

INTERVENTION

Ken Foster and the Development of UK Sports Law: A Reflective Interview

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This interview is a discussion with Ken Foster, eminent and groundbreaking sports law scholar, currently Associate Fellow at the Centre for Law and Popular Culture at the University of Westminster. Foster is asked to reflect on the development of sports law scholarship from the 1980s and his own specific experiences as the first academic to teach sport and law in the UK during the 1980s. In his reflections on the development of the field, notable in its early days for 'lack of materials', Foster highlights the importance of theory, of sporting culture and custom and the still under-researched area of 'private adjudication systems in sport'. It concludes that 'sport specific or national tribunals' still offers a wealth of opportunities to explore materials still 'waiting to be researched'. This interview forms part of ESLJ's special collection, 'Ken Foster and the Development of Sports Law' which includes a new (2019) article by Ken Foster, 'Global Sports Law Revisited' <https://doi.org/10.16997/eslj.228>.

The following questions were sent to Ken Foster in April 2018 and a dialogue took place over the following months clarifying some of the points made. The questions were designed by the *ESLJ* team.

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***ESLJ:* You were perhaps the first academic in the UK to teach sport and law in the 1980s. Can you tell us a bit about how this came about? What difficulties or challenges did you face?**

KF: I first taught a course at Warwick University in the 1987-8 session as a half module. I had been developing an interest for about a decade. In 1978 a visiting scholar at Warwick, Neville Turner from New Zealand, organised a conference at Birmingham University on sport and the law. I was teaching labour law at the time and contributed a piece on the professional footballer's contract. The degree of restricted freedom in the employment of players was its theme. Later in 1985 my colleague and sporting friend, Lincoln Allison of the Politics department, organised a session at the annual PSA (Political Studies Association) conference in Manchester on the politics of sport. I gave a paper on the autonomy of sport within law. The papers were published in a book the following year. By now I was actively considering how to construct a module on sport and the law. Fortunately a year's sabbatical followed which gave me time to research and organise.

I think the biggest problem initially was simply the lack of materials. There was very little case law, little periodical literature and no textbook on English law related to the area. However there was an excellent Australian text by G. Maurice Kelly (Kelly 1987), recently published in 1987, and this provided the original template for the module's structure. US sports law was also well developed by this time and although the emphasis was different, for example anti-trust law was very prominent, it helped to clarify the theoretical issues. A minor problem was getting approval from the university for a module that seemed too personal and frivolous. I remember being questioned about the overlap between my known sporting interests and the new module. My reply was to the effect that on that logic a module on beer and the law was long overdue.

***ESLJ:* Has the area developed and evolved as you thought? Which development has most surprised legally and by its impact on sport? Do you think the area is in rude health? What about the legal academy generally?**

KF: I'm not sure that I had any real idea how the subject would develop other than that the increasing commodification, not commercialization alone, would lead to increased legal involvement in the sporting field.

The most surprising development was the increased involvement of the European Commission post-Bosman. This led to the framework of competition law being applied for a period and the development of a major European angle to sports law.

The area as an academic subject has disappointed. There are few universities offering it as an option and its appeal seems less than when I began teaching. There may be two chief reasons. One is that the conceptualisation of the subject

has failed to feed into mainstream theories of law. This has happened despite the many intersections that are available. Too much of the literature in the field, particularly by practitioners, focuses on limited immediate issues outside any wider context. Second, the increased privatisation of dispute settlement has hidden the subject from public and student view.

The area has matured but still lacks proper theoretical underpinning. Maybe the pressure of publication does not allow the time for reflection and slow maturing of ideas that my generation of scholars enjoyed. The 'legal academy' generally seems riven with unneeded pressures of accountability and bean-counting processes of research activity. The founding father of Warwick Law School, Geoffrey Wilson, often said that no proper scholar in the social sciences should publish before the age of 55 as they were not ready before then to contribute anything worthwhile!

ESLJ: You have written a number of key works that have been widely cited and used, some of which are reviewed in [Simon Boyes' 'intervention' \(2018\)](#). In terms of passing the baton on to new generations of scholars, do you have any suggestions as to how these might be further explored or tested? What is the biggest challenge currently facing sports law/sport and the law?

KF: I feel that the theory of juridification has been underused. It has described how an arena of semi-autonomous control has been permitted by the judiciary and in the legislation. This has caused a feedback loop, or recursivity, that allows sporting federations to reincorporate legal issues into their private realm. This has seen the emergence of a hybrid private-public realm of regulation.

