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Sports Corruption: Sporting Autonomy, *Lex Sportiva* and the Rule of Law

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An apparent escalation in on-field corruption (doping and match-fixing) in professional sports has led to increasing numbers of athletes facing bans and a loss of livelihood as a consequence of decisions taken by sporting tribunals, as part of a regulatory system referred to as *lex sportiva*. This has led to challenges in domestic courts from athletes over the lawfulness and fairness of these proceedings (for example *Pechstein* and *Kaneria*). These challenges to the legitimacy of *lex sportiva* (and to the principle of the autonomy of sport) echo Foster's (2003) critique of *lex sportiva*/global sports law as:

a cloak for continued self-regulation by international sports federations...a claim for non-intervention by both national legal systems and by international sports law... [which] opposes a rule of law in regulating international sport.

The paper considers what is the 'rule of law' that regulates on-field corruption, and concludes that it is a complex web of law, since sports governing bodies now share with the state many aspects of the sanctioning of on-field corruption. The paper considers how the doctrine of 'the autonomy of sport' has informed the development of *lex sportiva* in regard to athlete corruption, and the competing claims of private sports law and national legal systems over the regulation of athlete corruption.

Keywords: *lex sportiva*; transnational; match-fixing; autonomy; doping; global sports law

Introduction

Foster (2011: 45) described the use of disciplinary and arbitral tribunals to regulate athletes as a system which 'claim[s] to be immune from challenge by national courts and ... is therefore a system of private transnational law beyond state control'.¹ The paper considers the extent to which the state controls the sanctioning of on-field athlete corruption (broadly match-fixing and doping).² This analysis entails asking two questions: (i) to what extent can athletes challenge in national courts bans imposed by sporting tribunals; and (ii) is the sanctioning of doping and match-fixing predominantly a matter still for sports governing bodies and sporting tribunals, or are national laws and courts superseding *lex sportiva*?

The Autonomy of Sport and the Regulation of On-field Corruption

In relation to on-field corruption (i.e. athlete cheating), sports governing bodies (SGBs) have introduced detailed regulations which are enforced through athletes submitting to internal disciplinary measures imposed by private sporting tribunals, often with a right of appeal to the Court of Arbitration for Sport (CAS), whose jurisprudence has been dubbed the source of the so-called '*lex sportiva*', or 'global' sports law, a system whose fairness and adherence to international legal norms Foster and others question.

The (enforced) use of private arbitration as the means for disciplining on-field corruption stems from the doctrine of the 'autonomy of sport'. The word autonomy derives from the Greek words *auto* and *nomos*, and means 'those who make their own law'. From the start, SGBs were viewed as autonomous entities regulating an activity which was amateur and private and therefore not within the remit of state regulation.³ The International Olympic Committee (IOC) president Pierre de Coubertin (1909: 152) stated in 1909. 'The goodwill of all the members of any autonomous sport grouping begins to disintegrate as soon as the huge, blurred face of that dangerous creature known as the state makes an appearance'. By the mid twentieth century, with the advent in the Olympic Games of Soviet bloc countries where there existed a culture of state regulation of sport, the Olympic Movement officially adopted the policy of autonomy for the national International Olympic Committees, and the Olympic Movement as a whole (Chappelet 2010: 89). The fifth fundamental principle of Olympism in the Olympic Charter refers to sports organisations having 'the rights and obligations of autonomy, which include freely establishing and controlling the rules of sport, determining the structure

and governance of their organisations' (International Olympic Committee 2015).⁴ Paradoxically, the IOC more so than any other sports governing body is a subject of international law (i.e. international public law) having being accorded a status similar to the International Committee of the Red Cross.⁵

The doctrine of sporting autonomy fuelled the growth of a *lex sportiva*. According to Beloff, Kerr & Demetriou (1999: 4) the 'cornerstone' of *lex sportiva* is 'autonomy for decision making bodies in sport' capable of producing a distinct and unique body of law, with due recognition of the CAS as the institutional source of sports law.⁶ *Lex sportiva* is now viewed as a positive self-regulating law rather than an 'ensemble of social norms which can be transformed into law only by the juridical decisions of nation-states' (Teubner 1997: 8). For Latty, (2011: 37) for whom *lex sportiva* constitutes a very clear manifestation of transnational law:

Taking the view that these standards cannot claim to have the quality of legal rules amounts to having a highly restrictive conception of the law... The "Sports and the Law" theory finds its roots in the state positivism that necessarily links the law to the state, the sole entity capable of imposing compliance through physical constraint.

