term involves the manipulation of an outcome (result) by competitors, teams, officials, sport agents or support staff.<sup>22</sup> Manipulation of results is therefore twofold: (i) the rules of the sport are broken; and (ii) one acts against the law.<sup>23</sup> Conduct that would constitute match-fixing under this definition would be deliberate fixing, deliberate underperformance, withdrawal from competition (also known as tanking), deliberate misapplication of rules, interference with the play and abuse of insider information to support a bet.<sup>24</sup> All of these actions may negatively affect sport, and lead to the downfall of the game. Another official definition according to the Oxford Dictionary states that match-fixing is the ‘action or practice of dishonestly determining the outcome of a match before it is played’.<sup>25</sup> It also involves third parties who pay money to a player, which he or she accepts in return for conduct (either by commission or omission) for the sole purpose of influencing the outcome of the relevant sports event or match, and this extends the meaning of match-fixing even further to provide for a wider scope of actions that encompasses the conduct of match-fixing.<sup>26</sup>

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<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> F Lord ‘Sport Integrity Units lead fightback against corruption in sport’ (2013) 1 *International Centre for Sport Security Journal* 88, 91.

<sup>23</sup> D Bodin & G Sempé *Ethics and Sport in Europe* (2011) ch1 & 2.

<sup>24</sup> Ibid.

<sup>25</sup> Match-fixing definition available at <http://www.oxforddictionaries.com/definition/match-fixing>, accessed on 10 June 2013.

<sup>26</sup> A Lewis & J Taylor *Sport: Law and Practice* Print on Demand ed (2003) 1094.

Match-fixing can be divided into three simple categories. Firstly, there is general match-fixing where an individual is paid an amount of money to lose the game.<sup>27</sup> Secondly, the term spot-fixing is a subcategory of match-fixing meaning the manipulation of a specific event during a competition or game.<sup>28</sup> An example of this would be a bowler in a cricket match deliberately bowling a no-ball during one of the overs in the game. The last category is known as point shaving, meaning the manipulation not of the outcome but of the result.<sup>29</sup> An example of this would be where members of a team are paid not to win or not to lose more or less than a certain amount of goals or runs depending which sport is being played.

Match-fixing is not an issue that is relevant only to those within the sporting industry. Many sportsmen and women perform as role models, setting an example for people (especially the youth) across the world. It can therefore be argued that, as a result of the high level of integrity that is needed to be a positive role model, people should be held accountable for their actions and in this case, be held criminally liable for such illicit conduct. It is here, however, that we encounter a measure of legal uncertainty in certain jurisdictions regarding the criminal aspects of match-fixing, which has served to stunt the development of a harmonised international approach to corruption in sport.

South Africa is an example of a jurisdiction where there is no specific legislation that criminalises match-fixing. This dissertation will examine relevant, generally applicable legislation which may be used to address sport match-fixing matters, including the Prevention of Organised Crime Act 121 of 1998 (hereinafter referred to as “POCA”), the Prevention and Combating of Corrupt Activities Act 12 of 2004 (hereinafter referred to as “PCCAA”) and the National Gambling Act 7 of 2004. This dissertation will also briefly look at the common law crime of fraud and whether it can assist where specific legislation cannot. As there are many stakeholders that participate (especially in top level sport), it is important to scrutinise the involvement of each stakeholder. This is due to the fact that match-fixing is a lucrative business to many different parties involved, and the fact that it also holds distinct implications for the different stakeholders. Ironically, despite South African cricket being rocked by one of the biggest match-fixing scandals in world sport (the ‘Hansiegate’ scandal or the ‘Hansie Cronje’ scandal in cricket), there is not much precedent or guidance in South

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<sup>27</sup> ‘National Action Plan against Match-fixing in Sport 2013-2015’ Norwegian Ministry of Culture, 4.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

Africa regarding the law relating to match-fixing. It will thus be important, in the course of this analysis to consider treatment in foreign jurisdictions for guidance on the matter and to incorporate relevant and applicable principles into our law.

The purpose of this study is to critically examine the above legislation, as well as the common law crime of fraud, in order to determine whether the act of match-fixing in South Africa does and should result in criminal liability and to determine whether it is possible to bring match-fixing within the ambit of those statutes and criminalise the conduct of the relevant parties involved. If it is found that such criminal liability is possible, the purpose of this study will be further to determine whether the existing legislative framework can deal effectively with the problem. In the process, the dissertation will also examine whether private initiatives emanating from within the sports industry (or related contexts, such as the sports sponsorship and sports betting industries) can and should be utilised in addition to the relevant domestic criminal laws. Finally, an additional aspect of the analysis will involve examination and evaluation of recent calls for an international instrument (e.g. an anti-corruption code or the like) and/or an international oversight body (e.g. an anti-corruption agency, possibly akin to the World Anti-Doping Agency, or WADA) in sport, and the potential role for such measures in the domestic context of South Africa's efforts to eradicate the social evil of match-fixing.

The first time South Africa was exposed to the concept of match-fixing resulted in the publication of the King Commission Report, which was the culmination of a process which dealt with the fall-out of the largest and most serious case of match-fixing that the sport of cricket had encountered up to that time.<sup>30</sup> Unfortunately, South Africans have become increasingly familiar with this concept because other sports have also yielded instances of illicit and corrupt conduct by participants and others (compare the recent match-fixing scandal(s) in South African soccer). Many South Africans were shocked by the soccer scandal that brought to the fore match-fixing on a large scale, not only influencing domestic soccer leagues but also involving our national team where some friendly matches in the run-up to the 2010 FIFA World Cup were allegedly fixed by ensuring that certain referees take

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<sup>30</sup> EL King *Commission of Inquiry into Cricket Match Fixing and Related Matters: Second Interim Report (2000) & Final Report (2001)* Cape Town.

charge of specific games that would ensure that the desired result would be achieved.<sup>31</sup> Government has threatened to step in and has once again called for a commission of enquiry to investigate the scandal.<sup>32</sup> FIFA requested that the South African government should not get involved and leave it to SAFA<sup>33</sup> to resolve the issue, which will apparently ensure that the autonomy of sporting organisations are protected.<sup>34</sup> However, despite the politics involved, a major problem remains the fact that many sporting organisations do not appear to be able to ensure proper governance of their respective codes and have failed to eradicate the problem of match-fixing. This has left the government with no choice but to step in to combat the problem in some way or other in order to safe-guard the sanctity of sport. In the milieu of the international governance of the individual codes, the insistence by international governing bodies (such as FIFA, a case in point) that sport corruption should not be the domain of national governments and domestic courts, is problematic. Such rules against government interference, coupled with mandatory arbitration provisions in sport contracts (such as player contracts in professional sport), may very well not only inhibit domestic legal intervention to deal with match-fixing, but also be unconstitutional in the South African context.

Match-fixing has become a growing problem in South Africa and across the world, which is a distressing sign for sports fans, consumers and sporting organisations, as the integrity of the sport appears to often be sacrificed for financial gain. As stated earlier, this is a rapidly-increasing problem, whereby the best way to counteract such conduct is to ensure that there is adequate governance and regulation of sport and to criminalise the conduct of transgressors in order to deter others from potentially involving themselves in such scenarios or corrupt activities. While it is currently unclear whether (or to what extent) WADA's<sup>35</sup> aggressive anti-doping efforts during the past decade (including often harsh sanctions for doping cheats) have in fact had a significant deterrent effect, criminal sanctions against the perpetrators of match-fixing as a corrupt practice may very well prove to be a more suitable deterrent in combating these practices which similarly and as seriously implicate the integrity of sport. The chapter that follows will further examine this concept of sporting integrity.

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<sup>31</sup> 'Safa to face judicial enquiry' The New Age 5 April 2013 available at <http://www.thenewage.co.za/mobi/Detail.aspx?NewsID=90458&CatID=1007>, accessed on 20 June 2013. Also see 'South African government given warning by Fifa' 31 March 2013 available at <http://www.bbc.co.uk/sport/0/football/21990738>, accessed on 25 June 2013.

<sup>32</sup> Ibid.

<sup>33</sup> South African Football Association.

<sup>34</sup> See Note 31 above.

<sup>35</sup> World Anti-Doping Agency.

## **Chapter 2:**

### **Integrity of Sport:**

#### **2.1 Introduction:**

It was previously stated that integrity plays an important role in sport and to understand why it is such a vital component of sport more analysis is needed. This chapter will provide this substantial analysis and will focus mainly on the definition and importance of integrity in sport. Sport is a discipline and in order to participate, whether as an individual or as a team, one has to adhere to certain rules and obligations. Participants who take part in any sport or sporting activity voluntarily accept the rules and obligations that are set out by each sport governing body, which ensures a proper structure for conduct of sport to be maintained. As a result of this, it provides protection for parties that are involved in sport or any sporting activity.<sup>36</sup> An example of this would be the ICC Code of Conduct, which requires players who participate in cricket to follow certain standards of rules to safeguard the players and any other relevant party involved. Non-adherence to the Code of Conduct will result in serious consequences for any party that involves themselves in any wrongdoing.<sup>37</sup>

#### **2.2 Definition of “sport integrity”:**

Integrity is a balance between good moral values, beliefs and principles, coupled with the actions by people based on the aforementioned aspects.<sup>38</sup> Therefore, it is key that a person of integrity can be trusted to act accordingly based on their moral values and will never veer from such values, even when exposed to irregularities or temptations.<sup>39</sup> Sports that are known for their honesty and good sportsmanship display a sense of integrity in sport.<sup>40</sup> This provides a safe environment for people to partake in sports. As long as people play by the rules, it can be said that integrity of sport is maintained and safeguarded from any irregular behaviour.

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<sup>36</sup> LAWSA 474.

<sup>37</sup> ICC Code of Conduct available at [http://static.icc-cricket.com/ugc/documents/DOC\\_BB1EB9635DEBBF50590D506FE7937343\\_1317276874961\\_245.pdf](http://static.icc-cricket.com/ugc/documents/DOC_BB1EB9635DEBBF50590D506FE7937343_1317276874961_245.pdf), accessed on 18 October 2013.

<sup>38</sup> ‘What is sport integrity?’ available at [http://www.ausport.gov.au/supporting/integrity\\_in\\_sport/about/what\\_is\\_sport\\_integrity](http://www.ausport.gov.au/supporting/integrity_in_sport/about/what_is_sport_integrity), accessed on 17 July 2013.

<sup>39</sup> Ibid.

<sup>40</sup> Ibid.

When a sport has a high level of integrity, it builds trust and confidence and induces businesses through sponsorship and other means, to invest in sport.<sup>41</sup> Sponsors will only sponsor those that maintain the highest level of integrity<sup>42</sup>, something that was illustrated in the sport of cycling through the recent exodus of sponsors following the Lance Armstrong doping scandal. Integrity in sport leads to increased participation, which makes the sport feasible and ultimately leads to success.<sup>43</sup> Conduct that manipulates results skews the playing field and creates an unfair advantage, thus match-fixing cannot be said to be associated with integrity as it undermines all the values that are associated with criminals.<sup>44</sup> Sport will always be judged and scrutinised by fans, the media, sponsors and many others, and it is therefore essential that a sport maintains a high level of integrity to ensure its survival, which means it needs to stay true to its values and principles.<sup>45</sup>

### **2.3 Importance of integrity in sport:**

Integrity is an integral part of sport as players, administrators, fans and other stakeholders attach huge value to honesty, which is a key component of integrity. Yet, whilst it is seen as the most important commodity of the modern game, there are many scandals that undermine this fundamental commodity.<sup>46</sup> Illustrative of the fact that integrity is the most fundamental value or commodity in sport, is that sport would become meaningless without it and competition worthless.<sup>47</sup>

Ultimately, integrity in sport provides for the legitimacy<sup>48</sup> of sport results, without which sport would be considered a charade, bringing with it illegitimate consequences.<sup>49</sup> The unique nature of sport requires sporting organisations to maintain integrity in sport, which will

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<sup>41</sup> Ibid.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid.

<sup>44</sup> Ibid.

<sup>45</sup> Ibid.

<sup>46</sup> Sports Accord Report 'Integrity in Sports: Understanding and Preventing Match-fixing' (2012). Also see Louw (Note 19 above) chapter 8, page 577, who quotes Hylton as to why sport is seen as an important commodity: 'sport is a common commodity in the modern world, and laws should be designed to encourage the maximum amount of public involvement as both participants and spectators and not merely to enrich those who control the production of the premier sporting events'.

<sup>47</sup> Ibid.

<sup>48</sup> Legitimacy is defined as: 'conformity to the law or to rules' available at <http://www.oxforddictionaries.com/definition/english/legitimacy>, accessed on 15 June 2013.

<sup>49</sup> Soebbing & Mason (Note 9 above) 223.

increase the uncertainty of outcome and ensure that results are legitimate.<sup>50</sup> Match-fixing undoubtedly undermines this. The key is therefore to ensure legitimacy through integrity in sport. If the integrity of sport is damaged, it will not only undermine this core value but affect the image and popularity of sport amongst the public. The public image of sport has great commercial value and if the public loses respect for sport, it threatens the commercial success of sport.<sup>51</sup> The potential risk is that sport fans will ignore sport, which will impact on commercial business by removing the target market of sponsors, advertisers and broadcasters.<sup>52</sup> Without respect for sport, fans will not associate with sport. Fans therefore require the belief that what is being displayed on a sports field is a true reflection of the skills that a competitor possesses, as this gives credibility to the sport as well as affirming the entertainment value of watching truly world-class athletes' perform. Sponsors, advertisers and even sport governing bodies will be negatively affected if there is no credibility, which in turn will lead to the downfall of sport in general.<sup>53</sup> In recent times the integrity of sport has been under severe pressure from match-fixing with the increasing possibility of exceeding doping as the greatest single threat to sport's integrity.<sup>54</sup> There is growing evidence however that the two are closely connected in the sense that criminal syndicates are often behind both of these irregular activities but a further discussion of this will follow in chapter 7.

Match-fixing and corruption is not a new phenomenon and can be traced back to the ancient Greek Olympics, but it has recently become much more prevalent.<sup>55</sup> Many suggest that the high moral standards sport claimed to be associated with in the past were simply a facade with the public having just become more aware of its prevalence in modern day life. This has led to the correlation between gambling and match-fixing because of money and the risk that is involved.<sup>56</sup> The risk that accompanies gambling like match-fixing is that it will seriously threaten the uncertainty of the outcome and retrospectively threaten the integrity in sport.<sup>57</sup> The financial gain that can be made from gambling is so great that it outweighs the consequences of destroying the integrity of sport. This has the effect that gambling in sport has become acceptable and has led to the temptation to fix sporting results to a favoured

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<sup>50</sup> Ibid.

<sup>51</sup> RH McLaren 'Is Sport Losing Its Integrity?' (2010-2011) 21 *Marquette Sports Law Review* 551, 551.

<sup>52</sup> Sports Accord Report (Note 46 above).

<sup>53</sup> Sport integrity available at <http://www.theicss.org/services/sport-integrity/>, accessed on 19 July 2013

<sup>54</sup> TWJ Serby 'Gambling related match-fixing: a terminal threat to the integrity of sport?' (2012) 2 *International Sports Law Journal* 7, 7.

<sup>55</sup> Ibid.

<sup>56</sup> McLaren (Note 51 above) 560.

<sup>57</sup> Soebbing & Mason (Note 9 above) 223.

outcome, to enhance profits and gain the maximum benefit.<sup>58</sup> A fix can be orchestrated by either an official or athlete by making a betting gain for their own account or some other financial gain in response to a bribe being offered by punters or bookmakers.<sup>59</sup> This threat will not just negatively impact on sport but also on the broader society because of the far-reaching effect it has. It is common knowledge that match-fixing branches out to various other aspects in society and is not seen as an isolated problem. The problem is that gambling has become an acceptable form of conduct and is growing in some cultures, whereas others totally forbid it. Therefore it is morally and politically wrong for sport and gambling to be linked too closely such that there are overlapping interests.<sup>60</sup> It is a major social issue that one has to address, but the fact that gambling related match-fixing is on the increase is largely as a result of the commercialisation of sport.<sup>61</sup> Effective regulation will possibly be the most appropriate measure to address the problem, which requires a combined effort between sporting and gambling organisations. This is possibly the only suitable way to combat the threat that match-fixing poses to the integrity of sport and its associating values.<sup>62</sup>

#### **2.4 Sport Integrity Unit:**

The threat to integrity of sport was seen as such a big concern that the ICSS<sup>63</sup> in 2011 established its own global Sport Integrity Unit (SIU) which is entrusted with a mandate to support all sport with specific focus on fundamental issues relating to integrity.<sup>64</sup> The SIU seeks to maintain integrity in sport and ultimately ensure the future of sport. It is provided with a mandate requiring it to focus its efforts on the following.<sup>65</sup>

- 1) The vulnerability of betting agencies accompanied with the confidential intelligence and what the impact will be on the integrity of sport globally.<sup>66</sup>
- 2) An early warning system to secure an arrangement on fraud investigation which will critically support and advise on issues that relate to sport integrity.<sup>67</sup>

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<sup>58</sup> McLaren (Note 51 above) 552.

<sup>59</sup> D Forrest, I McHale & K McAuley “‘Say it Ain’t So’: Betting-Related Malpractice in Sport’ (2008) 3 *International Journal of Sport Finance* 156, 157.

