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# Athletes' Rights vs. Anti-Doping Regulations: The Balancing Act of Strict Liability

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## ABSTRACT

*This paper scrutinizes a highly contentious interplay between athlete welfare and fundamental freedom and right of the athlete in sports law with a 'strict liability' principle. On one hand, strict liability, works on the basis that athletes bear a responsibility for ingestion of a banned substance in their body whatever the intent or consent. The practice is in support of the World Anti-Doping Act that promotes a 'zero qualification' policy to make the adjudication easy for elected officials and free of doubt, as means to deter any illicit practice of drug use. On the other hand, it is highly questionable in terms of fairness and justice where not every athlete has an intent to take the controlled and prohibited substance. Many accidental instances, as reported, have only emphasized the complexity of the problem. Broadly, it would be a complex question of how to guarantee the anti-doping measures as strictly in practice, but within the bounds of fairness, so as to support the integrity of the sport on the one hand and without compromising the dignity and rights of the athlete.*

**Keywords:** Athletes' Rights, Anti-Doping Regulations, Strict Liability, World Anti-Doping Agency (WADA), Fairness and Justice, Unintentional Doping.

## I. INTRODUCTION

Amid beating hearts and shouts, and high competitiveness, sport exudes passion and grit. At the same time, anti-doping rules exude a toxic, legalistic rhetoric that makes a discussion of sport doping laden with contradictions. Access to the mixed metaphor is through the door of strict liability – a legal doctrine that occupies a curious space within the entire corpus of sport laws if the problem of doping in sport is reduced to strict legal issues. In the debate between athlete's rights and anti-doping rules, the often-fragmented, dialectical interplay between the general features of good legal rules, and the hard demands of sport's ethics, permits some understanding of the doctrine of strict liability. This essay, which contends that the duty of proportionality (as a general feature of good legal rules) imposed on strict liability (which is a demanding doctrine

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of sports ethics) has corrosive effects on the rudimentary elements of such sports rights.

Strict liability is the rule that athletes are responsible for any banned substance that might be found in their bodies – even if the athletes didn't intend to take it, or even knew it was banned. It's one of the fundamental tenets of the World Anti-Doping Agency's Code. As the Agency explains: 'One of the principal tenets of the World Anti-Doping Program is strict liability. Strict liability means that an athlete is responsible for the substances found in his or her body: under strict liability, an athlete can receive an anti-doping rule violation even if the athlete was not aware of any wrongdoing.' 'Strict liability is a very, very severe policy' Strict liability thus sits at the heart of the 'zero tolerance' regime surrounding doping, a regime aimed in large measure at making the playing field level. It's a regime that avoids the need to prove an athlete's subjective intent to dope, which, as desirable as that might be, can sometimes be as elusive as it is worthy of pursuit. But it has obvious problems – mostly involving simple questions of basic fairness and justice. Athletes can get in trouble because they've used contaminated supplements, or they've used contaminated prescription medicines, or they've been drugged by somebody else.

## **II. THE FOUNDATION OF ANTI-DOPING REGULATIONS**

Competition is the basis of all sport's ideals and fairness, and therefore at the very heart of sporting values. But doping poses a threat to the fairness of competition, and so anti-doping rules have become the foundation of attempts to protect the spirit and worth of sport around the world. The organisation promoting these rules, attempting to protect and facilitate clean sport everywhere, is the World Anti-Doping Agency (WADA), established in 1999, which administers the Anti-Doping Code. This section will examine how the rules began, and provide an overview of the world of WADA and the Anti-Doping Code with a discussion of the principle of strict liability on which the regulatory framework is based.

### **(A) Overview of Anti-Doping Regulations: Introduction to the World Anti-Doping Agency (WADA) and the Anti-Doping Code.**

Recognized as a response to a pressing need for a harmonization of anti-doping at an international level, especially in light of the global nature and increasing sophistication of doping, WADA was born out of a collaborative effort between public authorities and the sports movement to address this common threat to the integrity of sports. The harmonization of antidoping policies from the international to the personal level is at the very heart of the WADA's cornerstone document: the Anti-Doping Code. This Code regulates the principles behind antidoping policies, rules, and practices worldwide, ensuring that all sports and countries

adopt the same antidoping rules and standards for their athletes.

