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You can't sit with us.

**Discrimination against women in football: a commentary
of the Mariyam Mohamed vs. Asian Football
Confederation (AFC) elections case**

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You can't sit with us. Discrimination against women in football: a commentary of the *Mariyam Mohamed vs. Asian Football Confederation (AFC) elections case*

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1. Introduction

There is something beautiful (but also visceral) about the power that football, and sports in general, have over people. Source of dreams and inspiration all over the world, sports make us believe that not all is lost until the last second of a match. There is magic in the collective frenzy and hope that an international sports competition can prompt at a global scale. The idea that sports is an agent of peace, promotion of human rights and social justice contributes to the argument that through sports one can fight discrimination of all sorts.¹ These noble claims may find some support, but recently it is the *bad and the ugly* in sports that have been drawing significantly more attention from the public.² The under-representation of women in positions of leadership is one of the problematic aspects in sports governance and the focus of our analysis.³

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¹ *The Ideals of Global Sport, From Peace to Human Rights*, Barbara J. Keys (ed), University of Pennsylvania Press (2019), p. 1.

² JOHN HOBERMAN, "The Myth of Sport as a Peace-Promoting Force" *SAIS Review* 31, n°1 (Winter – Spring 2011).

³ *Gender Diversity in European Sport Governance*, Agnes Elling, Jorid Hovden and Annelies Knoppers (eds.), Routledge Research in Sport, Culture and Society (2019), p. 3.

Football in particular, but not exclusively, has been stage for structural and institutional gender discrimination.⁴ Women still are excluded from the highest governance roles and most decision making tables, in a move that perpetuates still today male dominance in sports leadership.

The first part of this paper addresses the issue women discrimination in sports governance through looking into the case of *Mariyam Mohamed vs. Asian Football Confederation (AFC) elections*, which was recently decided by the Court of Arbitration for Sport (CAS). Further, the case analysis will also allow, in the second part of the paper to call the attention to several other malaises affecting sports leadership and decision making, such as the lack of transparency of the CAS decisions and their inability to deliver an effective remedy in situations like the one of Mariyam Mohamed. There was no question, for CAS, of whether the AFC electoral procedures were conducted in breach of the prohibition of discrimination against women and of improper third-party influence, however, CAS recognized that it was also powerless to act on it leaving the situation unremedied for the time being.

2. Setting the scene: Sports Governance and Discrimination Against Women

Much ink has been spilled about women in sport. Sports participation by women and girls, women's access to leadership positions, or the gender biased portrayal of women athletes and leaders are only a few of the heated debates around this matter.⁵ The Tokyo 2020 Olympic Games have been a (not so friendly) reminder that, despite the improvement in terms of numbers of women participating in the competitions and the initiatives to achieve gender equality,⁶ the concerns about discrimination are mostly unsolved.⁷ The former head of the Tokyo 2020 Olympics organising

⁴ MOYA DODD AND CATHERINE ORDWAY, "FIFA Governance: How Crisis Opened the Door for Gender Equality Reforms", *Jean Monnet Working Paper 14/20 - Symposium: Football Feminism – Global Governance Perspective*, NYU School of Law – The Jean Monnet Working Papers (www.jeanmonnetprogram.org), p. 1.

⁵ European Institute for Gender Equality, "Gender in sport", 26 January 2017, (<https://eige.europa.eu/publications/gender-sport>). (accessed July 2021).

⁶ With 49 per cent female participation at Tokyo 2020 were the more gender equal Olympic Games in numbers of athletes. International Olympic Committee, "IOC paves the way for a more sustainable, gender-equal and inclusive Olympic Movement", <https://abcnews.go.com/Sports/tokyo-olympics-highlight-strides-gender-equality-remaining-hurdles/story?id=78264991>. (accessed July 2021).

⁷ Alongside the under-representation of women in governing positions, the focus of this article, another area where women continue to be systematically and significantly discriminated regards athlete's remuneration. For more on this issue: NICOLE ZERUNYAN, "Time's up: Addressing Gender-Based Wage Discrimination in Professional Sports," 38 *Loy. L.A. Ent. L. Rev.* 229, 2017-2018, p. 229, PAMELA WICKER,

committee, Yoshiro Mori, sexist remarks about women talking too much in board meetings were a proof that the gender stereotypes are alive and kicking in sports governance.⁸ And the discussion around who is a woman athlete and who should be able to compete as such, for instance in relation to Christine Mboma e Beatrice Masilingi,⁹ show us that issue of women in sports is multidimensional and not always recognized as such. Structurally, several institutional practices contribute to maintain this male dominated arena where, not only there are deeply enshrined bias towards women, but also there is a clear disregard of the importance of intersectionality for women's identity in sports.¹⁰

Generally, one can think of two perspectives for framing this debate: sports participation by women (the athletes) and women leadership in sports (the decision makers). This paper is about the latter: those who take decisions and who reach positions of power and leadership in sports governance. Many argue that the under-representation of women is so enshrined in sports decision making and leadership that most times is overlooked as part of a feature of the sector.¹¹ At the same time, it should not be ignored that the under-representation of women in sports leadership positions is, at least in part, a consequence of the limits imposed on women's participation and the fact that the electoral communities that elect those leaders are, themselves, overwhelming composed by men.

