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DOPING IN SPORTS – ITS EVOLUTION AND ITS LEGALITY

Akash Agarwal*

ABSTRACT

In the 20th and 21st century, doping in sports has become a much-debated and criticized topic. Despite being an age-old practice, it has been recently brought into regulations; both in the international and national context. This paper begins with an insight into the concept of doping and its complexities. With a brief background, the paper aims at discussing the international regulations surrounding doping in sports which were brought into place, followed by the anti-doping laws adopted in India. The substantive as well as the procedural aspects of the issue are discussed with the help of two recent landmark judgments in the anti-doping laws jurisprudence. Further, the paper provides a comparative analysis on the turn of events on the legal validity of the International and National anti-doping laws, followed by the author's reviews and criticisms on the anti-doping laws.

Keywords: *doping, international, anti-doping, legal framework*

* Student of 5th year BBA.LLB from Alliance School of Law, Alliance University.
Email id : akash9080@gmail.com

BACKGROUND TO ‘DOPING’ AND ‘DOPING IN SPORTS’

The word ‘Doping’ is derived from the word ‘dop’, which is a term traditionally referring to a stimulant drink used during tribal ceremonies in South Africa in the 18th century. In simple words, doping can be defined as ingestion of external supplements to enhance performance-based activities. Intake of these substances benefits athletes in the following ways: recovering from injuries, decreasing fat tissue, increasing endurance, increasing muscle mass, increase in strength and recovering capacity. These numerous benefits make doping a common occurrence in sports.¹

Sport events and activities are greatly influenced by the sponsors as they provide funds and these funds help in organising these events and further provide the quoted prize money to the competitors. When an event has potential to attract a considerable number of audience it becomes a good opportunity for sponsors to promote themselves. With an intention to maintain their status and image in several events, athletes’ resort to indulging in substances to perform more than their capacity. In International competitions, the country’s image is at stake along with the participant’s own reputation. The participant athletes go through immense performance pressure. In order to prove themselves and not let down their nation, the participants indulge in doping activities. By enhancing their strengths through intake of substances which helps them to outperform others during competitions, ultimately serving their purpose.

Doping in sports is not a present or last century issue; it has been prevalent since ancient times. In Norwegian mythology, performance or strength enhancing substances were used to increase physical performance.² Similarly, doping mechanisms have been popularly used in ancient Greece and people offering such doping supplements were called medical specialists in sports.³ Additionally, in the ancient Roman Empire where race horses and gladiators used opium supplements to enhance their performances.⁴

It was only in 1928 when the act of doping was banned for the first time in athletic competitions by the International Athletics Federation (IAF) subsequently, 32 years later anti-doping tests were implemented.⁵ The first official definition of ‘doping’ dates from 1963, issued by the

¹ Vlad RA, Hancu G, Popescu GC, Lungu IA. Doping in Sports, a Never-Ending Story?. Adv Pharm Bull.;8(4):529-534, (2018).

² Ljungqvist A, “Brief History of Doping” 62 Med Sports Sci. 1-10 (2017).

³ Id.

⁴ Id.

⁵ Vlad RA, Hancu G, Popescu GC, Lungu IA, Doping in Sports, a Never-Ending Story?, 8(4) Adv Pharm Bull.

European Committee Council as “*Doping represents the use of substances or physiological mediators, which are not normally present in the human body, introduced as an external aid to increase the athletes’ performance during a competition*”⁶ ‘Doping in sports’ can be understood as administering or using of doping agents or doping methods in athletic competitions. It is highly criticised and is banned because it destroys the very spirit of sports and its competition. Further, it is harmful for the user’s health and it helps the person to gain an unfair advantage which he/she could not have achieved through natural means.