<sup>60</sup> *Ibid* 156-157.

<sup>61</sup> Serby (Note 54 above).

<sup>62</sup> McLaren (Note 51 above) 559.

<sup>63</sup> International Centre for Sport Security.

<sup>64</sup> Lord (Note 22 above) 91.

<sup>65</sup> *Ibid*.

<sup>66</sup> *Ibid*.



- 3) Providing programmes on topics such as education and communication that would help leaders in sport integrity.<sup>68</sup>
- 4) To develop structures that would cater for an integrated legal framework globally that would protect sport integrity.<sup>69</sup>
- 5) A support system for young children to ensure their integrity is maintained thereby protecting the sport.<sup>70</sup>
- 6) An assessment of sport integrity of different states.<sup>71</sup>

Integrity is therefore very important to secure the success of sport and the enjoyment of the participants along with the spectators.<sup>72</sup> This in essence is the objective of all SIU's not just specifically the one mentioned above, striving to achieve and return that enjoyment factor in sport without any negative connotations tarnishing the game. Declan Hill, which is a leading journalist in the field has criticised the establishment of this specific unit saying that it is merely a political move for Qatar to secure an Olympic bid as they have failed on previous occasions.<sup>73</sup> Carpenter sees INTERPOL as the most significant and most powerful international organisation in the fight against match-fixing as is evident by the many arrests they have made relating to match-fixing.<sup>74</sup> The sport integrity unit that forms part of INTERPOL would not have been possible to be established without the help of FIFA who made a substantial donation in the cause and set out clear objectives that had to be implemented by this unit.<sup>75</sup> The key objectives were global training, prevention as well as education with specific focus on regular and irregular betting accompanied by match-fixing as these two are closely connected.<sup>76</sup> In recent times INTERPOL has been so successful in the combat of match-fixing with its soccer gambling operations, which led to more than 7000 arrests, closure of illegal gambling dens which handled more than \$2 billion US dollars in the form of illegal bets and lastly it led to the seizure of nearly \$27 million US dollars in cash.<sup>77</sup>

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<sup>67</sup> Ibid.

<sup>68</sup> Ibid.

<sup>69</sup> Ibid.

<sup>70</sup> Ibid.

<sup>71</sup> Ibid.

<sup>72</sup> McLaren (Note 6 above) 16.

<sup>73</sup> K Carpenter 'Match-fixing – scandals, lessons & policy developments 2012/13- part 2' available at <http://www.lawinsport.com/articles/anti-corruption/item/match-fixing-scandals-lessons-policy-developments-2012-13-part2>, accessed on 11 July 2013.

<sup>74</sup> Ibid.

<sup>75</sup> Ibid.

<sup>76</sup> Ibid.

<sup>77</sup> Ibid.

This chapter has outlined why integrity is important not just to the athletes but to the spectators and relevant stakeholders which form part of broader society. In the next chapter the dissertation deals with the commercial impact that match-fixing will have if the problem is not addressed appropriately. The reason why this will have a commercial impact and why it is also an important focus of this dissertation is because of the fact that sport has essentially become big business in the corporate world and match-fixing has a definite impact on the business of sport and vice versa.<sup>78</sup>

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<sup>78</sup> A Smith 'All Bets Are Off: Match Fixing in Sport – Some Recent Developments' (2011) 9 *Entertainment and Sports Law Journal* 62, 70.

## **Chapter 3:**

### **The commercial impact of match-fixing on relevant stakeholders:**

#### **3.1 Introduction:**

Sport has progressed from a stage where the norm was that sport was played with honour and, dignity and one represented a club, region or country according to such values, to a point where people are concerned about the integrity of the sport because of the monetary value that is involved in the game and the big business it has become.<sup>79</sup> This focus shift is as a result of commercialisation of sport in the sense that there are many economic consequences that follow from success or failure.<sup>80</sup> Sport is often referred to as a ‘winner take all’ market from an economic point of view.<sup>81</sup> This has left little room for athletes to manoeuvre as they constantly have to be the best in order to compete against the best to ensure financial viability. Commercialisation of sport can therefore be seen as a big driving force behind the development of sport as a business often for the wrong reasons.<sup>82</sup> That is why according to Robinson commercialisation of sport has taken away the essence of sport and can be seen to be undesirable.<sup>83</sup> Professionalism of sport according to Robinson has undermined community values and therefore the focus of sport has shifted as identified earlier from its true nature.<sup>84</sup> Therefore Robinson makes it clear and states that commercialisation of sport has most certainly had an effect maybe even encouraged problems such as doping and more relevantly, match-fixing.<sup>85</sup>

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<sup>79</sup> L Robinson ‘The business of sport’ in B Houlihan *Sport and Society: A Student Introduction* (2008) 307, 310.

<sup>80</sup> EU Commission ‘Aren’t we all positive: executive summary: economic analysis of doping in elite sport’ available at [http://ec.europa.eu/sportlibrary/documents/c2/doc364\\_en.pdf](http://ec.europa.eu/sportlibrary/documents/c2/doc364_en.pdf), accessed on 20 August 2013.

<sup>81</sup> Ibid.

<sup>82</sup> Robinson (Note 79 above) 308-311.

<sup>83</sup> Ibid.

<sup>84</sup> Ibid.

<sup>85</sup> Ibid.

### **3.2 Commercialisation explained in terms of match-fixing:**

Commercialisation can be defined as ‘the act of commercialising something; involving something in commerce’.<sup>86</sup> The commercialisation of sport is not a new phenomenon, as Greek athletes as early as 590 BC were rewarded financially for an Olympic Victory.<sup>87</sup> Most recently sport has become big business with big corporates being profoundly involved in sport.<sup>88</sup> Sport governing bodies are often described as organisations which follow a “business like” strategy because they are market orientated and concern themselves with “business like” objectives.<sup>89</sup> They pursue objectives such as maximising profit and revenue for their own gain.<sup>90</sup> The growth of sports marketing, sponsorship and sports tourism have all been part of the process of commercialisation in sport and have proven to be big contributors to the development and growth of sport.<sup>91</sup> There are huge financial and economic benefits which accompany this but there are also concerns regarding the negative impact that commercialisation might have on sport.<sup>92</sup> As there is a constant pursuit for increased financing of sport events, sporting organisations have all embraced the commercialisation of sport, but often without ensuring proper regulation and monitoring, which has translated into a lack of accountability for many sporting organisations.<sup>93</sup> A lack of proper regulation coupled with commercialisation of sport encourages the development of certain forms of corruption.<sup>94</sup> One such problem is match-fixing, which has attracted growing interest from criminal groups who want to exploit the phenomenal revenues generated by sports betting.<sup>95</sup> This exploitation then undermines public order and the rule of law.<sup>96</sup>

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<sup>86</sup> Learning Legacies: Discussion Starter ‘Commercialisation of the games’ (2010) page 1 available at [http://www.heacademy.ac.uk/assets/hlst/documents/olympic\\_sig/discussion\\_starters/DS18-Commercialisation-of-the-Games.pdf](http://www.heacademy.ac.uk/assets/hlst/documents/olympic_sig/discussion_starters/DS18-Commercialisation-of-the-Games.pdf), accessed on 5 October 2103.

<sup>87</sup> T Slack ‘Studying the commercialization of sport: The need for critical analysis’ (1998) *Sociology of Sport Online* available at <http://physed.otago.ac.nz/sosol/v1i1/v1i1a6.htm>, accessed on 10 August 2013.

<sup>88</sup> *Ibid.*

<sup>89</sup> Robinson (Note 79 above) 308.

<sup>90</sup> E Eksteen *Sports Development, Law and Commercialization* (2012) 48.

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid.*

<sup>93</sup> W Andreff & S Szymanski *Handbook on the Economics of Sport* (2006) 232.

<sup>94</sup> Parliamentary Assembly Council of Europe: Resolution 1876 Final version ‘The need to combat match-fixing’ (2012) available at <http://assembly.coe.int/ASP/XRef/X2H-DW-XSL.asp?fileid=18264&lang=en>, accessed on 20 July 2013.

<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid.*

### **3.3 The role of integrity in the commercial success of sport:**

Linked closely with commercial values, the context of questionable integrity should be explained as a threat to the commercial success of sport. According to the Australian Sport Commission, the financial viability of sport has four cardinal elements: fairness, respect, responsibility and safety.<sup>97</sup> In this regard, integrity means to take these four elements into account thereby ensuring that one respects these values to ensure open and fair competition in sport.<sup>98</sup> Therefore, integrity in sport has an extended meaning for sport governing bodies because it goes beyond the field of play and is related to the business of sport and the branding thereof.<sup>99</sup> The business model of sport is primarily based on a contract of trust and confidence between the sport governing bodies, sponsors and spectators.<sup>100</sup> If the trust is undermined, for example by match-fixing, the sponsors and spectators (consumers) will retract their money and move it elsewhere which could threaten the financial stability of sport.<sup>101</sup> The commercial success of sport is often reliant on the entertainment value it provides for the public as a whole and in section 3.5 there is elaboration on this point although it is very brief. Therefore there has to be uncertainty of outcome in sport to ensure the entertainment value is maintained.

### **3.4 Commercialisation of sport and governments:**

As stated earlier the commercialisation of sport is about big money, not just for sponsors and broadcasters but also for governments as they all derive some form of benefit when involved in major sport events. It is not uncommon for governments to get involved in sport related matters as it has an enormous amount of recognised value for a nation as a whole.<sup>102</sup> Like Australia, South Africa's sporting success tends to be interlinked with the national pride of the country as seen every time South Africa hosts major sport events, such as the 1995 Rugby World Cup and 2010 Soccer World Cup. These clearly illustrate the passion and pride South Africans associate with sport.<sup>103</sup> These feel-good experiences that exert themselves every

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<sup>97</sup> J Anderson 'Combating Serious Crime and Corruption in Sport: International and Comparative Perspectives Workshop (2011) 6 Centre of Excellence in Policing and Security 1, 2.

<sup>98</sup> Ibid.

<sup>99</sup> Ibid.

<sup>100</sup> Ibid.

<sup>101</sup> Ibid.

<sup>102</sup> Dosen, Ballantyne, Brumpton, Gibson, Harris, Lippingwell, Mills, Smith, Whitting 'Topic 12: Sport and the law' (2013) Investigating Legal Studies for Queensland.

<sup>103</sup> Ibid.

time a South African team competes in a major sporting event will often lead to an increase in economic activity and the overall interest that the government has in sport is far reaching on more than one level.<sup>104</sup> This has resulted in sport becoming an industry just like any other but with a big societal impact, as there are numerous people earning a living from sport in various branches of the industry.<sup>105</sup> It is not only professional sport that contributes to the commercialisation thereof but also at amateur level, which is a big source of income for stakeholders like sponsors, as professional sportsmen and women start at amateur level and progress to professional level.<sup>106</sup>

### **3.5 Commercialisation of sport and the public:**

Sport, and major events in particular, has become important to a large portion of the public and the public domain has embraced the entertainment value that sport provides.<sup>107</sup> In order to provide such entertainment to the public, an enormous amount of money needs to be raised to ensure that sport and events associated with it are of significant value to the public.<sup>108</sup> This provides stakeholders with a wide range of opportunities to get involved in sport, be it by way of sponsorship deals, licensing or player endorsements. Sport (and especially major sporting events), provides an unparalleled marketing platform for brands. Stakeholders have the opportunity to grow their businesses through exposure of their brands, the image that they project and associate with, as well as the influence they might exert in consumer behaviour.<sup>109</sup> This increasing endeavour has ultimately led to the commercialisation of sport and it is set to continue, as lucrative deals are concluded almost on a daily basis. Businesses enter into such lucrative deals on the basis that there is an expectation of continued success of the sport or the player if they decide to endorse a specific athlete.<sup>110</sup>

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<sup>104</sup> Ibid.

<sup>105</sup> D Healey *Sport and the law* 4 ed (2009) ch 2.

<sup>106</sup> Ibid.

<sup>107</sup> I Hewitt 'Commercialisation of major sports events: Does the law help or hinder the event organiser?' (2005) 13(1) *Sport and the law journal* 32, 32.

<sup>108</sup> Ibid.

<sup>109</sup> JA Fortunato & SE Martin 'American Needle v NFL: Legal and Sponsorship implications' *University of Denver Sports and Entertainment Law Journal* 73, 73-82.

<sup>110</sup> A Healy 'Key legal issues in the business of sport' (2008) Beauchamps Solicitors available at <http://glenavy.servasport.com/downloadResource?id=43>, accessed on 5 August 2013.

### **3.6 Protection for corporate stakeholders: Morals Clauses:**

There is a comparison that can be drawn between doping and match-fixing scandals. The comparison is that the impact that these scandals have may be far-reaching for the stakeholders that are involved in the sport. Scandals like match-fixing will affect the perception of the public if such scandals come to the attention of the public, and such scandals can affect or even tarnish the saleability of the sport.<sup>111</sup> This might lead to stakeholders taking a decision not to continue their association with a specific sport and result in the downfall of the game, as money is a key factor in the survival of many modern sport leagues.<sup>112</sup> Examples in section 3.7 below are provided to show how sponsors react to the involvement of an athlete in a scandal and what the consequences might be for the athlete if he chooses to be part of the serious nature of these scandals.

In order for businesses or stakeholders to protect themselves and safeguard their interests, morals clauses are inserted into contracts in the circumstances where it involves corporate sponsors of events or individuals.<sup>113</sup> The reason why stakeholders get involved in the first place is because of the good reputation a sport, governing body or individual might have and there are various factors that contribute to such a reputation. Some examples of what constitutes a good reputation will include an admirable work ethic, high moral standards and a high level of integrity in respect of sport.<sup>114</sup> These are all factors that big corporate stakeholders would like to be associated with and it is important that the reputation of the business is not damaged in any way. There are numerous risks involved and corporate stakeholders take on a big part of that risk. Therefore, it is paramount that the stakeholders protect themselves by way of specific measures such as the use of morals clauses in sponsorship or endorsement contracts.<sup>115</sup> Morals clauses can usually be defined as provisions that are included in an endorsement contract, whereby the endorser has the right to cancel the contract if the image or reputation of the endorsee is tarnished in any way by bad publicity.<sup>116</sup> The reason why corporate businesses insert these clauses is not only to protect themselves in

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<sup>111</sup> Ibid.

<sup>112</sup> Ibid.

<sup>113</sup> D Auerbach 'Morals Clauses as Corporate protection in athlete endorsement contracts' available at [http://laworgs.depaul.edu/journals/sports\\_law/Documents/Auerbach%20Morals%20Clause.pdf](http://laworgs.depaul.edu/journals/sports_law/Documents/Auerbach%20Morals%20Clause.pdf), accessed on 7 September 2013, 1-18.

<sup>114</sup> Ibid.

<sup>115</sup> Ibid.

<sup>116</sup> Ibid.

general but to protect themselves from financial loss or embarrassment due to reputational damage. The last thing these corporate stakeholders want is for their public image to be damaged by a scandal, which they have no power or control over, as corporate stakeholders put all their faith in a specific individual or event to uphold that image to the highest standard possible that would grow the business as a result of the success of the sport or individual in the public sphere.

### **3.7 Impact of Scandals on Corporate Stakeholders:**

Since the commercialisation of sport has become such a big phenomenon, numerous scandals have appeared in the news whereby corporate stakeholders often have to bear the financial brunt of the scandal by way of the reputational damage that is associated with such events. Scandals regularly ruin the reputation of not only the individual but the company, through the association it might have with a professional athlete. Clearly there is a lot at stake for corporate stakeholders and the need to safeguard themselves adequately is imperative.

A good example in illustrating the nature of how a scandal can affect corporate stakeholders is the Tiger Woods saga.<sup>117</sup> Although not involved in match-fixing, his sex scandal created a worldwide outcry because he was involved in immoral conduct. Many corporate sponsors decided to withdraw as his sponsor as they did not want to be associated with the bad publicity and the bad image that Tiger had created for himself.<sup>118</sup> Lance Armstrong had the same fate when his doping scandal ruined the reputation of his most famous sponsor, Nike.<sup>119</sup> Nike withdrew as a sponsor to Lance Armstrong but not with Tiger Woods because the transgressions of the latter were not related to integrity of his performance, which is a significant distinction that has to be drawn between the two.<sup>120</sup> The recent events surrounding renowned Paralympic athlete Oscar Pistorius saw Nike having to withdraw what turned out to be a highly inappropriate print ad (which featured a photograph of Pistorius in the starting blocks with a caption 'I am the bullet in the chamber'). When such reputational damage is

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<sup>117</sup> P Fletcher & G Cherry 'Tiger Woods scandal cost shareholders up to \$ 12 billion' available at <http://www.reuters.com/article/2009/12/29/us-golf-woods-shareholders-idUSTRE5BS38I20091229>, accessed on 13 October 2013.

<sup>118</sup> Reuters with CNBC.com 'Tiger Woods Sponsors Are Already Reassessing Ties' available at <http://www.cnbc.com/id/34392450>, accessed on 13 October 2013.

<sup>119</sup> E Kay 'Why Nike stands by Tiger Woods but dumps Lance Armstrong' available at <http://www.sbnation.com/golf/2012/10/19/3526602/tiger-woods-nike-lance-armstrong>, accessed on 13 October 2013.