The Code defined doping as ‘the presence of a prohibited substance in an athlete’s sample or the use of a prohibited method’ – singling out, in the second category, a number of doping violations beyond the actual ingestion of prohibited substances, such as avoiding detection, refusing to grant sample access, evading surveillance, or tampering with doping control processes. There can be no overstating the importance of the Code to a fundamental aspect of the legitimacy of sports competition: that all sports achievements are deserved, the product of more talent and guts than bottled up in a vial.

**(B) The Principle of Strict Liability: Definition and Rationale Behind Its Application in Doping Cases.**

The principle of strict liability is crucial to the success of the Anti-Doping Code. Strict liability means that an athlete will be held automatically responsible for any substance detected in his or her bodily sample, with the athlete being accountable whether or not s/he intended to take the banned substance, whether or not s/he was at fault or negligent in taking it, and whether or not the athlete knew (or should have known) that what was taken was a banned substance according to the terms of the Rules. The fact that a banned substance is detected in an athlete’s sample is considered sufficient to constitute a doping violation under the Anti-Doping Rules, and it is not necessary for anti-doping organisations to prove that the athlete intentionally, or negligently, or knowingly, used a banned substance.

One of the main policy justifications for the use of strict liability in doping is the avoidance, as far as possible, of compelled proof of fault or intent in doping transgressions, which can be costly to prove, not to mention arguably impossible in certain contexts. The principle thus keeps the process simple and clean, and more effective and less expensive for the anti-doping authorities. It is also effective in acting as a stern deterrent against doping by emphasizing the athlete’s responsibility for keeping prohibited substances out of his or her body.

But the imposition of strict liability raises important questions of fairness and justice (especially where athletes ingest a banned substance through no fault of their own). To address these concerns, the Code provides for the principles of fault, negligence and circumstance to be taken into account in setting sanctions. In this way, the strictness of the liability imposed remains tempered by considerations of justice, with sanctions tailored to reflect the culpability or otherwise of an athlete.

### **III. ATHLETES' RIGHTS UNDER INTERNATIONAL LAW**

Athletes are also part of sport, a \*legal\* and moral universe with its own adjudicative structures whose impact on wrestlers' careers, dignity and fundamental rights is often crucial. International law, including a series of declarations and conventions, protect these rights. But the principle of strict liability raises doubts over the extent to which these protections remain and are individual rights, or are now limited to the collective interest as interpreted by the designated authorities. This section will explore the fundamental rights of athletes, as enshrined in international law, and critically assess how specific rights are affected by the anti-doping controls.

#### **(A) Fundamental Rights of Athletes: Examination of Rights Under the Universal Declaration of Human Rights Relevant to Athletes**

The UN General Assembly adopted the UDHR as a statement of the basic principles of human rights on 10 December 1948. These principles apply to athletes too. A small number of articles in the UDHR are particularly relevant to sport and to doping control. These are articles 2, 3, 5, 7 and 9 set out below:

Article 2: (1) Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race .

Article 3: Everyone has the right to life, liberty and security of person.

Article 5: No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 7: All persons are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination inconsistent with this Declaration and against any incitement to such discrimination.

Article 9: No one shall be subjected to arbitrary arrest, detention or exile.

Article 14. (1) Everyone has the right to seek and to enjoy in other countries asylum from persecution. It is clear from the UDHR that the human rights agenda must remain the key focus of sport, and in the context of doping control in particular.

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 7 UDHR expands on this core principle of anti-doping law: All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to

equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

In particular, Article 8 states: ‘Everyone is entitled to a practical and effective remedy by ensuring that the competent national tribunal or its equivalent has jurisdiction and can apply law, without suffering discrimination or delay.’ A right to an effective remedy before a national tribunal – or, simply, access to justice – is therefore considered ‘the cornerstone’ of the protection of the rights of athlete: it is the remedy for challenging a charge of doping, and also a recourse for obtaining reparation and compensation.

Article 12 reads: ‘1. No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks.’ Article 18 provides that: Everyone shall have the right to freedom of thought, conscience and religion; this right shall include freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance. These are the legal markers that make anti-doping so engaged with certain forms of law. The reason why is simple: every athlete will be subject to quite an intense number of drugs tests. This could interfere with the athlete’s right to privacy. These rights are manifestations of human dignity, critical to equity, and must be protected by balancing the integrity-restoring effect of anti-doping against them rather than by suppressing them as an unfair intrusion.

### **(B) Specific Rights Affected by Anti-Doping Measures: Analysis of Rights Such as Privacy, Presumption of Innocence, and Freedom from Discrimination**

Whether or not anti-doping rules are a good idea — good indeed for ensuring that sport is fair in the important sense that athletes who have trained hard enough on incremental improvements can beat those who have taken short-cuts using chemical enhancements — it is still the case that anti-doping rules operate to restrict the rights of athletes in a particular field, a freedom, which should be balanced against the value of sport itself.