The biggest challenge is, thus, the question as to whether the internal processes of sporting bodies are robust enough to satisfy the criteria of good governance and fairness in line with well understood principles of administrative law.

ESLJ: In terms of the interrelationship between sport and law, you have written previously about differing forms of sports regulation. What is your current view on governing bodies' attempts at self-regulation? Has a coherent global sports law developed? With Brexit looming, whither EU sports law?

KF: Global sports law has developed in many directions, but I'm not sure that I would term it coherent. As it happens these days I think transnational is a better description. There is an argument that the decline in judicial intervention in the UK has been permitted as case law has provided guidelines to sporting federations. So the internal procedures, especially but not solely disciplinary, are juridified and arbitration grows and legitimizes itself. The international sporting federations have recognized and embraced this trend. They therefore have asserted the autonomy of both their constitutive rules and their private arbitration systems of adjudication; call it *lex sportiva* if you wish. The rules emerging from this narrative are by definition transnational because of the global governance of sport that the federations have a near monopoly over. The so-far successful claim of near-exclusive jurisdiction over sporting disputes in the transnational arena has been insufficiently recognized and discussed in the academic literature.¹

On Brexit, removing the European dimension of sport must have an impact but there is little evidence of any government thinking on it. It may, for example, allow the FA to have quotas of home-grown players.

ESLJ: Sadly, Steve Redhead recently passed away (see [here](#) for a tribute), you had a long association with him – can you tell us a bit more about that? Do you have any thoughts on the impact and reach of his work?

KF: I first met Steve when I taught him as an undergraduate at Manchester University in 1971. After he graduated and was doing postgraduate work, I employed him as a research assistant on my Nuffield funded research on arbitration for small claims. When I moved to Warwick University in 1973 he followed and I became his supervisor on his PhD. dealing with the regulation of football. He quickly in his career widened this to popular culture.

Steve had many different impacts on people but I would highlight three. One, he treated popular culture and its working class dimensions seriously. Two, he integrated his own life interests, football and music particularly, into his academic work. Steve lived inside his work, and it showed. Three, he was genuinely multi-disciplinary. He was an example to us all in the field of sport and popular culture but none of us will ever quite reach the heights that Steve did.

ESLJ: Where do you see sport and law going as a discipline (if indeed it is a discipline)? Are there any key areas or issues, or perhaps approaches that have hitherto been overlooked and would benefit from further analysis?

KF: I think that a discipline should have a distinctive way of conceptualising law and its relation to society. My theoretical approach has always been about how 'law' as a set of rules can be created from the bottom up in an informal almost anarchic way. The intervention of formal law into fields that had some autonomy of rulemaking, enforcement and adjudication is a fascinating subject. In my academic career labour law, family law and medical law have all seen a move from self-regulation or degrees of immunity to greater legal intervention. Sports law is part of that trend.

As well as the theoretical dimension, there are also some other specific concepts that are very marked in sports law. Distinct and different principles of regulation may emerge from the global origin of 'legislative' rules in international sporting federations. The *lex sportiva* of transnational sports law can develop unique norms: for example the concept of team punishments for individual offences; the notion of sporting integrity as a guiding principle of adjudication and the acceptance of unequal opportunity in sports.

One issue that has been relatively ignored is the notion of fair play in sport. Many sports rulebooks were supplemented or modified by ideas of fair play developed from the mythical cricketer on Clapham Common. Increasingly these standards of etiquette and custom have been formalised into the rulebook, often via the discretionary notion of 'ungentlemanly conduct' or 'conduct contrary to the spirit of the sport'. But inevitably this formalisation leads to the exploitation of loopholes and lacunae and then further elaborate formal rules. There is a wealth of interesting theory in this process. Written versus unwritten rules, custom and practice overriding formal rules are just two of many angles. David Fraser's excellent work on this, *Cricket and the Law: The Man in White is Always Right* (2005), has been mainly ignored. There is a link here to the concept of 'sporting culture'. Why does 'sporting culture' mean that some rules of the game are obeyed and some waived or ignored by unwritten custom?

ESLJ: You have been involved in many PhD projects, as supervisor (including Steve Redhead's), examiner and rapporteur. If you could suggest a new topic to an aspiring graduate student what would it be?

KF: One area that is under-researched is the jurisprudence of the private adjudication systems in sport. There has been some work on the CAS (Court of Arbitration for Sport) and FIFA's dispute processes but very little on other sport specific or national tribunals. There is a wealth of material here waiting to be researched.

Notes

¹ See also, Foster 2019.

Competing Interests

The authors have no competing interests to declare.

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