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Global Sports Law Revisited

Ken Foster

University of Westminster, GB
goathlandken@gmail.com

This summary article considers the nature of global sports law. It examines in particular the extent of sport's autonomous self-governance, its claims to legal immunity from supervision by national courts and legislatures, and how such autonomy can be justified. It views these developments through a critical lens, drawing on many years of working in the area of sports law. This survey concludes by suggesting a number of possible reforms.

Keywords: sports law; transnational law; legislation; immunity; juridification, *lex sportiva*

Introduction

Global sports law has developed an ideology that it is an autonomous transnational legal order. This supposed autonomy has allowed international sporting bodies to claim an effective immunity from review by national courts and enabled them to maintain a degree of self-governance and non-accountability that is arguably unrivalled among international organisations.

Historically, international sporting federations claimed immunity on a variety of legal principles, but within the Anglo-American tradition principally so on the basis that they were private organisations and, as such, beyond the law's purview. As athletes became more professionalised and sport became more commercialised, this notion of sport as an activity governed by a private club unaccountable to anyone for their far-reaching decisions became more and more untenable. Thus during the 1990s there were a series of challenges before national courts by athletes who had been banned from competition by their international federation for drug offences. These were broadly based on the argument that their livelihood was threatened or even destroyed by arbitrary, and often secret, decision making by international sporting federations and their agencies.

This threat of entanglement with national legal systems led international sporting federations to react with various reforms. One was the expansion of the CAS (Court of Arbitration for Sport), which had previously been little used, into a fully global arbitration institution covering most sports. This was achieved by the IOC (International Olympic Committee) insisting on compulsory submission by individual sports federations to its arbitration system as a condition of inclusion in the Olympics, and by agreements with athletes to submit to CAS's jurisdiction as a precondition of participation.

Another important process was that of juridification. At both international and national level, rules books and constitutions were rewritten as legal type documents, often by lawyers directly; disciplinary tribunals were reconstituted to mimic legal bodies and often chaired by lawyers; and more attention was paid to legal standards of due process, proportionality in penalties, and good governance.

These changes were most visible at the global level with the IOC as a regulatory overlord and CAS as a global judicial tribunal. There was an accompanying ideological process in which the changing regulatory environment and juridification of the internal structures of international sporting federations led many commentators to perceive the emergence of a global system that had many, if not most, elements of a legal order.

The resulting combination of regulation and arbitration that has emerged has been variously described. My preference is to call it a global sports law, which is a variety of transnational law. Whatever it is called, the sociological context is that international sporting federations have regained the autonomy and freedom to govern themselves that they were in danger of losing to legal intervention by national legal systems. There may be self-imposed limits to this autonomy, especially as the process of juridification has bitten deeply and outlawed arbitrary and capricious decision making, but, overall, global sports law is a prime example of a regulatory private order of governance that parades as a transnational legal order.

Nevertheless, all is not well with this global legal order, for it has patently failed to prevent serious abuses and corruption within the governance of some international sporting federations. It is time that the autonomy of international sporting federations and the transnational legal order that it appears to have been created is re-examined.

In this article the nature of global sports law; the extent of its autonomous self-governance; its claims to legal immunity and supervision by national courts and legislatures; how such autonomy can be justified; whether it can be legitimated and permitted to continue; will be analysed. Finally it will suggest some reforms.

Definitions

Definitions of global sports law have been provided by a number of authors. Some have viewed it as a form of transnational law (Duval, 2013; Cotterrell, 2012). Other authors have seen it as an example of legal pluralism (Gómez, 2015). *Lex sportiva* is an alternative concept that has been widely discussed (see for example Foster, 2005a and Valero, 2014) and defining *lex sportiva* itself has proven problematic (Rigozzi and Hasler, 2013). There seems to be wide agreement that it has several integral elements. Broadly speaking it is possible to organise most contributions in the following ways:

- One approach is to define it as simply the rules and regulations of sporting federations with legitimate authority over the relevant field of sport; or at least the general principles that seem to emerge from such regulations. This definition leaves it as an apparently internal order of regulation **within** sport.
- Alternatively, some authors see its essence as emerging from CAS awards, particularly the set of unique sport-specific legal principles alleged to be applied by CAS arbitrators. Again, this approach emphasises the autonomy of global sport's own institutions and thus indirectly signals an internal order immune to external regulation.
- A third way is to further widen the concept and to argue that *lex sportiva* is the normative order of international sports regulation fusing the regulations of sports federations with the jurisprudence of CAS but adding more general principles of law, including global administrative law.

All variations of the concept of *lex sportiva* narrow the theoretical scope of inquiry and criticism. They do so in a manner that forecloses the debate by implicitly legitimising the self-created regulatory regime of international sport and its interpretative organs. It is imperative to have a wider interpretation of global sports law so that it encompasses wider constitutional, legislative and administrative elements.

So global sports law will be analysed here as an autonomous transnational legal order established by international sporting federations and those subject to their sporting jurisdiction[s] and which emerges from the statutes and regulations of federations as interpreted by institutions of alternative dispute resolution created by those federations. It is a private regulatory order, which is legitimised by contract and consent, operating transnationally to transcend national variation. The key element of this definition is the notion of autonomy. The ideology embodied within the concept of global sports law is that it is a law without a state and so outside the governance of national laws, that it is immune from state regulation and a legal order in its own right, and that it is legitimated by its subjects. This claim of immunity and autonomy makes global sports law of interest to a wide range of legal theorists but it also exemplifies a political struggle in international sports law governance between self-regulation and public accountability.