- **Privacy:** The right to privacy will always be tested in the context of doping control. An athlete must provide whereabouts information for out-of-competition testing and accept drug-testing measures at times that might be considered intrusive. Why is this deemed acceptable? That’s easy: because clean sport is legitimate and there are legitimate reasons why athletes should undergo, and accept forms of, intrusion that preserve the integrity of doping control.

- **Strict Liability:** The principle of strict liability in doping violations ignores the classic application of the presumption of innocence more generally stated in Article 11 of the UDHR as that ‘Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law’. With strict liability, the mere presence of a prohibited substance in an athlete’s sample is sufficient to establish a doping violation – regardless of whether the athlete intended to cheat or was negligent. This reverses individual rights and obligations as it avoids consideration of intent or negligence, assuming the athlete is ‘guilty’ until the athlete rebuts the charge.
- **Non-Discrimination:** To ensure the principle of non-discrimination, anti-doping regulations must be applied identically to all athletes, regardless of their country, gender or any other status. However, the variety of anti-doping regulations among sports and jurisdictions, and the multitude of mechanisms to enforce those rules, are likely to result in perceived or actual inequalities among athletes, undermining the principle of equality or fairness based on an equal playing field.

If those issues are too hard to overcome, then maybe other avenues can show us a different way: international organisations such as WADA constantly refine the regulations in an attempt to harmonise specific determinations and how they will be enforced across the board, and in ways that don’t endanger athletes’ careers by issuing false-positives. The Athlete’s Biological Passport, the refinement of thresholds for detected substances, and improvements to more sophisticated techniques of testing can similarly assist in assuring athletes that they aren’t at risk for false accusations and sanctions. And finally, honestly, these delicate balancing acts, such as the case of the Therapeutic Use Exemptions (TUEs), could not be performed otherwise: under strict guidelines, athletes are permitted to use certain medications for their health and functioning.

Perhaps leaving doping and athletes’ rights on a collision course between rigid integrity of the sport, on one hand, and human rights law on the other, reflects a mere matter of coexistence, if not mutual exclusivity. It is time that this dialectics of integrates and human rights X-rays into a sustained dialogue, legal lens, and a human right preserving and progressive regulations. The future of anti-doping for sport remains to be seen as the evolving regulatory frameworks are bound to go through a continuous paradigm shift. This transformation will naturally accommodate ways to achieve regulatory compliance without stripping off the core and inherent character of anti-doping, on one hand, and human rights in general, and athletes’ rights, in particular, on the other hand. Because the inevitable dynamics – a collision between intense

doping, persistent negligence in doping controls, doping policies dictated by the spectacle that cricket and football are, and human rights law – pose a challenge to the very credibility of sports and to human rights discourse as a whole. Both ought to claim the possible and the likely at once, to set the bar for fairness, integrity, and respect in each and every domain of human activity.

#### **IV. STRICT LIABILITY IN PRACTICE**

Strict liability in its anti-doping interpretation constitutes one of the most important, but also most controversial, principles in sports law. Without it, a whole legal landscape would not exist; a landscape that has changed careers and lives, and has revealed the sometimes-conflicting aims of fair sport and athlete protection. This section analyses the application of strict liability in practice by describing some of the issues and providing examples of its interpretation in actual cases.

##### **(A) Application in Notable Cases: Review of Key Cases Where Strict Liability Was Applied and the Outcomes**

The use of strict liability is such a central feature of anti-doping that it has influenced key decisions in several high-profile forfeitures in modern sport. In one of the earliest, and most dramatic upset of its kind, the professional tennis player Maria Sharapova failed a drug test for the banned substance meldonium at the Australian Open in 2016. Sharapova argued that she had been taking meldonium – a commonly prescribed drug in Eastern European countries – before the substance was detected on the anti-doping banned list, and that she was not aware that it had been added. However, as the WADA Code clearly states, this could neither excuse nor justify her presence of meldonium in her system, and she was accordingly held strictly liable. As a result, she was initially banned in 2016 by the International Tennis Federation (ITF) for two years. After appealing the decision to the Court of Arbitration for Sport (CAS), her ban was reduced to 15 months, with the panel agreeing that Sharapova had been in breach of the Code ‘due to the application of strict liability’, but that the severity of the penalty was ‘unduly harsh’.

