



AN ONGOING DEBATE

DOPING SCANDALS CONSISTENTLY ROCK THE SPORTING WORLD. THESE SCANDALS UNDERLINE THE IMPORTANCE OF BANNING CHEATERS FROM COMPETING AND TAKING A HARD-LINE STANCE AGAINST DOPING IN SPORT. ON THE OTHER HAND, SOME BELIEVE THIS IS THE REALITY OF SPORT AND THAT ATHLETES SHOULD NOT BE JUDGED TOO HARSHLY.

Over and above these practical mechanisms, in an effort to uncover doping violations, the anti-doping movement is now also relying more and more on athletes to report doping and/or suspicious activities. To this end, the "Substantial Assistance" provisions were added to the World Anti-Doping Code and by reference all Code Signatories' anti-doping rules, to allow athletes who have committed anti-doping rule violations to provide information that could allow an anti-doping organisation to charge other individuals with anti-doping rule violation in exchange for a lesser sanction.

It is perhaps not coincidence that at the 2017 IAAF World Championships, Justin Gatlin (a two-time anti-doping rule recidivist) stepped up to the podium to receive his Gold medal in the 100m dash instead of media darling Usain Bolt, whom only a few days earlier had spoken out against doping in athletics. This reignited a long-standing debate with regards to sanctions for doping: Should cheaters be allowed to return? Should doping bans be longer? Are we wrong to embrace athletes returning to sport after serving doping suspensions?

These questions are ripe with philosophical meaning, legal undertones and moral righteousness. Much time has been spent arguing and debating their merits.

Yet, attempting correctly to answer these questions is futile. No one can impose their moral views on another when it comes to matters of the heart (sport is passion after all). But there will always be those who try... This IPOD will perhaps shed some light on your next debate on this topic in the near or distant future.

RULES OF THE GAME AND RULES OF LAW

The authority or the power of an association to impose on its members standards of conduct necessary for the association to function properly is self-evident. Such are the **rules of the game** that are needed to run sport competitions.

The application of these rules is not, in principle, reviewable by a legal authority.

When athletes join a sporting federation and take part in sport competitions that are subject to the rules of international sports federations, they voluntarily agree, de facto, to bear specific responsibilities toward this federation. They agree to behave in a manner that will serve the federation's ideals. This responsibility has long included agreeing to abide by anti-doping rules and respecting the sanctions that arise from their breach.

Rules of associations that impose harsh penalties for specific types of conduct related to the sport, or for violations of the standards of conduct applicable in that domain where the violation is serious or repeated are always binding **rules of law**. This is the case for rules that punish such conduct or violations by means of strict measures such as retroactive disqualification, invalidation of important results or suspension for a relatively long period of time. The purpose of such rules is clearly not just to ensure the smooth running of a game, but the pursuit of more general objectives of a higher order. Yet, this pursuit has limitations.

Under the well established legal principle of proportionality, a restriction of fundamental rights must not exceed what is necessary to safeguard the public interest being pursued. Fundamental rights may only be limited by action of the governing body through statutory means. E.g. the International Federation's anti-doping rules. The harsher the restriction the governing body seeks to impose, the clearer and more precise the anti-doping rules must be. The restriction must also be warranted based on a sufficient public interest or the protection of the fundamental rights of others.

As a condition of membership, athletes enter into a contract with International Federations and agree to be subject to its anti-doping rules. But the possible penalty arising from a breach of these rules must be proportional to the objective being sought.

To better explain, just as the fundamental rights of members of a State can be restricted through rules and measures that are proportionate to the public interest objective sought

(from speeding tickets, to fines, to incarceration), so too can athletes forfeit their rights to their international federation by way of membership and be subject to the federation's rules and penalties; but only to the extent that the overall scheme of the contract makes this necessary and so long as the restriction imposed is in proportion to the objective of the rules. E.g. Drug free sport, health, etc.

PROPORTIONALITY

Proportionality is not only the paramount condition for the validity of restrictions to fundamental rights, it is also a Rule of Law governing the imposition of sanctions of any disciplinary body, whether it be public or private, including anti-doping tribunals and arbitration panels who decide on sanctions for anti-doping rule violations.