<sup>120</sup> Ibid.



done, it is impossible to regain the good image that the athlete once had. It is respectfully submitted that match-fixing will have the same effect and that stakeholders would not want to be associated with a tarnished image and this will in turn lead to the downfall of the individual, the governing body and the sport itself. A South African example is that of the late Hansie Cronjé, who was seen as a sporting icon in South Africa and admired by many for his perceived high moral standards and his sense of integrity.<sup>121</sup> News of his match-fixing activities in India then came to the public's attention, ruining not only his reputation but also the reputation of many of those who associated with him (including his corporate sponsors).<sup>122</sup> This also created a bad image for South African cricket and it was difficult to secure the well-being of the game by getting sponsors who would like to be associated with the game of cricket in this country.<sup>123</sup>

### **3.8 Gambling and Commercialisation of Sport:**

Gambling is a big part of the commercialisation of sport and has close ties with the industry, whether it is legal or illegal sports-based gambling.<sup>124</sup> According to Gardiner gambling is at the root of match-fixing.<sup>125</sup> Sport betting is a large source of income in the sports industry, the growth of which has been intimately connected to the ever-increasing commercialisation of sport. There have been calls for the recognition of a 'sports event organiser's right' which is a method introduced by the French to combat the betting problem.<sup>126</sup> In France, this is already recognised through its Droit de Sport.<sup>127</sup> This right is essentially a property right whereby the organisers have a right to the exploitation of their competitions relating to sports betting.<sup>128</sup> This will allow sport governing bodies, the professional sport leagues and the organisers to preserve the integrity of sport.<sup>129</sup> They will do this by having more and better control over the betting activities that relate to a specific competition. There are numerous reasons why this right is accepted in France. A few of these include sports betting being reliant on sporting events and the organiser is thus entitled to some commercial benefit from

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<sup>121</sup> King Commission Report (Note 30 above).

<sup>122</sup> Ibid.

<sup>123</sup> Ibid.

<sup>124</sup> S Gardiner et al *Sport Law* 3 ed (2007) 341.

<sup>125</sup> Ibid.

<sup>126</sup> EU Green Paper on On-Line Gambling in the Internal Market - Contribution from the professional sports committee of the French national Olympic and sports committee (CNOSF) page 4.

<sup>127</sup> Ibid.

<sup>128</sup> Ibid.

<sup>129</sup> Ibid.

the exploitation of a certain event.<sup>130</sup> Another reason why the right is recognised is to protect the ethics of competitions thereby ensuring the sustainability of sports events.<sup>131</sup> Lastly the property right is recognised to centralise the management of any commercial rights revolving around a sports event.<sup>132</sup> Sport governing bodies, have therefore seen an opportunity in the market to control these betting operations whereby betting companies would have to pay a percentage of the revenues from betting on a particular game or sport event to the relevant governing body, which will increase the monetary stake-holding of a sport's governing body in a particular sport.<sup>133</sup>

Finally, it is important to get the point across that commercialisation has the ability to infringe on the long standing values of sport and, by doing so, undermine the purpose that sport has in society.<sup>134</sup> It is important to mention that match-fixing is not compared to commercialisation in any way but that they are separate issues which impact on one another. Therefore, although commercialisation is seen as an issue in its own right, it impacts on the problem of match-fixing and undermines the social value that sport might have. It is therefore of utmost importance that the problem be eradicated by sport governing bodies themselves, and if they are not able to do so, to pursue different avenues such as to seek appropriate legislation whereby one can be prosecuted for the conduct of match-fixing.

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<sup>130</sup> Ibid 5.

<sup>131</sup> Ibid.

<sup>132</sup> Ibid.

<sup>133</sup> Ibid.

<sup>134</sup> D Brown 'The Societal Importance of Listed Events' (2010) British Association for sport and the law e-Discussion.

## **Chapter 4:**

### **The regulation of sport by sporting organisations:**

#### **4.1 Introduction:**

This chapter will look at what the role of sport governing bodies are and whether a self-governance approach according to Jones would be a viable option for sport governing bodies to combat corruption and more specifically match-fixing.<sup>135</sup> Jones is of the view that professional sports and a large part of amateur sports are organised in a way that intrinsically has a structure of management that directs not just the games but state the roles and responsibilities of those who participate in sport.<sup>136</sup> This gives us the idea that sport governing bodies are autonomous, but the fact that they are impacted and make an impact on the world leads us to believe that they are open systems.<sup>137</sup> Jones states it in a clear manner, sport governing bodies might have autonomous structures but they are open systems as they appeal to the broader public and not just too specific individuals.<sup>138</sup> Specific reference will therefore be made to two match-fixing related Codes of two major sport governing bodies, the ICC and FIFA, as these are the governing bodies which regulate two of the most prominent world sports, namely cricket and soccer.

The intrusion by various individual parties that engage in match-fixing and corrupt practices leads to vulnerability in sport and has challenged sporting administrators to be more influential to safeguard the integrity of sport. The lack of effective regulation and enforcement of existing rules leads to the destruction of sporting integrity whereby the integrity of the sport is being jeopardised for some ulterior motive.<sup>139</sup> To ensure that sport is clean from match-fixing, adequate regulation is required that will restore and rebuild the public confidence and indirectly restore the integrity of sport.<sup>140</sup> The governing bodies therefore must have a central role and take utmost responsibility to ensure that sport is free

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<sup>135</sup> KL Jones 'European Sports Governance: Consideration of a governance approach to preventing match-fixing' page 1.

<sup>136</sup> Ibid 6.

<sup>137</sup> Ibid.

<sup>138</sup> Ibid.

<sup>139</sup> McLaren (note 51 above) 551.

<sup>140</sup> Ibid 553.

from corrupt practices like match-fixing.<sup>141</sup> There is definitely a need for change, as the quality of the self-governance approach comes under question due to the commercialisation of sport, which exposes governance failures such as match-fixing in the context of this dissertation.<sup>142</sup>

#### **4.2 The Role of Sport Governing Bodies (SGB):**

Professional sport is undeniably huge business for many corporate stakeholders and because of the vast amounts of money invested, companies that avail themselves to be stakeholders in sport want to see a return on their investment. Corrupt practices such as match-fixing therefore ‘strikes at the root of our commercial life and democracy itself’ according to Ross, which is the view that is shared by the SGB’s.<sup>143</sup> Therefore, it is paramount to ensure that there is a proper management system and structure in place to not only safeguard the integrity of sport but to protect the investment made by various corporate stakeholders and ensure the commercial success not only for the stakeholders but the sport as well.

SGB’s have a wide ranging role when it comes to the governance of sport due to the complexity of tackling practices such as match-fixing, as there are many stakeholders involved and that have to be satisfied.<sup>144</sup> The SGB’s have essentially several functions, which can be construed as including a regulatory function to write the ‘rules of the game’; providing oversight over the running of a sport; and administering discipline.<sup>145</sup> According to Hoehn this is more distinctively separated into a legislative role, an executive role and judicial role, which is similar to the constitutional functions of a government.<sup>146</sup> SGB’s are mainly responsible for the rules of the game and importantly have the responsibility to ensure sports are organised at local, national and international level according to the rules and regulations

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<sup>141</sup> K Carpenter ‘Match-Fixing-The Biggest Threat to Sport in the 21<sup>st</sup> Century?’ (2012) 2 *Sweet & Maxwell’s International Sports Law Review* 13, 18.

<sup>142</sup> A Geeraert ‘Action for good governance in international sports organisations’ April 2013 Danish Institute for Sports Studies JENS ALM (ed) available at [http://www.playthegame.org/fileadmin/documents/Good\\_governance\\_reports/AGGIS\\_Final\\_report.pdf](http://www.playthegame.org/fileadmin/documents/Good_governance_reports/AGGIS_Final_report.pdf), accessed on 11 July 2013, page 11.

<sup>143</sup> T Ross ‘Corruption in Cricket: Using the Law to Cull Crooks from the Gentlemen’s Game’ (2010) 18(3) *Sport and the Law Journal* 28, 35.

<sup>144</sup> T Hoehn ‘Governance and Governing Bodies in Sport’ available at <http://www.competitionrx.com/documents/Sports%20Governance/Thomas%20Hoehn%20-%20Governance%20and%20Governing%20Bodies%20in%20Sport%20-%20Draft%20Handbook%20Chapter.pdf>, accessed on 17 June 2013, page 1-14.

<sup>145</sup> Jones (Note 135 above) 6.

<sup>146</sup> Hoehn (Note 144 above) 2.

of each specific sporting code.<sup>147</sup> Therefore, SGB's have to come up with rules and regulations that are applicable to their own specific sport, which they govern and implement rigidly with regulations to minimise any disputes that might arise in the context of sport.<sup>148</sup> It is often claimed that the SGB's like to remain autonomous and they believe that their autonomy should be respected.

SGB's ultimately want to remain autonomous in order to ensure they implement their own mechanisms to handle disputes if such disputes arise in their respective sporting codes. Many SGB's seek to set out these autonomous structures, such as tribunals and appeal panels, to deal with matters where a rule or regulation might have been contravened according to the code of the specific sport a person might have been involved in. This is however not the desired outcome for good governance as this will lead to SGB's having to develop their own jurisprudence for each specific sport. This will create uncertainty amongst athletes and the public. The goal of SGB's should be to create uniformity across the different sports, which will ensure certainty in the rules of the game and rule of law relating to sport activities. Therefore it is not feasible for SGB's to maintain absolute autonomy and a multifaceted approach is needed to effectively govern sport and thereby eradicate the problem of match-fixing.<sup>149</sup>

#### **4.3 The Role of the International Court of Arbitration for Sport (CAS):**

SGB's introduced sporting tribunals as a mechanism to handle any dispute that might arise when any of the disciplinary codes are transgressed. However, provision is made for an appeal procedure to CAS (the international Court of Arbitration for Sport) if one is not satisfied with the result of these tribunals or one is unsatisfied with how the case was conducted in the sense that it did not ensure that justice was done. CAS is seen as an independent body separate from SGB's that makes awards in sporting matters, and therefore its mission is to secure settlement of sport related disputes.<sup>150</sup> In order for CAS to make such

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<sup>147</sup> Jones (Note 135 above) 6.

<sup>148</sup> Smith (Note 78 above) 62.

<sup>149</sup> M Mrkonjic 'Sports organisations, autonomy and good governance' Action for Good Governance in International Sports Organisations; Danish Institute for Sport Studies; Play the Game page 145. Also see this article for further discussion on the different types of autonomy relating to sport and SGB's. Mention is made of political, legal, financial, pyramidal, functional, supervised, and negotiated autonomy, 133-150.

<sup>150</sup> Court of Arbitration for Sport: Guide to Arbitration available at <http://www.sportrecht.org/EU-Recht/CASguideArbitration.pdf>, accessed on 17 October 2013.

awards for the referral of matters to the organisation must be made in sporting statutes, and only then will CAS have the power or jurisdiction to hear such matters.<sup>151</sup> It is often said that CAS develops *lex sportiva*, which means that it creates its own law relating to sport.<sup>152</sup> This is seen as an advantage as it will create certainty amongst the sporting fraternity. CAS is a step in the right direction in combatting the problem of match-fixing in sport as they have a zero tolerance approach for corruption in sport, yet it is not the most effective way of coming to terms with the problem of match-fixing.<sup>153</sup> This is evident in the large number of scandals that have arisen in recent years as stated in chapter 3, which is a clear indication that CAS is not an effective deterrent. The reason for this might be the limited amount of power CAS has when enforcing an award they have made.<sup>154</sup> Although the need for a dispute resolution system that is uniform in nature and provides a quick process might well prevail over the right of an athlete to have his or her case adjudicated by an ordinary court of law.<sup>155</sup> This is subject to the fact that CAS adheres to the fundamental requirements of due process.<sup>156</sup> It is not CAS in itself that will serve as the deterrent to match-fixing but the sanction that is imposed by CAS. So even though they may not have a direct impact such as to enforce sanctions, it will most certainly have an indirect role to play in the future of combatting the problem match-fixing. The ultimate responsibility however, falls to sporting organisations to ensure proper regulation of sport, which will maintain the integrity of the sport and a good public image that will ensure a good return for investors (sponsors) in the game of sport.<sup>157</sup>

#### **4.4 The ICC Code of Conduct and the ICC Anti-Corruption Code:**

As stated in the introduction to this chapter, reference will be made to two specific sporting codes to illustrate measures that are in place to guard against match-fixing in sport. The first of these is the ICC also known as the International Cricket Council. This global body is responsible for the supervising and regulation of all the forms of cricket.<sup>158</sup> The ICC formed as a result of the Imperial Cricket Conference that was established in 1909 which had the role

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<sup>151</sup> A Beach “‘The Court of Arbitration for Sport’- a Supreme Court for the Sports World’ *The Student Journal of Law* ch 1 & 2.

<sup>152</sup> Smith (Note 78 above) 62.

<sup>153</sup> Smith (Note 78 above)

<sup>154</sup> Beach (Note 151 above) ch 1 & 2.

<sup>155</sup> Ibid.

<sup>156</sup> Ibid.

<sup>157</sup> Smith (Note 78 above) 62.

<sup>158</sup> Ross (Note 143 above) 30.

of governing international matches between England, Australia and South Africa.<sup>159</sup> The change from the Imperial Cricket Council occurred in 1989, where after it became known as the ICC and in 1997 became an incorporated body with a president at its head.<sup>160</sup>

According to Ross, contract law is the basis of all disciplinary actions in sport.<sup>161</sup> Ross states that this is as a result of the fact that individuals consent to signing contracts with private bodies which relinquishes control to these bodies.<sup>162</sup> If an athlete wants to compete in the specific sport regulated by such private bodies then the athlete has to adhere to the rules and regulations of such bodies.<sup>163</sup> These rules and regulations are set out in specific Codes and if athletes do not adhere to these Codes then they are in essence breaching their contracts.<sup>164</sup>

The relevant Code that is of significance is the Code of Conduct of the ICC for players and player support personnel.<sup>165</sup> This Code was adopted and implemented to maintain the public image, popularity and the integrity of cricket by ensuring that players and personnel conduct themselves in a proper way in line with the ‘spirit of cricket’, therefore providing means whereby people should not act contrary to these objectives.<sup>166</sup> Secondly, the Code provides for a disciplinary procedure that will ensure that if there is improper conduct that a matter will be dealt with fairly in a certain and expeditious manner.<sup>167</sup> Article 2 of the Code deals with conduct that is considered to be an offence under the Code, and more specifically Art 2.2.10 states the following: ‘Any attempt to manipulate an International Match for inappropriate strategic or tactical reasons’ is considered to be an offence under this Code of Conduct.<sup>168</sup> Tactical and strategic reasons include conduct whereby a team deliberately loses a game to have an effect on other teams or where they manipulate the run rate in order to achieve better standing. Therefore, Art 2.2.10 will not cover any corrupt practices or

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<sup>159</sup> Ibid.

<sup>160</sup> Ibid.

<sup>161</sup> Ibid.

<sup>162</sup> Ibid.

<sup>163</sup> Ibid.

<sup>164</sup> Ibid.

<sup>165</sup> ICC Code of Conduct available at [http://static.icc-cricket.com/ugc/documents/DOC\\_BB1EB9635DEBBF50590D506FE7937343\\_1317276874961\\_245.pdf](http://static.icc-cricket.com/ugc/documents/DOC_BB1EB9635DEBBF50590D506FE7937343_1317276874961_245.pdf), accessed on 18 October 2013.

<sup>166</sup> Ibid: Introduction.

<sup>167</sup> Ibid.

<sup>168</sup> Ibid: Art 2.2.10.

fraudulent acts and therefore may not serve any purpose in the fight against corruption and match-fixing.<sup>169</sup>

The ICC's Anti-Corruption Code for players and player support personnel is more applicable to the conduct of match-fixing. This Anti-Corruption Code came into effect on 6 October 2009 as a result of the increase in corruption in the sport, and makes all players and support personnel automatically bound to the provisions of the Code.<sup>170</sup> The Code was adopted for the purpose of recognising key sporting imperatives.<sup>171</sup> Such imperatives are, firstly, that matches should be contested on an equal basis and the result should be determined by merits only and that the outcome of the match should remain uncertain up until the point of completion of the match.<sup>172</sup> Secondly, the authenticity and integrity is important which links with the uncertain outcome and this is vital to ensure public confidence.<sup>173</sup> Lastly the increase of betting in the sport and the development of corrupt betting practices is an indication of why such a Code had to be introduced.<sup>174</sup> These are just some of the reasons to why the Anti-Corruption Code came into force and therefore it is clearly of significance to combat match-fixing in the realm of cricket.

Art 2.1 of the Code covers the aspect of corruption and stipulates what conduct will constitute corruption under the Code.<sup>175</sup> Art 2.1.1 provides as follows:

‘Fixing or contriving in any way or otherwise influencing improperly, or being a party to any effort to fix or contrive in any way or otherwise influence improperly, the result, progress, conduct or any other aspect of any International Match or ICC Event’ will be an offence under the Code.<sup>176</sup>

Similarly, Art 2.1.2 states that ‘seeking, accepting, offering or agreeing to accept any bribe or other Reward to fix or to contrive in any way or otherwise to influence improperly the result, progress, conduct or any other aspect of any International Match or ICC Event’ shall be

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<sup>169</sup> Ibid.

