



Fitting the punishment to the crime: The legitimacy of lifetime bans for first time doping offences

Introduction

This article considers the issue of lifetime bans for doping offences in the wake of the WADA Independent Commission report into allegations of coordinated and state sponsored doping in Russian athletics.

Sport captivates and inspires because of the extraordinary feats our sporting idols show the body to be capable of. However, these feats only have meaning when we believe they are achieved through genetic gifts, dedication and sacrifice. We feel deceived if we learn that they are the result of performance enhancing substances and those feelings are multiplied many times over for the sportsmen and women cheated out of the recognition that their genuine gifts, dedication and sacrifice merit.

The recent revelations of a coordinated doping programme within Russian athletics detailed in the WADA Independent Commission's Report¹ are all the more shocking because they concern the facilitation and promotion of doping behaviour by the organisations entrusted with its detection and eradication. Against this backdrop, calls for increased sanctions and, in particular, lifetime bans for doping offences are unsurprising. The logic of these calls is clear; the ultimate sporting sanction of lifetime ineligibility is necessary as an effective deterrent to would be dopers. Added to this is the unpalatability of watching those found guilty of doping offences return to compete for and, in some instances, win the biggest prizes in their sport².

Doping is not a new problem however. Nor is the concept of lifetime bans. Why, therefore, have the organisations entrusted with detecting and sanctioning doping not acted before to impose such a sanction? Further, could and should those organisations now introduce such a sanction?

Sanctioning within the global system of Anti-Doping Rules

International and national sports bodies are individually entrusted with rooting out doping within their particular sports. Their autonomy is constrained, however, by the need to comply with the provisions of the World Anti-Doping Authority's code, which has been almost universally adopted by the world's sports bodies, as signatories to it.

The Code (the latest iteration being implemented in 2015) stands at the top of a globally harmonised system of anti-doping rules with the rules of national and international participant bodies modelled on it³. In turn, individual competitors (and to some extent those supporting them) are bound to the WADA Code through their express or implied acceptance of their sport's anti-doping rules when participating in competitions / activities organised by its governing bodies. Compliance with the Code is therefore a precondition for sporting participation.

In fact, the Code's sanctioning regime does provide for lifetime bans. However, they are reserved, on a first offence, for what the Code considers to be the most serious offences, i.e. those involving trafficking or administration of banned substances (particularly where minors are involved). For the typical doping offence, involving presence of a banned substance (and other offences such as use/attempted use, whereabouts failures, possession and failure to submit to sample), lifetime bans are only imposed for a third offence. It would be a mistake, however, to think that the Code is lenient and flexible.

The minimum ban for a first time offence (involving the presence of a prohibited substance in a sample) is two years but this only applies where an athlete can show that the offence was unintentional. Following changes applied in January 2015, an offence is presumed to be intentional and a four year ban imposed unless the athlete can show positively that it was not⁴. The starting point is therefore a four year ban, which, in some cases, will operate effectively as a lifetime ban from competition given the length of time that an athlete will spend out of the sport⁵. For any subsequent violations within the same ten year period, the ban is increased to twice the period of ineligibility that would have been imposed for a first offence (generally 8 years) and then a lifetime ban for a third offence.

The Code is also inflexible in its approach to reduction / elimination of sanctions. Authorities have some discretion to reduce bans in recognition of co-operation⁶ or admissions prior to notice of an anti-doping rule violation⁷ but the scope for reducing or eliminating sanctions based on the degree of fault involved is very restricted. In order to avoid a ban entirely, an athlete has to show, first, precisely how the substance entered

¹ Available at https://wada-main-prod.s3.amazonaws.com/resources/files/wada_independent_commission_report_1_en.pdf

² To take athletics as an example, the 2015 IAAF Championships sixty six of the athletes competing had previously served bans for anti-doping rules violations.

³ Whilst governing bodies have some discretion in the manner in which the Code is implemented within their rules, the majority of the provisions, including those related to sanctioning, are mandatory.

their system and, secondly, that they bear 'No Fault' in relation to the offence. To obtain a reduction in the ban, they will need to show how the substance entered their system and that they bear 'No Significant Fault'.

