SHOULD DOPING BE A CRIME?

The recent controversy over whether to allow Russian track and field athletes to participate in the Rio Olympics for doping related activity, again raises huge concern over how clean sporting events turn out to be and what sanctions will face those athletes who dope. Should the UK follow the German example and criminalise athletes who test positive for or are found in possession of banned substances and send them to prison for up to 3 years? Those supplying them with banned substances face terms, in those countries, of up to 10 years in prison. In November 2015, Tracey Crouch, Sports Minister ordered her officials to draw up proposals for such a new law to have in place for the 2017 World Athletics Championship to be held in London. Criminal sanctions against doping in some form or another are already found in Australia, Austria, New Zealand, Spain, France and Italy.

There is an obvious, initial attraction to criminalisation as it may be seen to address the injustice of athletes denied a medal and subsequent lucrative endorsement and sponsorships deals that they would otherwise have been entitled to. It nourishes our sense of fair play, sporting ethos and general desire to see a just outcome. It may also prove to be the case that the threat of being imprisoned will ensure cooperating athletes are much more compliant and eager to assist prosecution authorities in doping prosecutions. However, no amount of compensation for the aggrieved or imprisonment for dopers will ever truly make up for the loss of standing in the stadium during the tournament and receiving a medal. That moment is lost forever and any retrospective action cannot recover it.

The World Anti Doping Agency indicated in October 2015, that they were not in favour of the criminalisation of doping athletes but encouraged the authorities to prosecute aggressively “those who are trafficking and distributing banned substances.” This was in keeping with their earlier policy, heavily influenced by an extensive investigation into the transnational trade in doping substances\(^1\), of pointing out the deficiencies in national law enforcement criminal codes in the areas of manufacture, supply and possession of doping substances. Their approach is to attack the suppliers and facilitators of doping, not the athletes.

Perhaps because so few athletes are actually caught there is a febrile public desire for something to be done to address the injustice and apparent lack of any long lasting consequences for those athletes caught doping. The current low standard of proof required of “comfortable satisfaction” has had little effect in closing the yawning chasm between those caught – about 1%- and the current estimate of Dick Pound\(^2\) of those taking banned substances - between 10% and 30%. How would a higher standard of proof of beyond reasonable doubt increase that conviction rate? It would not and it will in all likelihood lead

\(^1\) Alessandro Donati 2007
\(^2\) Former president of the World Anti-Doping Agency
to fewer athletes being caught. The imposition of sanctions by sports federations may well be suspended pending any criminal proceedings which could drag on for years leaving athletes in limbo while their careers slip way through the passage of time. That would clearly be unsatisfactory.

There is also the difficulty of investigating offences and maintaining evidential chains and deciding the time and venue of any prosecution. And would any criminal sanction be enforceable? How likely are the Russian authorities to extradite Russian athletes accused of doping to the UK following the discovery of a positive sample some time after the athletes have left the jurisdiction? And if athletes are arrested the next time they appear in the country, what effect would that have on the willingness of some athletes to attend events in the UK, even if they are clean?

Criminalisation could also disproportionately penalise younger athletes influenced or even perhaps unwittingly doped by their coaches. There is the obvious spectre of a state sponsored doping policy directed at athletes who have no desire and perhaps no understanding that they are being given banned substances.

An alternative to further criminalisation is a more robust use of current criminal sanctions. Many banned substances are also controlled drugs and subject to laws against possession and supply already. Those supplying controlled drugs to athletes or transporting for them across national territories are already in breach of drug laws. With the limited market that professional athletes represent, it cannot be beyond the wit of law enforcement agencies to target and investigate suspects and obtain the evidence they need against them under current legislation.

The authorities could also make the current testing regime more rigorous. Incredibly athletes’ samples are not routinely tested for all banned substances but only for a specific or a small range of them. These samples should be tested for all banned substances and then retained to re-evaluate at a later date when the testing technology has caught up with the cheats.

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