Global Sports Law as an Autonomous Legal Regime

The central ideology of global sports law is that it is an autonomous transnational legal order and thus outside the control of nation states and their legal orders. It is this ability to argue that national courts and legislatures have no jurisdiction over it which gives it claim to be 'a law without a state.' (Teubner, 1997). Each of the following elements is central to this ideology:

1. It is a product of the regulatory regimes of sporting bodies. Regulatory authority over players, officials and administrators is created by a hierarchical pyramid where international sporting federations legislate for a regulatory framework that is typically created by a chain of interlinked rules, which bind national associations, and are then enforced by imposing conditions upon players and others under the jurisdiction of the association. So there is created a voluntary, at least in form, regulatory regime consisting of a set of mutual rules accepted by all those within the governed sphere.
2. It follows that this is a private contractual order and thus has a legitimacy that derives from the agreements to be subject to the power and control of the sporting federations who are the creators of this regulatory regime. This is strongly reinforced by the rules of federations, typical and almost universal, which insist that those subject to their authority submit any disagreements to the private dispute institutions created within the system.
3. It is transnational. The globalisation of sport in the past three decades or so has made international federations much more powerful. Thus, the importance of global sporting bodies such as the IOC and FIFA has increased as the Olympic Games and the football World Cup have been transformed into global mega-events.
4. It is a legal order. This is arguably the boldest of the claims made for global sports law and one that ultimately underpins its claim of autonomy and virtual immunity from legal intervention or scrutiny by other legal orders such as national courts.

This final idea that global sports law is 'law' also implies that it has binding force as a global private regulatory regime. It is a regulatory system that commands obedience as a prerequisite for participation in organised sport. As such it is directly applicable to all who participate in sport at whatever level from the Olympic Games to Sunday morning parks football. Katia Fach Gómez has argued that, 'the rules created by the IOC (Olympic Charter) and IFs (their respective statutes or constitutions) are considered by commentators to be a genuine form of global law, as they are privately created, globally applied and able to produce direct effects on individuals (Gómez, 2015). As a legal order global sports law has all the attributes of a legal system with legislative, judicial, administrative and sanctioning elements. These will be dissected in turn.

The **legislative** element derives from international sporting federations creating and formulating rules and regulations meant to be universally observed throughout the particular sport. The need for uniformity throughout international sport is cited as the reason for harmonisation of rules amongst national associations so that the same rules are universally followed and enforced. The most prominent example of legislative imposition has been the WADA (World Anti-Doping Agency) Code. In its preamble the 2015 version of the WADA Code states:

These sport-specific rules and procedures, aimed at enforcing anti-doping rules in a global and harmonized way, are distinct in nature from criminal and civil proceedings. They are not intended to be subject to or limited by any national requirements and legal standards applicable to such proceedings, although they are intended to be applied in a manner which respects the principles of proportionality and human rights. When reviewing the facts and the law of a given case, all courts, arbitral hearing panels and other adjudicating bodies should be aware of and respect the distinct nature of the anti-doping rules in the Code and the fact that those rules represent the consensus of a broad spectrum of stakeholders around the world with an interest in fair sport. (WADA, 2018 [2015]: 16).

The involvement of public authorities and national governments in the creation of WADA and the formulation of the Code through these stakeholders has led commentators to describe WADA as a hybrid institution combining elements of both private and public legal regimes (Casini, 2009). What is important however for an argument about the autonomy of a global regulatory regime is that even though public bodies have a role in the formulation of the rules, thereafter the Code is, in general, given regulatory force through its adoption by the sporting federations alone. In some jurisdictions, for example France, the Code is incorporated into national law as part of its anti-doping framework (Code du Sport (2019) Article L232-9). The legitimacy and autonomy of the global regime still stems from the legislative actions of private bodies. However, it cannot be denied that the participation of national governments in the creation of the Code itself gives strong extra support to the claim of immunity from legal intervention by national courts. The very act of participation in drafting the Code by national governments can appear to be an implied grant of privilege and immunity.

The **judicial** element has been supplied by the use of arbitration that almost without exception in international sport forces athletes to use arbitration tribunals set up by the federations themselves. Many international federations have created their own tribunals. FIFA (Fédération Internationale de Football Association) has its own FIFA Disciplinary Code, which has jurisdiction within football. Article 2 of the Code declares, 'This code applies to every match and competition organised by FIFA ... It also applies to any breach of FIFA regulations that does not fall under the jurisdiction of any other body' (FIFA, 2011). It also has a judicial framework with a Disciplinary Committee, an Appeal Committee and allows a final appeal to CAS (FIFA, 2011, Art 73). FIFA also has a Dispute Resolution Chamber with jurisdiction over players and clubs for the purpose of resolving disputes regarding the international status and transfer of players (Blackshaw, 2013; de Weger, 2008).

Most of these arbitration procedures allow for an appeal to CAS. Its role in formulating principles of regulation, often described as *lex sportiva*, has been a powerful factor in the supposed recognition of a global sports law (Foster, 2005a; Foster, 2012a; Casini, 2011; Duval, 2013). However, commentators need increasingly to be aware of the jurisprudence developing in other sports arbitration tribunals. If *lex sportiva* is a developed set of consistent principles then consistency needs to be observed throughout all arbitration decisions including those that operate nationally or solely within a specific sport.

The **administrative** element has been largely ignored by commentators but the development of global administrative law has highlighted issues of procedural fairness in decision making, the accountability of organisations and their officials and the principles of good governance (Harlow, 2006). The exploration of global administrative law as a restraining factor on the self-governing autonomy of the sports field has also led commentators to consider global sports law as an example of global, and societal, constitutionalism (Duval, 2018). Klaus Dieter Wolf (2014) has explored whether a transnational private regulatory regime, such as global sports law, takes on constitutional functions. Because such a regime appears to be outside the control of national governments, the regulatory regime needs to legitimise its own self-constitutionalism. He argues that global sports law has achieved this mainly through WADA's role in the regulation of doping which has involved 'complex interactions between multiple public and private sites of constitutional authority.' He concludes that as the international political order is dispersed and fragmented so states are incapable or unwilling to regulate or control even as a backstop. Therefore, legitimation must be internally produced by those directly involved in private self-regulation but with the form of constituting and exercising public type authority and rules of law in order to achieve external legitimacy.

Sanctioning and enforcement focuses on the penalties imposed on those who break the rules. Leaving aside financial penalties, the typical penalty under a global sports legal regime is disqualification or suspension from the sport.