In football, the focus of our analysis, women have been kept for centuries at the decision-making tables. The Fédération Internationale de Football Association (FIFA), for instance, waited 109 years to elect a woman, Lydia Nsekera, for the first time to its Council. Moreover, today, the FIFA Council is composed by the 37 members of which

CHRISTOPH BREUER & SÖREN DALLMEYER, "The gender earnings gap among elite athletes in semi-professional sports", *Managing Sport and Leisure*, 2021.

⁸ The Guardian, "Tokyo Olympics chief resigns over sexist comments," <https://www.theguardian.com/sport/2021/feb/12/tokyo-olympics-chief-resigns-over-sexist-comments> 12/02/2021 (accessed July 2021).

⁹ CBC, "Mboma, Masilingi deal with fabricated controversy due to being born outside reactionary rule," <https://www.cbc.ca/sports/olympics/summer/opinion-christine-mboma-beatrice-masilingi-tokyo-2020-1.6128427> 04/08/2021, (accessed August 2021).

¹⁰ SARAH LEBERMAN and LAURA J. BURTON, "Why this book? Framing the conversation about women in sport leadership," in *Women in Sport Leadership, Research and Practice for Change*, Laura J. Burton and Sarah Leberman (eds.), Routledge, 2017, p. 2 and E. NICOLE MELTON AND MICHAEL J. BRYAN, "Intersectionality: the impact of negotiating multiple identities for women in sport leadership", in *Women in Sport Leadership, Research and Practice for Change*, Laura J. Burton and Sarah Leberman (eds.), Routledge, 2017, p. 62.

¹¹ JANET S. FINK, "Hiding in Plain Sight: The Embedded Nature of Sexism in Sport", *Journal of Sport Management*, 30 (1), 2016, 1-7, p. 2; *Gender Diversity in European Sport Governance*, Agnes Elling, Jorid Hovden and Annelies Knoppers (eds.), p. 3.

only 6 are women and none occupies the position of President or Vice President of the Council. Under public pressure for the “long-standing lack of women in positions of responsibility in the football community,”¹² FIFA has taken steps, at least on paper, towards the adoption of governance reforms that promote of human rights and gender equality.¹³ This commitment equality and the adoption of nondiscrimination policies has promptly become central to FIFA’s institutional discourse and identity.¹⁴ They were part of the strategy aimed at regarding public trust after the corruption scandals made public in 2015. These gender equality reforms were particularly strengthened by the amendments to the FIFA Statutes and Regulations in 2016, the adoption a set of Guidelines for Promoting the Involvement of Women on the FIFA Council (the *Guidelines*)¹⁵ by FIFA Governance Committee in 2017 and, more recently in 2018, the publication of FIFA’S Women’s Football Strategy.¹⁶

As it will be shown below, Mariyam Mohamed’s case clearly illustrates the weaknesses in the implementation and monitorization of these reform in this case, the Guidelines for Promoting the Involvement of Women on the FIFA Council. As part of the 2016 reforms, it became mandatory to have at least one woman, per confederation, elected for the FIFA Council¹⁷. Soon, however, the FIFA Governance Committee, that was given the responsibility to supervise elections,¹⁸ detected serious problems detected in how this provision was being implemented by several Confederations that were, de facto, limiting women to a single position. At least one woman was, de facto when not de iure, being interpreted as only one woman, transforming a provision aimed at promoting women’s representation into a provision discriminating against women. This motivated the Governance Committee to adopt and publish in 2017 a set of Guidelines for Promoting the Involvement of Women on the FIFA Council which are a form of soft law. The FIFA Governance Committee has no power to adopt

¹² FIFA, “Women’s Football Strategy”, 2018, (<https://digitalhub.fifa.com/m/baafcb84f1b54a8/original/z7w21ghir8jb9tguvbcq-pdf.pdf>), p. 4. (accessed in July 2021).

¹³ MICHELE KRECH, “FIFA for Women or Women for FIFA? The Inherent Tensions of FIFA’s Women’s Football Strategy”, *VerfBlog*, 2019/7/07, (<https://verfassungsblog.de/fifa-for-women-or-women-for-fifa-the-inherent-tensions-of-fifasomens-football-strategy/>), DOI: 10.17176/20190707-112634-0.

¹⁴ *ibid.*

¹⁵ Guidelines for Promoting the Involvement of Women on the FIFA Council <https://digitalhub.fifa.com/m/1e432c645600e569/original/oxkmv00wclfnjsgs6ob-pdf.pdf> (accessed in July 2021).

¹⁶ For an analysis of FIFA’s Strategy for Women’s Football see: MICHELE KRECH, ‘Towards Equal Rights in the Global Game? FIFA Strategy for Women’s Football as a Tightly Bounded Institutional Innovation’ (2020) 25(1) *Tilburg Law Review* pp. 12–26.