The other is another wrestler, but from a different continent – India’s Narsingh Yadav, who tested positive for a banned steroid a month before the 2016 Rio Olympics. Yadav claimed that someone had poisoned his food, and that was why a banned substance entered his body. Consequently, the National Anti-Doping Agency (NADA) of India cleared Yadav of wrongdoing, but not on grounds of sabotage. Instead, they used the exceptions provided for under various anti-doping laws, based on ‘no fault’ or ‘no significant fault’. That decision was



challenged by WADA to the CAS, which overturned the NADA ruling and reinstated Yadav's suspension. In the ruling, CAS implemented the doctrine of strict liability that Yadav had not cleared the high bar to claim sabotage.

These and other cases illustrate the sometimes-ruthless application of strict liability, which results in a doping charge where all that is required is that a prohibited substance be found in an athlete's sample, regardless of how it got there – or, in the vernacular – regardless of whether it was cheating to do so. The consequences of doping adjudications demonstrate how strictly sports doping is enforced, not just for athletes, but also for the whole sport world.

### **(B) Criticisms and Controversies: Discussion on the Critique Surrounding the Application of Strict Liability, Including Arguments of Unfairness and Potential for Wrongful Sanctions**

While the doctrine of strict liability has proved indispensable in the war against doping, it's never been free from intellectual scandal and legal controversy. Some have argued that the principle is inherently unfair because it doesn't consider the particularity of each case: for instance, an athlete who might have inadvertently ingested a banned substance or whose body responds differently to substances than the average person's.

Another criticism of strict liability revolves around the spectre of wrongful sanctions, where athletes might unwittingly ingest a banned substance without any fault on their part, through no fault of their own, and be subject to strict liability's presumption of guilt nonetheless. In such cases, the athlete is tasked with proving their lack of fault or lack of intent. This could result in a career-damaging sanction for a guilty coach and/or doctor, but leave an innocent athlete with no career whatsoever. Stewart and Francesco emphasise a number of features of the modern punitive and protective rationale. They observe that the concept of sport as competitive now warrants ensuring 'equity' among competitors.

Second, strict liability is criticized for insufficiently taking account of the context and circumstances in which prohibited substances are taken by athletes. People who use contaminated supplements, prescription medication or where corrupted testers or individuals with a grudge, as was alleged in Narsingh Yadav's case, ostensibly spike a clean athlete's feeding tube while they are unconscious, suffer from prohibited substances entering their bodies in ways that are beyond their control. The absence of a requirement for proof of fault is seen by some as unfair, because, in those cases, the athlete's punishment does not ensue from their culpability in ingesting a substance that is prohibited. A more differentiated and nuanced approach that attends, even if in a rudimentary way, to intent and/or negligence, might result in

sanctioning that is fitting to the degree of the athlete's fault.

At a more general level, debates over tight liability also reference broader moral issues, such as whether strict liability is compatible with the legal maxim in the Anglo-Saxon system of innocence until proven guilty. This is a reminder of the tension between a hard line on doping on the one hand and, on the other, a commitment to the values of justice and fairness in the treatment of an athlete.

Critiques of this system have led some to support reforms to the anti-doping regulatory system, focusing on the case-by-case flexibility of sanctions and adjudication based on context and evidence of intent. Other ideas to look into are: improved reliability and transparency of testing protocols; more access to legal representations for athletes and their support teams; clearer appeal rights; and careful consideration of the due process in how anti-doping infractions are handled.

The very strictness of the anti-doping strict-liability doctrine underlies a certain balance between the need for sports to be clean on the one side, and the need to protect the rights of athletes on the other. While it is clear that it has enabled successful anti-doping efforts to date, the criticisms that arise and the controversies that evolve will continue to highlight the need for discussion and possible reform. Finding the right balance of anti-doping regulation, a balance that will deter doping and treat athletes' rights fairly in the arena of international sport and beyond, is an enduring challenge.

## **V. BALANCING ACT: ATHLETES' RIGHTS VS. ANTI-DOPING OBJECTIVES**

It literally skips and skips sideways over the tensions between athlete rights and the harsh aims of anti-doping systems. Heroic, noble and equitable sports aspirations are constantly in direct conflict with the harsh mechanics of anti-doping. This section aims to hit the balance that is sought in relation to the need for doping controls and the problems of athlete-rights protection under the same harsh regime.