But there are other issues around sporting penalties, such as seasonality and team sanctions, that are relatively special to sport and as such are amenable to private discipline and sanctions. Such sporting penalties can have serious economic consequences for athletes and because international sporting federations are overwhelmingly the single monopoly regulator within the sport then issues of abuse of power, deprivation of livelihood and arbitrary unfairness are raised.

Each of these elements of global sports law listed above show the tension between the desire of sporting bodies to be free of legal intervention, totally autonomous and prepared to argue for a transnational legal regime independent of intergovernmental regulation, and on the other hand their need for forms of legitimacy which might justify some backstop oversight by national or international legal orders. In other words a tension exists between uncontrolled autonomy and relative or supervised autonomy (Geeraert et al. 2014). This tension forms the backbone of this article that explores the nature of global sports law as a private transnational contractual order and the limitations on its configuration as an entirely independent self-regulating and self-governing legal order. Global sports law is viewed as a transnational order that tries, and in some circumstances actually manages, to circumvent the hierarchy of state law (Meier and Garcia, 2015; James and Osborn, 2016). It frequently ignores state law, or claims immunity from its legal order or at the very least proposes an equal coexistence with domestic state law. And as seen in the introduction to the WADA Code it may even claim to be superior and directive; 'all courts ... should be aware of and respect the distinct nature of the anti-doping rules' (WADA, 2018 [2015]: Part One, Introduction).

The Various Claims of Autonomy

Sports bodies have always claimed autonomy over their own internal affairs. For a long time courts accepted the ideology that they were private associations in which members voluntarily accepted that they were subject to the rules of the organisation. The erosion of this ideology and the battle with national courts and transnational institutions, such as the European Union, over the regulation of international sport is a well-documented phenomenon and is dealt with in outline elsewhere in this article. Here I examine other manifestations of the ideology of sporting autonomy.

Self-governance

'Sport and politics don't mix' is a cliché of sports governance and has been repeated endlessly by sporting federations. This represents an ideology of non-political and non-governmental governance, with the associated view that such governance is neutral and objective.

FIFA for example has embodied the idea of non-interference by national governments into its statutes and its practice. Article 13.1.g of FIFA's constitution states that national federations must 'manage their affairs independently and ensure that their own affairs are not influenced by any third parties'. Meier and Garcia in their study of FIFA's relations with national governments, which covered suspensions of national federations from 2003 to 2013, concluded that, 'The presented evidence indicates that FIFA is able to confront national governments and defend its autonomy to govern and regulate football. The factor most indicative of FIFA's influence is the fact that case resolutions are invariably in line with FIFA's preferred solution' (Meier & Garcia, 2015).

One of the motives behind the establishment of WADA as a transnational organisation was to transcend the differing and arbitrary national regimes. This aim in itself created an assumption that the anti-doping regime thus established was intended to become a self-governing transnational regime beyond the reach of national courts.

A further indication of the supranational nature of international sporting federations is their claim to a special status in international law (Beutler 2008; Peacock 2010). The IOC has observer status at the United Nations. This reinforces its role of legitimate legislator for international sport. Bousfield and Montison have argued that:

The status of observer at the UN General Assembly creates expectations and normative pressure on the IOC ... [And] ... it represents an important move on the part of the IOC to keep its place as the norm entrepreneur for sport on the international stage. This willingness to 'stay at the centre' of sport standards is a characteristic attitude of the IOC choices since the nineteenth century' (Bousfield & Montison, 2012).

The IOC's status as a norm entrepreneur is further reinforced by UN resolution 69/11 of 16 October 2014, where the autonomy of sport and the specific mission of the IOC were recognised by the United Nations (United Nations General Assembly, 2014).

Legislative Immunity

This claim by sporting federations describes the process whereby they seek protection, privileges and immunities from states through the enactment of national legislation in their favour. A classic example is the IOC's approach in granting the Olympic Games to a host city. For example, the London Olympic Games and Paralympic Games Act 2006 legislatively implemented the contract between the IOC and the London Organising committee and granted numerous privileges to the IOC. This can be seen in the context of the London Olympics (James and Osborn, 2011; Gauthier, 2014) and the Sochi Winter Games (Postlethwaite, 2014) where various tax exemptions were provided, intellectual property was legally protected and laws were passed to prohibit ticket touting and ambush marketing. The effect is to create a legal zone around the Olympics that is almost an enclave governed by its own legal framework, and this is replicated at other sporting events and tournaments such as the FIFA World Cup (James and Osborn, 2016).

Contractual Authority

This form of legitimacy derives from the agreement to arbitrate, which is imposed by the governing bodies upon athletes. For example, FIFA Article 68 imposes compulsory arbitration on players and expressly excludes legal proceedings in the courts. It states that:

68(2) Recourse to ordinary courts of law is prohibited unless specifically provided for in the FIFA Regulations. Recourse to ordinary courts of law for all types of provisional measures is also prohibited
 68(3) ... Instead of ordinary courts of law, provision shall be made for arbitration. Such disputes shall be taken to an independent and duly constituted tribunal recognised under the rule of the Association or Confederation to CAS (Court of Arbitration of Sport). (FIFA, 2015: 49).

FIFA also requires national football federations to implement a similar rule in their own rulebook and to have sanctions for breach of these rules. The IOC has similar rules. Article 61 of the Olympic Charter states that:

The decisions of the IOC are final. Any dispute relating to their application or interpretation may be resolved solely by the IOC Executive Board and, in certain cases, by arbitration before the Court of Arbitration for Sport (CAS). Any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport, in accordance with the Code of Sports-Related Arbitration. (IOC, 2015).

The only legal appeal route allowed by these rulebooks is the Swiss Federal Tribunal. But the SFT's attitude has been that only exceptional circumstances will permit the invalidation of an arbitration award by CAS. CAS awards are enforceable globally by virtue of the New York Convention. This allows an exception under Article 5.2 if the award is 'against public policy'. But in the case of *Gatlin v. U.S. Anti-Doping Agency, Inc.* (Case No. 3:08-cv-241/LAC/EMT. (N.D. Fla. Jun. 24, 2008)), the US courts refused to intervene even though they dubbed the award 'capricious and arbitrary'. In summary this framework of contractual and compulsory arbitration has provided powerful support and a considerable degree of sporting autonomy for CAS awards and the whole system of *lex sportiva* (Casini, 2011).

