The criminalisation of doping in sport: The case for the prosecution

The invocation of such powerful machinery, such as criminal law, needs to be made with reference to sufficient reasons that can justify its application in the area of doping in sport.
The problematic operation of self-regulation is not a new phenomenon and it has been troubling practitioners, academics and sport administrators for years. The recent examples of doping, as well as their cover up, serves only to demonstrate how ineffective self-regulation is. Doping scandals and the inability of self-regulation to remedy the situation, have contributed to an environment of distrust and suspicion. Such is the nature of the decision making in self-regulation that the dichotomy of their ability and willingness to execute and apply their rules, in a purposeful and appropriate manner, is often called into question. Thus, corroborated evidence may also suggest that self-regulation is complicit in the biggest problem of modern sport, which is the prevalent use of doping. It is this realisation, therefore, that promotes the application of the criminal law on anti-doping infractions.

The theoretical background

The invocation of such powerful machinery, such as criminal law, needs to be made with reference to sufficient reasons that can justify its application in the area of doping in sport. Much of the objection to the use of performance-enhancing substances and other doping methods in sport is funded on issues of unfair competition and health, as well as the protection of the image of sport and other Corinthian values. These justifications are found in several documents of regulatory mechanisms and form the basis upon which all such mechanisms are founded and executed. But such reasons are not enough to justify the application of criminal law. This is because opponents of criminalisation of doping argue convincingly as to the limitations of the rigid and often dogmatic nature of criminal law, with reference primarily to the rights of the individual.

Opponents to the criminalisation of doping in sport also argue that the nature of the current anti-doping framework of sports governing bodies is of a disciplinary character. When an athlete wishes to participate in competitions, they must accept, unilaterally, the regulatory framework of their governing body. This, in essence, creates a contractual relationship between the athlete and the governing body, which means that both parties are bound by its terms. The terms, however, are drafted by the governing body and are imposed on the athlete. The athlete, therefore, submits to these terms and agrees to follow them, irrespective of whether this agreement is supported by valid consent, based on an informed decision. The athlete, consequently, agrees to submit to referential authority. If such authority is bypassed by the athlete, in the case of an anti-doping infraction, the athlete becomes the subject of disciplinary sanctions. Consequently, the application of disciplinary law on this pre-supposed contractual relationship between athletes and governing bodies, usually relates to the sphere of private law. But does this argument incorporate a valid justification for the exclusion of criminal law?

Private law or public law?

Although in a normal contractual breach, in a civil case, the court would offer a remedial application of compensation and/or damages, in a sporting dispute this contractual relationship may go further towards excluding the offender from his/her trade, with the application of a ban on sports related activities.

With this in mind, it is submitted that, unlike criminal law, the private nature of sporting disciplinary proceedings fails to consider the required elements of certainty and transparency towards a reliable disciplinary procedure, which would respect the rights of the accused. For example, in Squizatto v FINA CAS 2005/A/830, the Panel notes: “Applying the above explained principle was all the more necessary within sport, because regulations of sport federations, especially their doping rules, were often too strict and did not leave enough room to weigh the interests of the federation against those of the athletes concerned [...]”. Although the proceedings are of a disciplinary nature, the actual prosecution of a sporting offence and, its subsequent punishment, resemble that of criminal law. In the case of Kobzeva v FIG CAS 2002/A/386 the Panel notes: “As to the standard of proof, the Panel appreciates that because of the drastic consequences of a doping suspension on a professional athlete’s exercise of his/her trade (Article 28 Swiss Civil Code) it is appropriate to apply a higher standard than the generally required in civil procedures, i.e. to convince the court on the balance of probabilities.”

Similarly, it is submitted that the disciplinary proceedings of sports governing bodies, more often than not, fail to address the aims of their penalties, or at least, evaluate the main penological principles and, to a certain extent, go beyond what this private relationship presupposes. An athlete who is disobedient to their federation could be disciplined, but an athlete who breaches the anti-doping framework would be excluded.

Consequently, it is submitted that, in certain circumstances, a life-time ban and/or a considerable fine, cannot be said to be part of a remedial aspect of compensation. For example, a two year ineligibility from all competitions (which may increase to four years if the prosecuting authorities can establish mens rea) hardly gives rise to a soft disciplinary process. On the contrary, such punishment is very much the hard element of a paternalistic disciplinary process, given that such punishment has as an aim to either exclude the offender from his/her trade or ‘exhaust’ him/her financially. Notwithstanding the failure of the disciplinary process to establish a coherent and effective deterrent effect, it is submitted that the harshness of the rules, in relation to the application of the penalties, not only is disproportionate to the offence committed, within the regulatory framework, but it also creates an anathema of a kind that usually the criminal law regulates.

It follows that the nature of the disciplinary proceedings and the subsequent penalties imposed on the offender meet the criteria established in many criminal codes, whether in common or civil law jurisdictions. Some areas of self-regulation, such as sport, have immense significance to the public at large and, consequently, their activities and decisions may affect rights that would otherwise be considered public.