### **(A) The Need for Doping Control: Understanding the Rationale Behind Stringent Doping Controls to Protect Fair Play and Athlete Health**

Ultimately, however, arguments in defense of tough doping controls rest on something broader than the 'spirit of competition': they're about caring about athlete health, and embracing an ethos in which a person's talent is rewarded by a level playing field in which competitors are genuinely free. People who dope are given a free ride: they get to cheat but are still allowed to reap the rewards of the fair contest. For the true sportsman, the prize goes to the one who hurts

least, to the one who vindicates most nobly the spirit of sport: the one who wins by virtue of hard training and practice, and by driving themselves to the limits of their inherently human capacity, in order to compete at the very highest level. Ideas of personal athletic self-realization, and of streamlined and focused competition towards elite sporting achievements, lie at the heart of the World Anti-Doping Agency's (WADA's) Anti-Doping Code, which sets a global standard for sports-doping enforcement.

In addition to the competitive unfairness issue, doping represents a health hazard to the athlete – this can range from cardiovascular problems and psychological effects to many other ailments. PED use can lead to long-term health impacts, some of which may not become apparent until years after an athlete has stopped competing. Therefore, anti-doping policies serve a dual purpose: they aim both to protect the integrity of competition and to protect the health of the sportsman himself/herself.

Perhaps most importantly, the use of the strict liability standard reinforces these anti-doping measures via the ability to catch and punish a doping violation in the first place (a deterrent to the use of PEDs) and, just as importantly, to continue catching and punishing such violations even after they become more sophisticated. As new substances and methods of doping emerging, as integrated anti-doping systems have taken over, and as the delicate balance of anti-doping systems – preferring effective doping control, but fighting for a system that best protects the rights of the athlete – continues to evolve, the administration and enforcement of the programme must also adapt to those changes.

### **(B) Challenges in Protecting Athletes' Rights: Identifying the Legal and Ethical Challenges in Ensuring Athletes' Rights are Not Unduly Compromised**

Although the goals of anti-doping rules are clear and defensible, their application sometimes walks a dangerous line between fostering clean sport and violating athlete rights. The principle of strict liability in particular is a legal and ethical minefield. When an athlete could be held liable for any prohibited substance in her system, regardless of fault, the fundamental legal notion of innocence until proven guilty can collide with the athlete's pursuit of a clean slate, so to speak.

One of the biggest issues is the scope of privacy rights. The strict drug-testing regime and the requirement to provide detailed whereabouts information are intrusive, and while these are important to effective doping control, why are such intrusions necessary and fair, and what are the guarantees in place to protect athletes' privacy?

Besides, the presumption of guilt implicit in the strict liability standard violates the fundamental

principle that all defendants are innocent until proven guilty. The onus instead falls on athletes to either show that they did not dope – a tough task, especially for those who took a substance by mistake, such as one that had been contaminated with a banned substance, or via a mode that led to its presence such as a kiss from a doping partner – or to explain how it got there.

The risk of disproportionate punishment, and the risk that such incidents will result in the loss of a career, demonstrate that doping control violations need to be addressed on a case-by-case basis considering individual background and specific circumstances. Judicial and policy structures should incorporate mechanisms to discern purposeful from inadvertent violations of the regulations, and apply sanctions that reflect the type of culpability that has been found.

## **VI. LEGAL FRAMEWORKS AND PROTECTIONS**

The right of athletes to fair and reasonable treatment under these very different laws about fairness, and the right of individuals to have measures controlling doping imposed on them, create a comprehensive and complex patchwork of national and international legal frameworks. This chapter looks at the contours of the patchwork that operates within international sport and considers the role of the Court of Arbitration for Sport in interpreting national and international public law as applied to elite competition under the umbrella of international sport.

### **(A) National vs. International Legal Frameworks: Comparison of How Different Jurisdictions Balance Athletes' Rights with the Need for Strict Doping Controls**

As many sports are international and athletes can move freely between countries and even continents, anti-doping conventions need to be international too. The international backbone of this fight against doping is provided by the World Anti-Doping Agency (WADA) and its Anti-Doping Code. The groundbreaking principle of strict liability contained in this Anti-Doping Code is applied worldwide by the sporting bodies; all sports organisations adhere to this Code in order to secure the principle's uniform application across the world (and across the different disciplines of sports).