However, this autonomy was questioned in Germany by the Oberlandesgericht Munich (Higher Regional Court) in the decision in *Pechstein*. The court viewed the issue as one of competition law and treated the sporting federation as a monopoly forcing the athlete to accept the arbitration clause as an inevitable necessity. The court refused to accept the CAS award under the New York Convention because the process of appointing the arbitrators was not independent of the sporting authorities. There were also structural and procedural defects in the composition of CAS forcing an athlete to accept the jurisdiction of CAS which the court ruled constituted an abuse of market power. Nevertheless the court could see that even such a clause could be justified in sporting terms; in particular the need for harmonisation across national boundaries and the need for speedy resolution by experts familiar with the field. However, in June 2016 the German Federal Court rejected the reasoning in this decision and decided that the arbitration agreement was binding; domestic courts had no jurisdiction and her claim was inadmissible. CAS said in a statement that the decision was 'a very significant precedent and emphasizes more than ever the need to have the Court of Arbitration for Sport as the world's highest sports tribunal ... It is confirmation that the CAS arbitration clauses inserted in the regulations of sports organizations are valid ... that CAS is a genuine arbitration tribunal in the sense of German law, and that such sports jurisdiction is necessary for the uniformity in sport' (CAS, 2016).

In late 2018, the European Court of Human Rights (2018) provided further, though not unequivocal, support for the position of CAS (*Mutu and Pechstein v. Switzerland* (40575/10 and 67474/10, ECHR: 2018). The Court held that there was no breach of Art.6(1) of the European Convention on Human Rights as CAS arbitration proceedings were required to offer all the safeguards of a fair hearing. Even though Pechstein's acceptance of CAS's jurisdiction had not been freely given, the system of using a list of arbitrators had met the requirements of independence and impartiality applicable to arbitration courts. In contrast to existing practice, however, the Court held that the principles concerning the public nature of hearings in civil cases were valid for the ordinary courts and professional disciplinary bodies alike. The question of the merits of the sanction imposed on her for doping, debated in the context of those proceedings, had required a hearing that was held in public.

This series of judicial statements resoundingly confirms the authority of involuntary submissions to the autonomy of global sports law that sacrifices athletes' rights to the overriding system of transnational harmonisation of a sporting code. UNI World Athletes, the world players' association across professional sport, heavily criticised the decision saying that, 'The court's decision exacerbates the crisis of confidence with sport's justice system that prevails among player associations, and certainly does not bring this to an end. Reforms must urgently be negotiated with player representatives ... UNI World Athletes is committed to achieving a global arbitration system that upholds the human rights of the players, and an anti-doping system that is effective and proportionate. Sport presently has neither.' (UNI, 2016).

One of the key elements in Teubner's argument that an autonomous legal order can emerge from a transnational network of social practice and be binding is that there is an externalisation of authority, often through contractually agreed arbitration (Teubner, 2002). This externalisation allows the transnational order to develop its own

constitutionalism, which gives it a juridified autonomy. This process can be traced in the development of CAS's universal jurisdiction, the creeping codification of its principles, the publication of its awards which enables precedent and the greater use of a binary code of right/wrong and less of equity and fairness (Casini, 2011; Erbsen, 2012). The externalisation of authority is reinforced by decisions such as *Pechstein*.

Displacement of Review by National Courts

The most fruitful route for confirmation of sporting autonomy outside the limited scope of CAS awards and *lex sportiva* has been favourable interpretation by national judges. Sporting federations have argued, often successfully, before national courts that sport is special and that normal rules of law should be interpreted flexibly in their favour or even in some cases ignored completely. This process has a complex history that embodies two contrasting forces. On the one hand, there is a view that sport is no different from any other sphere of life, especially when it involves commercial and business interests and that there is no justification for the law to stop at the touchline. On the other hand, there is a view that so long as basic conditions of due process and fairness are observed then sport should be granted a relative autonomy from legal intervention as a sphere organised by private entities that can be trusted to govern their own affairs.

The increased resort to the courts by sports persons, especially from the mid-1980s onwards, was hastened by the commodification of sport. Increased economic rewards meant athletes could be seriously damaged by the arbitrary decisions of sporting federations. As the judicial caseload grew, the courts not only intervened with decisions but also often issued guidance to sporting federations. For example in *Jones v. Welsh RFU* (*The Times*, 6 January 1998) the judge, although critical of the Welsh RFU's disciplinary process, was prepared to concede a degree of autonomy for the sporting federation if it reformed its procedures along the lines suggested in her judgment. Such invitations to reform were normally followed by sporting bodies and consequently internal procedures were juridified. The parallel growth of arbitration in sport, both nationally and internationally, also led courts to accept that alternative dispute resolution was a viable option. Thus, there was a growing recognition, especially in the British courts, that juridification has resulted in a greater degree of internal legitimacy that allows courts to perceive their role as supervisory rather than corrective. This reprivatisation of sports law is a form of recursivity in which domestic legal principles are internalised and juridified by sporting bodies in a feedback loop. Likewise, transnational norms are respected by national courts by specifying criteria of exclusion from their supervision. The result can be seen as a dynamic interplay between lawmaking fora; the rules of the sporting federations, national courts, and transnational norms from CAS. The global sports law that emerges is a juridified field; but by accepting the incursion of these norms it preserves its operational autonomy even while surrendering some rule-making power.

United Kingdom

There was a historical reluctance on the part of the English courts to intervene in the affairs of private organisations. This was reflected in their treatment of sports clubs that were effectively left to regulate their own internal affairs. This was illustrated by Lord Denning's observations in *Enderby Town F.C v F.A.* [1971] 1 All ER 215 where he said 'justice can often be done in domestic tribunals better by a good layman than by a bad lawyer'. This non-interference was justified on various conceptual grounds. One was that sportspeople were essentially amateurs and thus no economic interest was threatened by their mistreatment in disciplinary matters or by an exclusion from participation. In *Currie v Barton* (*The Times*, 12 February 1988), the refusal to review a selection decision by a county tennis association was based primarily on the grounds that the player was not losing any money, even though he was a professional coach, by not being selected for an amateur tournament.