As Duval (2013) puts it, the regulation of international sport is an area that should be of great interest to transnational lawyers and 'could have profound consequences for an understanding of law developed in the face of a dominant, even monopolist in the Weberian sense, nation state'. *Lex sportiva*, a type of transnational law which has developed from the doctrine of the autonomy of sport, can be distinguished from public international law (a product of Westphalian state entities), and is, like *lex mercatoria*, a system of law 'sui generis'. *Lex mercatoria*, arising in pre-modern Europe, is commonly accepted as the paradigm of a transnational legal order. Recently, globalisation (the creation of a world society) and the increasing digitisation of human interaction (commercial and otherwise) has fuelled the emergence of private self-regulating non-state actors acquiring authority in various sectors, including economic, cultural, military as well as sporting (Teubner 1997: 23).⁷ States have facilitated the growth of transnational law by removing barriers to trade and adopting a system for the recognition and enforcement of arbitral awards (a system of private non-state law).⁸ The rise of a global financial industry and the growth of multinational enterprises in the era of the digital economy have contributed to the 'retreat of the state' allowing transnational law to flourish (George 1996).

Those, such as Foster, who have questioned the lawfulness of a global sports law argue that the use of arbitration, a private judicial system, carries an obvious threat to the 'rule of law' anchored in national legal systems. This criticism is echoed by Lord Mance (2016), a Justice of the Supreme Court of the United Kingdom, who, in the context of commercial arbitration, writes that 'theses advocating an independent or transnational system of arbitration lack coherence. Arbitration is not, and should not become, a law unto itself'.

Lex sportiva, appears to qualify as a law unto itself, since, under the Code of Sports-related Arbitration (2016 edition) of CAS Rule 58 states:

The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.

In the words of Lord Mance (2016), quoting Lord Justice Kerr, domestic (in this case English) law generally does not recognise 'arbitral procedures floating in the transnational firmament, unconnected with any municipal system of law';⁹ however, as can be seen from the discussion below on the *Kaneria* and *Pechstein* cases, the willingness of domestic courts to challenge *lex sportiva* is limited. More significantly, given that CAS operates under the review of the Swiss Federal Tribunal under s. 190(2) (a–d) Swiss Private International Law Act, the *Lazutina* case has given a favourable assessment of CAS's status as an independent judicial body post-Gundel.¹⁰

Match-fixing

Sanctioning athletes for match-fixing is highly problematical, since even where unusual betting patterns are detected, proving the mental intention of an athlete to underperform and profit from fixing is difficult, short of the type of 'sting' operation that uncovered spot-fixing by three Pakistani cricketers in 2010, which led to custodial sentences and lengthy playing bans (Serby 2015: 85).¹¹

The first involvement of the CAS in match-fixing was the 2009 FK Pobeda case.¹² Leuba (2011) noted that the award:

is a first in several respects, not only for UEFA but also for the CAS... one of the very first procedures that has led to sanctions being imposed against a club and individuals in relation to the fixing of football matches... Quite clearly, it is extremely important because of the fact that it is the first decision connected with the fixing of football matches at European level. Unfortunately, it is unlikely to be the last.

These last words were certainly prophetic. The CAS award in the FK Pobeda case concerned the fixing of a match in the 2004/05 UEFA Champions League. The expert evidence surrounding the movement of betting odds allowed the panel to find

to its 'comfortable satisfaction' (the burden) that fixing had occurred. It is interesting to note that in punishing match-fixing *lex sportiva* provides a burden of proof (comfortable satisfaction) short of the criminal burden (beyond reasonable doubt). In their award the CAS panel noted that the applicable regulations contained no specific provisions on the sanctioning of match-fixing, and the panel therefore had to rely on Article 5 of the UEFA Disciplinary Regulations which required players, officials and clubs to 'conduct themselves according to the principles of loyalty, integrity and sportsmanship'.