But establishing and enforcing international jurisprudence on a largely national activity such as sport poses challenges. Some countries have organisations that fall under the international umbrella of WADA while also working within their own national legal systems, with their own national anti-doping organisations (NADOs). For example, in the US, the Anti-Doping Agency (USADA) employs lawyers to bring cases on behalf of the United States Olympic Committee (USOC) under the rules and regulations of the USOC, the US Center for SafeSport, and WADA, as well as under relevant federal and state anti-doping laws. Such laws and regulations expand the pool of people who can be prosecuted under anti-doping rules, as well as the range and

seriousness of the violations that can be alleged.

In India, for example, where the Indian equivalent of the UKAD or the USADA is the National Anti-Doping Agency (NADA), an Indian athlete has a right of appeal to domestic courts beyond the framework of WADA. This can lead to contradictions between principles of national (often civil-law) legal systems and the discipline of international anti-doping regulation, with doping-related cases influenced by national legal standards relating to evidence, privacy and due process that could diverge from the processes dictated by the WADA Code.

More controversially, a number of countries have transposed the WADA Code into local legislation so that an anti-doping violation is not just a sanction under sports regulation, but a crime. This integration bolsters the directive of anti-doping policy, but it also raises issues over the comparability of legal standards in cases dealing with doping across different jurisdictions.

### **(B) Role of the Court of Arbitration for Sport (CAS): Examination of CAS's Role in Adjudicating Disputes Involving Strict Liability and Athletes' Rights**

The Court of Arbitration for Sport (CAS) is an independent arbitral tribunal that resolves disputes arising out of or related to anti-doping regulations and athletes' rights. Figure 3.1: the Court of Arbitration for Sport Based in Lausanne, Switzerland, CAS is the oldest and the world's only non-governmental, independent arbitration institution working specifically in the sports context and as the ultimate forum for the resolution of international sports law matters. Its decisions are legally binding for all signatory states. Across its almost 40-year history, CAS has assumed jurisdiction over many diverse cases ranging from contractual disputes to doping ones. Since its establishment in 1983, CAS has become the undisputed arbiter of sports law and its rulings have influenced the implementation of the law across the world.

The CAS has heard many cases based on the principle of strict liability and, by its determinations, the Court must craft cases of individual justice under the divinatory method of interpreting the WADA Code. The CAS jurisprudence shows a balancing act between the need for strict anti-doping measures and the protection of athlete rights.

Another, perhaps less obvious, hallmark of CAS jurisprudence has been the acceptance of the principle of 'no significant fault or negligence' as a mitigating circumstance in the context of doping cases. This principle has allowed athletes to escape significant sanction if they can demonstrate that they were not significantly at fault for the violation, an acknowledgement of the difficulties involved in avoiding doping at a time when the substances concerned are widely distributed and unintentional doping is all too prevalent.

Not just dreams, as CAS has insisted, of a muscular and pure sport ('do you prefer your

Eurovision Song Contest entrants singing castrato whole-tones on heroin to semi-tone vibrato with Laudanum?') but also – and this was sometimes forgotten – due process and the rights to be heard when accused of doping. Among the other standards it has set are the need for transparency in testing procedures, scientific evidence, and the rights of the accused to challenge findings and sanctions levied against them. In this way, CAS helps to ensure that the rules of sports – however Rubicon-crossing in their intent to ban all drugs – are enforced in accordance with legal principles.

This reflects the inherent delicacy of the balance of interests between the demands of clean sport and those of individual rights and safeguards. The strict liability principle embedded in the WADA Code set a global standard for doping controls. But as this mini-legal odyssey has shown, its application to concrete cases in different jurisdictions matched with an international legal interpretation set by reference to bodies such as CAS is on-going, and constantly evolving. This reflects the complexity of sports governance, and the fact that doping-free sport is, at its heart, bound up with notions of fairness, integrity and justice.

## **VII. REFORMS AND PROPOSALS**

That such an important aspect of the enforced anti-doping system as the principle of strict liability should still be the subject of debate about athletes' rights points the way to future reform. There are a number of proposed reforms to anti-doping that would enhance the rights of the athlete within the system, and other alternative approaches to the strict liability approach. In this section, those proposed reforms and such alternatives to strict liability that seek to find a greater balance between the goals of doping control and the rights of athletes are discussed.

### **(A) Reforms to Strengthen Athletes' Rights: Overview of Proposed Reforms to Anti-Doping Laws and Policies to Better Protect Athletes' Rights**

The push for reform is grounded in the conviction that anti-doping regulation should be fair and just to athletes. Reform proposals are numerous and varied and address different elements of anti-doping – from testing practices to adjudication of doping violations and sanctions. Some of the most important proposals include:

- **Improving Transparency and Accountability:** Improving the transparency of the testing methodology, the process for selecting athletes to be tested, and the process by which samples are handled, and holding anti-doping organisations accountable for procedural lapses that could compromise the testing results.