¹⁷ FIFA Statutes, Article 33(5).

¹⁸ FIFA Governance Regulations, Articles 27(5) (b), 62(b).

binding rules. But the Guidelines are an indication of how the FIFA Governance Committee intends to exercise its supervisory role with regard to the electoral process.

As stated in the Guidelines:

“Naturally, confederations are free to choose a different electoral procedure so long as it complies with the principles identified above. The Governance Committee anticipates, however, that an election procedure structured consistently according to these Guidelines would comply with the statutory obligation to elect a female representative”.¹⁹

The key recommendation in the Guidelines is that confederations should not take any actions which would suggest or imply that *only* one woman should be elected to the FIFA Council, and in particular should not designate any seat as a “women’s seat” or “female seat”:

“[W]hen confederations conduct elections to the FIFA Council, the election of *at least* one female candidate should be ensured by using an electoral system that neither suggests that only one woman should be elected, nor has the effect of encouraging that outcome in practice. Women should be encouraged to run for *all* seats on the FIFA Council. This includes generally available seats, seats reserved by confederations for specific regions or linguistic groupings (if any), and confederation presidencies. In particular, an electoral system that encourages women to run only for a “women’s seat” does not comply with the objective of promoting the *full* participation of women. (...)”

The Governance Committee recommends that a confederation should not label any of its seats on the FIFA Council as a “women’s seat”, and should certainly not create a separate category in which women are encouraged to run to the exclusion of other categories. This is because this is likely to have the effect, in practice, of limiting the participation of women and discouraging women from contesting other positions.”²⁰

The Guidelines also contain rules of procedure which confederations should follow in order to ensure that female participation was not restricted.²¹ These rules are given in

¹⁹ Guidelines for Promoting the Involvement of Women on the FIFA Council, pp.1-2.

²⁰ Guidelines for Promoting the Involvement of Women on the FIFA Council, pp. 1-2.

²¹ Guidelines for Promoting the Involvement of Women on the FIFA Council, pp. 3-5.

different variations, depending on whether the confederation reserved some of their allocated seats on the FIFA Council for a subset of member associations.

3. The facts and the unpublished awards: *Mariyam Mohamed vs. Asian Football Confederation Election*

The case of *Mariyam Mohamed vs. the Asian Football Confederation (AFC)* at the Court of Arbitration for Sport (CAS) is a textbook case of gender discrimination against women and unlawful third-party intervention in sports governance. Mariyam Mohamed, former Head of Women's Football at the Football Association of Maldives, sought election to the AFC Executive Committee and to the FIFA Council in April 2019 during the 29th AFC Congress in Kuala Lumpur (hereinafter 2019 AFC elections). Maryam Mohamed filled two appeals to the CAS arguing that the results of the election should be set aside, and they should be re-run on the grounds of gender discrimination and third-party interference. On the 25th of January 2021 the CAS Panel announced its awards. The awards were not made public and the decision of the Panel partially upholding the appeals of Mariyam Mohamed was disclosed in a short media release without the reasoning supporting it being developed.²²

Only two paragraphs of this document addressed the refusal of the AFC Electoral Committee to investigate a gender discrimination complaint filed by Ms. Mohamed in relation to the 2019 AFC elections procedures. The decision was clear, the consequences not so much. The Panel ruled that the AFC Electoral Committee decision was invalid and that the AFC 2019 Elections were conducted in breach of the prohibition against gender discrimination imposed both by the FIFA and the AFC statutes and, in addition, that the AFC did not comply with its obligation to promote the participation of women in the 2019 AFC elections. Mariyam Mohamed's appeal for the annulment of the results of the 2019 AFC elections, the request argued that electoral procedures should be re-held and the AFC statutes amended to ensure the respect for the duties not to discriminate against women and to promote their involvement in sport governance. This request was rejected due, apparently, to CAS's lack of competence.

In relation to the second appeal, CAS agreed that Ms. Mohamed's was the victim of third-party interference during the elections. The AFC Disciplinary and Ethics

²² Court of Arbitration for Sport, (CAS 2019/A/6310), *Mariyam Mohamed vs. Asian Football Confederation (AFC) election*, Media Release, 25/01/2021.

Committee failure to deliver a decision, within a reasonable timeframe, to Ms. Mohamed's complaint was considered by the Panel to be denial of justice. Consequently, the AFC 2019 elections were ruled to be in violation of the AFC and FIFA Statutes and Regulations in what concerned the prohibition of intervention of a third party. However, it was also stated in the award that the attempted to influence, in an improper manner, the 2019 AFC election was not effective, given that Ms. Mohamed did not end up withdrawing her candidature.

The CAS Panel had no doubt that the elections were in breach of the prohibitions of discrimination against women and of unlawful third-party intervention, regardless of its effect on the AFC election result. Nevertheless, it was also clear for CAS that the competence to annul the election or request any amendment to the AFC statutes was not theirs leaving that power to the AFC and FIFA.