INTERNATIONAL GUIDELINES ON DOPING IN SPORTS

On an international perspective, the first major doping control took place at 1972 Olympic Games at Munich and at 1976 Olympic Games of Montreal where many athletes were disqualified for indulging in doping activities with loss of medals.⁷ Subsequently, there was a race between those trying to find new doping substances which can’t be detected or not listed by any organisation and organisations in the doping substance. Subsequently, in 1999, the International Olympics Committee convened the World Conference on Doping in Sports at Lausanne, Switzerland and the Lausanne Declaration on in Sports was created and signed by multiple governments. The declaration resulted in the creation of World Anti-Doping Agency with the duty of harmonising anti-doping laws throughout the world. Further leading to the creation of the World Anti-Doping Code in 2004 which was made to be harmoniously accepted by nation-states via the Copenhagen Declaration on the doping in Sports in 2003. Subsequently, UNESCO’s International Convention on Doping in Sports on October 19, 2005 was accepted. The convention was entered into force from 1st February 2007 and has 189 state parties currently.⁸ All the signatories to the convention are mandated to comply by the World Anti-Doping Code and ratify it on the national level. This would help in creating a harmonious anti-doping law worldwide. The International Olympics Committee also established the Court of Arbitration for Sports (CAS) at Lausanne, Switzerland which is termed as the Supreme Court in the field of international sports to resolve any disputes in this matter.

The World Anti-Doping Code has been revised constantly through consultation processes and discussions at World Conferences on doping in Sports held regularly, giving rise to the revised

529, 529-530 (2018).

⁶ Id.

⁷ Id.

⁸International Convention against Doping in Sport, UNESCO (Oct. 4, 2020, 12:50 AM), <https://en.unesco.org/themes/sport-and-anti-doping/convention>.

World Anti-Doping Codes over the years. At present, World Anti-Doping Code 2015 with revisions in articles adapting to changes, till 2019 exists. Approximately 700 sports organisations have accepted the code worldwide including International Olympic Committee (IOC), the International Paralympic Committee (IPC), International Federations (IFs) (including all IOC-recognized IFs), National Olympic and Paralympic Committees, as well as the National and Regional Anti-Doping Organizations (NADOs and RADOs).⁹

The code, at present, adheres and conjuncts to six International Standards¹⁰ –

- The International Standard for Testing and Investigations (ISTI) – These standards deal with the planning of effective testing procedures and maintaining the integrity or identity of the samples. Additionally, they encompass guidelines from notifying the athlete to the handling and transportation of samples for testing.
- The International Standard for Laboratories (ISL) – This standard ensures proper and valid testing results by specifying the criteria that need to be met by the testing laboratories to achieve and maintain valid accreditation by the organization.
- The International Standard for Therapeutic Use Exemptions (ISTUE) – This standard lays down the conditions and procedures that an athlete needs to follow and fulfill in order to be granted an exemption for the presence of the prohibited drug from the prohibited list in their system as “therapeutic use exemption”.
- The International Standard for the Prohibited List (The List) - This standard deals with the substances or the methods that are prohibited in and out of competitions and is classified into different categories. For example steroids, stimulants, gene doping etc.
- The International Standard for the Protection of Privacy and Personal Information (ISPPPI) – These standards deal with ensuring the appropriate protection of privacy and personnel data of the athletes while dealing with the organizations and people in relation to anti-doping laws and policies.
- The International Standard for Code Compliance by Signatories (ISCCS) – This standard ensures and monitors the compliance of the code by all its signatories. It ensures the harmonious acceptance of the code by all countries to boost the confidence of athletes in fair sports competitions.

⁹ The Code, World Anti-Doping Agency (Oct. 4, 2020, 12:50 AM), <http://www.wada-ama.org/en/what-we-do/the-code>.

¹⁰ Id.