- Refined WADA Prohibited List by working with scientific experts, athletes and coaches to periodically review WADA's Prohibited List to ensure it reflects current science and is updated with substances that clearly pose a risk to athlete health or enhance performance.
- Streamlining the Therapeutic Use Exemption (TUE) Process: Improving the TUE process so that athletes who require medicine for legitimate medical reasons can gain exemptions and in a timelier fashion and with less administrative burden than required, compatible with the protection of competition.
- Graded Sanctioning Framework: Transitioning from a blanket approach to doping sanctions with universally imposed bans, to a system that looks at the context around the doping breach and the intent behind it, while still adhering to minimum deterrent sanctions and values where appropriate, but increasing the allowance for graduated sanctions in all other circumstances.
- Legal Support and Education for Athletes A. Legal Support for Athletes: Provide legal support for any athlete facing anti-doping charges, and B. Enhance Anti-Doping Education Programs: Strengthen education programmes in athletes' rights under the anti-doping regulatory framework, and the risks and consequences of doping.

**(B) Alternative Approaches to Strict Liability: Discussion on Alternatives to Strict Liability That May Offer a Fairer Balance Between Doping Control and Athletes' Rights**

Even though the strict liability principle gives this goal the best chance for identification and penalty of doping violations, the strict liability model has been accused of violating the rights of athletes. An attempt has been made to rectify possible violations and still maintain strict doping control using the following options.

- Fault-Based Liability: Under this system, if you test positive, you are punished only when you knowingly (and thus culpably) get a banned substance into your body, through negligent means, or through non-negligent but nonetheless blameworthy means.
- Risk Management Frameworks: Encourage athletes and their whole support staff teams to have tried-and-tested risk management against unintentional doping, such as clean diet and supplement checks, and training to avoid contamination.
- Pharmacogenomics as an escape hatch: Better pharmacogenomic testing eventually will show whether a metabolite of a prohibited substance present in a sample result from an

ingestion in a premeditated or in an unintentional manner, or why a metabolite presents actually had a performance-enhancing potential. Science might lead to lower liability and lesser sanction.

- Higher negligence and intent thresholds: To alleviate the immense financial cost for innocent athletes, raising the bar of the ‘negligence’ and ‘intent’ needed for proof of a violation. In other words, anti-doping agencies would need some level of fault or intent to prove a violation.

These, and other forms of reforms that are growing in traction, share this conclusion: the anti-doping regime can and should be recalibrated so as to foster (but no longer take for granted) the ideal goals of the campaign against illegal doping, without unfairly interfering with the rights of athletes. The thorn is not so much the ‘how’, but the ‘how not’? Anti-doping is a complex, technical, and politically charged issue, embracing overlapping jurisdictions and legal and cultural regimes, distrust and disinformation. The scientific and medical realities that shape anti-doping, talent(s), priorities, procedures, decisions, sanctions, and punishments merit respect if the regime itself is to serve its purpose: enable a collective framework in which athletes can compete safely, fairly and with dignity.

## VIII. FUTURE DIRECTIONS

Given the interplay between strict anti-doping liability and athlete rights at play in the complex anti-doping regime, the rapid technological advancements and revolutionary changes in legal standards to meet new challenges may result in significant evolution of anti-doping in sport. The next generation of games opens up the possibility for a sea change in the balance that should be struck between the competing objectives of enforcing the anti-doping rules and protecting the rights and freedoms of athletes. Most significantly, technological developments could evolve the legal standards necessary to achieve anti-doping in sport. This final section speculates about the future impact of technology on anti-doping efforts and considers the evolution of the legal standards that might be needed to maintain the integrity of sport, including fairness.

### **(A) Technological Advances and Anti-Doping: Consideration of How Emerging Technologies Could Impact the Balance Between Strict Liability and Athletes' Rights**

Modern technologies are the hope of the future in the anti-doping world. Biotechnology, artificial intelligence (AI) and blockchain are among the innovations that can change the approach to anti-doping, both in terms of the detection of doping and the implementation of



sports justice.