It is remarkable looking back to the period of the FK Pobeda case, how in the subsequent years the regulation, prevention and sanctioning of match-fixing not just by sports governing bodies, but by governments and law enforcement agencies globally has developed in just a few years. Most sports governing bodies now make it a condition of participation that athletes submit to codes of conduct that make match-fixing an offence that carries a discretionary life ban (failing to report an approach from a bookmaker is also commonly an offence).¹³ Therefore in one sense, the regulation of match-fixing by SGBs is an example of sporting autonomy, since they (the SGBs) apply rules they themselves have created, in their own sporting tribunals, and do not apply standards of proof and evidence common to judicial proceedings, fuelling the criticism that sporting autonomy deprives athletes of the 'rule of law'.¹⁴ However, as Carpenter (2015) points out in relation to more recent judgments from CAS 'the quality of evidence where allegations of manipulation/match-fixing are concerned is of paramount importance'.

Does *lex sportiva* in regard to match-fixing make a claim for non-intervention by national legal systems and oppose the rule of law as intimated by Foster? The *Kaneria* case is a good illustration of the extent to which *lex sportiva*, whilst perhaps not 'floating free of national legal systems', entrenches a system of private arbitration which has considerable autonomy in terms of process, evidential standards and sanctions.

In disciplinary proceedings brought by the governing body of English cricket, the England and Wales Cricket Board (the ECB), a Pakistani international cricketer Danish Kaneria was banned for life from all professional cricket globally for match-fixing.¹⁵ During proceedings before the ECB's Appeal Panel, and on Kaneria's application, the High Court was asked to determine whether the Appeal Panel hearing constituted an arbitration under the Arbitration Act 1996.¹⁶ Cooke, applying *dicta*, albeit *obiter*, of Thomas in *Walkinshaw v Diniz* [2000] 2 All ER (Comm) 237, upheld the submission of the national governing body (the ECB) that the Appeal Panel hearing, despite nowhere being referred to in terms as arbitral in the ECB Regulations, constituted an arbitration hearing, since inter alia the following were present: the athlete's right to be heard, full disclosure, proper and proportionate procedures, impartiality of the panel and enforceability of the award.¹⁷ These criteria reflect the juridification of the sporting disciplinary process, which can be said to contribute to the application of natural justice by sporting tribunals, a constituent of the 'rule of law'.

As Cooke observed, whether or not the Appeal Panel qualified as an arbitration hearing (the sole issue he had to determine), there was no general ouster of the court's jurisdiction in relation to Kaneria's treatment by the ECB. If (as Cooke held was the case) the Appeal Panel was an arbitration, then remedies for any irregularities in the proceedings were available from the court under Sections 67 to 69 of the Arbitration Act 1996. Alternatively, were the Appeal Panel to be construed (which it was not by Cooke) as 'internal proceedings', then the court would still have jurisdiction to intervene on one of various alternative grounds: a breach of human rights, a contractual breach of an implied term as to the conduct of proceedings, some overriding public policy reason such as an unreasonable restraint of trade, or under some form of judicial review.¹⁸

The outcome of Kaneria's subsequent application to the High Court in April 2014 under Section 68 of the Arbitration Act 1996 to set aside the ECB arbitral award to ban him for life (and impose costs orders totaling £200,000) evidences the ongoing strength of the 'sporting autonomy' principle. The grounds advanced by Kaneria were serious irregularity by the ECB arbitral tribunals and an arbitrary and capricious verdict.¹⁹ In its decision the court reinforced the principle of unfettered judgment for private sporting tribunals. Hamblen noting that the ECB Appeal Panel had discretion as to the length of the ban to be imposed, commented:

That discretion was vested in a specialist cricketing Panel with wide ranging knowledge and experience of the game. That Panel is in a far better position than this court to consider how to exercise discretion to determine the appropriate sanction.²⁰

A further application by Kaneria to the Court of Appeal to overturn the life ban was dismissed as 'totally without merit'.

Kaneria's case emphasises the deference shown by courts to the autonomy of sporting tribunals and the reluctance of (in this case the English) courts to intervene in sanctions for cheating at sport. This was notwithstanding the strength of Kaneria's argument that there was considerable disparity between the sanction applied to him and the periods of suspension for match-fixing offences of a similar nature (in the same sport) applied elsewhere.²¹ On the other hand, the Kaneria case is a reminder that sports disciplinary/arbitral proceedings have undergone considerable juridification in return for their continuing autonomy.