<sup>170</sup> Ross (Note 143 above) 31.

<sup>171</sup> ICC Anti-Corruption Code: Introduction available at [http://static.icc-cricket.com/ugc/documents/DOC\\_988F9785FD768E4902737F0ACA2E856B\\_1352699899561\\_933.pdf](http://static.icc-cricket.com/ugc/documents/DOC_988F9785FD768E4902737F0ACA2E856B_1352699899561_933.pdf), accessed on 18 October 2013.

<sup>172</sup> Ibid.

<sup>173</sup> Ibid.

<sup>174</sup> Ibid.

<sup>175</sup> Ibid: Art 2.1.

<sup>176</sup> Ibid: Art 2.1.1.



considered to be an offence.<sup>177</sup> Thirdly, conduct of ‘failing, for Reward, to perform to one’s abilities in an International Match’ will also amount to an offence.<sup>178</sup> Lastly, the conduct of ‘soliciting, inducing, enticing, instructing, persuading, encouraging or facilitating any Participant to breach any of the foregoing provisions of this Article 2.1’ will be considered for the purposes of this Code to be an offence.<sup>179</sup> Under this Anti-Corruption Code the above articles all involve conduct that amounts to an offence under the Code and is extensive, to cover a wide range of different conduct that will assist in the capturing of match-fixing under these types of conduct as mentioned above. The Anti-Corruption Code (also under Article 2) makes provision for conduct that constitutes offences relating to ‘Betting’, ‘Misuse of Inside Information’ and ‘General’.<sup>180</sup> The consequences of the abovementioned conduct will be discussed below and analysed.

In order for SGB’s to show stakeholders and especially fans that the threat of match-fixing is taken seriously, punishments imposed should be extremely severe when any of the rules of the sport are contravened.<sup>181</sup> In terms of Art 6.1 of the Anti-Corruption Code the Anti-Corruption Tribunal can consider certain factors to determine what an appropriate sanction should be.<sup>182</sup> Art 6.2 goes further in stating a minimum and maximum that can be imposed for people involved in offences under articles 2.1.1 to 2.1.4 of the Code, which essentially are the articles dealing with corruption which is seen as very serious offences.<sup>183</sup> The minimum sanction that can therefore be imposed is an ineligibility period of five years and the maximum is a lifetime ineligibility period.<sup>184</sup> These are therefore the internally imposed sanctions that will apply to match-fixing, and depending on how serious the match-fixing is, the sanction will only involve a ban from the sport with no criminal liability being imposed. It is submitted that these sanctions are not serious and severe enough to deter people from involving themselves in the conduct of match-fixing, and therefore the SGB’s do not account to the fans and stakeholders in showing them that they take match-fixing seriously. Although this might be harsh on SGB’s, the fact that they do not have the authority to rigorously enforce the Code on non-members like illegal bookmakers does not exult them from ensuring

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<sup>177</sup> Ibid: Art 2.1.2.

<sup>178</sup> Ibid: Art 2.1.3.

<sup>179</sup> Ibid: Art 2.1.4.

<sup>180</sup> Ross (Note 143 above) 31.

<sup>181</sup> Carpenter (Note 141 above) 18.

<sup>182</sup> ICC Anti-Corruption Code: Art 6.1 (Note 171 above).

<sup>183</sup> Ibid: Art 6.2.

<sup>184</sup> Ibid. Also see Smith (Note 78 above) 65.

proper and effective governance. As stated earlier the ultimate responsibility lies with the SGB's to safeguard sport in its purest form and a Code like this should serve that purpose and it would be imperative that a Code like this should be applied more stringently.

#### **4.5 FIFA's Code of Conduct:**

The Fédération Internationale de Football Association, or FIFA, is a SGB that governs the sport of soccer worldwide. The hype around the scandals of match-fixing in recent years has caused FIFA to take a step in the right direction and implement a Code of Conduct that can serve as a mechanism to eradicate the problem of match-fixing. This Code of Conduct is currently only in draft form and is not yet in force.<sup>185</sup> The objective of this Code is to protect the game, which will result in the improvement of the sport as well as promote educational, cultural and humanitarian values.<sup>186</sup> These objectives are aimed to prevent conduct that will jeopardise the integrity of matches and competitions.<sup>187</sup> The draft Code contains 11 core principles, of which two of the key aims or principles are a zero tolerance stance on bribery and corruption, and that no betting or manipulation will be allowed.<sup>188</sup> The zero tolerance on bribery and corruption specifically rejects and condemns all forms of bribery and corruption.<sup>189</sup> The principle of no betting or manipulation says that we as FIFA do not take part in any betting that is connected with football and that we will not tolerate any manipulation of a match results or unlawful influencing of such results.<sup>190</sup> The threat of match-fixing for FIFA as a SGB is a significant problem and according to FIFA the sport will be brought into disrepute if the credibility of football and its integrity are not maintained.<sup>191</sup> This is the reason why the draft code of conduct was put forward to the board, although we have not seen much progress from the point that it was published. We are yet to see what the Code when officially published will entail and what penalties will address the conduct of

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<sup>185</sup> G Dunbar 'FIFA publishes anti-corruption code of conduct' April 26 2012 available at <http://p.washingtontimes.com/news/2012/apr/26/fifa-publishes-anti-corruption-code-of-conduct/>, accessed on 18 October 2013.

<sup>186</sup> Draft: FIFA Code of Conduct available at <http://www.fifa.com/mm/document/affederation/bodies/01/62/05/88/denclenglisch.pdf>, accessed on 18 October 2013 3.

<sup>187</sup> Ibid.

<sup>188</sup> Ibid 4.

<sup>189</sup> Ibid. Also See 'Fifa publishes anti-corruption code of conduct' 26 April 2012 available at <http://www.citypress.co.za/sport/fifa-publishes-anti-corruption-code-of-conduct-20120426-3/> accessed on 18 October 2013. Also See Dunbar (Note 185 above).

<sup>190</sup> Draft: FIFA Code of Conduct (Note 186 above) 4.

<sup>191</sup> Integrity of sport – match-manipulation Background information (April 2013) available at [http://www.fifa.com/mm/document/affederation/bodies/02/08/92/16/fifabackgroundpapermatchmanipulationapr il2013\\_neutral.pdf](http://www.fifa.com/mm/document/affederation/bodies/02/08/92/16/fifabackgroundpapermatchmanipulationapr il2013_neutral.pdf), accessed on 5 September 2013.

match-fixing. It can be noted that the penalties will most likely be similar to those of the ICC which imposes a minimum five year and maximum life time ban if one is involved in the conduct of corruption. As stated earlier it is submitted that even though it might be seen as severe punishment it will not be comprehensive enough to combat the problem of match-fixing effectively. It might be severe in the sense that it has a significant impact on the athlete alone but the public at large are still left with the feeling of injustice, as moral values clearly dictate that match-fixing is wrong and logic expects that justice should be done.

#### **4.6 Regulation of sport in South Africa:**

This section merely serves as a brief outline of how South Africa regulates sport as regulation in sport is mostly concerned about the adherence to rules and regulations whereas governance encapsulates not only regulation but decision making and the leadership aspects of SGB's. The fact that there is reference to a state in this regard and not a SGB is another reason why reference is made to regulation and not governance. Therefore this section draws a distinction as to how a country regulates sport and how SGB's governs sport.

It can be argued that sport regulation in South Africa was not as comprehensive until the recent enactment of the PCCAA, as compared to other international countries. This was because there was a lack of legislation that dealt with sport matters before the enactment of the PCCAA. Proper regulation of sport is crucial to ensure that the integrity of the game is maintained and that sport can still be held in high regard, and to avoid erosion of the value that sport adds to society. Le Roux has previously argued that there is a lack of legislative material in South Africa which, in turn, provides players and officials involved in sport with a major problem.<sup>192</sup> Nonetheless, the contrary can be said as the PCCAA now ensures governance and protection in the sporting sector.

South Africa has a limited number of statutes that deal with sport specifically. The first of such acts is the South African Institute for Drug-Free Sport Act,<sup>193</sup> which was passed to promote participation in sport free from the use of prohibited substances that may artificially

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<sup>192</sup> R Le Roux 'Under Starter's Orders: Law, Labour Law and sport' 23 (2002) *Industrial Law Journal* 1195, 1204 & 1205.

<sup>193</sup> Act 14 of 1997.

enhance performance.<sup>194</sup> Secondly, the National Sport and Recreation Act<sup>195</sup> which plays a critical role in the development of sport and ensures that sport is used as a recreational platform in the country. Thirdly, the PCCAA was a significant step forward for South Africa in its fight against match-fixing, which will be further elaborated on in Chapter 5.

However, if South Africa wants to combat match-fixing effectively, it will require a much more active role from government, either by way of effective regulation, or specific and well-rounded legislation that should be enacted. As to which one will be best is a question that is left open for debate. Governments essentially either adopt an interventionist or non-interventionist model when it comes to sport.<sup>196</sup> The interventionist model is typically based on a legislative structure and the non-interventionist is based on a model that focuses on the financial regulation of the sport as well as provides logistical support to sport.<sup>197</sup> According to many authors a government with a non-interventionist model can have just as much of an impact if not more so than an interventionist approach to sport.<sup>198</sup> It is submitted that an interventionist approach is best suited for South Africa as it will create certainty among the sporting fraternity being that we are such a big sporting nation.<sup>199</sup> It is often said that in South Africa there is a lack of understanding of the unique nature that sport possesses, as argued by Le Roux, and it is yet to be seen that the government takes this issue seriously.<sup>200</sup> The lack of understanding is clearly illustrated in South Africa's biggest match-fixing scandal yet, involving the late Hansie Cronjé. If Cronjé was not indemnified of criminal prosecution, it would have been interesting to see whether he would have been prosecuted in terms of common law, statutory criminal law or even under the PCCAA.<sup>201</sup>

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<sup>194</sup> Ibid Sec 10.

<sup>195</sup> Act 110 of 1998.

<sup>196</sup> A Chaker *Good Governance in Sport: A European Survey* (2004) page 9.

<sup>197</sup> Ibid.

<sup>198</sup> J.A.R Nafziger & S.F Ross 'Handbook on International Sports Law chapter: Models of sport governance within the European Union 129.

<sup>199</sup> This point is submitted on the basis that 'the non-interventionist approach to gambling corruption is at odds with the Government's hands on stance on doping' See A Nixon 'The Sports Lawyer: The government's non-interventionist approach on match-fixing is at odds with its approach to doping' available at <http://www.sportingintelligence.com/2011/11/07/the-sports-lawyer-the-governments-non-interventionist-approach-on-gambling-fixes-is-at-odds-with-its-approach-to-doping-071105/>, accessed on 10 December 2013.

<sup>200</sup> Le Roux (Note 192 above) 1205.

<sup>201</sup> Ibid.

As Le Roux observes:

‘There does not seem to be a (South African) crime into which all forms of match fixing can be accommodated’<sup>202</sup>

The view of Le Roux was held before the enactment of the PCCAA and his view may well now be different or not. It is submitted there is no specific legislation that specifically mentions the term of match-fixing in South Africa even though we have the PCCAA which impliedly deals with match-fixing under the heading of sporting events. Therefore it would be hard to charge someone in respect of a crime and to impose a criminal sanction. The criminal sanction is arguably required to deter people from getting involved in match-fixing and jeopardising the integrity of sport.

As illustrated above there is clearly insufficient measures in South Africa to deal with the fight against match-fixing and it cannot be done by the government alone of the SGB’s but cooperation is needed in the form of statutes that can be utilised to try and bring match-fixing within the scope of certain Acts. These Acts will be discussed in Chapter 5 to see whether they are sufficient and effective enough or whether more extreme measures is needed.

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<sup>202</sup> Ibid.

## **Chapter 5:**

### **The governing legislation in respect of corrupt match-fixing practices in South Africa:**

#### **5.1 Introduction:**

In this particular chapter, there will be a focus on the governing legislation in South Africa that could possibly find application in dealing with this phenomenon called match-fixing, which could possibly lead to criminal sanctions being imposed on perpetrators. The main purpose of the chapter is to examine the potential relevance of the common law offence of fraud as well as to determine whether the South African legislation is sufficient to combat the problem of match-fixing. The specific statutes that will be analysed are the following: The Prevention and Combating of Corrupt Activities Act, 12 of 2004; the National Sport and Recreation Act, 110 of 1998, the Prevention of Organised Crime Act, 121 of 1998, and the National Gambling Act, 7 of 2004. Ultimately it will be evaluated which of the aforesaid statutory provisions would serve as the best procedure to adopt in combatting match-fixing. In order to evaluate the Acts effectively, there is a need to examine cases and the facts of such cases and then determine whether the conduct complained of would fall within the ambit of the Acts discussed. Specific reference will be made to the infamous match-fixing case in South Africa involving the late Hansie Cronje. The other case, albeit not a South African case, which will briefly be mentioned, is that of the recent UK case involving Pakistani cricketers Mohamed Amir, Salman Butt and Mohamed Asif, who were charged in the UK for involving themselves in spot-fixing conduct (which is a form of match-fixing). The scholar, Gokhale makes an interesting point that, before one determines the significance of legislation, it should be borne in mind that match-fixing does not just involve players but potentially also many others parties.<sup>203</sup> There are essentially three categories of people that are important and that could have a role to play in match-fixing.<sup>204</sup> The conduct of the following role players will be considered: (i) players; (ii) officials; and to a large extent (iii) the betting syndicates, which are ultimately responsible for initiating match-fixing practices in the first place.<sup>205</sup>

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<sup>203</sup> N Gokhale 'Fixing the Fixers: The Justification of Criminal Liability for Match-Fixing' 2 (2009) *National University of Juridical Sciences Law Review* 319, 324.

<sup>204</sup> Ibid.

<sup>205</sup> Ibid.

## **5.2 The South African Constitution:**

The South African Constitution is the supreme law of the Republic as stated in Section 2<sup>206</sup> of the Act and it is vitally important to mention very briefly the impact of the Constitution on criminal law as this dissertation primarily focuses on the criminal liability that should be imposed for people involved in the conduct of match-fixing. However, the criminal prosecution of any person involved in match-fixing cannot be considered without due consideration of how the criminal justice system operates in the South African context. The criminal justice system is primarily controlled by the Criminal Procedure Act<sup>207</sup> and its application in the criminal process. The introduction of a justiciable Bill of Rights<sup>208</sup> on 27 April 1994 in the interim Constitution<sup>209</sup> of the Republic of South Africa steered the country into a new legal and constitutional dispensation, which in turn impacted profoundly on the criminal justice system. While the present focus will be exclusively on South African procedural and substantive law, reference will be made to other jurisdictions to reveal the shortcomings in the current legal provisions. The South African Constitution,<sup>210</sup> in particular affords specific rights to persons accused<sup>211</sup> of crime and accordingly any proposed legislative enactment or application should pass constitutional muster. Thus the State has an important role to play since it should promote the public's faith in the criminal justice system to safeguard the integrity of the system and that justice will be done in respect of community values. Match-fixing clearly does not only affect the players involved in the sport, it impacts on the public, who invest in sports and who have an interest in sport and therefore when sport is compromised by such conduct it is expected that justice will be done.

## **5.3 The common law crime of fraud:**

It is submitted that the common law crime, fraud may be the only common law crime that finds application in dealing with match-fixing conduct. The crime is defined under South

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<sup>206</sup> See section 2 of the Constitution of the Republic of South Africa, 1996.

<sup>207</sup> Act 51 of 1997.

<sup>208</sup> Under a justiciable bill of rights a court has the power to test not only executive acts on the basis that the norms laid down in the bill of rights should be observed but also annulled if any act is contrary to the said norms. See generally M Capeletti 'Judicial review of constitutionality of state action: Its expansion and legitimacy' (1992) *TSAR* 256.

<sup>209</sup> Act 200 of 1993.

<sup>210</sup> 1996 Constitution.

<sup>211</sup> See section 35 of the 1996 Constitution.

African law as follows: ‘Fraud consists in unlawfully making, with intent to defraud, a misrepresentation which causes actual prejudice or is potentially prejudicial to another’<sup>212</sup> Based on the aforesaid definition the elements of the crime are: (1) unlawful; (2) misrepresentation; (3) prejudice<sup>213</sup>; (4) and the intention to defraud.

