

The winner takes it all! Reflections on the world anti-doping code and the possible criminalisation of doping in sport

"I got caught in Seoul and lost my gold medal. I'm here to try to tell people ... it's wrong, to cheat, not to take drugs, they're bad for your health"

(Ben Johnson, 1989 as quoted in Nafziger "International Sports Law" (2004) 147).

1 Introduction

The use of performance enhancing substances in sport has been a phenomenon of time immemorial. The use of performance enhancing substances in order to ensure the best possible results in sports is commonly referred to as doping (see Law "Doping Regulation" in *International Encyclopaedia of Laws* (eds Blanpain & Colucci) (2009) 129-143; Gardiner *et al Sports Law* 3rd ed (2007) 269-291; Gardiner *et al Sports Law* 4th ed (2012) 364-392; Anderson *Modern Sports Law – a textbook* (2010) 113-140; Nafziger *supra* 147-164; O'Leary *Drugs and Doping in Sport – Socio-legal perspectives* (2001) 1-57; 125-146; David *A guide to the World Anti-doping Code – fight for the spirit of Sport* (2008) 1-52; Ioannidis "The application of criminal Law on doping infractions and the 'whereabouts information rule – state regulation v self-regulation" (2010) *ISLJ* at www.buckingham.ac.uk/wp-content/uploads/2010/11/ioannidis.pdf (accessed 2012-12-04)).

Doping in sports is currently a highly debated and controversial issue impacting severely on the spirit of sport and the principle of fair play. The question as to how doping in sport can be effectively combatted poses a major challenge to sport. Recently, doping in sport once again received much attention in the highly controversial Lance Armstrong debacle. Armstrong was banned for life by the United States Anti-doping Agency (USADA) and stripped of his seven Tour de France titles. USADA's comprehensive report pertaining to Armstrong revealed that Armstrong was the centre of a sophisticated doping programme. The report disclosed that Armstrong used, *inter alia*, testosterone and blood transfusions and in addition expected his teammates to likewise take part in using prohibited substances (see "USADA: Armstrong 'cheated' way to top" at <http://uk.eurosport.yahoo.com/news/usada-report-proves-armstrong-used-drugs-15393> (accessed 2012-12-04)). USADA's report further provided that Armstrong and his teammates used a range of performance enhancing substances ranging from erythropoietin (EPO), blood transfusions, testosterone, corticosteroids, human growth hormone and masking agents (USADA *supra*). Armstrong subsequently admitted to the use of performance enhancing substances which included, *inter alia*, blood transfusions (See for example the article by

Okuro "Lance Armstrong's doping admission: Cheap confession in a reality of TV culture" *Washington Post* 2013-01-28).

Armstrong's case is yet one more example of doping in sport by a highly acclaimed sport star. A question which inevitably arises upon reading the plethora of newspaper coverage pertaining to Armstrong is whether the sanctioning of doping in sport is by any means effective. Upon closer scrutiny of doping in sport, it becomes apparent that doping encompasses a much wider playing field than merely the athlete doping him or herself. USADA's report on Armstrong confirmed that the doping regime in Armstrong's case comprised of a team of individuals all participating in the doping process.

The World Anti-Doping Agency (WADA) was established on 10 November 1999 with the aims of promoting, coordinating and monitoring the combat against doping in sport (David 1). WADA later sought to develop a standardised approach in respect of the detection and punishment of doping and introduced the World Anti-Doping Code (Code) which was unanimously adopted in March 2003 (David 2-3). The code has been adopted by signatories around the world. The striking reality is, however, that despite WADA's efforts to combat doping and despite the Code, the practice of doping in sport is not decreasing. On the contrary, it seems to be escalating.

The latter inadvertently leads to the question as to whether current anti-doping mechanisms are effective in combatting the phenomenon. It is clear that a more robust approach to doping is essential in eliminating this phenomenon. The question which inevitably falls to be assessed is whether doping in sport should not be criminalised. Ioannidis (1-2) eloquently espouse the following opinion:

It is submitted that the invocation of such powerful machinery, such as the criminal law, needs to be made with reference to sufficient reasons that can justify its application in the area of doping in sport.

In this contribution I will assess the practice of doping in sport against the backdrop of the instruments currently operative in support of combatting the practice of doping. I will, in addition, address the question as to whether doping should be criminalised.