The fluidity between public and private law in the context of transnational sports law on athlete corruption is reflected by the introduction in many states of new laws making match-fixing a criminal offence (Serby 2015). Match-fixers have been convicted and served prison sentences, in addition to facing long-term bans handed down by private sporting disciplinary/arbitral tribunals for the same acts.²² In relation to the welcome state prosecution of match-fixers, the writer has argued previously (Serby 2015) that the creation of specific match-fixing laws is secondary to the requirement

for a proactive policy by public agencies to detect and punish match-fixers under general laws regulating corruption. In the UK, the National Crime Agency actively pursues match-fixers under the bribery laws.²³

An example of a shared jurisdiction over match-fixing between SGBs and states, is the significant international treaty, the Council of Europe Convention on Manipulation of Sports Competitions, which creates a template for a partnership between private sports federations and states and other agencies, private and public, in the global attempts to combat 'match-fixing'.²⁴ The Convention aims to introduce cooperation both within individual states between the interested stakeholders, SGBs, regulators and betting companies, and more widely between states, given the global nature of sport. Prior to the coming into force of the Convention sports governing bodies are already working closely through memorandums of understanding with crime agencies to detect and punish match-fixers.²⁵

Equally the use of 'unexplained wealth' laws using civil proceedings brought by state agencies has been suggested as another possible solution to match-fixing, since the burden of proof is less than in criminal proceedings (Serby 2013). In England, this is now more likely under a new law, the Criminal Finances Bill published on 13 October 2016, which introduces the concept of 'unexplained wealth orders', enabling state agencies to apply to the High Court for an order forcing suspects to explain the sources of their wealth if it appears to be the result of corruption. More problematical would be the introduction of sporting body code of conduct regulations allowing for bans for match-fixing based on 'unexplained wealth' using the sliding scale of probability that exists under the disciplinary regulations of SGBs.²⁶

Doping

Foster's argument that global sports law is self-regulating and does not conform to principles of international law is more difficult to make out in regard to the regulation of doping in sport, since sports governing bodies already of course operate in a public law sphere in relation to anti-doping. The rules are based on the 2005 United Nations Economic, Social and Cultural Organisation (UNESCO) Convention against Doping in Sport and are the most egregious example of 'sporting rules' stemming from the international legal order. The World Anti-Doping Agency (WADA) comprises representatives both of public authorities and of the Olympic movement.²⁷ The UN Convention gives effect to the WADA Code under public international law and under Articles 11 and 12 states are obliged to facilitate the creation of national anti-doping agencies. However the WADA Code only has legal force by its transposition into the anti-doping regulations of the various sports bodies, again with the burden of proof not matching that of public criminal courts, thus meriting a description of the anti-doping movement as 'a privatized analogue to the criminal justice system that operates at or beyond the fringes of national legislative and judicial control'.²⁸

Foster's critique of global sports law was tested in regard to anti-doping in the recent *Pechstein* litigation which threatened to break open completely the doctrine of sporting autonomy since it questioned the underpinning principle of *lex sportiva*, namely the use of private arbitration/disciplinary hearings and the acceptance of CAS as an independent judicial body.²⁹ Pechstein (a celebrated Olympic ice skater) sought a declaration from the German courts that her CAS endorsed doping ban was unlawful, as she had not freely consented to the sporting regulation providing for private disciplinary proceedings to the exclusion of the court. Pechstein challenged the judicial independence of CAS from her sport's governing body, framing her argument on EU competition law and on Article 6 of the European Convention on Human Rights (the right to a fair trial).

Article 27 of the CAS Code recognises the principle of consent (to arbitration to the exclusion of the courts), which is deemed to be given through participation by athletes in events organised under the regulations imposed by SGBs, a position endorsed by the Swiss Federal Tribunal in the *Roberts* case in 2001.³⁰ Since the 'leitmotif of arbitration is autonomy and consent' (Mance 2016: 2) the issues raised in Pechstein's challenge to *lex sportiva* are fundamental: first, is the consent of athletes to submit to arbitration freely given and valid; and second, a subsidiary question, how independent is CAS of SGBs? The *Pechstein* litigation therefore raised again the question of whether 'CAS has sufficient independence to be a law-maker'? (Vaitiekunas 2014: 2).³¹

Initially Pechstein's challenge in the courts to *lex sportiva* and CAS made some headway. The decision of the Oberlandesgericht (OLG) München was that it would be contrary to German public policy, which prohibits abusive conduct by undertakings that have dominance in a market, to recognise the CAS award; essentially the court held that CAS lacked the requisite independence from SGBs. This ruling was welcomed by those, such as Duval and Van Rompuy (2015), who argue that CAS needs reform, and that democratisation of transnational judicial bodies (such as CAS) is key to them delivering 'justice'.³² The later decision of Germany's highest civil court, the Bundesgerichtshof (BGH) to overrule the inferior court's ruling, thereby restoring the status quo ante, and to a great extent the legitimacy of CAS procedures, and the whole system of sporting disciplinary tribunals, is in some respects therefore disappointing, as it represents a missed opportunity to reform CAS procedures.³³