The confidentiality of the awards does not allow for a more thorough analysis of the reasoning of the CAS Panel, thus the section below unpacks the AFC's electoral procedures which were the cause of Ms. Mohamed's appeals, in an attempt to clarify why were they considered discriminatory.

4. You can't sit with us: the AFC discriminatory election procedures

The objective of increasing diversity within FIFA, including to facilitate the participation of women at every level of FIFA's governance structure, as mentioned, was one of the priorities of the FIFA Governance Committee and was also enshrined in FIFA's Statutes.²³ The FIFA Statutes and Governance Regulations were amended in February 2016 to require each member confederation to elect *at least* one woman to the FIFA Council.²⁴ It is important to stress that this requirement is a minimum, and it is certainly not a maximum number of female representatives.²⁵ If it were to be a maximum, it would serve not to promote female representation in FIFA, but to limit such representation and discriminate against women.

²³ FIFA Statutes, Article 2(f).

²⁴ Formerly known as the Executive Committee. FIFA Statutes, Article 22(3)(b) and Article 70.3 of the FIFA Governance Regulations.

²⁵ Guidelines for Promoting the Involvement of Women on the FIFA Council, page 1: 'This requirement is a minimum: it is not a statement about what level of female representation is sufficient to achieve the objective of promoting the participation of women in football governance, and it is certainly not a maximum. It should form part of an overall programme of encouraging and developing the role of women in football governance in FIFA, in each confederation, and in each member association.'

In the same month, the number of members of the FIFA Council was increased from 25 to 37. Thus, each of the six member confederations were required to elect additional members to the FIFA Council by 30 September 2016 (in time for the meeting of the FIFA Council in October 2016), and to ensure that at least one of that confederation's representatives on the FIFA Council was female. For each of the confederations,²⁶ this meant that at least one of the newly-elected FIFA Council members would have to be female. For example, the AFC had to elect three new members of the FIFA Council by 30 September 2016, and at least one of these had to be female.

All of the confederations scheduled elections for, respectively, the second and third quarters of 2016. Certain confederations had adopted, or were intending to adopt, electoral procedures that were discriminatory against women by creating a specific female position to which all female nominees were candidates. This transformed a rule that was aimed at guaranteeing that at least one woman was elected into a rule that limited women to a single position. One of these confederations was the AFC.²⁷

4.1 The AFC 2016 and 2017 elections

For each of these elections, the FIFA Governance Committee appointed a number of its independent members (or independent representatives) to supervise the electoral procedures and voting, the AFC was no exception.²⁸ In the view of the FIFA Governance Committee there was a serious risk that the elections would be conducted on a discriminatory basis if certain actions were not taken by the AFC to correct the discriminatory effects of the nomination procedure. Nevertheless, the AFC Congress voted to postpone the elections the 2016 AFC. The AFC elections to the FIFA Council were rescheduled to in May 2017 and, similarly to the 2016 procedure, the FIFA Governance Committee also supervised the preparations.²⁹

²⁶ Apart from Confédération Africaine de Football (CAF), which had elected a female FIFA Council member since 2012.

²⁷ The Oceania Football Confederation (the OFC) and UEFA also adopted the same practice.

²⁸ Miguel Poiaras Maduro, one of the authors of this paper, was a member of the delegation for only the AFC Congress but, as Chair, followed and supervised all of the confederations' elections. The FIFA Governance Committee is a single body and all its decisions are communicated by the Chair, in the name of the Committee, to the relevant parties. The Governance Committee independent members are those that fulfill the requirements set out in Article 5 FGR. Notably they cannot be, or have been, in the past 4 years, a member of a wide array of football bodies. It was the view of the Governance Committee that non-independent members could be in a conflict of interest while supervising the elections. A majority of the members of the Governance Committee need to fulfill the independence criteria.

²⁹ The FIFA Governance Committee, chaired at the time by Miguel Poiaras Maduro, appointed three other members to supervise those elections: Judge Mukul Mudgal (at the time Deputy Chair of the

This supervisory group received information from the AFC regarding the organization of the May 2017 elections. In spite of some amendments, the proposed procedure for the elections was still likely to discriminate against women. The FIFA Governance Committee informed the AFC accordingly and asked for additional clarifications. Following the AFC's reply it was still the overwhelming view of the FIFA Governance Committee representatives that serious problems of discrimination persisted and this was conveyed in a second letter to the AFC. It appears that the nomination and electoral procedures remained fundamentally the same and thus continued to be discriminatory against women.

At the same time of the AFC May 2017 elections were taking place, the FIFA Congress also took place and led, by choice of the FIFA Council or resignation of Governance Committee members, to a substantial change in the composition of the Governance Committee. In fact, almost all, if not all, of the independent members that had been responsible for approving the Guidelines and the decisions implementing them with regard to AFC were either forced to leave the Governance Committee or resigned in solidarity with the others.

4.2 The 2019 AFC elections

Despite having the Governance Committee guidelines from 2016 to avoid discriminatory practices and the introduction of some changes in 2017 to avoid more blatant forms of the discrimination, the 2019 AFC elections were still conducted under rules and in a manner that discriminated against women, both directly and indirectly, and failed to promote their involvement in all levels of football governance.