It is necessary to discuss the element of misrepresentation, which in this sense is regarded as deceiving or misleading the victim.<sup>214</sup> In essence the victim in the context of match-fixing would be the public that is being misled regarding the outcome of an event. The mere fact that a misrepresentation had been made does not necessarily mean that those making the misrepresentation will be criminally liable for committing the offence of fraud. What is required under the common law is that the perpetrators also need to have the necessary intention to commit the crime. Snyman deals with the required intention as follows:

‘There is a distinction drawn between an intention to deceive and an intention to defraud. The former means an intention to make somebody believe that something which is in fact false, is true. The latter means the intention to induce somebody to embark on a course of action prejudicial to him/herself as a result of the misrepresentation. The former is the intention relating to the misrepresentation, and the latter is the intention relating to both the misrepresentation and the prejudice’.<sup>215</sup>

In light of the aforesaid it should be evident that in the majority of match-fixing incidents the state will at times likely fail to prove the offence successfully, since it is cumbersome and difficult to prove the required intention. The common law approach of combating match-fixing by charging the perpetrators with fraud is therefore insufficient, especially given the challenges to the South African criminal justice system. The challenges are in this respect, proving the necessary intent and ensuring the co-operation of witnesses, as the lack of evidence is one of the main reasons why there such minimal prosecution on the conduct of match-fixing. On a jurisdictional level, instances of match-fixing would only be dealt with on a territorial basis<sup>216</sup> and secondly it is unlikely that witnesses would co-operate as stated earlier since there would be no protective measures in terms of the common law to protect

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<sup>212</sup> J Burchell *Principles of Criminal Law*, 3 ed (2005) 833. See Also *S v Gardener and Another* 2011 (4) SA 79 (SCA). See Also *S v Van den Berg* 1999 (1) SACR 104 (T) 106b.

<sup>213</sup> For detailed discussion on the element of prejudice see Burchell (Note 213 above) 840 – 844.

<sup>214</sup> *Ibid* 836.

<sup>215</sup> CR Snyman *Criminal Law* 5 ed (2008) 531. Also See *S v Huijzers* 1988 (2) SA 503 (A) 506I-508B.

<sup>216</sup> See section 110 of the Criminal Procedure Act read with section 90 of the Magistrates’ Court Act 32 of 1944.



those who blow the whistle on those involved in match-fixing. The common law approach is not the best possible response to the issue of match-fixing, as there is a real likelihood that any prosecution under the common law might fail for the reasons listed above. As the common law crime of fraud might not be sufficient to deal with problem of match-fixing effectively it is important to explore other avenues that might be more fruitful in the fight against match-fixing. Therefore there will be an analysis of various different Acts that might be more effective in the fight against this match-fixing phenomenon.

#### **5.4 Prevention and Combating of Corrupt Activities Act 12 of 2004:**

The Prevention and Combating of Corrupt Activities Act is the first vital piece of legislation that will be discussed in this chapter and is the first profound piece of legislation enacted to fight match-fixing. As it has been previously stated, legislation is crucial to combatting match-fixing as it has crippled the integrity of sport for far too long. The PCCAA was specifically enacted to combat the problem of match-fixing and is the most crucial element that imposes criminal liability. Essentially, the PCCAA was enacted as a result of South Africa being party to the United Nations Convention against Corruption, which was adopted by the General Assembly on 31 October 2003.<sup>217</sup> In order to understand the extent of match-fixing in the context of corruption, it is important that the required criminal liability be discussed if such liability is imposed on the conduct of match-fixing. Criminal law principles will provide some guidance in respect of the main submission of this dissertation, namely that criminal liability can be imposed on match-fixing as a form of corruption. The PCCAA was introduced with the purpose of combating the growing problem of corruption as it threatens the stability of many democratic states.<sup>218</sup> This problem is especially rife in South Africa. The key feature of the Act is that it strengthens measures relating to corruption and it combats corruption, as well as corrupt activities, by introducing strict and strong measures where rights of citizens are undermined.<sup>219</sup> Usually betting syndicates are the initiators of match-fixing and it is in this capacity that bribes are usually paid to players or officials, which in general can constitute a corrupt activity.

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<sup>217</sup> Burchell (Note 213 above) 892.

<sup>218</sup> Ibid 891.

<sup>219</sup> Preamble of the PCCAA.

Section 15 of PCCAA most importantly is specifically aimed at perpetrators involved in corrupt activities relating to a sporting event.<sup>220</sup> Some have gone so far as to calling this clause the “Hansie Clause” as the Hansie Cronje scandal was the first time South Africa publically came face to face with the phenomenon called match-fixing.<sup>221</sup> The section reads as follows:

‘15. Offences in respect of corrupt activities relating to sporting events-

Any person who, directly or indirectly-

(a) accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of that other person or of another person; or

(b) gives or agrees or offers to give to any other person any gratification, whether for the benefit of that other person or for the benefit of another person-

(i) in return for-

(aa) engaging in any act which constitutes a threat to or undermines the integrity of any sporting event, including, in any way, influencing the run of play or the outcome of a sporting event; or

(bb) not reporting the act contemplated in this section to the managing director, chief executive officer or to any other person holding a similar post in the sporting body or regulatory authority concerned or at his or her nearest police station; or

(ii) as a reward for acting as contemplated in subparagraph (i); or

(c) carries into effect any scheme which constitutes a threat to or undermines the integrity of any sporting event, including, in any way, influencing the run of play or the outcome of a sporting event, is guilty of the offence of corrupt activities relating to sporting events.’<sup>222</sup>

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<sup>220</sup> R Cloete ‘*Match-Fixing in Sport*’ (2008) Introduction to Sports Law in South Africa para 2.19 – 2.36.

<sup>221</sup> Ibid.

<sup>222</sup> Section 15 of PCCAA.

According to Cornelius, section 15 of PCCAA is specifically aimed at match-fixing because it makes provision for offences which involves corrupt activities relating to a sporting event<sup>223</sup> in the following ways:

1. Where a person accepts or agrees to accept any gratification<sup>224</sup> from any other person whether for his own benefit or for the benefit of another;
2. Where a person gives or agrees or offers to give any person any gratification whether for the benefit of that person or another;
3. To perform an act, which constitutes a threat to, or undermines the integrity of any sporting event, including, in any way, influencing the run of play or outcome of a sporting event.<sup>225</sup>

It is submitted that that the section is inadvertently aimed at match-fixing even though there is no specific mention of the term, labelled match-fixing. The section in the Act can even be construed to include players, punters and conduct that would not normally fall under the heading of match-fixing, which means it gives the section a wide definition of what one considers to be a crime under this specific section.<sup>226</sup>

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<sup>223</sup> Section 1 of PCCAA: 'Sporting event means any event or contest in any sport, between individuals or teams, or in which an animal competes, and which is usually attended by the public and is governed by rules which include the constitution, rules or code of conduct of any sporting body which stages any sporting event or of any regulatory body under whose constitution, rules or code of conduct the sporting event is conducted'.

<sup>224</sup> Section 1 of PCCAA: 'gratification' includes-

- (a) money, whether in cash or otherwise;
- (b) any donation, gift, loan, fee, reward, valuable security, property or interest in property of any description, whether movable or immovable, or any other similar advantage;
- (c) the avoidance of a loss, liability, penalty, forfeiture, punishment or other disadvantage;
- (d) any office, status, honour, employment, contract of employment or services, any agreement to give employment or render services in any capacity and residential or holiday accommodation;
- (e) any payment, release, discharge or liquidation of any loan, obligation or other liability, whether in whole or in part;
- (f) any forbearance to demand any money or money's worth or valuable thing;
- (g) any other service or favour or advantage of any description, including protection from any penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary, civil or criminal nature, whether or not already instituted, and includes the exercise or the forbearance from the exercise of any right or any official power or duty;
- (h) any right or privilege;
- (i) any real or pretended aid, vote, consent, influence or abstention from voting; or
- (j) any valuable consideration or benefit of any kind, including any discount, commission, rebate, bonus, deduction or percentage'.

<sup>225</sup> S Cornelius 'Match fixing: official charged under post-Cronje legislation' (2007) *World Sports Law Report* 7, 7-8.

<sup>226</sup> Cornelius (Note 225 above).

Cornelius goes further and states that the offence under section 15(c) consists of two distinct elements. However, what is crucial to this section is that it does not contain the requirement of inducement, which is essential to most forms of corruption under the Act.<sup>227</sup>

The two distinct elements are as follows:

1. There must be a scheme, and, as Cornelius states, this means that there must be some form of premeditation which involves not only one person; in order for conduct to be considered as a scheme, the following requirements must be met:
  - a. The conduct must be in the form of a premeditated plan; and
  - b. There must be a plot or a conspiracy that involves more than one person;<sup>228</sup>
2. The scheme should undermine the integrity of a sporting event and in order to undermine the integrity of sport it can be done in three of the following ways, namely doping, sabotage and match fixing.<sup>229</sup>

It is followed that when the Act was formalised and signed into law, section 15 was aimed at combatting match-fixing. Cornelius stated above that section 15 can provide for a wide interpretation as previously stated. This can be a detriment of the fight against match-fixing and a narrow interpretation will ensure that there is certainty in the law, which is currently not the case. Therefore it is submitted that a direct approach should be adopted by the enactment of specific legislation which addresses the conduct of match-fixing in a more specific manner, as seen in New Zealand, Australia and many European countries.

There are several other provisions within the PCCAA which may be utilised in opposing the threat of corruption in sport other than section 15 of the Act.<sup>230</sup> One such example is section 3 of the PCCAA, which encapsulates the general offence of corruption. Section 3(i)(aa) includes the act of inducing somebody to act in a manner that amounts to the illegal, dishonest, unauthorised, incomplete, or biased exercise, carrying out or performance of any

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<sup>227</sup> S Cornelius 'South African Measures to Combat Match Fixing and Corruption in Sport' (2007) 3-4 *The International Sports Law Journal*, 68, 69.

<sup>228</sup> Ibid.

<sup>229</sup> Ibid.

<sup>230</sup> Ibid.

powers, duties or functions arising out of a constitutional, statutory, contractual or any legal obligation. It goes further by inducing someone to act in a manner that amounts to the abuse of a position of authority, a breach of trust or the violation of a legal duty or a set of rules,<sup>231</sup> that is designed to achieve an unjustified result<sup>232</sup> or that amounts to any other unauthorised or improper inducement to do or not to do anything.<sup>233</sup> Cornelius states that since most relationships in sport are based on contract, all conduct relating to match-fixing, whether it is players underperforming or match officials making false rulings, can be held accountable under section 3 of PCCAA.<sup>234</sup>

The general offence of corruption under section 3(i)(bb) can further be defined to include the illegal, dishonest, unauthorised, incomplete, or biased misuse or selling of information or material acquired in the course of the exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation. The main element in the Hansie Cronje case was the passing of information to bookmakers and punters; it can therefore be said that Hansie Cronje could have been charged under section 3(i)(bb) of PCCAA if it was enacted prior to his inappropriate conduct, as the section specifically concerns the selling of information or material illegally acquired.<sup>235</sup> It is submitted that once again that section 3 of the Act is too wide in its interpretation to specifically cater for the crime of match-fixing. The wide interpretation will hamper the chances of the prosecution to get a successful conviction as the evidentiary burden will be too great.

Corruption of Agents, Disciplinary Proceedings, Employment, Contracts and Gambling are all individually dealt with under section 6, 8, 10, 12 and 16 of PCCAA. It is often found that most sporting players have agents that support them in one way or another. It is therefore vital that corruption of sporting agents is addressed, as they also play a key role in match-fixing. Section 6 of PCCAA imposes criminal liability on agents for the offence of corruption where someone induces an agent or an agent induces someone to act in a manner that:

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<sup>231</sup> Section 3(ii) of PCCAA.

<sup>232</sup> Section 3(iii) of PCCAA.

<sup>233</sup> Section 3(iv) of PCCAA.

<sup>234</sup> Cornelius (Note 227 above) 69.

<sup>235</sup> Cornelius (Note 227 above) 69.

1. Amounts to the illegal, dishonest, unauthorised incomplete, or biased exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;
2. Amounts to the misuse or selling of information or material acquired in the course of the exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;
3. Amounts to the abuse of a position of authority, a breach of trust or the violation of a legal duty or a set of rules;
4. Is designed to achieve an unjustified result, or that amounts to any other unauthorised or improper inducement to do or not to do anything, is guilty of committing an offence of corruption relating to agent.<sup>236</sup>

An example of where sporting agents are involved in match-fixing is the scandal of the Pakistan cricketers who were found guilty of match-fixing in the UK; the details of which will be discussed further on.

Section 8 of the PCCAA deals with the involvement of judicial officers in corrupt activities.<sup>237</sup> The definition of a judicial officer includes an arbitrator, mediator or umpire, who presides at arbitration or medication proceedings for the settlement of a dispute. It is even wide enough to include a person who presides at any trial, hearing, commission or committee or any other proceedings and who has the authority to decide causes or issues between parties and render their decisions in a judicial capacity. Therefore, the definition is wide enough to include board members and chairpersons of a disciplinary tribunal which is often found in modern sport. Section 8 is also similar in its approach as seen in section 6. However, there is one distinction: section 8(2) goes further in that it defines what is meant where one is to act in a corrupt way. “To act” can be defined as to include the actions of performing or not adequately performing a judicial function, making decisions affecting life, freedoms, rights, duties, obligations and property of persons, delaying hindering or preventing the performance of a judicial function, aiding, assisting or favouring any particular

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<sup>236</sup> Cornelius (Note 227 above) 70.

<sup>237</sup> See section 1 of PCCAA for the definition of a ‘judicial officer’.

person in conducting judicial proceedings or judicial functions, showing any favour or disfavour to any person in the performance of a judicial function or exerting any improper influence over the decision making of any person, including another judicial officer or a member of the prosecuting authority, performing his or her official functions.<sup>238</sup>

Section 10 of PCCAA concerns itself with persons who are parties to an employment relationship. Therefore, when a person who is party to such a relationship is induced or induces another to perform any act in relation to the exercise, carrying out or performance of that party's powers, duties or functions that fall within the scope of the party's employment relationship, he or she will be guilty of an offence of receiving or offering an unauthorised gratification.<sup>239</sup>

Section 12 of PCCAA states that where a person is induced or who induces another to improperly influence the promotion, execution or procurement of any contract with a public body, private organisation, corporate body or any organisation or institution or the fixing of the price, consideration or other moneys stipulated or otherwise provided for in any such contract, is guilty of the offence of corrupt activities with regards to contracts.<sup>240</sup>

Gambling under section 16 of PCCAA is viewed as a corrupt activity where one is involved in gambling games or games of chance which consist of inducement to engage in such conduct that constitute a threat to undermine the integrity of any gambling game or game of chance, which will include influencing the outcome of a gambling game or a game of chance.<sup>241</sup>

In terms of PCCAA, there is a duty to report contained within section 34(1) as corruption is of a very serious nature in South Africa and it is expected that one should report such illicit conduct. It states that any person who holds a position of authority, who knows or ought to have known or suspected that any other person has committed an offence in terms of the PCCAA is obliged to report such offence to a police official. This, in turn, means that a person is deemed to hold a position of authority if they act in the following capacities: manager, secretary or director of a company or a close corporation. A chief executive officer

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<sup>238</sup> Cornelius (Note 227 above) 70.

<sup>239</sup> Cornelius (Note 227 above) 70.

<sup>240</sup> Cornelius (Note 227 above) 70.

<sup>241</sup> Cornelius (Note 227 above) 70.

or a person holding an equivalent position of any organisation who oversees the overall control or management of a business is also seen as a person who holds a position of authority and also has the duty to report corrupt activity as defined by the Act.<sup>242</sup> If a person in any aforementioned capacity fails to comply with section 34, he or she may be found guilty of an offence under the Act.

The issue of extraterritorial jurisdiction is confronted in section 35 of PCCAA. An act which occurs outside of South Africa may still fall within the jurisdiction of the South African courts, irrespective of whether or not the act constitutes an offence at the place of its commission. This is dependent on the premise that the person committing the offence:

1. Is a South African citizen;
2. Is an ordinary resident in South Africa;
3. Was arrested in the territory of South Africa or in its territorial waters, or on board a ship or aircraft registered or required to be registered in South Africa at the time the offence was committed;
4. Is a company, incorporated or registered as such under any law, in South Africa;
5. Any body of persons, corporate or unincorporated, in South Africa.<sup>243</sup>

Section 35 goes further with providing a South African court with the jurisdiction to deal with an offence committed outside of South Africa if the:

1. Act affects or is intended to affect a public body, a business or any other person in South Africa;
2. Person is found to be in South Africa;
3. Person is for one or other reasons not extradited by South Africa or if there is no application to extradite that person.

The provision therefore provides South Africa with the necessary powers and competence to try a corrupt activity of a South African, taken place outside of South Africa, and to try a foreigner who commits a PCCAA offence within the borders of South Africa, which was not in existence at the time of the Hansie Cronje scandal, whereby the manipulative acts occurred

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<sup>242</sup> Cornelius (Note 225 above) 8-9.

<sup>243</sup> Cornelius (Note 227 above) 70-71.



in India.<sup>244</sup> It is submitted that this section is a step forward in the development of the law, which should be used effectively to curb the problem of match-fixing.

Last but not least one has to discuss the penalties of a convicted person under section 26 of PCCAA as this will be the trump card to deter those potential wrongdoers. Section 26 penalties are therefore considered to be severe and should have a profound impact in the fight against match-fixing if applied correctly. The penalties imposed under section 26 are the following:

1. The High Court may impose a fine or sentence up to a period of life imprisonment;
2. A Regional Court may impose a fine not exceeding R360 000.00 or imprisonment not exceeding 18 years;
3. The Magistrates Court may impose a fine not exceeding R100 000.00 or imprisonment not exceeding 5 years.<sup>245</sup>

Additionally, the provision allows for a court to impose a fine equal to five times the value of the gratification involved in the offence in terms of PCCAA.