Two more International Standards are set to come force from 1st January 2021 along with the new World Anti-Doping Code 2021 –

- The International Standard for Education (ISE)
- The International Standard for Results Management (ISRM)

According to the definition of the World Anti-Doping Agency (WADA), doping should be intended as any ‘anti-doping rule violation’, which include one or more of the following as per the World Anti-Doping Code¹¹ which involves all violations of doping laws stated in Article 2 of the World Anti-Doping Code:

- (i) presence of a prohibited substance or its metabolites or markers in an athlete's bodily specimen; (Article 2.1)
- (ii) use or attempt to use 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 authorized 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 whereabouts information and missed tests that 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 and (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 and Article 2.9)
- (ix) Associating in professional capacity with an organisation or individual engaged in the violations of doping laws (Article 2.10)

The code also provides for ample hearing and rebuttal opportunities by the athlete in doping cases. Further Article 4.3 of the World Anti-Doping Code, 2015 states the conditions for consideration of a substance or method to be prohibited. It lays down three conditions and

¹¹ Giuseppe Lippi, Massimo Franchini, Gian Cesare Guidi, Doping in competition or doping in sport?, 86(1) *British Medical Bulletin* 95, 96-97(2008), <https://doi.org/10.1093/bmb/1dn014>.

states that if any two of the three conditions are satisfied relating to the use of a substance/method, the same shall be considered for inclusion in the “Prohibited List” –

- a) The substance alone or with other substances has the potential to enhance performance
- b) If the use of the substance has actual or potential risk to the health of the athlete
- c) Is against the spirit of the sport

In this manner, the WADA has included numerous substances and a couple of methods in the prohibited list by categorising them into groups. The code provides that the athlete is presumed to know about the doping laws and is supposed to abide by the same. As the international standards prescribed are stated above, the code further contains articles to the same effect. Under Article 3, the burden of proving the doping violation is stated to be on the anti-doping organisation while in rebuttal of the same, the onus of proof shifts to the athlete while keeping in mind the International Standards in both cases. The burden of proof is between the balance of probabilities and beyond reasonable doubt as the panel has to be successfully convinced of the same. While it's easier for the anti-doping agency to prove the violation through means of laboratory testing, the burden of proof is more on the athlete after the test results turn positive as proving the 'no fault or negligence' criteria is hard to do as one can understand. The code provides for sanctions against individuals proven to be violating doping laws under Article 10 of the code including a two year ban for first time offenders (Article 10.2), life time ban for third-time offenders (Article 10.7.2) and for forfeiture of any medals or prizes won by the athlete as a result of doping in a competition along with being banned in that competition (Article 10.8). If the athlete is able to negate the presumption of intention of consuming the doping violation established by the concerned organisation, the sanction may range from a mere warning to 1-year ban. Additionally, the Court of Arbitration in Sports (CAS) handles the disputes at the final level.

NATIONAL GUIDELINES ON DOPING IN SPORTS AND THE REALITY

India is a signatory to the Copenhagen Declaration on Doping in Sports, 2003 as well as the UNESCO's International Convention on Doping in Sports, 2005. In 2005, India ratified and set up the National Anti-doping Agency (NADA) as a registered agency and set up Anti-doping rules of NADA in 2008, in conformation with the World Anti-doping Code of WADA.

But the practical reality in India is far more different. The Anti-doping rules were adopted from the World Anti-Doping Agency by India without considering the practical implications and

consequences of the same. The National Anti-Doping Agency has been serving as the mere prosecutor without raising any awareness about doping and doping substances in the context of Indian sports. Most of the athletes in India come from a rural background and have no awareness of doping and the prohibited substances of doping. Since sports in India, except cricket, is not widely famous or practiced professionally, many athletes are engaged in sports due to personal reasons more than professional reasons as there exists an advantage of sports quota in attaining a government job.¹² Alongside, a large number of doping cases in India are registered because of the lack of awareness in relation to the banned substances and methods in athletes. Doping gives a competitive edge to the athlete and several coaches themselves indulging in providing prohibited substances to the athletes. Thereafter, the athlete consumes the same without the knowledge of it being a doping violation. Lack of awareness is one of the major reasons cited by athletes in India who have been caught in doping violation cases.