As to any criticism that *lex sportiva* and its system of private arbitration is inherently in opposition to the rule of law, it is important to note that the OLG did not question the principle of athletes being obliged to submit disputes to arbitration. It adopted the same approach as the English Court of Appeal, which in *Stretford v The Football Association* [2007] EWCA Civ 238 was equally supportive of the principle of arbitration in sport: 'To strike down clauses of this kind because they were incompatible with art 6 [ECHR] on that basis would have a far-reaching and, in our opinion, undesirable effect on the use of arbitration in the context of sport generally'. This echoes the comments made by the English court in *Kaneria*, upholding the autonomy of sporting tribunals and unfettered discretion afforded to sporting tribunals under *lex sportiva*.

Complementary State and Private Norms on Athlete Corruption?

Although the cases considered above tend to affirm Foster's concern that *lex sportiva* is a self-regulating system in regard to sanctioning athlete corruption, the position is complicated by new state laws both in regard to match-fixing (as noted above), and now doping, as illustrated by Germany's first Anti-Doping Act (the Act) which came into force on 1 January 2016 and which introduced the criminalisation of doping.³⁴ Is this a recognition that in relation to anti-doping *lex sportiva* is somehow inadequate, contrary to the rule of law or in any way a challenge to accepted legal norms? Clearly not, since Section 11 of the Act recognises the legitimacy of the existing anti-doping mechanisms and of the international system of sports arbitration (i.e. *lex sportiva*). Interestingly, in a press release, the World Anti-Doping Agency has indicated it does not favour the criminalisation of doping, as has occurred in Italy and Germany, (WADA 2015).

The Agency believes that the sanction process for athletes, which includes a right of appeal to the Court of Arbitration for Sport (CAS), is a settled process, accepted by all governments of the world, and further that the sanctions for a doping violation by an athlete, which now includes a longer, four-year period of ineligibility, have been globally accepted by sport and government. (Brown 2015)

In the UK the so-called 'GIGS' (government integrity group for sport) group is drawn from across Whitehall and key agencies such as the Gambling Commission and UK Anti-Doping and has been instituted to promote sporting integrity against the threat of match-fixing and doping.³⁵ The UK government's 'Sporting Future' strategy plan acknowledges the requirement to help to tackle doping and match-fixing (HM Government 2015). The introduction written by then Prime Minister David Cameron confirms that 'We will stand up for the integrity of the sports we love' and includes a commitment to signing and ratifying the Council of Europe Convention on Manipulation of Sports Competitions: 'In doing so [we] will review the effectiveness of the UK's existing legislative framework', reads the strategy.³⁶

Just how modest a threat to the sporting autonomy this is, can perhaps be gleaned from a debate in the House of Lords in May 2016 on the state's role in investigating and sanctioning doping and match-fixing.³⁷ Parliamentarians (Lords Addington, Collins and Wallace) pressed for law reform to curb the autonomy principle and allow state intervention in international sports federations to restore the integrity of sport, by the creation and 'funding of a body that is independent of sports governing bodies'. The Parliamentary Under-Secretary of State, Department for Culture, Media and Sport (Baroness Neville-Rolfe), while acknowledging a role for GIGS and UK Sport and Sport England, defended the principle of the autonomy of sport and did not favour funding an anti-corruption body independent of sports governing bodies, ('I am not convinced that the direction in which the noble Lord is going is the right one'), but acknowledged that the government was 'looking at the whole area, including the question of criminal sanctions'.³⁸ This is a reference to the criminalisation of doping which, as has been noted, has occurred in other states and has also been actively considered as part of the UK government's Sporting Future strategy on sport, according to the Minister for Sport, Tracey Crouch, who has said 'We have to look at criminalisation to see whether or not that's something we can add to the toolbox of combatting corruption in sport'.³⁹

This overlay of private and public regulations aimed at sanctioning match-fixing and doping is an example of the fluidity in transnational law between the boundaries of state and private regulation. Jessup, (1956: 2) an early proponent of theories of transnational law, used the term to describe all laws that regulate events transcending national frontiers, to include both public and private law.⁴⁰