2 Doping Defined

From the outset it is to be noted that there is no general legal definition of doping. Doping is defined in terms of article 1 of the Code as the occurrence of at least one of the eight anti-doping violations as provided for in article 2 of the Code (Anderson 122). The eight anti-doping violations can be summarised as follows (David 100-131):

- (i) Presence of a prohibited substance or its metabolites or markers in an athlete's bodily specimen (article 2.1);

- (ii) Use or attempted use of a prohibited substance or a prohibited method (article 2.2);
- (iii) Refusing, or failing without compelling justification, to submit to sample collection after notification as authorised in applicable anti-doping rules or otherwise evading sample collection (article 2.3);
- (iv) Violation of applicable requirements regarding athlete availability for out of competition testing including failure to provide required whereabouts information and missed tests which are declared based on reasonable rules (article 2.4);
- (v) Tampering or attempting to tamper with any part of doping control (article 2.5);
- (vi) Possession of prohibited substances and methods (article 2.6);
- (vii) Trafficking in any prohibited substance or prohibited method (article 2.7);
- (viii) Administration or attempted administration of a prohibited substance or prohibited method to any athlete, or assisting, encouraging, aiding, abetting, covering up or any other type of complicity involving an anti-doping rule violation or any attempted violation (article 2.8).

An in depth analysis of each of the abovementioned violations falls beyond the scope of this contribution. It is important to note that articles 1 and 2 of the Code should be read in conjunction with the preamble to the Code which provides that anti-doping rules equate, in a quasi-contractual fashion to sports competition rules regulating the conditions under which the particular sport is played and athletes are deemed to accept and be bound to the rules as a condition of participation (Anderson 122-123). Articles 1 and 2 should, in addition be read within the context of article 21.1.1 of the Code which provides that athletes are deemed to have constructive notice of their specific roles and responsibilities and “to be knowledgeable of and comply with all applicable anti-doping policies and rules adopted pursuant to the Code” (Anderson 123).

3 Code – Fighting for the Spirit of Fair Play in Sport?

For purposes of the current contribution, emphasis will be placed on the Code as the most prominent international code dealing with the prohibition on doping.

As stated above, the Code was the initiative of the WADA and was the product of a long drafting process. The Code was first adopted in 2003 and became effective in 2004 (Gardiner *et al* 371). The current revised Code came into operation on 1 January 2009 (Gardiner *et al* 371). The main objective of the code was to produce international consensus with the organisations which are signatories to it (David 2). The code contains “core” articles dealing mainly with doping violations, the proof of such violations and sanctions (David 2). The practical implication of the acceptance of the code is that both national and international level athletes who are bound by the code can be subjected to both testing for the presence of prohibited substances in their bodily samples in and out

of competition and to investigation pertaining to various violations which do not necessarily require adverse analytical outcomes or the analysis of bodily samples (David 4). In addition, other individuals who are bound by the code such as athlete support personnel, who may commit anti-doping violations such as trafficking or administering prohibited substances, can also be assessed by anti-doping organisations at both national and international level (David 4). The organisations which can accept the code as signatories save for WADA itself, include the International Olympic Committee, national Olympic committees, the International Paralympic Committee, national Paralympic committees, international federations, national anti-doping organisations and major event organisations (David 3; Gardiner *et al* 371). Neither governments nor national sporting organisations may be signatories to the code (David 3). National sporting organisations are brought within the ambit of the code by means of agreements made by signatories which adopt the code such as international federations and national anti-doping organisations (David 3).

The Code contains a set of regulations that strive to promote consistency in the application of anti-doping regulation (Gardiner *et al* 372). Gardiner *et al* (372) elucidates the problematic aspect of implementing the code as follows:

One of the major obstacles for any body intent on implementing a rule for the whole world is that it must encompass a diverse range of religious, legal and social perspectives. The imposition at a global level of blood testing, for example would meet with resistance on the grounds of religion and might prove counter-productive for where resistance to the global regime has arisen at a local level, whether as a result of cultural, social or legal disparities, this has had the effect of creating a situation of imbalance, where athletes are either subject to much stricter controls or effectively allowed to act irrespective of the rules 'imposed by the global regulator' (see also Boyes "The International Olympic Committee, transnational doping policy and globalisation" in O'Leary (ed) "Drugs and Doping in Sport" (2000) 178).