In *Modahl v BAF (no2)* [2001] EWCA Civ1447 the Court of Appeal even discussed seriously whether an athlete's relationship with her national association was intended to create legal relations. Latham LJ said 'The remaining question is whether or not the parties can have had an intention to create a legal relationship. This seems to me to be the difficult part of the problem. It could be said that in the context of a sport, that involves imposing an inappropriate legal structure on for what for many will be recreation.'

Another justification for non-intervention was a belief that insiders, who knew the sport and its informal conventions, were best placed to make judgments on such matters rather than the courts. In *Wilander v Tobin* [1997] 2 Lloyd's Rep 293 the Court of Appeal concluded its judgment with this defence of sporting autonomy: 'the history of these proceedings discloses that the plaintiffs have taken point after point with a view to defeating domestic disciplinary proceedings which in relation to sporting activities should be as untechnical as possible. While the Courts must be vigilant to protect the genuine rights of sportsmen in the position of the plaintiffs, they must be equally vigilant in preventing the Courts' procedures being used unjustifiably to render perfectly sensible and fair procedures inoperable.'

There were other more conceptual approaches. Sport can be viewed as a private association with shared goals and the voluntary acceptance of rules that govern the game. As such contract law is the appropriate legal form and not public law with standards of accountability in the governance and administration of the association.

However, the increasing commercialisation of sport and the emergence of full-time athletes in many sports that had been traditionally if nominally amateur, such as athletics and rugby union, caused a significant rethink. Combined with poor administration in some sports and an often flagrant disregard of due process in disciplinary proceedings that now often had significant economic consequences, the courts in the UK revised their approach. As the fear of judicial

intervention grew throughout the 1990s, this encouraged much reform and rewriting of rulebooks by sporting federations. The case of Modahl had financially crippled the governing body, the British Athletics Federation, and it went into administration to be replaced by a new body entirely.

But this very reform of disciplinary rulebooks and the increasing juridification of procedures ensured that the administration of most sports was better and more transparent. Lawyers were increasingly involved and procedures improved. The emergence of global institutions to regulate international sport, especially CAS and WADA, led to a trickle-down effect that meant that national procedures were more attentive to legal issues such as fair process and proportionality. Perhaps for these reasons and others the UK courts in the 2000s appeared to retreat to notions of sporting autonomy, preserving self-regulation at least if there had been some internal juridification, albeit modified by supervised limits to that autonomy.

Thus a process that could be described as the re-privatisation of sporting governance began with a criminal case, *R v Barnes* [2005] 1 WLR 910. In this case, a football player was prosecuted for a reckless tackle that caused a serious injury. The Court of Appeal overturned a conviction for assault and in doing so issued a strong statement of sporting autonomy. Only in the most exceptional of cases should such cases be dealt with by the criminal courts rather than the sport's own internal disciplinary tribunals it was declared. The very existence of a process within the sport seems to be sufficient to grant criminal immunity. The Court of Appeal said, 'In determining what the approach of the courts should be, the starting point is the fact that most organised sports have their own disciplinary procedures for enforcing their particular rules and standards of conduct. As a result, in the majority of situations there is not only no need for criminal proceedings, it is undesirable that there should be any criminal proceedings' (*Barnes*, at 912–3). In the light of such a strong sentiment it would be a brave prosecutor who would even contemplate a prosecution for violence on the playing field committed in the normal course of play even if outside the rules. It is worrying however from the viewpoint of sporting immunity that there is no hint in the judgment as to the competence and nature of the disciplinary tribunals that allow such lack of scrutiny.

During the same period, the mid 2000s, civil courts were also retreating from an interventionist approach. Here too the influence of rapid juridification within sport seems to have been a motive in the courts adopting as a standard that of supervised autonomy and using the test of 'a reasonable range of responses', perhaps borrowed from unfair dismissal and its legitimation of managerial prerogative. So in *Bradley v the Jockey Club* [2004] EWHC 2164 where Mr Justice Richards noted that 'The importance of the court limiting itself to a supervisory role of the kind I have described is reinforced in the present case by the fact that the Appeal Board includes members who are knowledgeable about the racing industry and are better placed than the court to decide on the importance of the rules in question and the precise weight to be attached to breaches of those rules. (*Bradley*, 2004, para 46)'. This in essence is no different from Lord Denning's approach in 1971 so that insider knowledge becomes the crucial factor in allowing sporting immunity, irrespective of any serious examination of the integrity of the internal disciplinary procedures being used.

Similarly in *Fallon v HRA* [2006] EWHC 2030 the Court of Appeal approved the existing judicial approach to challenges to the sport's disciplinary proceedings in these terms 'a significant degree of deference should be shown by the courts to sporting bodies with regard to their disciplinary processes ... [and it] important to bear in mind the point that a conclusion that the disciplinary process should be looked at overall matched the desirable aim of affording to bodies exercising jurisdiction over sporting activities as great a latitude as is consistent with the fundamental requirements of fairness.' (see *Flaherty v The National Greyhound Club Ltd.* [2005] EWCA (Civ) 1117).

The situation surrounding the implication of the drugs ban imposed upon Dwain Chambers provides a useful insight into this process (*Chambers v British Olympic Association* [2008] EWHC 2028 (QB)). The athlete was banned from competing in the Beijing Olympics. Chambers challenged the BOA's byelaws, and in particular their stipulation under byelaw 25 that any person found guilty of a doping offence by a governing body recognised by WADA would not be entitled to compete as a member of Team GB or benefit from any BOA accreditation with regard to any future Olympic Games. His application for relief here failed but what is particularly interesting is not the reasoning of the Court as regards the issues of restraint of trade, competition law or irrationality and proportionality, but the court's view of its own role and function within such proceedings:

I must ask myself this question, acknowledging that, though the court must not shrink from exercising a supervisory power which it has if it affects the claimant's right to work ... the BOA, if acting honestly and not capriciously and within its powers, is and must be a body better fitted to judge what was needed than me, or any court (*Chambers*, para 39).