Conclusion

As a contractual order based on the regulations of the sports federations, *lex sportiva* has been criticised for its autonomy from national legal systems, thereby potentially qualifying it, in Teubner's (1997) phrase, as a 'global law without a state'. This has raised questions as to the fairness of both the process, and the sanctions applied, in private disciplinary rulings for athlete corruption. In particular, the notion of the willing consent of athletes to submit to disciplinary hearings and sports arbitration, raised by Pechstein before the German civil courts, has been criticised as a fiction. Yet it is hard to see how the core principle of a system of arbitration with the protection afforded by CAS as tribunal of last appeal can be improved; so long that is as the tribunals, in particular CAS, apply recognisable legal norms and are independent from SGBs. The alternative solution of disputes being raised by athletes of different nationalities before multiple jurisdictions arriving at contradictory decisions is avoided through *lex sportiva* and CAS; in the words of the German court in the *Pechstein* ruling 'a uniform competence and procedure can preclude that similar cases be decided differently, and therefore safeguard the equal opportunities of athletes during the competitions'.⁴¹ Exactly the same approach has been taken by other courts whenever the fairness of sanctions imposed through *lex sportiva* for on-field corruption has been questioned. In both *Kaneria* and *Pechstein* the courts have reaffirmed their approval of the use of private disciplinary/arbitral tribunals as the best way to regulate on-field corruption, on condition of course that the arbitral/disciplinary process must conform to the rules of natural justice. The flaws in CAS procedures articulated by the German court and (among others) Duval and Van Rompuy (2015) should act as a guard against complacency and a spur to further reform of CAS.⁴²

Moreover, national governments have rightly, whether through domestic laws or international treaties, signalled their intent to aid sports governing bodies to prevent and sanction match-fixing and doping. This paper has considered

the panoply of laws and regulations that have emerged to curb on-field corruption, in which public and private powers sometimes compete, sometimes cooperate, in their exercise of authority over athletes. Both international law, whether the 2005 UNESCO Convention against Doping in Sport, or the more recent Council of Europe Convention on Manipulation of Sports Competitions, and increasingly, national laws, are part of the framework of legal measures that regulate on-field corruption in sport.

The traditional argument for justifying sporting autonomy (keeping sport free from political interference), does not reflect the realities of modern professionalised sport which has engendered on-field corruption which sports governing bodies alone cannot counter.

'A better justification today would be that the twenty-first-century state cannot do everything; therefore, from a liberal point of view, governments should delegate what they can to other bodies, including self-financed private organisations, such as sports organisations, as long as the state retains control over legislation and the regulation of the sector in question.' (Chappelet, 2016: 8)

In the twenty-first century therefore, in the context of regulating on-field corruption, the 'autonomy of sport' means an acceptance by sports governing bodies and states that they both have a role to play in preventing and punishing cheating by athletes. States and national courts recognise that the running of sport is best delegated to private bodies and that this carries with it a private regulatory system with the power to ban athletes for corruption, but that given the scale of the match-fixing and doping problems in sport, action by public agencies relying on national laws is a necessary corollary to *lex sportiva*.

The emergence of legal norms to combat an alarming rise in athlete cheating has led to a shared competence between states and private sports governing bodies and tribunals which are a perfect illustration of the pluralistic nature of global or transnational law with its multifarious legal subjects and sources, characterised by Picciotto (1999: 9) as 'a spaghetti bowl or spider's web of intertwined organizations and arrangements which evade traditional categories of private and public, national and international law'.