The preamble to the Code strives to preserve the essence and intrinsic value of the "spirit of sport" (Gardiner *et al* 372). In terms of the "spirit of sport" various values come into play such as ethics, fair play, honesty, health, excellence in performance, fun and joy, teamwork, dedication and commitment, respect for rules and laws, respect for self and other participants and courage (Gardiner *et al* 372).

Articles 1 and 2 of the Code contain the anti-doping rule violations under the code. The various violations have already been noted under paragraph 2 above. Article 3.1 of the Code provides that the burden of establishing that an anti-doping violation was committed falls on the anti-doping organisation alleging the violation (Gardiner *et al* 377; David 133). The standard of proof will entail whether the particular anti-doping organisation sufficiently established an anti-doping violation to the satisfaction of the hearing panel. The standard of proof is more than a mere balance of probability but less than proof beyond reasonable doubt

(Gardiner *et al* 377). Where the code specifically places the burden of proof upon an athlete or other person alleged to have committed an anti-doping rule violation, the burden of proof is a balance of probabilities except in terms of articles 10.4 and 10.6 where the athlete is required to meet a higher burden of proof (Gardiner *et al* 377; Anderson 128-129; David 133-134). Article 3.2.1 of the Code, in addition, contains a rebuttable presumption that the accredited laboratory conducted the particular assessment correctly (Gardiner *et al* 378).

Article 8 to the Code specifically pertains to the right to a fair hearing. The hearing process should address whether an anti-doping rule violation was indeed committed and, if so, the consequences thereof (Gardiner *et al* 378; David 189).

The hearing process should, *inter alia*, respect the values of a timely hearing; fair and impartial panel; the right to legal representation; the right to be timely informed of the alleged violation and the right to a written and reasoned decision with specific reference to an explanation of the reasons for any period of ineligibility (Gardiner *et al* 378). WADA provides for its own list of banned substances providing not only for a list of substance outlawed, but also their metabolites and 'related' substances (Gardiner *et al* 381). Article 4.3 provides for the following:

- 4.3.1 A substance or method shall be considered for inclusion on the Prohibited List if WADA determines that the substance or method meets any two of the following criteria:
 - 4.3.1.1 Medical or other scientific evidence, pharmacological effect or experience that the substance or method, alone or in combination with other substances or methods has the potential to enhance or enhances sport performance;
 - 4.3.1.2 Medical or other scientific evidence, pharmacological effect or experience that the use of the substance or method represents an actual or potential health risk to the Athlete;
 - 4.3.1.3 WADA's determination that the use of the substance or method violates the spirit of sport described in the Introduction to the Code.
- 4.3.2 A substance or method shall also be included on the Prohibited List if WADA determines there is medical or other scientific evidence, pharmacological effect or experience that the substance or method has the potential to mask the Use of other Prohibited Substances or Prohibited Methods.

The sanctioning of doping violations is provided for in articles 9 and 10 of the Code. One of the fundamental cornerstones of the Code is premised on the principle of strict liability. The latter doctrine entails that an athlete is strictly liable for the prohibited substance detected in, and revealed by, the testing of their bodily specimen and that an anti-doping violation is committed regardless of whether the athlete intentionally or unintentionally used a prohibited substance or was negligent in respect thereof (Anderson 123; Gardiner *et al* 387; David 169). Article 9 of the Code reaffirms the position of strict liability in respect of anti-doping

violation and provides that an anti-doping transgression in respect of an in-competition test automatically leads to the disqualification of the individual result in the competition in conjunction with all the resultant consequences such as the forfeiture of any medals or prizes won (David 169). In terms of Article 10, fixed periods of ineligibility are provided for each anti-doping rule violation as well as subsequent violations (David 170). The most important sanctioning provisions can be summarised as follows (Gardiner *et al* 388-389; David 172):