Additionally, in *Chambers v BOA* (para 22) a further ground for refusing relief to an athlete barred by his association from the Olympics was that participation was non-economic: 'They make no profits. They pay no wages to the athletes. They offer no prizes beyond the medals for the first three places. I accept that as a movement it has an idealistic basis.'

This move back towards re-privatisation could be summed up by the aphorism that 'sport knows sport best'. But whereas the original justifications for private governance were centred on arguments that internal administrators and officials were better placed than the reified machinery of justice to deal with disputes, the more recent emphasis has been on ensuring that internal juridification and independent arbitration are adequate to protect athletes' rights.

United States

The American courts have taken a different approach. But they too have confirmed the apparent supremacy of global sports law. In a handful of cases they have directly addressed the accountability of international sporting federations. In *Martin v IOC* 740 F.2d 670 (9th Cir. 1984 (see generally Mitten, 2009) the plaintiffs argued that the non-inclusion of women's long distances races in the Olympic Games was discriminatory. Their case was rejected; the court stating that 'A court should be wary of applying a state statute to alter the content of the Olympic Games. The Olympic Games are organized and conducted under the terms of an international agreement—the Olympic Charter. We are extremely hesitant to undertake the application of one state's statute to alter an event that is staged with competitors from the entire world under the terms of that agreement.' The key element in the court's reasoning here was that the IOC was outside the jurisdiction of the American courts as it was a foreign organisation.

A second argument accepted in *Martin* was that the USOC (United States Olympic Committee) was not a state actor, but rather a private body, and thus not subject to constitutional rights. So likewise in *Michels v USOC* 741 F.2d 155, 159 (7th Cir. 1984) in an judgment denying a weightlifter banned for drug abuse an action against the USOC, it was declared that 'there can be few less suitable bodies than the federal courts for determining the eligibility, of athletes to participate in the Olympic Games.' More broadly the American courts have interpreted the Amateur Sports Act as preventing private actions against international and national sporting bodies. The Act gives wide-ranging immunity. It grants exclusive jurisdiction to the USOC over matters relating to participation in the Olympic Games and prioritises arbitration to resolve swiftly disputes with athletes. As one commenter concludes; 'In summary courts hold that the Amateur Sports Act limits the nature and scope of judicial authority ... The role of the judicial system is that [sporting bodies] follow their own rules and provide a minimal level of procedural due process' (Nafziger and Ross, 2011: 240).

Canada

The limited scope of domestic national courts to establish jurisdiction over transnational regulatory orders was further illustrated in a Canadian case concerning the Olympic Games. In *Sagen v Vancouver Organizing Committee (VANOC) for the 2010 Olympic & Paralympic Winter Games* (2009) BCSC 942.(2009) BCCA 522 the Canadian courts declined to intervene in the format of the Winter Olympic Games when a female skier sued the IOC when women's ski-jumping was not included as a sport in the Games claiming gender discrimination. The court refused to intervene against the IOC, who was not a party to the proceedings. The defendants were the local organising committee and the court ruled they had no authority to order either the inclusion of women's ski-jumping or the exclusion of men's ski-jumping at the 2010 Games. The judge concluded 'there is no remedy available to them in this Court. But this is the outcome I must reach because the discrimination that the plaintiffs are experiencing is the result of the actions of a non-party which is [not] subject to the jurisdiction of this Court' (*Sagen v VANOC* [2009] BCCA 522). This conclusion was reached despite the fact that the local organising committee had no say in the matter and were merely a passive implementer of the IOC's programme. Even the argument that such blatant gender discrimination was unconstitutional was rejected. In other words, the IOC's immunity overrode even the Canadian constitution.

To sum up there are reasons why national courts, and even transnational regulators such as the European Union,¹ have been hesitant to intervene in the sporting sphere thereby reinforcing the notion of an autonomous global sports law. There has been a marked and increasing judicial deference to private regulatory authority. Whilst it can be argued that this is generally true of the approach of national courts to private non-commercial associations, it seems also that the development of adequate internal appeal procedures, combined with the standard of 'exhaustion of all internal remedies' is a high bar to clear. The review of sporting decisions, and their disciplinary consequences, usually involves a determination of facts or an exercise of discretion within clear reformulated rules of the federation, and as such national courts have adopted a deferential standard of review or overruling. The standard has been formulated as a defensible decision within a reasonable range of possible choices, echoing the test of managerial discretion in employment cases, or as administrative decision making, using criteria such as 'patent unreasonableness' or 'disproportionality' which are relatively easy for a sporting body to meet in a well-regulated federation with legally drafted rules.

Uniqueness of Sports Law

The Creation of Unique Rules

The argument so far has concentrated on the claim of transnational sports law and its distinct institutions to be the most appropriate forum in which disputes within the sporting field are settled; and that this requires immunity from supervision by national courts. But there is a more nuanced argument. Global sports law does something more than merely fillet national laws for their essence, for it develops its own norms and distinctive principles that are solely applicable to the sporting context. This is an argument that there is an inherent uniqueness about sporting regulation and adjudication which is distinct and of its essence. Not only are there norms that are of legislative origin in the rules of sporting federations, but the *lex sportiva* contains and develops its own norms. This cultural difference can only be understood as a unique phenomenon and therefore normal standards of law are inappropriate. The essence of global sports law thus lies in the unique rules that evolve from it.

There are many unique elements relating to sport that require different legal treatment and which reinforce the claim that sport is different and that there is a space for global sports law to function as a distinct separate legal order. What follows below is a summary, for more detail see (Foster, 2005b).