Notes

- ¹ Foster distinguishes between 'global sports law' and 'international sports law'. The latter comprises the general legal principles that are part of international customary law – the *jus commune* – such as the principles of equity and proportionality. Regarding arbitration, see for example *Fulham Football Club (1987) Ltd and Sir David Richards (1) and The Football Association Premier League Ltd* [2011] EWCA Civ 855 which upheld Section S of the Football Association Premier League Rules that all disputes arising out of the rules must be submitted to final and binding arbitration.
- ² The serious ongoing threat to the integrity of sport posed by doping is laid bare in the 2016 Investigation and Independent Person report by McLaren to WADA. For further discussion of the problem of match and spot fixing in sport, also referred to as the manipulation of sports competitions, see Carpenter (2012); Veuthey (2014) and Serby (2015).
- ³ For a discussion of the autonomy of traditional associative sports organisations throughout the twentieth century see (Chappelet 2016).
- ⁴ Indeed there have been various instances of sports federations (including the IOC) suspending national governing bodies in cases of state intervention in sport. For example the IOC's suspension from the Olympics of Afghanistan, Kuwait and India in 2000, 2012 and 2014 respectively; and in 2016 Kuwait and Benin were suspended by FIFA over state interference; discussed at (Chappelet 2010: 6).
- ⁵ The IOC, whose legal seat is in Switzerland, is recognised as a legal person by the Swiss Federal Council (Latty 2011: 34).
- ⁶ For others, it is more complex, for Duval (2013) for example, *lex sportiva* reflects the complex legal interaction between the rules (and raw political power) of SGBs and the CAS's jurisprudence.
- ⁷ As Teubner (1997: 7) pointed out: 'global law will grow mainly from the social peripheries, not from the political centres of nation-states and international institutions. A new "living law" growing out of fragmented social institutions which had followed their own path to the global village seems to be the main source of global law'.
- ⁸ For example under the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1958, 330 U.N.T.S. 38, Can. T.S. 1986 No. 43 [the New York Convention].
- ⁹ *Bank Mellat v Helliniki Techniki SA* [1984] QB 291, recently cited by Simon in *Yukos Capital SarL v OJSC Oil Co. Rosneft* [2014] EWHC 2188 (Comm), [2014] 2 Lloyd's Rep 435.
- ¹⁰ See Latty 2011 and Blackshaw 2003 for further discussion.
- ¹¹ In another press expose of match-fixing, in 2016, a BBC/BuzzFeed investigation into Grand Slam match-fixing in tennis, individual athletes were not named. Heidi Blake of BuzzFeed speaking on 20 October 2016 at the Westminster Forum accepted that the evidence was not strong enough to name the suspected players in that investigation. In a recent and significant ruling from the CAS, evidence of betting patterns (BFDS reports) was admitted to corroborate suspected match-fixing, making it easier for sports governing bodies to impose banning orders for match-fixers. CAS 2015/A/4351 Vsl Pakruojo FK. There is also increasing cooperation between the IOC and INTERPOL, focussing on education programmes as outlined in Olympic Agenda 2020.