- (i) Article 10.2 – the periods of ineligibility for a contravention of article 2.1 (as discussed above in paragraph 2), article 2.2 or 2.6 are for a first violation two years and second violation, life.
- (ii) Article 10.3.1 – for violations of article 2.3 or article 2.5 the period shall be two years for a first violation.
- (iii) Article 10.3.2 – for violations of articles 2.7 or 2.8, the period of ineligibility shall be four years for a first violation up to a maximum of life.
- (iv) Article 10.3.3 – for violations of article 2.4 the period of ineligibility shall be a minimum of one year and a maximum of two years.
- (v) Article 10.5.3 – provides that an anti-doping organisation may, prior to a final appellate decision under article 13, suspend a part of a period of ineligibility imposed in an individual case where the athlete or other person provided substantial assistance to an anti-doping organisation or professional disciplinary body which results in the discovery or establishing of an anti-doping rule violation by another person. The extent to which the period of ineligibility may be suspended will depend on the seriousness of the anti-doping rule violation committed as well as the significance of the substantial assistance provided by the athlete or person concerned.
- (vi) Article 10.5.4 – provides that a period of ineligibility may be reduced where an athlete or other person voluntarily admits to the commission of an anti-doping rule violation.
- (vii) Article 10.10.1 – provides that no athlete or other person who has been declared ineligible may, during the period ineligibility, participate in any capacity in a competition or activity initiated or organized by any signatory, signatory's member organization or a club or other member organization.

In addition article 11 provides for sanctions to be imposed on teams who participate in team sports (Gardiner *et al* 390).

It is clear from the abovementioned summary of the most important principles of Code, that the code provides a well-structured and coordinated regulatory framework aimed at combatting doping in sport and to enhance the spirit of sport. The question which inevitably arises is whether the sanctions imposed upon athletes or other persons who committed anti-doping violations are effective in combatting the phenomenon. Should doping in sport not also be criminalised at a national level? Despite movements in some countries to criminalise doping, doping in sport to a large extent is not regarded as a criminal

offence (see for example Halgreen “The Danish Elite Sports Act” 2005 *ISLR* 74-75; Gardiner *et al* 391).

4 Doping Regulation in South Africa – a Synopsis

In South Africa it is notable that the South African Institute for Drug free Sport (SAIDS) was established in terms of the South African Institute for Drug-free Sport Act 14 of 1997 (hereinafter “the Act”). In terms of the Act, the SAIDS “fulfils an independent testing, education and research function relating to drugs and doping in sport” (Louw 129). In 2006 the Act was amended in order to provide for the enactment of matters contained in the Code and established a doping control programme in line with the code (Louw 129). The definition of doping in terms of the Act corresponds with the definition contained in the Code as well as the anti-doping violations and the burden of proof (Louw 133-136). South Africa is also a signatory to the Code. The SAIDS, in addition, provides for its own unique list of prohibited substances (see www.drugfreesport.org.za (accessed 2012-12-04)).

5 A Move Towards the Criminalisation of Doping in Sport

Despite the immense value of the Code and its regulatory framework in respect of doping, the practice of doping in sport is still a reality. The deterrent effect of the Code in respect of doping remains questionable. A related anomaly pertains to the potential criminal liability of not only the athlete him- or herself, but also of the coaches, medical doctors and others involved in the doping process. Principles of criminal liability which come to fore are *inter alia*, the crime of fraud, aiding and abetting as well as the doctrine of participation. Ioannidis correctly opines that establishing a criminal framework for doping in sport achieves those elements which are currently missing from the sporting governing bodies’ regulatory disposition which are certainty, consistency and transparency (Ioannidis (2010) *supra* 15). Ioannidis (15) in addition note that the purpose of a criminal framework:

[i]s not retribution for an injustice, but the protection of athlete’s health, as well as the protection of the social and cultural role of sports, the “fair play” principle, the genuineness of the results and the general and specific prevention.

Criminal sanctions should also pertain to those who encourage and assist an athlete with the use of the prohibited substances. Athletes may perhaps not have the necessary medical knowledge to assess the dosage or the most appropriate time for receiving these substances and will inadvertently turn to doctors or coaches for advice which in turn exacerbates the need for criminalising the conduct of such persons assisting the athlete (Ioannidis (2010) *supra* 16). The regulatory framework currently in place will in all probability be effective in the case of individual transgressions due to the principle of strict liability prevailing, but will be less successful in unveiling the organised crime of doping underlying the system of doping in sport. The main advantages