The discrimination against women begins with Article 32.1 of the AFC Statutes (2018), which provides that the AFC's Executive Committee shall be constituted as follows:

The Executive Committee shall consist of up to thirty (25) members elected from amongst the candidates nominated by the Member Associations and Regional Associations for the following positions:

a) President (who shall assume the position of FIFA Vice President ex officio);

Committee and who was from the AFC region; the Committee had decided to include someone from the region of the confederation in an effort to facilitate a dialogue), Judge Navi Pillay (a former UN Human Rights High Commissioner) and Mr Ron Popper (an expert on human rights). Both Judge Pillay and Mr Popper had been appointed to the FIFA Governance Committee after the AFC Congress in Goa.

- b) five (5) Vice Presidents;
- c) six (6) FIFA Council members, one (1) of whom shall also be a Female Executive Committee member;
- d) five (5) Female Executive Committee members, one (1) of whom shall also be a FIFA Council member; and
- e) nine (9) Executive Committee members.

This provision clearly limits female representation in the FIFA Council to one woman from the AFC. The provision does not use the expression ‘at least’ or indicate in any other way that it is referring to a minimum representation. This discrimination is compounded by the fact that there is a specific nomination form for the female seat. This is contrary to the Guidelines, and clearly discriminatory.

As stated in the Guidelines, this is likely to have the effect in practice of discouraging women from running for the other ‘non-female’ seats on the FIFA Council (or indeed any of the other positions at the elections which are not expressly designated as female seats). Thus, it does not comply with the obligation on the AFC and all member confederations of FIFA to ensure the full participation of women in all levels of football governance.

The AFC has similarly labelled five of its fourteen Executive Committee seats as female seats and this practice is discriminatory for the same reasons given above in relation to the FIFA Council seats.³⁰ The cumulative effect of the AFC’s Statutes and nomination forms is that women have been discouraged from applying for any positions other than the reserved “female seats”. This is clear from the nominations for the AFC’s 2016, 2017 and 2019 elections. In none of these elections did a female candidate stand for any seat other than a reserved female seat. This is simply not rational. Why would any candidate limit her or his chances of being elected by being in a single ballot when she or he could be in four? This outcome is irrational unless women felt pressured into not running for the ‘male’ seats or, in the more benign of cases, simply did not know they could.

Further, the AFC Statutes require that the female FIFA Council member also be an AFC Female Executive Committee member. This is discriminatory as it imposes an

³⁰ The term here in the sense of the five ‘Female Executive Committee’ members and the nine ‘Executive Committee members’ provided for in Article 32.1(d) and (e). Technically, the AFC President, AFC Vice-Presidents and FIFA Council members are also members of the Executive Committee as Article 32 of the AFC Statutes uses the term in both senses.

additional requirement which is not required of the male candidates. That is, male FIFA Council members do not need to be first elected to the AFC Executive Committee. Indeed, none of the male candidates elected at the AFC Congress to the FIFA Council were also elected as AFC Executive Committee members (in the sense of the term used in Article 32.1(e) of the AFC Statutes). This requirement thus discriminates against women and fails to promote the involvement of women in all levels of football governance. These discriminatory regulations are compounded by the procedure used for voting at the Elections.³¹ This procedure formally distinguishes between men and women and failed to promote the inclusion of women in all levels of football governance.

The procedure in relation to the FIFA Council and AFC Executive Committee seats³² was as follows:

- (a) Voting was held for five of the six seats on the FIFA Council. These were contested by seven candidates, all male.
- (b) Voting was then held for four of the five AFC Female Executive Committee members, conducted for each AFC zone in turn. (The election for the Female Executive Committee member from the Central Zone was to be contested at a later date as no candidates were put forward.)
- (c) An election was then conducted among the just-elected AFC Female Executive Committee members to determine the FIFA Council member.
- (d) Finally, elections were held for the remaining seats on the AFC Executive Committee, conducted for each regional zone in turn. All the candidates were male, of whom ten were elected.³³

As the Guidelines make clear, and with several examples, it is fairly simple to organize the ballot so as to guarantee that at least one woman is elected. For example, the voting procedure at the AFC Elections could have been conducted as follows:

³¹ See for more on the AFC electoral rules <<http://www.the-afc.com/news/afcsection/29th-afc-congress-kuala-lumpur-2019-all-you-need-to-know>> and <<https://www.youtube.com/watch?v=HxV5TGF3GGw>> (accessed July 2021) .

³² In the sense of the term used in Articles 32.1(d) and (e) of the AFC Statutes.

³³ This is one more than the nine seats provided for in the AFC Statutes (Article 32.1(e)). It appears, however, that it was necessary to elect ten Executive Committee members in order to meet the zonal quota set out in Article 32.7. The discrepancy appears to have arisen because the same individual – Mr Saoud A Aziz M A Al-Mohannadi of Qatar – was elected as both a FIFA Council Member and an AFC Vice-President, thereby reducing the representation of the AFC West Zone by one for the purposes of the zonal quota (which had to be made up by the election of an additional member of the Executive Committee).