- One clear example has been the development in CAS jurisprudence of a new standard for the onus of proof, specifically in doping cases. This is usually expressed as 'comfortable satisfaction'. It implies a level greater than 'on the balance of probabilities', the normal common law standard in civil cases, but lesser than 'beyond a reasonable doubt', the standard in criminal cases. This seems to quantify as about 75% probability. It now seems well established in CAS arbitrations. The reasoning behind this is obscure but it allows doping offences to be accepted as somehow quasi-criminal without the restrictive and difficult criminal onus of proof being invoked (see Stewart 2006 for a detailed treatment).
- Linked to this have been the efforts to create a standard of strict liability for doping offences under the successive WADA codes. This has a complex history. The notion of strict liability is disliked by lawyers as it imposes sanctions without fault and so goes against basic notions of fairness. On the other hand it is said that the 'war against doping' can only be won if athletes are held responsible for all substances found in their bodies (Soek, 2006; van Kleef 2013).
- Another example of sports rules diverging from national laws is the concept of 'sporting nationality'. Most sports federations have regulations that allow athletes to establish a nationality on the basis of grandparents, allowing them more multiple nationalities over and above those that would be allowed under national laws. Likewise many sports federations have residency requirements that are relatively generous. Some nations have also been ready to expedite nationality procedures to grant citizenship to talented athletes from other nations. Qatar is one notorious example (Nafzinger, 2016; Shachar, 2011).
- A similar departure can be seen in the exemption provided for gender discrimination. Separate competitions for men and women are permitted so that the relatively better performance of men in many sports is not used to disadvantage opportunities for women. A similar rule for youth competitions or for athletes with disabilities allows sport to avoid discrimination legislation based on age or disability.
- The specific nature of sport can also be seen in the CAS arbitrations relating to team punishments. These accept that collective responsibility means that if an athlete is found guilty of doping the whole team can be sanctioned even if this means that innocent athletes will suffer.
- A similar rule seems to accept that the notion of 'seasonality' can be used to tailor sanctions to the specific nature of sport. So for example in a sport that has a well-developed seasonal break, different lengths of ban may be appropriate depending of the timing of the ban so that roughly equal periods of disqualification are imposed.
- It is accepted in many international competitions, for a range of reasons especially safety, that a limit on the number of participants is desirable. CAS arbitrations seem to accept that the regulations to determine eligibility in these cases are the unchallengeable preserve of the sports federations, even if that means that merit or rankings can be ignored.
- The decisions made by match officials during the course of the game are sacrosanct and unchallengeable. Even though a patently wrong decision can have huge consequences for a team or an individual athlete, for a host of sporting reasons such decisions are not reviewable, even in circumstances where judicial review of decision making in administrative law might be available.
- It has been accepted to a great degree that one of the essential elements of sport is that the outcome should be unpredictable and this uncertainty is a key factor. For this reason, regulations to preserve that uncertainty are acceptable even if they might otherwise breach national laws. Similarly rules to maintain a competitive balance between clubs in team competitions seem to be allowed.
- A wider principle is that of 'sporting integrity'. This broad but somewhat vague notion is used to justify interventions where the honesty of the result in competitions might be compromised. A much-quoted example is the award in *AEK Athens v UEFA CAS 98/2000* where the single ownership of several clubs in European football competition was barred on the grounds that it potentially threatened sporting integrity.
- Finally, it is accepted that the optimal organisational structure for the good governance of sport is a single international federation with single national associations under its jurisdiction. This despite the fact that such monopoly organisations regulating substantial economic activity could fall foul of national and transnational competition laws.

All of these examples are norms that have grown out of the transnational order of global sports law. In principle they have the same characteristics as legal norms; that of certainty, universal applicability and being recognised as binding by its subjects. But there is also an equitable insertion in sporting culture, that of 'fair play'. This notion, especially strong in sports such as cricket and golf, creates expectations of behaviour, derived from custom and etiquette, which participants treat as morally binding. Yet even these standards of fair play are being juridified. Many sports have formal rules that outlaw 'ungentlemanly behaviour'. And historically many sports had a minimum of constitutive rules but the exploitation of loopholes and lacuna has led to more elaborate formal rules (Vamplew, 2007).

The Developing Global Administrative Law

General Principles of Fairness and Due Process

Legal scholars have in the last decade begun to develop and expand the concept of global administrative law (Cassese, 2016). International sport has developed global institutions of governance and regulatory regimes that constitute an autonomous and normative realm within a structured pyramid of sporting federations. The challenge is how to limit,

organize and control what is already a pre-existing constitutional regime with quasi-legal instruments such as the Olympic Charter or the World Anti-Doping Code. This transnational regime of governance is such that the organizations of global sport are, it is argued, by analogy akin to public administrative bodies in domestic law rather than purely private bodies bound together by contract (Casini, 2009). There is a need for administrative law principles to be injected into global rule-making for sport, into adjudication proceedings and to be used to strengthen procedural guarantees of a fair hearing.²

These developments have created for some writers a 'crisis of accountability'. With no apparent legal oversight such regimes of global governance have appeared accountable to no one but their own internal procedures. They display at best a self-reflexive accountability formulated in accordance with the logic of their own operational field. This absence of, or limited amount of, accountability by transnational organisations controlling important global activities has led to demands for legal control. Such control can either be achieved by an extension of domestic administrative law principles to transnational governance or by developing a new global administrative law. The first option has its problems. There are limits on how far some jurisdictions will apply what they see as public law principles of accountability to private rule-making bodies. This is especially marked in England where the courts have shown an extreme reluctance to extend judicial review to the decisions of sporting federations (most notably in *R v Disciplinary Committee of the Jockey Club, ex parte Aga Khan* [1993] 2 All ER 853). There is also the question of jurisdiction over transnational organisations located overseas and therefore outside the scope of the national courts (see *Martin* and *Sagen* above). This dilemma conceptually mirrors the difficulty with making transnational private arbitration systems accountable. Thus, it is argued the better option is to develop a parallel global administrative law in order to remedy the defects inherent in a global sports law.

Formulating a concept of global administrative law immediately faces the questions of 'what are its sources' and 'what is its content'? As a variety of transnational law, it is by definition different from international law, which is a creation of interstate activity, and from domestic law. But global administrative law struggles to articulate its own sources and content. It seems that the best attempt is the nebulous concept of 'general principles of law'. This is problematic unless it can be shown that there is a high degree of agreement and convergence in the principles used by varying domestic courts. Another difficulty in the concept of global administrative law is how it is enforced. Again, the answer to this question can only lie at present in domestic courts claiming jurisdiction over the institutions of global governance by using their principles of administrative law in a global context.