of criminalising doping are certainty, independent and transparent proceedings and consistence (see “Making doping criminal – the Austrian ‘sports fraud’ provision and general thoughts on criminalizing doping” in *Sport and the Law* (2010) at <http://www.law.ed.ac.uk/courses/blogs/sportsandthelaw/blogentry.aspx?blogentryref=8> (accessed 2012-12-04) hereinafter referred to as “Making doping criminal”). It could be argued that the aspect of prevention within the criminal context renders the criminalisation of doping more effective to the system currently run by the various sporting governing bodies (Making doping criminal 1). Criminalising doping will, in addition, have the added benefit of public prosecution which entails that doping transgressions will be investigated more effectively due to enhanced legal backing and manpower of the prosecuting authority (Making doping criminal 2). Ioannidis states that doping has an inherent element of cheating and correctly asserts that any manifestation of cheating has the potential to undermine and infringe upon sport (24).

It is submitted that doping in sport should be criminalised in terms of legislation specifically providing for the offence of doping within sport and prescribing penalties for the various violations. Such legislation should obviously be drafted with due regard to the Code and as such the legislation could complement the Code.

Ioannidis (24) mentions the following in respect of the enactment of legislation criminalising doping in sport:

The adoption of such legislation is intended to reflect the important role sport plays in society and in citizen's lives. In this legislation, the parties involved will accept responsibility for safeguarding the public interest in sport, which encompasses education, professionalism and the ideals of fairness, justice and equality. The legislation will also have to take into account the enormous public interest in sport as a means of promoting health and the vital role that sport plays in improving the health of a nation.

It is submitted that doping impacts severely on the whole principle of sport. It remains an undeniable fact that sport plays an integral and vital role in society. Doping destroys the spirit and purport of sport and will inadvertently result in society losing interest in sport due to the fundamental principle of fair play being diminished. Despite the vital role of WADA in the ultimate struggle against doping, doping violations in sport remains an inescapable reality. It is submitted that a more robust approach is needed to penultimately combat this phenomenon and to protect the reputation and image of sport. The latter can be achieved by means of a statutory framework in terms of which athletes or other persons, who have committed anti-doping transgressions will be prosecuted in terms of the criminal law regime and if found guilty, sentenced according to prescribed statutory sentences. Such legislation should in addition, punish doping on all levels as it is clear that doping is more often than not, a multi-layered programme stretching beyond merely the athlete doping him or herself.

6 Conclusion

Fair play in sport means fairness in all respects. Athletes gaining unfair advantages to other athletes due to the use of performance enhancing substances, need to be prosecuted and punished appropriately as such conduct not only destroys the spirit of sport, but could also prove detrimental to the athlete as well. In addition, all other parties involved in the process of doping should be punished for their involvement in the doping process. A possible way forward would be to criminalise doping in terms of a statutory framework punishing doping on all levels. Legislation criminalising doping can be effectively applied in conjunction with the Code. Public awareness of doping should also be increased with specific reference to the serious implications of doping in modern sport. The detrimental side effects of performance enhancing substances should also be constantly emphasised in an ultimate hope of convincing participants not to use these substances thereby protecting the true spirit of sport and fair play.

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Regulated flexibility and the Labour Relations Amendment Bill of 2012

1 Introduction

Contrary to statements by Zwelinzima Vavi, general secretary of the Congress of South African Trade Unions (Cosatu), the South African government is not ignoring a decision adopted at the African National Congress' (ANC's) 2007 national congress in Polokwane to ban "labour brokers" (s 198 Labour Relations Act 66 of 1995 (LRA) refers to "labour brokers" as "temporary employment services" (TES); Anon "Labour Brokers" *Leadership* 19 March 2012 available at <http://bit.ly/13Wyg1v> (accessed 2013-5-25)). This is confirmed by the ANC's 2009 election manifesto which called for laws that would "ensure decent work . . . introduce laws to regulate contract work, subcontracting and out-sourcing, address the problem of labour broking and prohibit certain abusive practices" ("2009 ANC Election Manifesto" available at <http://bit.ly/gP5gKl> (accessed 2013-5-25); Benjamin "To regulate or to ban? Controversies over temporary employment services in South Africa and Namibia" in *Labour Law Into the Future: Essays in Honour of D'Arcy du Toit* (eds Malherbe & Sloth-Nielsen) (2012) 189 202). A lot of water has flowed into the sea since these political commitments were made, but all