Fortunately, the provisions of the World Anti-Doping Code which was conformed to by the National Anti-Doping Agency of India upholds the strict liability principle on athletes. They are presumed to have the intention of consuming the prohibited substance if the same is found in their systems. Further, many medicines for curing illness or common pains used on day to day basis contain these banned substances.¹³ In *National Doping Agency v. Jyotsna Pansare*¹⁴, a banned substance entered the athlete's body due to the use of a beauty product which had geranium oil in it.¹⁵ This case highlights the existence of banned substance in daily use products. Further, though her period of ban was reduced, it shows that a naturally well-trained athlete also lacks the awareness in relation to the banned substances in doping. Similarly, in the case of *Manjeet Singh v. National Anti-Doping Agency*¹⁶, the athlete was referred by the Sports Authority of India to the doctors specializing in sports medicine wherein the doctor himself prescribed the athlete some medicine containing the prohibited substance.¹⁷

¹² Solomon & Co., Anti-Doping Regulations in India, Mondaq (Oct. 04, 2020 12:50 AM), <https://www.mondaq.com/india/sport/623940/anti-doping-regulations-in-india?>

¹³ Lakshay Anand, Doping in India: A two-faced coin under Sports Law, Legal Bites (Oct. 04, 2020 12:50 AM), <https://www.legalbites.in/anti-doping-laws-india/>

¹⁴ Appeal No. 13.ADAP.2012.

¹⁵ Milind Rajratnam and Srishti Bhargav, Anti-doping Law: The Quagmire of Enforcing WADA Norms in India, RMLNLU Law Review Blog (Oct. 04, 2020 12:50 AM), <https://rmlnlulawreview.com/2020/04/08/anti-doping-law-the-quagmire-of-enforcing-wada-norms-in-india>.

¹⁶ Appeal No. ADAP/12/2011.

¹⁷ Id.

Furthermore, all Indian athletes are either not fluent in the English language or do not have the resources/knowledge to get well accustomed to the prohibited substances under the doping laws. Many players are unaware of their rights to appeal against the disciplinary panels and are afraid of stringent punishments due to the lack knowledge. Thus the athletes end up becoming a victim to the legal complications without insight into their legal rights.

This laid-back attitude of the National Anti-Doping Agency was highlighted in a case study¹⁸ where six Indian athletes who were gold medalists in the Commonwealth Games tested positive for doping and the banned substance found in their system was Ginseng, a form of anabolic steroids. It became a legal battle between the athletes and the National Anti-Doping Agency. The Sports Authority of India had the duty of providing them the needed supplements which they failed to do and hence their coach provided the bottle of those supplements for the athletes. The Anti-doping disciplinary panel found the athletes not at fault or negligent and remanded them for a year. This decision of the panel was appealed against by both, the athletes as well as the National Anti-Doping Agency and the World Anti-Doping Agency. The athletes wanted a complete reprieve while the agencies wanted a stricter action. The appeal resulted in the first decision of the panel being upheld. This further escalated to the Court of Arbitration in Sports, Lausanne (CAS) by the International Athletes Federation, the World Anti-Doping Agency and the National Anti-Doping Agency where the Court of Arbitration in Sports, under the anti-doping rules of the International Athletics Federation and the World Anti-Doping Code read with the anti-doping rules of the National Anti-Doping Agency, held that the athletes were at fault and issued a full two year ban on four of those athletes.¹⁹ If anyone was at a loss here, it was the athletes and for no fault of their own. Two years of ban impacted their career drastically. Among those athletes, there was a tribal girl who couldn't converse either in English or Hindi.²⁰ Athletes like them cannot be expected to gain the knowledge on anti-doping rules and prohibited substances by themselves; let alone the fact that these substances are present in daily use products. These cases highlight an aspect which raises an urgent concern of educating the athletes about the doping substances and what procedures they shall follow to prevent them from falling prey to such unethical products.

The National Anti-Doping Agency of India is just an imitation of the body of World Anti-Doping Agency, but it lacks the values of the World Anti-Doping Agency. The lack of

¹⁸ Solomon & Co., Anti-Doping Regulations in India, Mondaq (Oct. 04, 2020 12:50 AM), <https://www.mondaq.com/india/sport/623940/anti-doping-regulations-in-india?>

¹⁹ Id.