Justifying the application of criminal law and the public interest theory

It is submitted that the creation of a criminal law framework produces the elements that are currently missing from the sphere of self-regulation: certainty, consistency, clarity and transparency. Criminalisation of doping in sport, however, is a radical step and to a certain extent it creates serious consequences for both the individual and the state. Such coercive response needs to be explained and justified and, inevitably, it incorporates and counters the claims of liberal theorists. It further joins the Mill/Hart/Devin debate and it ensures that criminal law proposals can withstand the rights based agendas of jurists such as Dworkin. It also distinguishes and justifies the highly paternalistic approach of criminalising doping in sport and it shows that such approach is inherent within the proposals for criminalisation.

A further and compelling justification for the criminalisation of doping in sport relates to those who supply athletes with performance-enhancing substances and/or coerce them into...
such use. When athletes turn to doctors, physiotherapists or coaches for advice as to the use of performance-enhancing substances and/or methods, it is submitted that all forms of participation can be established, such as complicity, accessory before the fact, etc. In such situation, the paternalistic approach for the imposition of criminal law receives a compelling justification. In addition, the application of criminal law can be justified in terms of proving joint responsibility for a common criminal purpose with the aim to aid and abet. Such joint responsibility concerns the sporting officials, doctors, physiotherapists and coaches who supply athletes with performance-enhancing substances.

The main justification, however, for the criminalisation of doping in sport, relates to the ‘public interest’ theory. Its application waives the necessity of justifying a paternalistic approach, as the latter requires a balance between individual autonomy and the rights of society. Although the enforcement of criminal law entails an element of morality, it is submitted that the use of the public interest theory creates a distinguishing point. Such point explains that this unique proposal of criminalising doping in sport, does not enforce the will of society. Although the enforcement of an external regulation framework produces explicit references to health risks posed by doping and the protection of the spirit of sport. Although a legal moralism discussion may potentially cause difficulty in the justification of external regulation of doping (hence the use of the public interest theory which excludes a discussion on moral justifications), it, nevertheless, indicates that ethics in sport remain at the forefront of the public discussion and set the ground for the invocation of the public interest theory.

The public interest theory, as it has already been suggested, confirms that doping is a problem and different as it threatens to destroy sport and tends to damage the development of community in financial and social terms. The definition of the public interest theory demonstrates that in decision making processes that incorporate large segments of society, a unified public interest must be established, before the invocation of a powerful machinery, such as the criminal law, can be assumed. Although doping in sport is a controversial issue and tends to create polarisation, it can be submitted that doping in sport creates a situation where the public interest ought to outweigh the rights of individuals. Such justification has been illustrated in several sporting and non-sporting cases and forms the basis for the creation of an external regulation framework for combating doping in sport1.

As such, ‘the individual liberty’ argument fails to consider the coercive nature of doping, which, sometimes, is at its most insidious at the professional and state levels. Doping has as an aim the achievement of financial and social rewards. Notwithstanding the argument that the use of doping by elite athletes sets a destructive example for young athletes (the so-called ‘modeling process’) it is submitted that sometimes doping is the result of coercion and hence is a non-consensual and harmful action. Such coercion can be both literal and non-literal, particularly in a situation where doctors and/or coaches provide athletes with prohibited and, sometimes, harmful substances. Equally, in this, the focus of the law is the criminal act of the supplier rather than the self-harming act of the athlete (even if the focus was the harm to the athlete, we would still be able to classify this as permissible soft paternalism).

It follows that both soft and hard paternalism justify the doctrine of the public interest and, consequently, allow for the creation of external regulation in the form of criminal law. In the author’s opinion, such paternalism is inherent in several documents of self-regulation and given the importance of sport for society, doping in sport raises issues that are truly public and, therefore, deserve constitutional protection.

Conclusion
Criminalisation of doping is a positive step towards the elimination of the doping problem. It will ensure that public confidence and respect are restored, as it adheres to specific benchmarks such as transparency, certainty, accountability and efficiency. Doping is a special issue which affects large segments of society and the application of paternalism justifies the criminalisation of harm and risk despite the individual’s consent (see the decision of the European Court of Human Rights in Laskey v. UK 1997 24 EHRR 39, on the appeal from R v. Brown).

Consequently, it is submitted that state coercion is reserved for activities that pose a serious threat to society’s welfare, integrity and existence, such that it demands a public rather than private response. It follows that the public interest theory confirms that criminalisation of doping will not discriminate against individuals, but it will safeguard and protect the general good, the healthy development of society and the protection of innocent individuals who choose to compete without resort to performance-enhancing substances and methods. Criminalisation of doping in sport, therefore, will act in the public interest.

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1. Dworkin will not accept a dividing line between the law and morality, which characterises positivist interpretations.