Therefore, it is clear that the PCCAA provides for the prosecution of the conduct of match-fixing under the Act and it is essentially a forward step in the fight to combat match-fixing. The question that remains is, why this Act has not been properly and more regularly utilised to impose criminal liability on parties that are involved in match-fixing. One reason may be that it is difficult to prove the existence of *dolus directus* which is required.<sup>246</sup> The concerns raised have been eliminated by Section 24 of the PCCAA which creates, as argued by Burchell, an inference or a presumption of *mens rea*, including knowledge of unlawfulness, which is rebuttable by the accused on adducing evidence that is sufficient to create reasonable doubt in favour of the accused.<sup>247</sup>

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<sup>244</sup> Cornelius (Note 227 above) 70.

<sup>245</sup> Cornelius (Note 225 above) 9.

<sup>246</sup> Burchell (Note 213 above) 893.

<sup>247</sup> Ibid.

The section above illustrates that where one undermines the integrity of sport and acts unethically and not just unlawfully, one will be contravening the Act and it is well established that match-fixing does undermine the integrity of sport and it does involve unethical behaviour.

### **5.5 The Hansie Cronje Case:**

The issue of the match-fixing involving the late Hansie Cronje was comprehensively dealt with by the King Commission, which was entrusted with investigating match-fixing complaints against the South African national cricket captain (as he then was).<sup>248</sup> He testified to the fact that he was in contact with Indian bookmakers who set the plot for match-fixing practices for not just him but a number of his teammates.<sup>249</sup> Although the case of *Cronje v United Cricket Board (UCB) of SA*<sup>250</sup> related to his employment contract with the UCB it presents the facts comprehensively.<sup>251</sup> The following facts are important for the present purposes: Cronje was leading the South African cricket team as captain in April 2000 in a series against the Indian national cricket team. After being approached by bookmakers to ‘fix’ a match, Cronje agreed and offered teammates Gibbs and Williams an amount of 15 000 US dollars each if they deliberately played badly.<sup>252</sup> In the case of the batsman, Gibbs, there was an agreement that he would obtain money if he would not score more than 19 runs in his innings. Contrary to the agreement, Gibbs played well on the day of the match and scored more than 50 runs.<sup>253</sup> In the instance of the player Williams, he was asked to bowl badly and concede in excess of 50 runs in his allotted 10 overs.<sup>254</sup> Both players before the match were in agreement with Cronje and Cronje knowingly led the team on the field to play dishonestly.<sup>255</sup> Kirk-Cohen J observed the following:

‘Viewed objectively, the applicant (Cronje) led his team on to the field having done all in his power to falsely misrepresent to his employers, the other team members, spectators at the match and on

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<sup>248</sup> Serby (Note 54 above).

<sup>249</sup> Ibid.

<sup>250</sup> *Cronje v UCB SA* 22 ILJ 2577 (T) 2585.

<sup>251</sup> Ross (Note 143 above) 39.

<sup>252</sup> *Cronje v UCB SA* (Note 250 above) 2585.

<sup>253</sup> Ibid.

<sup>254</sup> Ibid.

<sup>255</sup> Ibid.

television throughout the world, the sponsors of the television broadcast and cricketers in other countries that the match was a bona fide one in all respects.’<sup>256</sup>

The court held that Cronje had converted an international cricket match into what may euphemistically be termed ‘a charade’.<sup>257</sup> Many players were implicated before the King Commission and many testified to the wrongdoings involving match-fixing conduct.<sup>258</sup> Hansie Cronje was never criminally prosecuted. What followed was a disciplinary enquiry against him and he was banned for life by the national governing body for the sport.

### **5.6 The Prevention of Organised Crime Act 121 of 1998:**

The Prevention of Organised Crime Act is probably the least suited Act to explore in respect of charging individuals for the conduct of match-fixing. This submission is based on the fact that POCA focus in main on the conduct of enterprises. POCA, however, remains relevant and could be useful in the prosecution of betting syndicates that involve themselves in match-fixing practices. It is important to discuss the meaning of “organised crime” in order to establish whether match-fixing can be brought within the ambit of its meaning.

According to Goredema, organised crime should be defined as follows:

‘Systematic criminal activity of a serious nature committed by a structured group of individuals or corporate body in order to obtain, secure or retain, directly or indirectly, a financial or other material benefit’<sup>259</sup>

It is clear that the definition offered by Goredema is very comprehensive, and it is also evident that match-fixing would fall within this definition. However, it is not that simple to apply the legislation since various other factors will need to be considered to determine whether match-fixing can be brought under the ambit of the Act. Burchell states some key factors that will distinguish “organised” criminal activity from ordinary criminal activity.

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<sup>256</sup> Ibid.

<sup>257</sup> Ibid.

<sup>258</sup> For full report consult the King Commission Report as well as ‘The Cronje Chronicles: A timeline of the Hansie Cronje match-fixing episode from 2000 and the impact on the players named’ July 22 2013 available at <http://www.espn.com/cricket/story/654219.html>, accessed on 28 October 2013.

<sup>259</sup> C Goredema ‘Legislation in South Africa, Swaziland and Zimbabwe to combat organised crime’ (2001) ISS Monograph 56 Organised Crime in South Africa: Assessing Legislation 25.

These factors include: (i) a structured group or enterprise; (ii) continuity of the group; (iii) systematic criminal activity; and (iv) pursuit of a common goal.<sup>260</sup> Not all of these factors have to be present and as long as there is some element of organised crime present, the specific provisions of the Act find application.<sup>261</sup> What should be borne in mind is that organised crime in the modern world remains difficult to detect and there are not many successful prosecutions of the crime. In a country like South Africa, with limited resources, it is even more difficult to have successful prosecutions since acts of racketeering require dedicated and special investigation.

Section 2 of the Act deals with racketeering activities.<sup>262</sup> It is probable that racketeering<sup>263</sup> would include the conduct of match-fixing on the part of the betting syndicate but not on the part of the player as it usually involves property<sup>264</sup> being derived directly or indirectly for the purpose of using or investing it in an enterprise,<sup>265</sup> which does not expressly involve an individual (player) but will most certainly involve a group (betting syndicate). The following is provided in section 2 of the Act:

(1) Any person who-

- (a) (i) receives or retains any property derived, directly or indirectly, from a pattern of racketeering activity; and
- (ii) knows or ought reasonably to have known that such property is so derived; and
- (iii) uses or invests, directly or indirectly, any part of such property in acquisition of any interest in, or the establishment or operation or activities of, any enterprise;
- (b) (i) receives or retains any property, directly or indirectly, on behalf of any enterprise; and

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<sup>260</sup> See Burchell (Note 213 above) 975. For more detail see footnotes in Burchell (note 213 above) 975.

<sup>261</sup> Burchell (Note 213 above) 976.

<sup>262</sup> Section 2 of POCA.

<sup>263</sup> Section 1 of POCA: 'pattern of racketeering activity means the planned, ongoing, continuous or repeated participation or involvement in any offence referred to in Schedule 1 and includes at least two offences referred to in Schedule 1, of which one of the offences occurred after the commencement of this Act and the last offence occurred within 10 years (excluding any period of imprisonment) after the commission of such prior offence referred to in Schedule 1'.

<sup>264</sup> Section 1 of POCA: 'property means money or any other movable, immovable, corporeal or incorporeal thing and includes any rights, privileges, claims and securities and any interest therein and all proceeds thereof'.

<sup>265</sup> Section 1 of POCA: 'enterprise includes any individual, partnership, corporation, association, or other juristic person or legal entity, and any union or group of individuals associated in fact, although not a juristic person or legal entity'.

- (ii) knows or ought reasonably to have known that such property derived or is derived from or through a pattern of racketeering activity;
  - (c)
    - (i) uses or invests any property, directly or indirectly, on behalf of any enterprise or in acquisition of any interest in, or the establishment or operation or activities of any enterprise; and
    - (ii) knows or ought reasonably to have known that such property derived or is derived from or through a pattern of racketeering activity;
  - (d) acquires or maintains, directly or indirectly, any interest in or control of any enterprise through a pattern of racketeering activity;
  - (e) whilst managing or employed by or associated with any enterprise, conducts or participates in the conduct, directly or indirectly, of such enterprise's affairs through a pattern of racketeering activity;
  - (f) manages the operation or activities of an enterprise and who knows or ought reasonably to have known that any person, whilst employed by or associated with that enterprise, conducts or participates in the conduct, directly or indirectly, of such enterprise's affairs through a pattern of racketeering activity.
- (2) The court may hear evidence, including evidence with regard to hearsay, similar facts or previous convictions, relating to offences contemplated in subsection (1), notwithstanding that such evidence might otherwise be inadmissible, provided that such evidence would not render a trial unfair.
- (3) For purposes of proving a previous conviction during a trial in respect of an offence contemplated in subsection (1), it shall be sufficient to prove the original record of judicial proceedings if a copy of such record, certified or purporting to be certified by the registrar or clerk of the court or other official having the custody of the record of such judicial proceedings or by the deputy of such registrar, clerk or other official or, in the case where judicial proceedings are taken down in shorthand or by mechanical means, by the person who transcribed such proceedings, as a true copy of such record, is produced in evidence at such trial, and such copy shall be *prima facie* proof that any matter purporting to be recorded thereon was correctly recorded.
- (4) A person shall only be charged with committing an offence contemplated in subsection (1) if a prosecution is authorised in writing by the National Director.<sup>266</sup>

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<sup>266</sup> Chapter 2, Section 2 of POCA.

Burchell argues that racketeering offences have three common elements.<sup>267</sup> Firstly, there is the existence of an enterprise. Secondly, a pattern of racketeering activity has to be present, and thirdly, the accused should have participated either indirectly or directly in the affairs of the enterprise.<sup>268</sup>

It is submitted that betting syndicates that are involved in the illegal conduct of match-fixing can be considered to fall within the ambit of the definition of an enterprise and that it would be possible to prosecute people involved in these betting rings under this Act. The Act is very far reaching as one does not have to prove that a person has committed a particular offence, but simply that the person was directly or indirectly involved in the racketeering. This makes it very accessible to the state to eradicate the illegal betting syndicates, which are often responsible for the initiation of match-fixing conduct.<sup>269</sup>

Burchell mentions some constitutional challenges that maybe faced in using the racketeering provisions. It is worth mentioning these challenges since it may impact on the constitutionality of the Act and might expose the Act to constitutional challenges on the bases of: (i) vagueness; (ii) retrospectivity; and (iii) jeopardising one's right to a fair trial.<sup>270</sup>

The Act poses an attractive option in combating match-fixing related criminal activity, and in light of the penalties prescribed by the Act it is suggested that authorities would be justified in considering use of the Act, since it could serve as a good deterrent to persons who wish to involve themselves in the conduct of organised crime and more specifically, conduct that constitutes match-fixing. In terms of section 3 of the Act it is possible that a person convicted could receive life imprisonment or a maximum fine of R1000 million. One of the obstacles foreseen by using POCA, however, is that it is difficult to bring match-fixing under the meaning of "unlawful activity"<sup>271</sup> as the definition clearly states that unlawful activity deals with conduct that constitutes a crime or contravenes any law. Match-fixing is not yet specifically criminalised under SA law and therefore it cannot be labelled as a crime. As there is also no legislation that makes specific reference to match-fixing per se. It will be difficult

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<sup>267</sup> Burchell (Note 213 above) 977.

<sup>268</sup> Ibid.

<sup>269</sup> Ibid 978.

<sup>270</sup> Ibid 981.

<sup>271</sup> Section 1 of POCA: 'unlawful activity means conduct which constitutes a crime or which contravenes any law whether such conduct occurred before or after the commencement of this Act and whether such conduct occurred in the Republic or elsewhere'.

therefore to say that the conduct of match-fixing contravenes any specific statute. It is however possible to make out an argument that the conduct constitutes a fraud, and that it is also regulated by section 15 of the PCCAA that criminalises match-fixing without specifying it as match-fixing.<sup>272</sup>

Another issue to consider is what happens when there is legal betting and the betting syndicates operate within this sphere; will this section have any relevance to combat the problem of match-fixing? It is respectfully submitted that it would be unlikely to bring legal betting in the spotlight and to charge someone with a crime according the provisions of POCA. Sport betting is not illegal in South Africa and if someone makes the decision to involve themselves in legal betting, it cannot unequivocally be said that the person is involved in match-fixing. It will be very tough to prove that a person is involved in a betting syndicate as there is not a lot of room to gather appropriate evidence and to adduce such in court. Therefore, the “help” by a player who receives a bribe and conspires with the betting syndicate to conduct themselves in match-fixing practices is needed to bring these betting syndicates to justice. As stated, it is not illegal to bet on sports in South Africa and if a person is making a legal bet, it would be difficult to charge that person with a crime of match-fixing.

It is submitted that the sections referred to are most relevant in dealing with criminal conduct in respect of the Act and the rest of the Act is less applicable, as the focus is only on the criminal liability aspect of match-fixing. The Act remains useful especially in the light of the penalties that are prescribed when provisions of the Act are contravened. The severity of the penalties could serve as a good deterrent in combating organised match-fixing practices.

### **5.7 The National Gambling Act 7 of 2004:**

According to Gardiner, gambling and sport are considered to have a very close relationship to one another.<sup>273</sup> This is why it is important to look at the National Gambling Act<sup>274</sup> of South Africa and to compare it with The National Gambling Act<sup>275</sup> of the UK. The latter has been utilised (specifically section 42 of the Act) to prosecute and find people guilty in the UK for

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<sup>272</sup> In interpreting “law” the provisions of section 2 of the Interpretation Act 33 of 1957 should be borne in mind.

<sup>273</sup> Gardiner (Note 124 above) 341.

<sup>274</sup> National Gambling Act 7 of 2004.

<sup>275</sup> 2005.

involvement in the conduct of match-fixing.<sup>276</sup> The UK Act makes provision for a custodial sentence to be imposed if one “cheats at gambling” or “does anything for the purpose of enabling or assisting another person to cheat at gambling”.<sup>277</sup> This Act is however rather generous in that it only imposes a maximum sentence of up to two years, which, it is submitted, is disproportionate to the serious nature of match-fixing. Focus will be placed on whether South Africa’s gambling legislation provides anything of a similar nature to that of the UK, which would enable the state to prosecute match-fixing under this Act and impose a criminal sanction, as that is submitted that such a strong response is the potentially most effective way to get rid of the problem of match-fixing.

It is of relevance to consider what the Gambling Act says about gambling activity and whether match-fixing could be described as a gambling activity. Secondly, if one has determined that match-fixing is a gambling activity under the Act, one needs to determine whether such an activity is illegal in terms of the law.

The Act describes a gambling activity in the following way:

‘An activity is a gambling activity if it involves-

- (a) placing or accepting a bet or wager in terms of section 4(1);
- (b) placing or accepting a totalisator bet, in terms of section 4(2); or
- (c) making available for play, or playing-
  - (i) bingo or another gambling game in terms of section 5; or
  - (ii) an amusement game, to the extent that applicable provincial laws require such games to be licensed.’<sup>278</sup>

It is also important to look at how bets and wagers are described as this will interlink with the above provisions. Bets and wagers are described by the Act as follows:

‘(1) A person places or accepts a bet or wager when that person-

- (a) Being a player, stakes money or anything of value of on a fixed-odds bet, or an open bet, with a bookmaker on any contingency; or
- (b) Being a bookmaker-

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<sup>276</sup> S Gardiner ‘Match fixing in sport: Recent Developments’ 18(2) (2010) *Sport and the law journal* 28, 36.

<sup>277</sup> Ibid.

<sup>278</sup> See section 3 (Note 274 above).



- (i) accepts a stake of money or anything of value on a fixed-odds bet, or an open bet, from a player on any contingency; or
- (ii) stakes money or anything of value on a fixed-odds bet, or an open bet, with another bookmaker or any contingency;
- (c) stakes or accepts a stake of money or anything of value with one or more other persons on any contingency; or
- (d) expressly or implicitly undertakes, promises or agrees to do anything contemplated in paragraph (a), (b) or (c).
- (2) A person places or accepts a totalisator bet when that person stakes money or anything of value on the outcome of an event or combination of events by means of-
  - (a) A system in which the total amount staked, after deductions provided for by law or by agreement, is divided among the persons who made winning bets in proportion to the amount staked by each of them in respect of a winning bet; or
  - (b) Any scheme, form or system of betting, whether mechanically operated or not, that is operated on similar principles.<sup>279</sup>

In terms of the above sections, it will be easier to establish that match-fixing will form part of some sort of gambling activity. If one looks at the particularity of the words used in the section then it is clear that it speaks of bets, wagers, bookmakers and players. In all likelihood a player in this context would not be an athlete but a player involved in a gambling game. Therefore the focus of the gambling Act would be to prosecute not the athlete but the punter or bookmaker that uses a player to obtain a specific result. It is suggested then that bookmakers are at the tip of the iceberg who initiate the match-fixing practices and benefit from match-fixing, players that are influenced by such bookmakers are seen as the foot soldiers that do all the work. There is no reason why match-fixing practices will not form part of a gambling activity as match-fixing usually involves betting in one form or another. In a recent study, which focussed on gambling in South Africa the following forms of gambling were listed as being prevalent: lottery, scratch-cards, slots, horses as well sports betting, which is evidence that sports betting amounts to gambling.<sup>280</sup> Even though it has been established that match-fixing might form part of a gambling activity it is necessary to establish whether such gambling activity will be considered as illegal and unlawful.