²⁰ Id.

awareness about the anti-doping rules combined with the lack of opportunities in sports, in one of the most populated countries of the world, is not the concern of the National Anti-Doping Agency or its anti-doping rules. The government while ratifying the code did not consider the ground realities of India with regards to sports which is a big handicap for Indian athletes when they compete with athletes all around the world who don't share the same disadvantage as them. At the end of everything, anti-doping rules which were incorporated mainly to protect the spirit of sports are killing that very spirit of sport in India.

RECENT LANDMARK INTERNATIONAL CASES ON DOPING

One of the landmark and recent case is the *Lawson v. IAAF*²¹ case. It is widely debated, criticized and welcomed decision by the advocates and athletes all around the world since it deals with the “no fault or negligence” principle and burden of proof. The code lays down the strict liability principle on the athlete once the athlete has tested positive for the presence of a prohibited substance in his sample but the “no fault or negligence” principle leaves a narrow window for the athlete to prove that the ingestion of such prohibited substance was not intentional. To prove that such ingestion was unintentional, the athlete has to sufficiently prove the source of the ingestion to explain how did it get into his system. Speculative evidences are not considered in the “No Fault or Negligence” defense. The defense has to prove not only the likelihood but also the probability of its happening, i.e. more than 50% probability.²² But this decision is criticized to have been a relaxing stand by some advocates while it is said to have been a continuity of normal standards by others.

In this case, Jarrion Lawson, the athlete had tested positive at Arkansas for Epi trenbolone, a prohibited anabolic steroid. His samples taken for test reflected traces of prohibited substance. He was provisionally suspended by the Athletics Integrity Unit wherein he submitted that the positive result must be because of the teriyaki beef bowl he had the day before the test was taken. It was a common practice in US to use trenbolone in cattle rearing. Additionally, he provided his hair sample to prove that he didn't ingest the substance on a regular basis. Thereafter, a First Instance Disciplinary Tribunal was formed. The details of the meat that the meat processor had provided the restaurant couldn't be obtained without a subpoena. The First

²¹ CAS 2019/A/6313.

²²Lindsay S. Brandon, Howard Jacobs, *Lawson v. IAAF: a view from the perspective of athletes' counsel*, LawinSports (Oct. 04, 2020 12:50 AM), https://www.lawinsport.com/topics/anti-doping/item/lawson-v-iaaf-a-view-from-the-perspective-of-athletes-counsel?category_id=121#.

Instance Disciplinary tribunal found his argument to be likely but not probable (more than 50% probability). The reasoning of the tribunal was based on the expert Professor Ayotte who stated that it is unusual for the edible meat to have trenbolone since the US laws required the same to be injected to the cattle's ears and it would be highly unusual for the back muscles of the cattle to be injected with the same since it would destroy the purpose of injecting trenbolone in cows.²³

After the First Instance Disciplinary Tribunal's decision, the athlete submitted himself to a polygraph test and the results confirmed that he was telling the truth. He appealed to the Court of Arbitration in Sports with the same hard burden of establishing the source of ingestion of the substance. The CAS after looking at all the evidences found Mr. Lawson not at fault or negligence and that he should not receive any sanction under the 'No Fault' provision of Article 10.4 of the World Anti-Doping Code. The CAS rejected both the athlete's as well as Professor Ayotte's expert testimony with respect to the possibility of the meat he consumed to have caused the positive results and accepted the expert testimony from the cattle industry witnesses that the injection in the cattle might have been misplaced.²⁴ It also considered the hair tests which negated any frequent doses of the said prohibited substance but not the possibility of single intentional ingestion. Looking at all the evidences together, the CAS found it probable the beef bowl which the athlete had the day before the test led to the positive test. In cases of *WADA & UCI v Contador & RFEC*²⁵, the principle of establishing the source of the positive test was reaffirmed. In the cases of *Mauricio Fiol Villanueva v. FINA*²⁶ and *Arijan Ademi v. UEFA*²⁷, it has been pointed out that while establishing the absence of intent and proving the source of such prohibited substance in the system and of the positive test, the character and the history of the athlete plays an important role in the defence of the athlete. In similar meat contamination cases of *FISA v. Arriaga* and *ITF v. Farah*, while tribunals held that it was not enough to prove that the meat contamination was a possible source of the prohibited substance, the CAS stated that it is enough to prove there is a 51% chance that the meat contamination