(a) Voting should have been held for five of the six seats on the FIFA Council, with all male and female candidates encouraged to contest these seats. If no women were elected to the FIFA Council in this way, an election for the sixth seat should have been held among the female candidates only. If one or more women were elected to the FIFA Council in the first round, the election for the sixth seat could have been open to all remaining male and female candidates. In this way, it is guaranteed that there would be a minimum of one woman elected to the FIFA Council with the possibility that more than one could be elected.

(b) The elections to the AFC Executive Committee are slightly more complex as the AFC, for legitimate reasons, reserves a certain number of seats for regional associations (i.e. West, South, Central and East Asia, as well as ASEAN). With that said, it is still easy to devise a procedure which does not discriminate between male and female candidates while also promoting the participation of women.

(c) As a first step, the AFC should have determined what it considers to be the minimum number of female representatives on its Executive Committee. The AFC should have set aside that number of seats as 'open' seats to be voted on last. (This could be five seats, being the number of seats that the AFC currently specifies as female seats.) The remaining seats could then be divided up between its regional associations in a manner of the AFC's choosing, i.e. 'reserved' seats.

(d) Elections should then have been held for the seats reserved for each regional association, going by each association in turn. Each of these regional seats should have been contested by male and female candidates. For example, the seats reserved for AFC South would be contested by both male and female candidates.

(e) Finally, the AFC should then have noted how many female candidates were elected to its Executive Committee in the first round of voting before conducting the voting to the 'open' seats. If this fell short of the minimum number of female Executive Committee members set by the AFC, it should restrict the necessary number of open seats to female candidates only. For example, assuming that the minimum number of female members is set at five and that, say, three female candidates were elected to regional seats, two of the

open seats should be contested by female candidates only; the remaining open seats should then be contested by both male and female candidates.

(f) Such a procedure would ensure that a minimum of one female representative was elected to the FIFA Council and a minimum of five to the AFC Executive Committee without creating a limited number of “female seats” that, as we have seen, discriminates against women and ends up excluding them from all other seats.

In spite of the above, the AFC proceeded by organizing the elections in a different way. It communicated to its Member Associations that under Article 33.5 of the FIFA Statutes, they must ensure that at least one (1) female candidate is elected to the FIFA Council. Additionally, that according to Article 32(1)(d) of the AFC Statutes, one (1) of the five (5) AFC Female Executive Committee members shall be elected to the FIFA Council. These obligations were still implemented by having a reserved “female position”, but it added, in a move intended to protect itself from claims of discrimination, that this did not prevent female candidates from being nominated for other positions.

Is this an effective remedy to the AFC discriminatory election procedures? Not really. First, it is not clear from the communication sent to the Member Associations if women can run, at the same time, for both the female and non-female positions or if they are required to choose. This discourages women from applying for the non-female positions. Even if that is not the intention, the risk of confusion is clear. The AFC has done nothing to prevent such risk or to correct it.

Further, the AFC made no effort to communicate this possibility to the candidates themselves, nor to make sure that its Member Associations would do so. As a consequence, this may have had no effect in encouraging female candidates to apply for ‘non-female’ positions. On the contrary, female candidates upon receiving nomination forms for a female position are encouraged to put themselves forward only for the female position. The best confirmation of this is that, in the three elections that have already taken place for AFC members of the FIFA Council, not a single female candidate has stood for election to any position other than the designated female position. In any event, a few paragraphs in a single letter are not sufficient to overcome the cumulative discriminatory effect of the AFC Statutes, the Nomination Forms and the voting procedure at the elections.

In conclusion, the rules and practices of the AFC elections directly discriminate against women. Moreover, it cannot be ignored that the AFC had ample opportunities, following its exchanges with the FIFA Governance Committee and the receipt of the FIFA Guidelines, to easily amend its rules and procedures. The fact that it chose not to do so indicates a discriminatory intent against women.

But, even if one were to consider that there is no direct discrimination against women, there is, at least, indirect discrimination. There is indirect discrimination when the rules and practices, albeit not directly discriminating, have discriminatory effects. In other words, when, even if not formally distinguishing between men and women, the rules and practices in question lead to a more disadvantageous result for women than men. This is clearly the case with the AFC election procedures. They have, *de facto*, led to a result that limits women candidates to a single female position in the FIFA Council.

As already mentioned, no woman was a candidate to any of the many other, supposedly open, Council positions, in the three elections that have taken place under the current system. The discriminatory effects are therefore clear. In this context, it would be for AFC to put forward an objective justification to continue to adhere to an electoral system that clearly results in discriminatory effects against women. No such objective justification has been advanced. On the contrary, AFC insists in an electoral system that discriminates, directly or indirectly against women, when it could very easily have adopted a non-discriminatory system, such as one of those put forward in the Guidelines. This is clearly discriminatory and fails to promote women sufficiently in the governance of football.