Decisions in doping matters rendered by many International Federations and the Court of Arbitration for Sport (CAS) have made it clear that proportionality plays a predominant role in assessing the validity of restrictive doping regulations. According to established CAS jurisprudence and legal doctrine the principle of proportionality requires to assess whether a sanction is appropriate in relation to the violation committed. Excessive sanctions are prohibited.

More specifically, as stated by Jean Paul Costa in his **Legal opinion regarding the draft 3.0 revision** of the World Anti-Doping Code, on June 25, 2013:

"One must recall that the principle of the necessity of sanctions, or the proportionality of the sanctions to the violations, has a wider scope of application than just to criminal subject matter; this is reasonable bearing in mind the risk of curtailing personal freedom, and in particular, professional freedom arbitrarily or disproportionately, and hence unfairly. In the same way, sanctions (or sentences) must not be automatic and they must be adjustable depending on the circumstances: this is a conse-

quence of the principle of the individualization or personalization of sanctions and sentences. This is precisely what we are dealing with here: not only are sanctions not automatic, they are adjustable/scalable. The modularity of sanctions stems from the consideration of several circumstances: the nature of the prohibited substance, the gravity of the individual fault, behavior during the procedure («prompt admission»), or even age (minors). Moreover, it is not possible to increase too significantly the consideration given to individual circumstances, since athletes have to be treated equally at the international level, and it would be unjust to treat athletes who have used the same prohibited substance differently, merely because they practice different sports. A more lenient sanction for a first offence or a second offence is likely to seriously jeopardize the effectiveness of the fight against doping.”

DETERRENCE

It is widely recognized that to promote effectively the fight against doping, the imposition of a suspension must necessarily have a deterrent effect for athletes.

Indeed, one cannot seriously dispute that the imposition of an ineligibility period is necessary to deter athletes from committing anti-doping offences and thus one cannot dispute the efficiency of such anti-doping regulations. Sufficiently severe sanctions are necessary to deter the use of doping.

It is obvious that the risk of a long suspension and permanent inability to hold a world record will, in general, be a significant deterrent for doping offences for most athletes. But in effectively imposing such a sanction, a disciplinary body would also be taking away any athlete's livelihood or the athlete's right to compete, etc. They would be restricting the athlete far longer than what is necessary or proportional to his or her infraction.

Under the current World Anti-Doping Code and ISSF Anti-Doping Rules, for athletes who commit a first doping offense, a two-year sanction for specified substance or a four-year sanction for non-specified substances, a fine and a cancellation of all prior results is the “price to pay” to ensure that the objectives of the fight against doping are met, and to ensure harmonization and effectiveness. This sanctioning scheme has been widely accepted as being proportional, necessary, and capable of achieving the legitimate aim of combating doping in sport.

It has been generally accepted that neither a two-year ban for a first doping offence nor a four year or life ban for intentional doping infractions are disproportionate in-and-of themselves, considering the compelling and necessary need to ensure harmonization, to sanction athletes who use performance enhancing substances and to deter others from doing so.

Yet, many believe these sanctions are not sufficiently punitive and do not offer a sufficient deterrent effect.

THE PURSUIT OF A LEGITIMATE AIM

The primary condition to justify a restriction of the athletes' fundamental rights is that such restriction pursues a legitimate aim.

Many have argued that life time bans should be imposed as a consequence to serious doping infractions.

The fight against doping being a legitimate aim, a provision seeking life time bans, which aims to reinforce the effectiveness of such fight may qualify as legitimate. Therefore, the key condition for justifying a possible restriction of the athletes' personal liberty and right to work could be met. But the fact that a sanction can go far beyond what is proportional could be problematic.

It has been well established in law that imposing a sanction on athletes beyond the period of ineligibility stated in an International Federation's anti-doping rules falls outside the ambit of the fundamental rights that all athletes and humans have. It is not something that should be endorsed.

Clearly, there are limits to the length of period of ineligibility that can and/or ought to be imposed on athletes as a result (of a first) anti-doping rule violation. In its current version, the Code and ISSF Anti-Doping Rules already consider recidivism as a specific aggravating circumstance by providing for different sanctions for first, second and third anti-doping rule violations (See Code and ISSF Anti-Doping Rules article 10.7). These provisions distinguish between “ordinary” first violations and “severe” first violations, or in other words violation involving specified substances vs. violations involving non-specified substances or methods and those involving a high level of fault as opposed to those where there is no significant fault or negligence involved.