²³ Jonathan Taylor, Assessing contamination and thresholds under the World Anti-Doping Code: an advocate's view on Lawson v IAAF, LawinSports (Oct. 04, 2020 12:50 AM), <https://www.lawinsport.com/topics/item/an-advocate-s-view-on-lawson-v-iaaf-cas-2019-a-6313>.

²⁴ Lindsay S. Brandon, Howard Jacobs, Lawson v. IAAF: a view from the perspective of athletes' counsel, LawinSports (Oct. 04, 2020 12:50 AM), https://www.lawinsport.com/topics/anti-doping/item/lawson-v-iaaf-a-view-from-the-perspective-of-athletes-counsel?category_id=121#.

²⁵ CAS 2011/A/2384.

²⁶ CAS 2016/A/4534.

²⁷ CAS 2016/A/4676.

was the source²⁸. Thereby, the CAS has clearly stated the principle of “to be more probable than to be more likely or not likely”.

Another recent landmark case is of **WADA v Sun Yang**²⁹. While the earlier case dealt with the substantive aspects of the code, this case deals more with the procedural aspects of the code. In this case, there was a protest against Sun Yang, who had previously served a 3 month ban for doping violations, wherein he had been involved in an incident with doping officers again in 2018. An out of competition testing was to be conducted. The blood was taken from the athlete and the container was secured but the athlete displayed concerns about the actions and the accreditation of the testers. On his doctor’s advice, the athlete caused the vial containing the athlete’s sample to be smashed. The investigation by FINA (International Swimming Federation) held that the athlete’s actions were justified on the grounds of procedural errors and misconduct by the testers. The World Anti-Doping Agency viewed FINA’s approach to be lenient and filed an appeal to the CAS. Subsequently a public hearing was held at Switzerland. The three main arguments that were raised by Sun Yang through his translators were³⁰ –

- 1) There was no intent or fraudulent conduct to tamper and that he was acting on the instructions of his entourage
- 2) The DCO did not comply with her duties to inform the athlete of the consequences of not complying with the sample collection process which he was supposed to
- 3) That the blood sample was not a genuine blood sample but was just blood waste due to the procedural errors involved. The athlete also argued that it breached WADA’s regulations on protection of privacy and personnel information.

The CAS dismissed all of the above arguments by stating that the logic of anti-doping tests and anti-doping rules; that the athlete shall be subjected to the test whenever asked, while following the procedures in the World Anti-Doping Code, and the same has to be gone through despite athlete’s objections or the test itself would never occur. Further, CAS also refuted WADA’s argument that an athlete would commit doping violation in all circumstances if he/she refuses to comply with testing procedure or doesn’t allow the same to happen. The CAS states that the

²⁸ Lindsay S. Brandon, Howard Jacobs, Lawson v. IAAF: a view from the perspective of athletes' counsel, LawinSports (Oct. 04, 2020 12:50 AM), https://www.lawinsport.com/topics/anti-doping/item/lawson-v-iaaf-a-view-from-the-perspective-of-athletes-counsel?category_id=121#.

²⁹ CAS 2019/A/6148.

³⁰ Jack Anderson, A detailed review of the CAS Panel’s decision in WADA v Sun Yang & FINA, LawinSports (Oct. 04, 2020 12:40 AM) https://www.lawinsport.com/topics/anti-doping/item/a-detailed-review-of-the-cas-panel-s-decision-in-wada-v-sun-yang-fina?category_id=121#.

athlete may refuse to comply with the procedure in exceptional circumstances if there are serious flaws in following the doping procedure mentioned in the code but the onus of proving and establishing the existence of such exceptional circumstances will be on the athlete. It states that, in general matters of doubts and suspicions, the athlete shouldn't take matters into one's own and should comply with the procedure and then later object to the testing with the grounds for such objection. If not, the immense burden of justifying such actions lies with the athlete.