5. All talk and no action? The lack of transparency or remedies in sports gender discrimination disputes

5.1 How many women are enough on the CAS bench?

In accordance with FIFA's Statutes "any dispute that may arise between or among member associations, confederations, clubs, officials and players" shall be resolved through institutional means.³⁴ Furthermore, and in case of an appeal like those filled by Ms. Mohamed, "all relevant stakeholders must agree to recognise the jurisdiction

³⁴ FIFA Statutes, Article 5 (2).

and authority of CAS and give priority to arbitration as a means of dispute resolution.”³⁵ CAS, coined by some as the “Cour Suprême du Sport Mondial”, is central to the dispute settlement of international sports.³⁶ With its relevance grew also the criticism for its lack of transparency,³⁷ independence and accessibility.³⁸ The awards handed down by the CAS Panel following Ms. Mohamed’s appeals showcase several of the weaknesses affecting this international arbitration regime, in particular, as it will be explained below the lack of transparency of its decisions and the inability to produce effective remedies to the disputes that come before it.

Before moving on to discuss the aspects above, it is important to stress the extent to which women are under-represented in CAS itself. In the case brought by Ms Mohamed that directly involved discrimination against women it was noticeable that there was no woman in the Panel. This is not intended to question the competence and independence of the three male arbitrators (all of which are recognized as leading sports law lawyers and scholars). It also did not prevent them from making a decision that, in many respects, is path-breaking in sports law. However, the under-representation of women in CAS Panels is a systemic problem that also weakens its legitimacy. The question of how many women judges are enough on the bench is not new.³⁹ Famously, Justice Ruth Bader Ginsburg answered this question, in relation to US Supreme Court’s bench, with a simple line: “when there are nine.” The truth is, reality shows us that the answers may be straightforward, but the path to achieve gender equality on the number of seats at international courts and arbitrations is not so easy.⁴⁰

The all-male CAS Panel that decided Ms. Mohamed’s appeals illustrates this concern. The case was about discrimination against women sitting at the AFC’s Executive

³⁵ FIFA Statutes, Article 15 (f)

³⁶ JOHAN LINDHOLM, *The Court of Arbitration for Sport and Its Jurisprudence – An Empirical Inquiry into Lex Sportiva*, ASSER International Sports Law Series, Springer, (2019), p. 3-7.

³⁷ ANTOINE DUVAL, “Time to Go Public? The Need for Transparency at the Court of Arbitration for Sport,” In: Duval A., Rigozzi A. (eds) *Yearbook of International Sports Arbitration 2017. Yearbook of International Sports Arbitration*. T.M.C. Asser Press, The Hague, p. 4.

³⁸ KRECH, “Towards Equal Rights in the Global Game? FIFA Strategy for Women’s Football as a Tightly Bounded Institutional Innovation’ (2020), p.17.

³⁹ ANDREAS FOLLESDAL, “How many women judges are enough on international courts?”, *J Soc Philos*, 2021, pp. 1-23.

⁴⁰ *ibid*; NICOLA PEART, JENNIFER IVERS, HANNELORE SKLAR, “Cross-Institutional Task Force Releases Groundbreaking Report on Gender Diversity in Arbitral Appointments and Proceedings,” *Kluwer Arbitration Blog*, 11/08/2021, (<http://arbitrationblog.kluwerarbitration.com/2020/08/11/cross-institutional-task-force-releases-groundbreaking-report-on-gender-diversity-in-arbitral-appointments-and-proceedings/?print=pdf>). (accessed July 2021).

Committee and there was no input of a woman about it in the awards. As stated, the absence of female arbitrators in CAS Panels is, unfortunately, not surprising. Not only the rules for appointment of arbitrators are not gender sensitive,⁴¹ but also practice shows that women representation in CAS is below the trend of other arbitration tribunals.⁴² Lindholm pointed out, in 2019, that of a total of 230 CAS arbitrators, 20 are women and, to make things worse, these women were appointed fewer times than CAS male arbitrators. Only 3.5 percent of all CAS arbitrator appointments were attributed to women arbitrators.⁴³ Although there are structural reasons that may justify the underrepresentation of women in international arbitration, such as the lack of formal gender sensitive appointment rules, in the case of CAS there is also a complete disregard of the importance of gender diversity leading to biased appointment procedures. Can the commitment to gender equality in sports be effectively guaranteed by a judicial body that internally does not see eye to it?

5.2 No transparency nor effective remedy for Mariyam Mohamed

In accordance with the CAS Code, proceedings under those rules are confidential and “awards shall not be made public unless all parties agree, or the Division President so decides.”⁴⁴ The confidentiality of CAS awards has been widely criticized for contributing to the lack of transparency in sports arbitration. This is so due to the impact of the awards on issues that touch upon public interest and the compulsory character of its jurisdiction as recognized by the European Court of Human Rights (ECHR) in the case *Mutu and Pechstein v. Switzerland*.⁴⁵

The *Mariyam Mohamed vs. Asian Football Confederation Elections* case, like many other, was not made public and the confidentiality of those awards raises several concerns, namely: the uncertainty of the criteria for the publication of CAS awards, the coherence of CAS jurisprudence and the guarantee of an effective remedy to the case due to the secrecy on the reasoning justifying the awards.