In many cases, demonstrating how a substance has entered an athlete's system is a significant challenge, particularly when notification of a positive test follows weeks or even months after a sample was given. This presents a risk that an athlete, who has unwittingly come into contact with a prohibited substance, will be treated as an intentional doper and banned for four years simply because of a lack of evidence. Imposing a lifetime ban whenever an athlete is unable to show how a substance entered their body could therefore lead to potential injustices.

Demonstrating a lack of fault is also exceptionally difficult as it involves proving that ingestion of the Prohibited Substance could not have been avoided, even by taking **all realistic and practicable steps** to do so. In practice, because of the exceptionally high level of care that athletes are expected to apply throughout their daily lives, this has proved virtually impossible for most athletes to do even where the substance has entered their system in what, to many people, would seem quite bizarre and exceptional circumstances⁴. It is, therefore, unsurprising how few athletes across all sports have succeeded in proving 'No Fault' since the Code's inception.

Obtaining a reduction in the ban through a finding of 'No Significant Fault' is considerably more achievable than a finding of 'No Fault'. It remains, however, restricted to cases of inadvertent doping and, even then, only where an athlete can show that their level of fault was, by ordinary standards, genuinely very slight. Further, the maximum reduction available is a year and, in many instances, it will be no more than a matter of a few months.

The Legitimacy of Lifetime Bans

The short answer to why governing bodies do not impose lifetime bans for a first offence is therefore straightforward; they are not allowed to as they are committed to following the Code. The extent of this commitment has been tested previously. Prior to the London 2012 Olympic Games, both the International Olympic Committee and the British Olympic Association had rules in place restricting athletes who had committed doping offences from competing at the Olympic Games.

The IOC's rule, known as the 'Osaka' Rule⁵, excluded any athlete that had received a doping ban of more than six months from competing at the next Olympic Games. Following a challenge by the United States Olympic Committee, CAS held the rule to be invalid because the restriction operated as an additional sanction on top of those mandated by the Code⁶. It was, therefore, inconsistent with the IOC's obligations as a signatory to the Code.

Following CAS' decision, WADA challenged the BOA's own rule (known as 'bye-law 25'), which provided that athletes who received doping bans were subject to lifetime ineligibility for selection for the GB Olympic team. The rule was enthusiastically supported by leading athletes and the BOA argued that it could be distinguished from the IOC's 'Osaka' rule as it concerned eligibility for team selection rather than the imposition of a sanction. CAS, however, held it to be inconsistent with the Code and the BOA's obligations as a signatory to it⁷.

It is therefore clear that sport's governing bodies, as signatories to the Code, cannot introduce rules inconsistent with its mandatory provisions and this position is reinforced by various provisions designed to address non-compliance including consequences such as ineligibility to bid for events and forfeiture of positions within WADA. In theory, WADA could change the Code to provide for lifetime bans but such a change is unlikely for a number of reasons.

First of all, the legality of such a ban is highly questionable. There are a number of aspects to this and a detailed analysis of the arguments is beyond the scope of this article. However, it is easy to see that a rule that effectively puts a stop to an athlete's career may infringe the principle of proportionality and engage both potential competition law issues and arguments over an individual's right to work. This is particularly the case in the context of the Code's rigid and standardised sanctioning regime which considerably restricts the scope for tailoring the length of the ban to the individual facts of the case.

Clearly, no regulator wants to implement rules which are potentially invalid. It is, therefore, understandable that WADA would opt for a maximum sanction that falls short of what some would consider to be an appropriate deterrent but which it can be confident will withstand legal challenge. As WADA's current President, Sir Craig Reedie, was quoted as observing prior to implementation of the new four year ban:

"Our advice was that [life bans] would be challenged and would not be sustainable in law....A four-year penalty will stand up in court and takes a person out of the cycle of an Olympic Games."