The panel noted that there were no procedural errors from the beginning in this case and that the athlete had initially signed his acceptance on the doping control form indicating that that he was notified properly but he later revisited his initial acceptance by tearing up that form. Further, the panel noted that the athlete was actually informed of the consequences of not complying with the doping procedures but the warnings were lost amidst the noise of the athlete's and his mother's (his entourage) protest.³¹ Eventually, the panel held that the athlete kept trying to shift blame to his support staff when an athlete himself is personally responsible even in face of the support's staff's threats on consequences of an action.

Finally, the panel stated that the athlete was liable for doping violations and termed him for an eight year ban due to repeat of doping violations. Since the violation was in respect of procedures and not of consuming prohibited substance, he was not stripped off of his earlier achievements and awards. The panel stated that he can apply for sentence reduction under the World Anti-Doping Code, 2021 which is supposed to come into effect from 1st January 2021 since it has provision to that effect.³² Thus, this case highlights the importance of the procedural aspects that is to be followed in anti-doping testing and conducts.

LEGAL VALIDITY OF THE INTERNATIONAL AND THE NATIONAL LAWS WITH RESPECT TO DOPING IN SPORTS

To understand the legal validity of the International and National Laws with respect to doping, it's essential to understand the principles or sources of International Laws and its adoption to National laws.

³¹ Id.

³² Id.

Article 38(1) of the International Court of Justice (ICJ) statute 1945 states the sources of International laws. Therefore, it is the foundation of existence of all International Laws that exist in the current world. Article 38(1) of the ICJ statute is as follows –

“The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;*
- International custom, as evidence of a general practice accepted as law;*
- the general principles of law recognized by civilized nations;*
- subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”³³*

*Therefore, three main sources are concerned when it comes to legality of the anti-doping laws – international conventions recognised by states, international customs and general principles of law recognised by nations. Before the Copenhagen Declaration on the Doping in Sports of 2003 and UNESCO’s International Convention on Doping in Sports of 2005, only the International customs would have formed the source for doping laws. Doping acts or enhancement drugs were widely used by all nations throughout the world and therefore the act of doping should have been legal as an International Law. To establish something as an international custom, it has to be consistent and uniform in its usage and should be practised by majority of nations.³⁴ This was the case before the 2003 Copenhagen declaration and 2005 UNESCO Convention despite International Olympic Committee attempting to ban doping and the users engaged in doping. But subsequent to the declaration and the convention, they itself became the source of international law and all signatories are bound by the declaration. The convention as per the **Article 26 of the Vienna Convention on the Law of Treaties 1980** which states the principle of “Pacta sunt servanda”³⁵ binding all signatories to the said Copenhagen declaration and the UNESCO convention. Further, it has mandated application of the World Anti-Doping Code harmoniously by all signatories, and can be said to have become the new international customary law. Hence, it is completely legal and valid from the point of*

³³ Article 38(1), International Court of Justice Statute, June 26, 1945.

³⁴ Malcolm Shaw, International Law, Encyclopaedia Britannica (Oct. 04, 2020 12:50 AM), <https://www.britannica.com/topic/international-law>.

³⁵ Article 26, Vienna Convention on the Law of Treaties, Jan 27, 1980.

International Law. The said ratification of International Law in National Laws is also valid and legal.

CRITICAL ANALYSIS

While one cannot question the legal validity of the anti-doping laws existing internationally as well as nationally overall, one can question the nature of laws involved in anti-doping laws and suggest or recommend appropriate changes to the same. The idea behind anti-doping laws was valid and reasonable from the point that it destroyed the spirit and competitiveness of the sport activities; severely damaging the health of the athletes. It was care for the sports and care for the professional involved in the sports. But over the years, in the race between individuals finding enhancement drugs not yet listed in the prohibited list and the anti-doping agency trying to find the said drugs and to add them to the prohibited list, the anti-doping community has become so fixated on it that it has begun to lose track of its initial ideas of protecting the spirit and competitiveness of the sports and being against severe damage to the health of professionals. It has been over-reaching its boundaries in the name of upholding its ideals.