- ¹² *FK Pobeda et al. v. UEFA* (CAS 2009/A/1920).
- ¹³ See for example Articles 2 and 6 of the (International Cricket Council 2014). Article 6.2 makes failure to report an approach a ban punishable by a ban of between six months and five years.
- ¹⁴ See, for example, Article 3.2 (International Cricket Council 2014) 'The *Anti-Corruption Tribunal* shall not be bound by rules governing the admissibility of evidence in judicial or other proceedings. Instead, facts may be established by any reliable means, including admissions and circumstantial evidence'. At Article 3.1 the standard of proof is whether 'the Anti-Corruption Tribunal is comfortably satisfied that the alleged offence has been committed, bearing in mind the seriousness of the allegation that is being made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt'.
- ¹⁵ *ECB and Kaneria* [2013] EWHC 1074. Danish Kaneria is a Pakistani cricketer who had represented his country (over many years and with considerable success) and in 2009 was playing professional first class cricket in England as a registered 'overseas' player on a contract with Essex County Cricket Club. He was found guilty by a three man Disciplinary Panel of the England and Wales Cricket Board's (ECB) Cricket Discipline Commission (CDC) of orchestrating 'spot-fixing' and therefore of breaches of the 2009 ECB Directive 3.3 (bringing the game into disrepute) and 3.8.5 (inducement or encouragement to another to underperform) and was ordered to pay costs of £100,000 and banned for life from cricket, a ban reciprocated by other national cricket boards.
- ¹⁶ Only if it did could the court under that Act grant a witness summons sought by the ECB compelling attendance before the Appeal Panel of fellow player Mervyn Westfield whose evidence was crucial to proving Kaneria's role in the spot fixing.
- ¹⁷ See further judgment Kaneria para 31 ff, Cooke.
- ¹⁸ *Ibid.*, para 13. Under the doctrine of the court's inherent supervisory regulation of private tribunals, the grounds for review, even though under private rather than public law, are essentially the same as the public law grounds used by the Administrative court under Civil Procedure Rules Part 54 (judicial review). As Richards J observed in *Bradley v Jockey Club* [2005] EWCA Civ 1056, it would be 'surprising and unsatisfactory if a private law claim in relation to the decision of a domestic body required the court to adopt a materially different approach from a judicial review claim in relation to the decision of a public body'. For a general discussion of judicial review (or the lack of it) in relation to sports tribunals, see (Anderson 2010) Chapter 2.
- ¹⁹ See *Kaneria v The England and Wales Cricket Board Ltd* [2014] EWHC 1348 (Comm).
- ²⁰ *Ibid.*, para 41.
- ²¹ The court failed to accept Kaneria's argument that his life ban was disproportionate in comparison with the five-year bans imposed on Pakistani cricketers Butt, Amir and Asif by the International Cricket Council-the game's international governing body, and the six-month bans for South African cricketers Gibbs and Williams (handed down by a tribunal operating under the aegis of the South African cricket board).
- ²² See (Serby 2015: 89) for a detailed description.
- ²³ See <http://www.nationalcrimeagency.gov.uk/news/news-listings/436-football-match-fixing-charge>.
- ²⁴ Council of Europe (2014). The UK government has said it will sign the Convention but until all 28 EU member states agree none can ratify the Convention. Malta is currently opposed to ratification on account of its potential impact on their off shore gambling industry.
- ²⁵ See (Serby 2015) for a general discussion of the Convention and (Serby 2013) for discussion of the cooperation between FIFA and Interpol; and for the recent International Cricket Council agreement with the UK National Crime agency see <https://www.theguardian.com/sport/2015/dec/14/international-cricket-council-match-fixing-agreement-national-crime-agency>. At the time of writing, February 2017, an international Pakistani cricketer Nasir Jamshed has been arrested and bailed by National Crime Agency officers on suspicion of match-fixing in the Pakistan Super League.
- ²⁶ See n 14 above and n 28 below.
- ²⁷ Article 6 WADA Statutes. UK Minister for Sport Tracey Crouch, one of three European Union representatives, joined the WADA Foundation Board in January 2016. The Foundation Board is WADA's main decision-making body and its 38 members are drawn from Olympic organisations and national governments. WADA is a private law foundation with its legal seat in Switzerland, but is best described as a hybrid between private and public law, see further (Pound 2002: 54).
- ²⁸ (Erbsen 2006: 446). Art 3.1 of the WADA Code 'Burdens and Standards of Proof' states that the standard of proof is 'comfortable satisfaction... greater than a mere balance of probability but less than proof beyond a reasonable doubt'.
- ²⁹ For a full analysis of the case see (Duval and Rompuy 2015) and (De Marco 2016).
- ³⁰ Swiss Federal Tribunal, 7 February 2001, *Roberts v. Fédération Internationale de Basketball (FIBA) & Court of Arbitration for Sport* (CAS), 4P.230/2000.
- ³¹ As noted by Vaitiekunas (2014) 'the closer CAS's standards of independence and impartiality are to those that apply to the judiciary, the stronger may be the claim that CAS's *lex sportiva* constitutes law'.
- ³² See Duval and Van Rompuy (2015) for a detailed critique of the lack of independence of CAS from SGBs (contrary to the SFT ruling in the Gundel case) and their recommendations in relation to the identity of arbitrators and the ICAS panel.

- ³³ See also the comments of Charles Flint QC, Chairman of the International Tennis Federation's Anti-Doping Tribunal, on the need to alter the *de novo* basis of appeals to the CAS, without any deference to the findings of the inferior disciplinary hearings/tribunals; made in the light of tennis star Maria Sharapova's recent suspension for doping; in September 2016 CAS reduced Sharapova's ban; CAS 2016/A/4643 *Sharapova v. ITF*.
- ³⁴ German Anti-Doping Act, 10 December 2015, BGBl. 2015, 2210, available at, https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/BGBl_Anti-Doping.pdf?__blob=publicationFile&v=2.
- ³⁵ See HM Government (2015: 64) and Hansard (2016).
- ³⁶ *Ibid*: 64.
- ³⁷ See Hansard (2016).
- ³⁸ *Ibid*.
- ³⁹ See Brown, A. (2015).
- ⁴⁰ There is an alternative narrow definition of transnational law where the transnational space is restricted to 'transnational relations—contacts, coalitions and interaction across state boundaries that are not controlled by the central foreign policy organs of governments' (Nye and Keohane 1972).
- ⁴¹ OLG München, 15 January 2015, Az. U 1110/14 Kart, at II. 3) bb) (2) aaa).
- ⁴² See 32 above.

Competing Interests

The author has no competing interests to declare.

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