There are also policy reasons for restricting the imposition of the lifetime ban. It is obviously important that sporting punishments serve a deterrent function. However, they must also fit the sporting crime if the most serious offences are to be marked out as such. Whilst some might contend that intentional cheating is so heinous that it warrants the most severe penalty possible, the Independent Commission report itself demonstrates that an athlete's decision to dope does not take place in a vacuum.

It is generally the result of others encouraging, facilitating and, in some instances, compelling doping behaviour. Trafficking and administration of Prohibited Substances to others therefore lie

⁴ The position is different where the violation concerns a 'Specified Substance'. Specified Substances refer to an open ended category of substances being those that are not specifically identified within various designated classes on the Prohibited List due to their potential presence for legitimate non-doping reasons. Periods of ineligibility for Specified Substances range from zero (with a reprimand) up to two years unless it can be shown that the anti-doping rule violation was intentional, in which case the period of ineligibility is four years.

⁵ It would however not prevent their future involvement in the sport in another capacity such as a coach.

⁶ The otherwise applicable ban may be reduced by 75% in cases of Substantial Assistance (or down to eight years if the offence would otherwise have resulted in a lifetime ban).

⁷ The otherwise applicable ban may be reduced by 50%.

⁸ Take, for instance, the case of Mariano Puerta, where the Tribunal accepted that the cause of the positive test was inadvertent ingestion of traces of his wife's premenstrual medication in an apparently empty glass of water but held that he still bore some fault because of the level of care expected of him in checking what he drank from.

at the root of the problem in the first place and it is right that the sanctioning regime distinguishes these offences as especially abhorrent by reserving the most severe sanction for them. Seeing a convicted doper return to challenge again for sport's biggest prizes is unpalatable but the greater threat to anti-doping lies in the continued participation in sport of the coaches and physicians, amongst others, who make doping possible in the first case.

Further, whilst it is right that wrongdoing is punished in the sporting context, there is also a place for recognising the potential for rehabilitation. The practice of doping is unquestionably morally corrupt but it is difficult to justify imposing a lifetime ban on a first time doper when society accepts the need for 'second chances' in other aspects of life, including situations involving physical harm to another. To take an extreme example, why should the drink driver who has killed somebody be allowed their licence back but the doper never be allowed to compete again?

Finally, the heavy evidential burden and limited scope for consideration of individual circumstances mandated by the Code fortunately means that, once caught, few if any dopers will escape sanction. Inevitably though, when coupled with a backdrop of tight timescales and potentially significant professional fees, it also means that those who have inadvertently come into contact with a prohibited substance may end up being sanctioned as intentional dopers. This is the price paid for a globally harmonised and strictly enforced system of rules. Whilst deeply regrettable, such a cost may be deemed acceptable in the context of the global fight against doping provided the wrongly imposed sanction is limited to four years. Such a miscarriage of sporting justice becomes almost impossible to justify though if the sanction is a lifetime ban.

Conclusion

The lack of a lifetime ban for first time doping offences may seem unduly lenient, particularly in a situation involving apparent deliberate and unrepentant doping. It is, however, the trade-off for a legally enforceable and morally justifiable set of anti-doping rules which is, in turn, key to the Code's appeal amongst a diverse spectrum of sports throughout the world. Without this appeal, a globally harmonised and consistently applied set of anti-doping rules would not exist and, as the failings of the various institutions highlighted in the Independent Commission report demonstrate, the need for harmonisation, transparency and co-operation between national and international enforcement bodies, remains as strong as ever.

In addition, although it is appealing to think that the deterrent function of lifetime bans would help to prevent the endemic doping revealed in the Independent Commission Report, harsher sanctions are only meaningful when properly applied and enforced. In the context of the broken systems and procedures revealed in the report, harsher sanctions might treat the symptom but would do nothing to treat the cause of the problem.

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⁹ *USOC v IOC (CAS 2011/O/2422)*

¹⁰ *BOA v WADA (CAS 2011/A/2658)*

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