

ROAD TO RIO

3: Doping in Sport



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*For your fair sakes have we neglected time,
Play'd foul play with our oaths.*

Biron, Love's Labours Lost, 1588

Sports law, regulation and doping

There are complex global rules which constitute each sport. Its ethics must also be accepted. This is required to achieve what we understand by the Shakespearean concept of “fair play”, a level playing field upon which everyone gets their just desserts.

This is getting more difficult to achieve. At elite level sport is now professional and highly technical. There are glittering prizes for success. Victory can depend on tiny margins of superiority. Denis Lillee’s aluminium cricket bat was not around long enough to find out whether it gave one. The umpires banned it before anyone could find out.

Other artificial aids are, however, more persistent and worrying. These include performance enhancing drugs (PEDs). PEDs offer this margin of superiority. In the 1970s the concern was anabolic steroids: synthetic steroid hormones made to resemble testosterone. These increase muscle mass and strength, but can be easily detected. Now there is a greater range of PEDs which, importantly, are less detectable. These include Erythropoietin (EPO) which enables more oxygen to be carried to the muscles and so enhance training regimes; and human growth hormone (HGH), which increases muscle mass.

Strict liability anti-doping rules are therefore needed to protect competitive equality.

But pressure to win also drives elite athletes knowingly to break the letter or spirit of the rules for an unfair advantage. Often they do this on the understanding that their competitor is doing the same, though this is no excuse. The Bard called this “foul play” or in simple terms, cheating.

This article considers the rules against doping and the external regulation of this area of sport by the law. It concentrates on doping of humans, rather than animals such as horses or greyhounds, though they are doped as well.

The international framework against doping

The World Anti-Doping Agency (WADA) was established in 1999 as an international independent agency. It is funded and assisted by sports and governments. It is best known for promulgating the World Anti Doping Code and developing anti-doping capacities nationally and internationally. The International Olympic Committee requires adherence to the Code. Participation by a sport at international level is, in practice, impossible without adherence.

Two international instruments specify governmental obligations in relation to doping. A 1989 Council of Europe Convention requires a national body to work to coordinate measures in each signatory state and a commitment to reduce the use of banned doping agents. It has been signed by the 52 members of the Council as well as other states. A 2005 UNESCO International Convention requires appropriate measures to be taken to combat doping at national and international level.

The CJEU considered the effect of sports anti-doping codes in *Meca-Medina v Commission* [2006] 5 CMLR 18. It recognised that sporting activity can be an economic activity within the meaning of Article 2 of the EC Treaty. It also recognised that bans on professional athletes pursuant to strict regulatory rules restrict freedom of movement and freedom to provide services. It held, however, that the rules were lawful as a matter of EU law because they pursued a legitimate objective and were necessary to *ensure the proper conduct of competitive sport*. The WADA compliant swimming rules in issue, requiring bans for positive tests, were not disproportionate in the circumstances.

The Court of Arbitration for Sport (CAS) in Lausanne was set up in the 1980s. Its aim, largely achieved, is to keep sport-related disputes out of the courts and within the sporting world. Disputes can be referred by agreement and most sports organisations agree to this under their rules. An affected individual or the sporting entity can refer disputes to CAS. Many of its cases have involved doping, though its role in influencing anti-doping policy has declined as WADA's has increased.

The 2015 WADA Code

Some of its provisions must be incorporated verbatim into the rules of anti-doping organisations. These include:

Art 1 defining *doping* as one of more of the anti-doping rule violations;

Art 2 indentifying the anti-doping violations. These include at:

- 2.1, the presence of a prohibited substance or its metabolites or markers in an athlete's sample;
- 2.2, attempted use by an athlete of a prohibited sample or method;
- 2.3, evading, refusing or failing to submit to a sample collection;
- 2.4, violations in connection with the out of competition testing regime known as *whereabouts* failures (essentially failing to be present at the location notified to testers or failing to notify altogether);

2.5, tampering or attempted tampering with doping control (for example with the untested sealed part of the sample labelled “B” which is retained when the “A” sample is tested);

2.6, possession of a prohibited substance or method.

They also include violations involving trafficking or administering prohibited substances and complicity in substantive violations.

Art 3 concerning proof of doping. This requires something *more than mere balance of probability but less than proof beyond reasonable doubt*. This is known as the “*comfortable satisfaction*” burden of proof.

Art 4 the annually updated list of prohibited substances and methods.

Other provisions establish mandatory guiding principles or requirements to be applied in the particular code. These include provisions relating to sanctions, including minimum disqualification periods, for those who commit violations.

As explained, the Code operates a *no fault* system. For example a positive test is sufficient to establish a violation. This approach has been upheld by CAS (see [Quigley v UIT CAS 94/129](#)) and the High Court (see [Gasser v Stinson, Scott J, Lexis Nexis, 15.6.88](#)).

Domestic cases and regulation

The High Court has also upheld a key principle in anti-doping regulation. There will be an implied, if not express, contractual relationship between competitor and the governing body. This requires adherence to the rules. On the facts the implied contract came from the athlete’s conduct in joining a club, competing on the basis of the sport’s rules and in submitting to testing in and out of competition. See [Modahl v British Athletic Federation \[2002\] 1 WLR 1192](#).

The national authority is now UK Anti-Doping (UKAD), a Non-Departmental Public Body accountable to Parliament through the Ministry of Culture, Media and Sport. It follows the WADA Code. Unlike some other countries the UK has resisted the introduction of criminal sanctions for doping violations, although recently there have been renewed calls for this stance to be reconsidered. Indeed, only last month, in response to a Sunday Times report regarding a UK doctor who had allegedly prescribed banned drugs to athletes from a range of sports, John Whittingdale MP (Secretary of State for Culture, Media and Sport) stated: “We are looking at whether existing legislation goes far enough...If it becomes clear that stronger criminal sanctions are needed we will not hesitate to act.”

Is the system working?

Recent revelations by whistleblowers and investigative journalists suggest not effectively enough. PEDs are too easily available, including on the black market and the internet. New drugs and methods are constantly developed to beat the testers. These include regularly doping small amounts of PEDs out of competition (micro-dosing) and exploitation of therapeutic use exemptions for PEDs (TUEs). Smart competitors and coaches know how to beat the system. In many countries there is limited commitment to regulation if it means their athletes will become less successful on the global stage. Blind eyes can be turned in return for payment.

There is some hope, however. Cases like Lance Armstrong's show that whistleblowers can achieve in weeks what the current under resourced testing regimes fail to achieve in years. Every time a scandal erupts, the public becomes yet more sceptical. In the end the sponsors and fans may drift away. The financial imperative for the big money sports to provide resources for testing, commensurate to the scale of the problem, will become obvious. All, not just some, of those in the game may then have to start playing fair play with their oaths.

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Further information

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