- **Biotechnology:** Research in genomics and metabolomics might allow for more effective, targeted tests of whether a prohibited substance has an external (exogenous) or internal (endogenous) origin. These more precise, sophisticated tests could potentially overhaul strict liability by giving athletes a clear means of establishing that they ingested a banned substance unintentionally or that it occurred naturally in their bodies.
- **Artificial Intelligence:** AI will be a game-changer in the way we detect doping by using pattern-recognition and identify physiological ‘outliers’ in athletes’ biological passports that track wide range of biomarkers over time. Using machine-learning techniques and identifiers of suspected doping, anti-doping agencies can introduce ‘compute-doping’ as a surveillance tool and help to make current testing programmes more effective. AI can assist athletes with blood doping, health and performance issues in a highly responsible way but would have to respect the need for privacy and avoid intrusive probing into athletes’ bodies to ensure that rights are not compromised.
- **Blockchain:** by using blockchain technology, we could for the first time ensure transparency and security in the way that athletes’ testing data is collected and held. If every test result and any resulting TUEs (Therapeutic Use Exemptions) were recorded in a blockchain, virtually impenetrable by outside attack and impossible to tamper with, it would be almost impossible to fabricate information. Athletes’ privacy would be protected, and the anti-doping infrastructure’s integrity maintained.

**(B) Evolving Legal Standards: Speculation on How Legal Standards May Need to Evolve to Address Future Challenges in Anti-Doping**

This could mean that it becomes necessary for legal standards to evolve along with technological advances that open up new avenues to dope and that offer new ways of catching those who do it. New technological capacities notwithstanding, the old legal rules change the game.

- **Data Privacy and Protection:** With the wider adoption of digital technologies in anti-doping processes, there are pertinent questions about athletes’ privacy and the protection of their data. Legal frameworks will need to be refined to establish more robust standards for the collection, storage and use of athletes’ data, with robust protections to prevent unauthorized access or improper use.

- **Admissibility of Technological Evidence:** The use of AI and biotechnology in detecting doping also raises questions of admissibility of the evidence generated: the use of artefacts and formulas will require courts to determine the reliability and validity of the evidence, and the standards that must be satisfied for it to be admissible. Otherwise, there is a real risk that some athletes involved in the new technologies will face steeper penalties than they deserve.
- **Analytical and ethical oversight of technological tools:** As we see increasing deployment of novel technologies in anti-doping, we may need increased analytical and ethical oversight of their use. Whether this is taking the form of a new set of regulations or the revision of existing ones, a process to foster innovative regulations could be established to better address the particular challenges of high-technology innovations.

The extent to which anti-doping can be balanced with athletes' rights depends on the extent to which the global sports community is able to manage the demands brought onboard by technology and shifting legal standards. But if technologists, lawyers, and sports administrators work together, we can find a way to harness the benefits of innovation while maintaining the core values – fairness, integrity, and justice – that undergird all that is good in sport. In the years to come, any future changes to legal frameworks and the ability to adopt technology more selectively and intelligently will be the key to shaping the future of sport in a way that protects athletes' rights while preserving the values and spirit of sport.

## **IX. CONCLUSION**

Strict liability, a principle of anti-doping, underlies the intricate relationship between athletes' rights and anti-doping authority, and is contested legal and moral ground. Adherence to strict liability – one of the pillars to level the playing field – presupposes that if a test shows prohibited substance in an athlete's sample, he or she is responsible for its presence and doesn't have to show intent. This principle might imperil due process and fairness if athletes unwittingly take and test positive for a substance on the prohibited list. The history of this principle from memorable cases shows that the struggle for justice is real. The line drawn between the culture of doping control and the world of human rights should be clear, but it remains blurred in reality. International sports are also characterized by both differences in interpretation of the rules of anti-doping and actual differences in their implementation. Only the World Anti-Doping Agency can bring some harmonization of the legislation and enforcement of this field. However, both rules and their interpretation differ from country to country, with the Court of Arbitration for Sport as an arbiter of disputes.

The reforms or alternative approaches all also seek to better safeguard athletes' rights. Improvements in transparency and the accountability of decisions, and more nuanced ways of applying strict liability that take context and subjective intent into account, have all been suggested. Meanwhile, ongoing advances in biotechnology, artificial intelligence and blockchain hold the potential to truly revolutionize anti-doping, providing more sophisticated testing methods and greater data security and privacy.

It seems likely that the debate over athlete rights versus anti-doping objectives will continue to lobby for more legal standards as well as technologies as time goes on. Any changes in anti-doping policy must continue to balance the vigilant enforcement of doping controls with athlete rights and dignity to conform with widely accepted principles of justice in the future.

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