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<sup>279</sup> See section 4 (Note 274 above).

<sup>280</sup> S Nzimande *Gambling Review Commission: Final Report – Review of the South African gambling industry and its regulation* (2010), 75.

A gambling activity will only be considered to be illegal and unlawful when one of the following scenarios pan out, as stated in section 7 of the Act:

“Despite any other law, a person must not-

- (a) engage in, conduct or make available a gambling activity if the outcome of that activity depends directly, indirectly, partly or entirely on a contingency related to an event or activity that is itself unlawful in terms of any law;
- (b) permit any gambling machine or device under the person’s control to be used for the purposes of a gambling activity contemplated in paragraph (a);
- (c) maintain or operate any premises, whether or not such premises are licensed premises, for the purposes of a gambling activity contemplated in paragraph (a); or
- (d) permit any premises under the person’s control, whether or not such premises are licensed premises, to be used for the purposes of a gambling activity contemplated in paragraph (a).”<sup>281</sup>

The Section makes it clear, as provided for in subsection (a), that one cannot rely on an unlawful activity to fuel a gambling activity. If this is done, such a gambling activity will be unlawful. It is recognised that most sport events like cricket or soccer are generally lawful, but when the result has been unlawfully manipulated then the activity in itself will no longer be lawful and accordingly the related contingency will also be unlawful. This makes it clear that match-fixing in itself is unlawful and if one engages in any gambling activity, which essentially would be betting, then such activity will be considered to be illegal and unlawful.

Section 83 poses the penalties that may be imposed if there is a contravention of the Act, and more particularly, the Act provides that anyone who is convicted of a criminal offence in terms of this Act is liable to either a fine or imprisonment not exceeding ten years or to both in appropriate circumstances. It is submitted that, although it might be difficult to obtain a successful prosecution under this Act as it depends on the interpretation of the Act by a court, the penalties provided for are severe and will be sufficient to deter people from conduct that will constitute match-fixing. Much of the above is based on a generous interpretation of the Act.

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<sup>281</sup> See section 7 (Note 274 above).

It is noted that gambling and match-fixing are closely related and it is well known for example that in India, betting is illegal and unlicensed. As a result of this gambling and corruption has a severe impact on the integrity of sport because of the popular nature of sport and more specifically the game of cricket.<sup>282</sup> In Europe, on the other hand, there is widespread use of online gambling, which forms part of the fastest growing segment of gambling in general.<sup>283</sup> Most of these gambling activities are unlicensed, but the difference between India and the EU is that there is a regulatory framework that ensures that there is no illegal activity; if such illegal activity is to present itself, the governments are quick to eradicate such illegal activity.<sup>284</sup> In the UK, as stated earlier, they were successful in prosecuting the conduct of match-fixing under the Gambling Act, which is a testament to the importance of gambling legislation in the fight against match-fixing in sport.<sup>285</sup> Serby states that self-regulation measures introduced by sport governing bodies have been more effective than initiatives that are introduced by governments.<sup>286</sup> It is respectfully submitted that there is no evidence to suggest that self-regulation of the issue is more effective than state intervention as match-fixing is on the increase and is becoming more prevalent on a regular basis by the amount of scandals in the public sphere.

### **5.8 English Case: Pakistani Cricket Scandal:**

This case, which will also be mentioned later in the dissertation in more detail dealt with three Pakistani cricketers namely Mohammed Asif, Salman Butt and Mohammed Amir who were charged with the conspiracy to cheat in respect of conduct that amounted to match-fixing.<sup>287</sup> The reason why the case is mentioned here is because they were charged in respect of section 42 of the UK Gambling Act 2005.<sup>288</sup> The three were accused of being involved as well as participating in an operation whereby they would accept corrupt payments to cheat.<sup>289</sup> The three were suspended as a result of the accusations, and it was later held that they were guilty after being criminally prosecuted, and they were sentenced as a result of the guilty

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<sup>282</sup> Serby (Note 54 above).

<sup>283</sup> Ibid.

<sup>284</sup> Ibid.

<sup>285</sup> Ibid.

<sup>286</sup> Ibid.

<sup>287</sup> Gardiner (Note 276 above) 36.

<sup>288</sup> Ibid.

<sup>289</sup> W Cairns 'Corruption Watch: Pakistan corruption scandal ends in jail sentences' (2011) 19(1) *Sport and the Law Journal* 53, 53 see also pages 54-60 for full discussion of case.

conviction to two years imprisonment.<sup>290</sup> While, it is submitted, the outcome of a criminal prosecution for match-fixing activities was appropriate, the Act did not make provision for an appropriate sentence and one may argue that the cricketers got off easy. If there was a more severe punishment under the Act it could serve as a powerful weapon to combat match-fixing.

### **5.9 The National Sport and Recreation Act 110 of 1998:**

As alluded to at the start of this chapter the Sports and Recreation Act, 110 of 1998 will also be discussed.<sup>291</sup> The Sports Confederation of South Africa would be entitled to launch investigations into any alleged malpractice in a sport.<sup>292</sup> It is submitted that the powers within Section 13(4) of the National Sport and Recreation Act 110 of 1998 goes beyond the scope of this paper, however for the sake of completeness it is listed here, since section 13(4)(a) also regulates the powers of the Sports Confederation, in cases of corruption and malpractice.<sup>293</sup> For a more comprehensive discussion of the role of government in sport see 4.6 above.

### **5.10 Conclusion:**

As much as it can be said that the South African criminal laws sufficiently provide for effective prosecution against any conduct that constitutes match-fixing, it is also evident that some of the definitions in the various Acts do not go far enough and uncertainty exists as to how courts would interpret concepts such as, the ‘integrity of sport’ and ‘integrity of a game of chance’. The wide interpretation provided for under section 15 of the PCCAA does also not help the cause as it adds to the uncertainty in the law. Therefore it is submitted that all of this uncertainty can be avoided if the South African legislature intervenes and creates a specific offence of match-fixing that will encompass corrupt activities and bribery, as this will create certainty in South African law. The PCCAA is limited in its application that it

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<sup>290</sup> Ibid.

<sup>291</sup> See Report by United Nations on Drugs and Crime (UNODC) ‘Criminalization Approaches to Combat Match-Fixing and Illegal/Irregular Betting: A Global Perspective’: This document is the most recent document (July 2013) on the applicability of criminal law provisions concerning match-fixing as well illegal/irregular betting and the study was done in the form of a comparative analysis comparing many countries 191 available at [http://www.unodc.org/document/corruption/Publications/2013/Criminalization\\_approaches\\_to\\_combat\\_match-fixing.pdf](http://www.unodc.org/document/corruption/Publications/2013/Criminalization_approaches_to_combat_match-fixing.pdf), accessed on 28 September 2013, 193 & 194.

<sup>292</sup> Ibid.

<sup>293</sup> Ibid.

fails to mention the phrase of match-fixing directly, which can also lead to the same uncertainty. Most corruption cases are considered to be complex and it is submitted that one requires this direct approach which is not specifically mentioned by the PCCAA to ensure effective prosecution and finalise matters expediently. This will in turn deter wrongdoers as it will instil fear that if they are caught they will be convicted.<sup>294</sup> It is submitted that it is envisaged that such legislation would not only be aimed at protecting the integrity and uncertainty of outcome in sport, but that it would also provide for special protection for whistle-blowers and witnesses.<sup>295</sup> Without their co-operation there will be no effective citizen participation in the criminal process.

In the light of the foregoing discussion it is submitted that the State ought to have charged Hansie Cronje either with fraud or alternatively considered the provisions of POCA at that time. It is likely that if the same incident should take place today that given the existing legislation that it is likely that Mr Cronje could be convicted of contravening section 15 of the PCCAA. The evidence is there to support that Cronje could have been charged and convicted, as earlier this year (2013) a man was sentenced to five years imprisonment for corruptly paying a police officer posing as a referee R2000 to fix soccer matches in the Vodacom Tournament that took place in June 2011.<sup>296</sup> The man was essentially found guilty for the conduct of match-fixing in terms of the PCCAA.<sup>297</sup> However, mention must be made that this case was decided in the Bellville Specialised Commercial Crime Court and it is yet to be seen whether this approach would be endorsed by higher courts in South Africa.

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<sup>294</sup> See National Prosecuting Authority Annual Report 2012-2013 at page 50.

<sup>295</sup> The Witness Protection Act, 112 of 1998, more specifically see section 12 of the Act.

<sup>296</sup> Agency Staff 'Safa welcomes jail term for match-fixing former coach Setshedi' Sowetan 13 February 2013.

<sup>297</sup> Ibid.

## **Chapter 6:**

### **The international standards of different jurisdictions in dealing with the problem of match-fixing and whether they can be incorporated into South African law:**

#### **6.1 Introduction:**

As noted in previous chapters, the problem of match-fixing is not a stand-alone problem, but that it requires co-operation of various stakeholders of which governments and SGB's are the most important. The problem that is posed by international jurisdictions is that each domestic jurisdiction, similar to SGB's, tend to strive for autonomy (compare the autonomous structures of SGB's and the interventionist and non-interventionist approaches to sport adopted by governments). It is often found that match-fixing falls under the broad scope of corruption, if one considers codes of conduct that are in force as well as legislative material to curb the problem of match-fixing. Therefore it is of importance to undertake a brief overview of what different jurisdictions regard the conduct of match-fixing to be, as this will give an encompassing perspective of match-fixing. This links to chapter 7, where it is submitted that there should be an establishment of a similar body like the doping body WADA, which will regulate the problem of match-fixing in ensuring effective mechanisms are in place to combat this growing problem.

#### **6.2 The UN (United Nations):**

The United Nations Convention Against Corruption (UNCAC)<sup>298</sup> requires countries (governments) to establish their own criminal offences that deal with corruption. The purposes of UNCAC are stipulated in Article 1, of which (in Art 1 (c)) is to promote integrity and accountability. This intrinsically links with what SGB's and governments aim to achieve in the sporting context, as match-fixing undermines the integrity of sport as can be seen from previous chapters.<sup>299</sup> There are two distinct forms of corruption: (i) active corruption; and (ii) passive corruption.<sup>300</sup> In respect of both the following is said by Dasgupta:

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<sup>298</sup> The United Nations Convention Against Corruption available at [http://www.unodc.org/documents/treaties/UNCAC/Publications/Covention/08-50026\\_E.pdf](http://www.unodc.org/documents/treaties/UNCAC/Publications/Covention/08-50026_E.pdf), accessed on 19 October 2013 page 7.

<sup>299</sup> Ibid: Chapter 1: Article 1: Statement of Purpose.

<sup>300</sup> Dasgupta (Note 12 above) 8. Also See Article 21 of UNCAC page 19.

‘Active corruption is offering or giving, directly or indirectly, for an undue advantage to the person by underperforming or breaching his duties. Passive corruption is solicitation or acceptance of undue advantage to the person seeking it by underperforming or breaching his duties’.<sup>301</sup>

Any person involved in match-fixing, such as players, coaches or officials, will easily form part of these definitions because of the wide spectrum that it can cover. This mechanism that is used by UNCAC will most definitely cover all the bases of sports corruption that is needed to do away with the key role players that bring sport into disrepute.<sup>302</sup> The only obstacle that it poses is that the provisions discussed above are not considered to be mandatory; countries only have an obligation to consider these provisions when establishing criminal offences, which makes it difficult to enforce it in sport, and therefore will likely not be effective in the combating of match-fixing.<sup>303</sup>

### **6.3 The EU (European Union):**

The European Union (EU) also does not have legislation that specifically addresses the issue of match-fixing. However, it does have the Criminal Law Convention on Corruption<sup>304</sup> which covers corruption in the public and private sphere (this includes active and passive corruption).<sup>305</sup> The private sphere has a restriction in the sense that the corruption is limited to commercial activity, which will exclude the practice of match-fixing and will therefore be ineffective to combat corruption in sport according to Dasgupta.<sup>306</sup> However in *Meca-Medina and Majcen v Commission*<sup>307</sup> as well as in the case of *Walrave and Koch v Association Union Cycliste Internationale*<sup>308</sup> the European Court of Justice that ‘...having regard to the objectives of the Community, the practice of sport is subject to Community law only in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty’.<sup>309</sup>

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<sup>301</sup> Ibid. Also See Article 21 (a) and (b) page 19.

<sup>302</sup> Dasgupta (Note 12 above) 8.

<sup>303</sup> Ibid 8-9.

<sup>304</sup> Criminal Law Convention on Corruption available at

<http://conventions.coe.int/Treaty/en/Treaties/Html/173.htm>, accessed on 19 October 2013.

<sup>305</sup> Dasgupta (Note 12 above) 9.

<sup>306</sup> Ibid.

<sup>307</sup> Case C-519/04 P, (2006) ECR I-6991.

<sup>308</sup> Case 36/74 (1974) ECR 1405.

<sup>309</sup> S Miettinen & R Parrish ‘Nationality Discrimination in Community Law: An Assessment of UEFA Regulations Governing Player Eligibility for European Club Competitions (The Home-Grown Player Rule) page 4 available at

Therefore it is submitted that the view of Dasgupta is unfounded and unjustified. Both sport and match-fixing may constitute economic activity. This Convention also benefits state autonomy as a result of the power the ratifying state is given in choosing whether to ratify it or not. The states have the option of not criminalising active and passive corruption if they do not wish to, and therefore the mechanism once again will not necessarily be successful in dealing with the issue of match-fixing.<sup>310</sup> Dasgupta is of the (rather radical) view that a minimal amount of states will consider the implementation of the criminalisation of match-fixing as a result of the high level of corruption that exists within the system of the governing states themselves, and this renders the Convention ineffective to implement measures to criminalise match-fixing.<sup>311</sup>

As stated earlier, there is no specific legislation in the EU that governs the conduct of match-fixing but there are guidelines laid down in the Lisbon Treaty which gives the EU the power to sanction certain criminal offences.<sup>312</sup> Article 83 of the Treaty on the Functioning of the European Union<sup>313</sup> enables the EU to legislate on a wide range of issues, which in the context of this paper includes corruption and organised crime.<sup>314</sup> This read together with Article 6 of the treaty which states ‘The Union shall have competence to carry out actions to support, coordinate or supplement actions of the Member States’, gives the Union unequivocal powers to legislate on the problem of match-fixing as section (e) of Article 6 states the Union shall have the abovementioned powers in respect of sporting matters.<sup>315</sup> Article 83 will ultimately be the basis on which the EU will rely on to legislate on the issue of match-fixing and to criminalise any conduct which can constitutes match-fixing.<sup>316</sup> Therefore, it is clear that the EU by having the powers took a step in the right direction in 2003, when deciding to criminalise active and passive corruption, but the implementation thereof was ineffective and unsuccessful.<sup>317</sup>

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[http://www2.warwick.ac.uk/fac/soc/law/elj/eslj/issues/volume5/number2/miettinen\\_parrish/miettinen\\_parrish.pdf](http://www2.warwick.ac.uk/fac/soc/law/elj/eslj/issues/volume5/number2/miettinen_parrish/miettinen_parrish.pdf), accessed on 19 October 2013.

<sup>310</sup> Dasgupta (Note 12 above) 9.

<sup>311</sup> Ibid.

<sup>312</sup> Ibid.

<sup>313</sup> Treaty of the Functioning of the European Union available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:en:PDF>, accessed on 19 October 2013.

<sup>314</sup> Ibid Art. 83.

<sup>315</sup> Ibid Art. 6(e).

<sup>316</sup> Dasgupta (Note 12 above) 9.

<sup>317</sup> Ibid.



In recent years the EU has committed itself fully to fight the threat that match-fixing poses to the integrity of the game, which might taint the sport and bring it into disrepute. Recent resolutions that were adopted by the EU are the following: (i) Recommendation on promotion of the integrity of sport against the manipulation of result<sup>318</sup>; (ii) the EU Council of the Conclusions on combatting match-fixing<sup>319</sup> and (iii) the European Parliament of the resolution on the European Dimension of Sport<sup>320</sup>.<sup>321</sup> These resolutions that were adopted clearly show the commitment of the EU to combat match-fixing.<sup>322</sup> Therefore, the EU has called on all the national governments to ensure that there is legislation sufficient to deal with the issue of match-fixing and to ensure that the sanctions that are imposed against match-fixing are in accordance with the serious nature of the conduct.<sup>323</sup> It has also called on governments to make unlawful or illegal activities that affect the integrity of sport a criminal offence that would illustrate the severe threat that match-fixing poses.<sup>324</sup>

#### **6.4 The UK:**

The UK took a different stance on the matter of match-fixing and how to best combat the ever-increasing problem. This is illustrated by the UK Gambling Act, 2005 which was adopted to address, *inter alia*, the issue of cheating at gambling (which is contained in Section 42 of the Act).<sup>325</sup> Section 42 makes it abundantly clear that those who place bets illegally and are involved in the manipulation of sport events can be imprisoned for a period that does not exceed two years or can be given a fine.<sup>326</sup> The section holds that, irrespective of whether the person gains anything from illegally placing a bet or whether it improves his chances of winning, the person will still be held accountable for the illegal acts that were

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<sup>318</sup> See 'Recommendation on promotion of the integrity of sport against the manipulation of result' for full discussion on this issue available at [http://www.coe.int/t/dg4/epas/resources/texts/CM\\_Rec\\_2011\\_10\\_en.pdf](http://www.coe.int/t/dg4/epas/resources/texts/CM_Rec_2011_10_en.pdf), accessed on 25 September 2013.