The CAS Code rules for publication of awards clearly favour confidentiality. The rules allow CAS to almost arbitrarily decide which awards should be published and those

⁴¹ Code of Sports-related Arbitration: S13 – S 19.

⁴² LINDHOLM, *The Court of Arbitration for Sport and Its Jurisprudence – An Empirical Inquiry into Lex Sportiva*, (2019), p. 267.

⁴³ *ibid.*

⁴⁴ Code of Sports-related Arbitration: R43.

⁴⁵ DUVAL, “Time to Go Public? The Need for Transparency at the Court of Arbitration for Sport,” (2017), p.5 and ECtHR, *Mutu and Pechstein v. Switzerland*, 40575/10 and 67474/10, 2 October 2018.

that should not, in case the parties are not against it without a proper justification (or a disclosed one).⁴⁶ A “sense of entitlement”, mentioned by Duval, emerges from CAS’s options of publication of awards.⁴⁷ In particular, the criteria, or their absence, to make those choices contributes to the uncertainty around this matter. Let us take *Mariyam Mohamed’s* case as an example. The media release published on the CAS website that announced the CAS Panel’s decision on the appeals does not address any of the reasons for CAS administration not to disclose the full text awards. That in itself is problematic as it feeds into the inconsistency of these criteria and leaves the decision not make the awards public unjustified to the public. This does not allow appropriate scrutiny by the legal community and the broader public. This is more troubling as CAS has become the almost exclusive jurisdiction for sports matters and as already stated, such jurisdiction is the, de facto, mandatory, and not voluntary, as recognized by the European Court of Human Rights.

Furthermore, the confidentiality of the awards also negatively impacts the coherence of CAS decisions. By keeping the awards confidential, the coherence and legal certainty of CAS jurisprudence in relation to gender discrimination and corruption matters, will be compromised. Transparency, in this sense, plays a key role for the consistency of future CAS Panels deciding on the same matters and for the preparation of the parties before the arbitration.

The lack of a systematic policy for publication awards may, additionally, represent a risk for the effectiveness of CAS’s decisions. The legal reasoning of an award is essential to ensure not only effective judicial protection to the parties, but also to assert the court or tribunal’s authority through the implementation of the decision. This can hardly be guaranteed when an award is confidential and its public legal reasoning is vague and fits a page of a media release, like in the *Mariyam Mohamed vs. Asian Football Confederation Elections* case.

Also, it is troublesome, to say the least, that the most thorough source of information on the legal reasoning of the *Mariyam Mohamed’s* award is leaked information in the media.⁴⁸ This is especially true when the verdict was, to put simply: yes, there was discrimination against women and corruption and no, we cannot do anything about

⁴⁶ Code of Sports-related Arbitration: R59.

⁴⁷ DUVAL, “Time to Go Public? The Need for Transparency at the Court of Arbitration for Sport,” (2017), p.20.

⁴⁸ THE NEW YORK TIMES, “A soccer official proved her discrimination case. No one was punished.”, 5/04/2021, (<https://www.nytimes.com/2021/04/05/sports/soccer/fifa-afc-mariyam-mohamed.html>). (accessed July 2021).

it. In both awards, the CAS Panel did not shy away from uncovering that the AFC elections did not respect FIFA and AFC Statutes, especially, the Guidelines. Moreover, in both awards the CAS Panel affirmed its inability to act in what concerned the annulment of the flawed AFC elections. That power is to be kept by FIFA and the AFC, both organizations that, as the entire case appears to demonstrate, have done their utmost not to address these problems. Why the CAS Panel has decided this way is not possible for us to know in light of the confidentiality of the award's reasoning.

This aspect sheds light into a structurally more profound consequence to sports justice of CAS and other sports governance bodies *modus operandi*: CAS's apparent lack of power to provide effective remedies contributes to perpetuate and validate FIFA's (and the AFC) lack of action to put right situations publicly tainted by discrimination and corruption. The absence of remedies emerging from the CAS awards questions whether Ms. Mohamed's did in fact receive effective judicial protection but ultimately, strongly compromises the authority of CAS.

The global governance of sports is greatly affected by this result. FIFA's recent strategic commitment to champion gender equality and human rights in football is undermined by the *Mariyam Mohamed vs. Asian Football Confederation Elections* case. When the AFC is found guilty by CAS of gender discrimination and corruption and no consequences are taken, how can FIFA be expected to still fulfil its promises of achieving gender equality in football? It is hard to believe that commitment when FIFA does not act (and, on the contrary, has tried to shield from action) to correct a blatant case of discrimination against women. If the *Mariyam Mohamed vs. Asian Football Confederation Elections* case leads nowhere in terms of remedies, the complacency of FIFA with gender discrimination and third-party intervention is once again exposed. And that is enough to say that, for the time being, FIFA's objective to promote human rights and gender equality enshrined in its own statutes is all talk and no action.