The community must not lose the sight of the fact that the sport an athlete is participating in, is the profession of an athlete. While trying to ban enhancement drugs and hold testing for the same is completely reasonable, the approach must be fair to the athletes in the same regards. A ban on an athlete by the organization impacts the athlete's career significantly and obviously leads to the loss of livelihood of that athlete. While intentional consumption of the enhancement drugs leading to disqualification or ban of the athlete is justified on all grounds, the procedure established with regards to the same is not justified. The World Anti-Doping Agency frames the World Anti-Doping Code and revises timely through consultations and then it mandates the same to be uniformly adopted by all nations. But it forgets the fact the nations all around the world are not uniform. The code prescribes the principle of 'strict liability' if any prohibited substance is detected in an athlete's system.

Due to scientific evolution and the fact that since specific compounds can be individually administered, the prohibited list has identified individual compounds which can lead to doping. As stated throughout this paper, in many cases like that of India, there is no proper awareness of doping and its laws. The same is probably true for many developing and under-developed nations. The International Community, therefore, while framing anti-doping laws are ignoring the plight of the third world countries. Further, it has also been noted that the said compounds can also enter one's body through use of daily products, food consumptions, medicines etc.

With all this combined, the anti-doping laws are more harassing to the innocent athletes than effective on intentional users and to control doping. A reasonable human being cannot remember all the compounds listed in the prohibited list and at the same time be aware of what compounds are involved in the products which he/she uses or his/her closed ones use. Especially with those athletes who are unaware of doping laws itself. These compounds, if somehow detected in the system of an innocent athlete, becomes mental harassment for the innocent athlete.

Once an athlete tests positive for a prohibited substance, the burden of proof on the athlete is termed to be between 'the preponderance of probability and beyond reasonable doubt', but in reality, the World Anti-Doping Agency and its panel makes the burden of proof almost to the point of beyond reasonable doubt. This is because of the application of the principle of strict liability and the expectation of an athlete to provide for the proof of the source of the prohibited substance. Providing such proof might be easy for some cases while it might be really hard in many cases. This becomes a mental harassment for innocent athletes and even then, if the panel is not convinced with the proof, it will ban the athlete. This could be seen in the above-mentioned Lawson case as well as the 6 Indian athletes ban case. Many athletes might not even have the knowledge or the resources to appeal against the anti-doping agency's decisions.

The inclusion of narcotics substances in the prohibited list also shows the arbitrary regulatory powers that the World Anti-Doping Agency is engaging in since the code is slowly invading in the private lives of the athletes, dictating what they can do and what they cannot do. The World Anti-Doping Agency should focus on just the enhancement drugs which hinder the competitiveness and the fairness in sports among all athletes and limit itself to that. It should let the athletes decide what's good for their health in general and what's not since the athletes are 'adults' themselves. When one connects all these dots together, it really begs the question whether the present anti-doping laws are really protecting the spirit of the sport and the health of the athletes in this manner?

CONCLUSION

The World Anti-Doping Agency had started out with good motives and ideals. There is need for it to remain true to these ideals. While the act of intentional doping really needs to be prevented, it shall be equally applicable to all the athletes who engage in the sports as their 'profession'. While a uniform anti-doping law is helpful, the international community needs to focus on the third world country problems too when it comes to framing of the laws in that aspect. The nations all over the world are not uniform in nature and have many differences. With the advancement of science, many compounds are used in our daily products that we use or consume normally. Hence, it is needed to revisit the aspects of framing anti-doping laws and make more elaborate laws to effectively control intentional doping without sacrificing innocent athletes and their careers. The Legislative intent behind the initial formation of the anti-doping laws shall always be borne in mind which is preventing acts of 'intentional doping' in sporting activities.