Despite these formidable obstacles there does seem to be a wide degree of acceptance in the literature as to the emerging principles that would be considered as a minimum content of global administrative law. These are:

- Principles of stakeholder participation in the initial formulation and articulation of rules and standards within the transnational organisation. This is especially relevant in organisations such as WADA where there are a number of often conflicting interests involved. Without wide participation, either in the constitutional makeup of the organisation or in the ad hoc formulation of rules, the legitimacy of the rule-making process is weakened.
- Decisions of the organisation should be reasoned, given in writing and transparent; hence publication of all decisions and their reasons is crucial, for without such transparency the assessment of rationality is impossible and precedent is unlikely to develop.
- There should be a system of internal review and an appeals procedure to ensure proper standards of decision making.
- There should be due process in decision making; so that principles of impartiality, opportunities to be heard and represented, unbiased judging and a hearing subject to public scrutiny are respected.
- Substantive standards of justice in decisions must be met. These include proportionality, especially in relation to penalties, that there is a rational relation between means and ends, and that legitimate expectations are not defeated.

These are minimum standards but to date there is little evidence of their acceptance by national courts. Neither is there much evidence that the arbitral and other regulatory orders of transnational private regulation have been prepared to accept global administrative law as a source for overturning decisions. However, it is suggested that global administrative law ought to have the potential to allow the internal review of international sports federation rules even where such rules have been constitutionally formulated and accepted. The most fruitful route for its incorporation into global sports law would be an express constitutional adoption of its principles outlined above by organisations such as WADA and a corresponding use by arbitrators in CAS.

Accountability

Broadly these principles of global administrative law are all moving towards a general principle of accountability. Stewart (2014, 476) has written, 'With the growth of global administrative law, including the greater availability of review of global administrative decisions by regime-specific tribunals, by international and domestic courts and tribunals, and by other global administrative bodies, legal accountability is becoming a more important factor in global administrative

governance. Review can be direct, by a tribunal with jurisdiction to determine the legal validity of an administrative decision and, in some instances, for example in the case of the global Court of Arbitration for Sport, to render it null and void.' He concludes that although the growth of independent review is welcome there are significant limits to legal accountability mechanisms for supervising global regulatory bodies.

One response to failures of governance by international sporting federations has been to establish 'independent' reviewing bodies. These can be seen as an attempt to preserve the regime's integrity by exposing failures and proposing reforms. If reform follows there again occurs an intensification of the juridifying process discussed previously. Such bodies can be structures within the federation's existing structure. For example, the IAAF created an Ethics Board 2014 as an independent judicial body to investigate misconduct and corruption. Its nine-person panel includes some high profile lawyers, such as retired judges from South Africa and the United Kingdom. Its Code of Ethics applies to 'all conduct that damages the authenticity, integrity and reputation.' (IAAF, 2015, A2). The Board has already decided several cases. (IAAF, 2015–18).

Alternatively, reports may be commissioned ad hoc in response to a specific scandal. There have been several recent examples. One is the report to FIFA on human rights by Professor Ruggie, sparked by concerns over conditions for workers preparing world cup stadia in Qatar. In it he recognised that global sports law could be used to avoid national legal orders and thus be a danger to substantive justice (Ruggie, 2016). In his recommendations he said 'FIFA should carefully review the exemptions it seeks from national laws to avoid their leading to human rights harm.' (Ruggie, 2016, 4.2). In his conclusion he writes:

What is required is a cultural shift that must affect everything FIFA does and how it does it. The result must be 'good governance', not merely 'good-looking governance' ... The prevailing social expectations of organizations with a footprint as large as FIFA's, which wield great economic power and exert significant political influence, is that they must become more transparent and more accountable. Nowhere is this more pressing than in relation to human rights—which, quite apart from hard and soft law standards, have become the vernacular spoken by people everywhere to affirm and assert their human dignity. The social legitimacy of FIFA and similar organizations, and therefore their business model, hinges on their embracing this new world, and incorporating its rules into their own. (Ruggie, 2016, ch 6).

Conclusion

There is no doubt that international sport governance is in crisis. Sports federations are being investigated for corruption as with the scandals surrounding FIFA. The doping regime of WADA appears to have been seriously compromised as outlined in the reports of 2015–6. The integrity of results in sports as diverse as tennis and cricket is being investigated. The broader picture is one of a serious failure of internal governance, regulation and transparency. How far this has resulted from the lack of supervision, by national courts and governments, into the internal regulation and affairs of international sports federation is a crucial issue. Have the claims of autonomy and limited supervision of the supposed independent legal regime created by global sports law led to the corruption and misfeasance now being exposed by the investigation of criminal law agencies? If so, this raises important questions for the future of global sports law.

The process of privatisation of internal governance through constitutive rule-making and private adjudication may have been counterproductive by contributing to a sense of immunity from all external supervision. Equally the process of juridification by reincorporating the resolution of issues into a semi-autonomous sphere may have left sporting federations with internal procedures that are insufficiently robust to control the major issues of sporting integrity and financial corruption. If so, global sports law as a form of transnational law faces an uncertain future in which the agencies of nation states, especially those charged with investigating crime, must become more active and interventionist.

Notes

¹ This is a different dimension of the analyses of this field that is dealt with much more fully elsewhere. See in particular, Foster (2005c) *Global Law and Regulation* in Allison L. (ed.) *The Global Politics of Sport: The Role of Global Institutions in Sport* pp. 63–86 (Abingdon: Routledge).

² This section is adapted from Foster K. (2012b) *Global Administrative Law: The Next Step for Global Sports Law?* U. of Westminster School of Law Research Paper No. 12–10, 2 March. DOI: <http://doi.org/10.2139/ssrn.2057750>.

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Author Information

Ken Foster is Associate Fellow, Centre for the Study of Law, Society and Popular Culture, University of Westminster.

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