DRAWING PARALLELS

Considering the principles of proportionality and legitimacy, it would seem, then, that imposing life time bans, and not allowing athletes to reintegrate to their sport, could in fact be exceeding what is necessary to safeguard the interest of doping-free sport.

There is something to be said for allowing athletes the right to rehabilitate themselves. This is the basis of the criminal law. Once an individual has served a period of ineligibility, should she or he not be allowed to re-enter society and the sporting world and be given an opportunity to right a wrong. Should the athlete not be given a second chance?

But when we all see, and specifically, when young children see a Justin Gatlin (who had committed two prior anti-doping rule violations) winning a Gold medal, do they see a

rehabilitated athlete or do they see a cheater who has gotten away with it? And when a super star like Maria Sharapova gets wild card entries into tennis tournaments (instead of other promising athletes) after serving her ban for an anti-doping rule violation, does this mean the sporting world is willing to excuse certain anti-doping rule violations depending on the star status of the athlete or the money that can be made by endorsing them? How does the athlete who has come up short for that wild card feel?

For arguments sake (I am preparing you for a debate after all), let us compare doping infractions to criminal infractions.

Surely, someone who intentionally murders someone should not bear the same penalty as someone who accidentally hits someone driving and kills them?

Surely, someone who knowingly steals billions from a well thought out Ponzi scheme cannot be equated to someone who shoplifts sunglasses?



The ISSF Anti-Doping Button

All these infractions are punishable and must be punished by the State in the pursuit of public interest by the imposition of penalties as both a deterrent and a punitive measure. But the penalty must be proportional to the infraction and necessary to achieve the legitimate aim.

In other words, not all infractions are, can, or should be treated equally. And, the same applies in anti-doping.

Should an athlete who took a cold medication containing a specified substance and inadvertently forgot to obtain a Therapeutic Use Exemption be sanctioned equally as an athlete who has intentionally been following an elaborate doping regime including blood doping and steroids?

The “*mens rea*” or intention of the athlete against whom an anti-doping rule violation has been asserted, like that of the wrongdoer who has committed a crime, is a necessary element in imposing the penalty.

Article 10.2.3 of the Code and ISSF Anti-Doping Rules explains that an intentional anti-doping rule violation is committed by a cheater; one who knowingly is trying to enhance his performance or one who knowingly or at



WORLD ANTI-DOPING CODE

The official WADA World Anti-Doping Code is available on www.wada-ama.org

least manifestly disregards a significant risk. This means that an anti-doping rule violation committed by an intentional cheater is, can, and should be treated more harshly. This is precisely why there is a sliding scale for infractions involving specified substances (from a warning to a 2-year ban) and why bans for intentional use of non-specified substances or prohibited methods will be 4 years (or 2 if the athlete can provide it was

non-intentional) or life (for multiple violations). There is no perfect system. But, the sporting world has sought to address the issue of proportionality as best as possible over the years. The World Anti-Doping Code and CAS jurisprudence both serve as testaments to this evolution.

THE DEBATE CONTINUES

The debate on the adequacy and length of currently imposed competition bans for anti-doping rule violation continues.

There will always be individuals who believe athletes who cheat should be banned longer; just as there will always be individuals who believe athletes who dope should be treated with more leniency. Conversely, there also will always be athletes who return from their bans to a successful career and others who will continue to be the subject of scrutiny and debate long after their bans have been served.

Should we shun these athletes as confirmed dopers? Should we commend them on their rehabilitation? Should we give them a chance to right their wrong? Or should they forever be considered cheaters?

Do you believe athletes who cheat should be given a second chance? Or, do you believe they should continue to bear the price of their doping violation for the rest of their life?

The bottom line is that every athlete against whom an anti-doping rule violation is asserted is different, just as the circumstances surrounding the anti-doping rule violation are different. So, the punishment, repercussions and ramifications of each rule violation will, rightly, also be different.

Under the current regulatory system and basic human rights laws, athletes who are punished and have served their bans can be given a second or sometimes third chance to return to sport. But this is only if the Rules allow for this and when it is so decided by a disciplinary panel. This is also if their body is still healthy, if their desire to compete is still there and if their passion for the sport remains.

Is this just or not? This is up to you to decide! In the end, I think it is fair to say, regardless of the outcome of this debate, that an athlete found guilty of violating sporting conduct by committing a doping violation will never quite dispel the dark hanging over his or her head.

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