<sup>319</sup> See 'EU Council of the Conclusions on combatting match-fixing' for further discussion available at [http://www.consillium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/educ/126413.pdf](http://www.consillium.europa.eu/uedocs/cms_data/docs/pressdata/en/educ/126413.pdf), accessed on 26 September 2013.

<sup>320</sup> See 'European Parliament of the resolution on the European Dimension of Sport' on the issue of match-fixing available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONGML+COMPARL+PE-466.981+01+DOC+PDF+V0//EN&language=EN>, accessed on 27 September 2013.

<sup>321</sup> Match-fixing in sport 'A mapping of the criminal law provisions in EU 27 March 2012 KEA European Affairs Page 2.

<sup>322</sup> Ibid.

<sup>323</sup> Ibid.

<sup>324</sup> Ibid.

<sup>325</sup> Dasgupta (Note 12 above) 9. See also Section 42 of the UK Gambling Act, 2005.

<sup>326</sup> Dasgupta (Note 12 above) 9.

committed.<sup>327</sup> The Act also provides that licensed gambling houses should provide information and details about illegal betting on sports, which is a mechanism that ensures that gambling is transparent and does not affect sport in a negative way.<sup>328</sup>

Dasgupta is of the opinion that some of the provisions in the UK Gambling Act are ineffective and will be unfruitful in pursuing the goal of combating match-fixing effectively.<sup>329</sup> The reason Dasgupta gives is that he is of the view that there will be a limited amount of information that will flow from licensed gambling operators to authorities as some of these gambling operators might be involved in match-fixing themselves.<sup>330</sup> It is submitted that the Act is a step in the right direction and that Dasgupta has misconstrued his opinion in light of the Pakistani cricket scandal in England.<sup>331</sup> The recent case of *R v Mohammed Amir and Salman Butt* is evidence of the submission that the Act is a forward step against match-fixing.<sup>332</sup> This case involved, as stated earlier in Chapter 5, two accused cricketers who were involved in accepting corrupt payments in the course of involvement with a conspiracy to cheat.<sup>333</sup> The two cricketers were approached by their agent, who agreed with a bookmaker that they would bowl three “no balls” in the game, which essentially was called spot fixing, considered as an example or sub-category of the general conduct of match-fixing.<sup>334</sup> All of the parties involved were found guilty under the UK Gambling Act.<sup>335</sup> Both cricketers were sentenced to two years and six months respectively for their involvement in the manipulation of sport under the Act.<sup>336</sup> It is therefore clear that, as stated earlier, this Act is a step in the right direction. However, it is further submitted that, even though they were held criminally liable, the sanction imposed was not proportionate to the serious nature of the conduct of match-fixing.<sup>337</sup> These sentences in retro spec would not deter people to get involved in match-fixing as the sentences are not harsh enough to combat the problem.

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<sup>327</sup> Ibid.

<sup>328</sup> Ibid.

<sup>329</sup> Ibid 10.

<sup>330</sup> Ibid.

<sup>331</sup> Ibid 9.

<sup>332</sup> (2012) 2 Cr. App. R. (S.) 17.

<sup>333</sup> Ibid.

<sup>334</sup> Ibid.

<sup>335</sup> Ibid.

<sup>336</sup> Ibid.

<sup>337</sup> Ibid.

## 6.5 The USA:

The USA has experienced match-fixing for a much longer period of time, with a prominent early example being the well-known ‘Black Sox’ scandal.<sup>338</sup> The specific law that is in place in the USA, and which can be used to prosecute cases of sports match-fixing, is the Racketeer Influenced & Corrupt Organizations Act, 1970 (the RICO Act).<sup>339</sup> This Act is a good example of deterrence for people who wish to participate in match-fixing, since the only thing that needs to be proved is that they form part of an umbrella definition (i.e. “part of an enterprise” and not part of a single conspiracy).<sup>340</sup> Therefore, with this Act, the only obligation on the state is to prove criminal behaviour in order for conduct to be punishable under this Act.<sup>341</sup> The Act has been efficient in a wide variety of cases involving bribery, extortion and corruption.<sup>342</sup> The prosecution has also successfully prosecuted a case of match-fixing relating to the game of boxing in the case of *Venzor v Gonzales* which is evidence to show that match-fixing can be dealt with according to the provisions of the Act.<sup>343</sup>

It is noted that there is once more a great disparity in how countries or states deal with a problem such as match-fixing. Therefore, a more centralised system is needed in order to ensure that there is certainty amongst nations, which will make co-operation much easier and lead to a better understanding of the problem. By doing this there is a greater possibility that match-fixing can be stopped without having done too much harm to sport and the community

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<sup>338</sup> The ‘Black Sox’ scandal involved a match that took place between the White Sox baseball team and the Cincinnati Reds in the 1919 World Series. It involved a number of players from the White Sox team who allegedly accepted 100 000 US dollars to fix the game thereby ensuring that they the White Sox would lose the game intentionally. The players were acquitted by a jury but were nevertheless banned from the game of baseball. This is a good example that the issue of match-fixing is not a new phenomenon. See J.H Kahn ‘Book Review (Levelling the Playing Field: How the Law Can Make Sport Better for Fans)’ (2001) 41 *Santa Clara Law Review* page 925. Also See I Preston & S Szymanski ‘Cheating in Contests’ (2010) 19 *Oxford Review of Economic Policy* page 619.

<sup>339</sup> Dasgupta (Note 12 above) 10. Also See Gokhale (Note 204 above) 329.

<sup>340</sup> Dasgupta (Note 12 above) 10.

<sup>341</sup> Ibid.

<sup>342</sup> Ibid.

<sup>343</sup> 936 F. Supp. 445 (1996): This case involved a boxing match between two fighters namely Julio Cesar Chavez and Craig Houk. The match lasted, only 96 seconds, much shorter than a typical fight. It was later alleged that Houk ‘took a dive’ and therefore the fight was fixed. The case involved not only allegations of match-fixing but bribery too. The RICO Act was considered by the court and illustrated that the Act can be applied in the sporting context. This is a good indication that liability can be imposed on match-fixing as well as sport authorities under such legislation, which main function is to combat organised crime. Also See Dasgupta (Note 12 above) 10 and Gokhale (Note 204 above) 329.

values in possesses. In light of this there is a call for a dedicated international body that will deal specifically with the problem of match-fixing.

## **Chapter 7:**

### **Combating match-fixing by means of a dedicated international body:**

#### **7.1 Introduction:**

It is important to note that, in order to resolve the problem or “cancer”<sup>344</sup> of match-fixing, it requires the cooperation of many parties, including SGB’s, governments, police forces, betting companies and gambling boards.<sup>345</sup> The problem of match-fixing is that it is so widespread that it will not suffice that one party alone tries to resolve the issue on its own.<sup>346</sup> Therefore, it is critical that there be a network of understanding between the relevant parties involved to issue a mandate that is consistent across borders to combat this ever-growing problem.<sup>347</sup> It could be argued that the most effective way to obtain such an understanding across borders would be the establishment of a dedicated independent body or organisation which will be the central body, internationally, in the fight against match-fixing and corruption.<sup>348</sup> It is submitted by Carpenter that the body should be structured in a similar way as the World Anti-Doping Agency or WADA and should have the same wide reaching powers and coherent approach to match-fixing as that adopted in respect of sports doping.<sup>349</sup> It is therefore necessary to consider WADA and whether it is feasible to implement such a body in the context of corruption. This is the objective of this chapter, to provide a brief overview of WADA and justify why such a body should be implemented in the context of sport corruption and, more specifically match-fixing.

#### **7.2 WADA (World Anti-Doping Agency):**

WADA was established in 1999 and is known as an independent agency that is funded on an equal basis by SGB’s as well as various governments.<sup>350</sup> The purpose of WADA was ultimately to set unified standards of what substances is allowed and what is not when

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<sup>344</sup> Carpenter (Note 141 above) 13-24.

<sup>345</sup> Gardiner (Note 276 above) 35.

<sup>346</sup> Ibid.

<sup>347</sup> Ibid.

<sup>348</sup> Carpenter (Note 73 above) part 3.

<sup>349</sup> Ibid. See also Carpenter (Note 141 above) 37.

<sup>350</sup> Ross (Note 143 above) 42.

competing in sports, thereby coordinating all efforts on the anti-doping front.<sup>351</sup> After the introduction of the World Ant-doping Code (WADC), WADA now ensures that there is compliance with this Code in a strict sense.<sup>352</sup> Rules, regulations and policies are all contained in the framework of the WADC, which several nations have signed, thus giving their assurance that their rules and regulations pertaining to sport and doping will be in line with the mandatory parts of the Code.<sup>353</sup> The growing jurisprudence of CAS, dealt with earlier, on the issue of doping is testament to the success of WADA with a growing impact in ensuring integrity of sport is maintained.<sup>354</sup> This success is as a result of athletes being subjected internationally to the same rules, processes and sanctions irrespective of the country of origin of the athletes.<sup>355</sup>

WADA is an example of coordination between public and private authorities, as 50 percent of WADA is comprised of governments and the other 50 percent is comprised of private sport enterprises, giving a balanced perspective.<sup>356</sup> WADA therefore is an excellent prototype to establish cooperative agencies.<sup>357</sup> It is clear that an independent body cannot combat the problem on its own but needs to work closely with national law enforcement agencies as well as INTERPOL in ensuring that integrity is maintained across all sporting codes and sporting events.<sup>358</sup> Therefore, to ensure adequate oversight there has to be a sharing of responsibilities between governments and SGB's to alleviate the challenges that face effective sport governance, such as doping or corruption and match-fixing.<sup>359</sup> One thing is clear; SGB's are not well equipped to deal with issues such as doping, corruption and betting on their own and they need assistance in their quest to restore the integrity of sport.<sup>360</sup>

Some of the problems that might arise could lead to a delay in the establishing and implementation of a world anti-corruption agency.<sup>361</sup> One of the main problems that might

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<sup>351</sup> Ibid.

<sup>352</sup> Ibid.

<sup>353</sup> Ibid.

<sup>354</sup> Ibid.

<sup>355</sup> D Howman 'Supporting the Integrity of sport and Combating corruption' (2013) 23(2) *Marquette Sports Law Review* 245, 247.

<sup>356</sup> Ibid 245.

<sup>357</sup> Ibid.

<sup>358</sup> Ibid.

<sup>359</sup> Ibid 247.

<sup>360</sup> Ibid.

<sup>361</sup> N Harris 'Head of Wada calls for global anti-corruption body' 23 February (2011) news article: available at <http://www.sportingintelligence.com/2011/02/23/head-of-wada-calls-for-global-anti-corruption-body-230201/>, accessed on 23 October 2013.

hinder the establishment of such an independent body is the funding of the body itself.<sup>362</sup> Funding is critical for the establishment of such a world body and it means that governments must show a willingness to contribute to such a body and it must be politically justified to invest in such a body.<sup>363</sup> Carpenter is of the view that until countries like the USA, India and China discourage illegal sports gambling, such a body will not be established.<sup>364</sup> It is difficult when powerhouse economies encourage illegal sports gambling and lack the political will and conviction to work together with the international community to fight this ever growing problem.<sup>365</sup> These markets are therefore clearly seen as danger markets in the fight against corruption in sport and more specifically match-fixing.<sup>366</sup> Another problem is that according to Howman ‘Sport has no real power or jurisdiction but governments do’.<sup>367</sup> This is used in the context of combating corruption on an international stage. WADA, according to Howman, has no real power and is not well equipped to deal with the criminal underworld, which is ultimately responsible for the problems in world sport such as corruption and doping.<sup>368</sup> Therefore, if an independent body or agency is established to deal with corruption such as match-fixing in sport, the body will have to have ‘statutory teeth’, which will give the police and prosecutors the willingness to act on issues of corruption such as match-fixing.<sup>369</sup>

If the problems stated above can be overcome and there is global understanding about the severity of corruption in sport on the international stage, an independent body might be the answer to ensure a multi-agency approach similar to that of WADA to combat this ever growing problem of match-fixing. However, this is not the only way to combat the problem and there are many other mechanisms that can be utilised as mentioned in earlier chapters, but it is submitted that such an independent body would be a great tool in the existing context as there would be a combination of agencies working together with the assurance and support of governments. As stated earlier, the onus cannot be placed on one party alone to fight the problem but rather on a network that would ensure effective control over the problem of

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<sup>362</sup> Carpenter (Note 73 above) part 3.

<sup>363</sup> Ibid.

<sup>364</sup> Ibid.

<sup>365</sup> Ibid.

<sup>366</sup> Ibid.

<sup>367</sup> Howman (Note 355 above) 248.

<sup>368</sup> Ibid.

<sup>369</sup> Ibid.

match-fixing.<sup>370</sup> By combining the resources of the various stakeholders, it will create a bigger sense of stability in such an agency.<sup>371</sup>

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<sup>370</sup> Gardiner (Note 276 above) 37.

<sup>371</sup> *Ibid.*



## **Conclusion:**

Match-fixing undeniably poses a threat to the integrity of sport and it possibly threatens the very existence of sport.<sup>372</sup> This, in addition to the fact that match-fixing impacts on public order it forms part of the rationale for the outlawing of match-fixing in a direct sense.<sup>373</sup> Therefore governments and sport governing bodies are forced to work together and create a uniform approach in the fight against match-fixing.<sup>374</sup> This uniform approach should include legislative material that can impose strict criminal sanctions as it would be the most effective way to deter people from the involvement in match-fixing.<sup>375</sup> This in turn would create the perception amongst the public and sporting fraternity that the conduct of match-fixing is taken seriously and would restore of the public's faith in sport in general. Commercialisation of sport in essence has also been a significant contributing factor in the increase of match-fixing practices as a result of the amount of money that is involved, as stated in Chapter 3. However the commercialisation of sport is not necessarily a bad thing as it contributes to the ever growing world economy but it needs to be regulated in a strict way that would not allow match-fixing to erode the economic value it may bring in future generations. Therefore there needs to be a balance in any legislation the will be enacted in future, which will have to cater for many stakeholders and safeguarding all the rights of such stakeholders involved in sport.

In order to achieve the objects stated above, it is imperative that, South Africa has legislation in place which will ensure that one can prosecute the crime of match-fixing effectively without the fear that the prosecution might be jeopardised as a result of the uncertainty in the law. Therefore, it is necessary that South Africa adopts a uniform approach to create legal certainty which is the ultimate goal in the fight against match-fixing. It is submitted that this can only be done if a specific match-fixing act is enacted that can take account of the unique nature of sport. However, for the time being South Africa has Sec 15 of the PCCAA to curb match-fixing but it is submitted that in future South Africa will require a more direct approach. If South Africa is not prepared to act on this in future and turns a blind eye to the dangers match-fixing poses then the future development of sport in this country, which is a sport mad nation, would be hampered, if not stalled. It is submitted that our government

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<sup>372</sup> KL Jones 'Match-fixing in Sport: A Mapping of Criminal Law Provisions in EU27 (March 2012)' (2012) 1-2 *The International Sports Law Journal* 135, 135.

<sup>373</sup> Ibid.

<sup>374</sup> Ibid.

<sup>375</sup> Carpenter (Note 141 above) 18.

should act now rather than later. With this said, the fight against match-fixing cannot be done alone and international help is also required. This help can be in the form of an international body that fights corruption in sport, which will encapsulate match-fixing similar to WADA as stated in Chapter 7. The mistake is often made that a single institution, country or organisation, can fight match-fixing alone. All Stakeholders, however, should individually take responsibility in a way that would complement others activities to ensure that once again a comprehensive uniform approach can be followed to eradicate match-fixing conduct.<sup>376</sup>

It stares one in the face that cheating in sport, be it by way of match-fixing or doping, is dangerous and it will rob the sport of its essential feature namely the uncertainty of outcome which makes sport credible and believable.<sup>377</sup> If this is done, sport is spun into turmoil and is converted into a rehearsed show just like the entertainment industry and henceforth loses its attraction and support of those who love sport.<sup>378</sup>

Finally, it is submitted that the view of Justices Royce and Globe in the case of *R v Mohammed Amir and Salman But*<sup>379</sup> is in line with the critical approach of how match-fixing should be treated. The Court held as follows: ‘The game would be impoverished if the Court failed to make it clear that conduct like this was criminal conduct of a very serious kind which must be marked with a criminal sanction.’<sup>380</sup>

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<sup>376</sup> E Bozkurt ‘Match fixing and fraud in sport: putting the pieces together’ (2012) available at <http://www.europarl.europa.eu/document/activities/cont/201209/20120925ATT52303/20120925ATT52303EN.pdf>, accessed on 6 June 2013 page 3.

<sup>377</sup> Ibid.

<sup>378</sup> S Zaksaitė ‘Cheating in Sport: Lithuanian Case of Legal Regulation’ (2010) 7(2) US-China Law Review 1, 1.

<sup>379</sup> (2012) 2 Cr. App. R. (S.) 17.

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