
DOPING IN SPORT: THE SPIRIT OF SPORTS, HUMAN RIGHTS AND HUMAN RESOURCE DEVELOPMENT DILEMMA

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The spirit of sports, namely ethics, fair play and honesty; health; excellence in performance; character and education; fun and joy; teamwork; dedication and commitment; respect for rules and laws; respect for self and other participants; courage; community and solidarity. Sports governing bodies consider the principal policy of anti-doping regulation as a creation of a level playing field. This article explores the spirit of sport, namely, ethics, fair play, honesty, health, excellence in performance, the interplay with International law and Human Development. The article considers fundamental rights, their applicability and justification to doping disputes. An analysis is made on the impact of adjudication of a doping dispute on fundamental human rights and human resources.

Key words: spirit of sport, doping, adjudication, human rights, human resource development.

Introduction

The spirit of sports, namely ethics, fair play and honesty; health; excellence in performance; character and education; fun and joy; teamwork; dedication and commitment; respect for rules and laws; respect for self and other participants; courage; community and solidarity. Sports governing bodies consider the principal policy of anti-doping regulation as a creation of a level playing field. Commentators emphasize that this is what differentiates sports from circus or other entertainment shows. Doping is contrary to the values of sport and the principles for which it stands: fair play, equal chances, loyal competition and proper comparison of athletics performance. Sport is meant to be a life-enhancing activity not one that imperils life. Protecting the image of sports discipline in the public is a legitimate goal of Anti-doping regulation.

Doping Crisis and Doping Regulations

The Copenhagen world conference of 2003 adopted the world Anti-Doping Code [17]. In the subsequent consultations too, athletes' fundamental rights in doping disputes was debated by sports layers. However, there was the fear that application of human rights standards would jeopardize the fight against doping [7. P. 595, 601]. As a matter of fact it's agreeable that human rights brings «new challenges» for the sporting world.

Before we delve into further details, let us define the terms «fundamental rights and human rights». The Olympic charter sets out that the practice of sport is a human right and fundamental right is often used for rights based on national (constitutional) law while the term «human rights» is used for rights based on international (convention).

This article will refer to three universal International instruments for the protection of human rights: the Universal Declaration of Human Rights; the International Covenant on civil and political rights of the United Nations [9. P. 566]; and the International Covenant on Economic Social and Cultural Rights of the United Nations (ART. 12 of the Universal Declaration of Human Rights and Art. 17 of the UN Covenant on Civil Rights). These human right issues in the context of sports will be brought before courts of human rights or any other judicial bodies, though national courts will continue to be the most important forms where doping cases are decided. However, anti-doping laws sometimes clash with International laws as stated below:

– Anti-doping involves invasion of an athlete’s right to personal liberty and privacy. This has served as a basis for overturning a disciplinary sanction imposed under sports regulations [4. P. 53]. The right to privacy is also recognized by universal declaration of Human Rights and Art. 17 of the UN Covenant on Civil Rights. Article 8 of the European Convention on Human Rights (ECHR) and enforced since 1953. The covenant continues to state that no interference by a public authority unless required in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime;

– The right to equal treatment is also recognized in Art. 29 of the UN Covenant on civil Rights, «All persons are equal before the law and are entitled without and discrimination to the equal protection of the law. Art. 14 of the ECHR provides for the same principle. Athletes’ right to a fair hearing and the right to be presumed innocent is advanced and recognized as a fundamental human right. Art. 6 of the ECHR provides that: everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal establishment by law. Article 14 of the UN Covenant on Civil Rights provides for a fair hearing in similar terms;

– And if sport is taken as an economic activity, economic regulatory regimes such as competition law in Article 81 of the EC treaty, shall apply. This means agreements and decisions by association which may affect trade prevent, restrict or distort competition are prohibited and incompatible. The doctrine of restraint of trade provides that, contractual terms that limit the freedom of trade and prevent a party from exercising talents and earning a living from such talents are not enforceable [4. P. 2].

Sporting activity fall under the right to work. Article 6 of the UN Covenant on Economic Rights stipulates the right to opportunity to gain a living by work that one freely chooses or accepts. Article 1 of the European Social Charter provides that:

- Parties shall accept responsibilities and achievements of stable employment;
- Protect the right to earn a living in an occupation freely entered upon;
- Provide guidance, training and rehabilitation;
- Establish employment service for all works;

- Protect effectively the right of the worker to earn a living.

To what Extent are Human Rights and Fundamentals Rights Applicable in Doping Disputes?

In the European Union and a vast other countries sport federations and their disciplinary organs are private organizations and the state does not exercise or delegate power through them. On the other hand fundamental rights protect the individual from the state. Some have therefore argued that fundamental rights instruments are governing bodies. European court of Human Rights, has not applied the adjudication of doping disputes by private sports governing bodies [16. P. 566].

The Swiss Federal Supreme Court seems to concur with the ECHR in its statement that an athlete is not a subject of a measure taken by the state. However, some academics have asserted that sports organization respect fundamental rights. That universal Declaration of Human Rights means every individual and organ of society should observe human rights [15. P. 561, 571–572].

The Swiss Federal Supreme Court in a landmark decision Gundel, held that doping sanctions by sports federations are private rather than criminal in nature [10. P. 219]. The District Court of Palmerstone North referring to the decision in Hawker Vs New Zealand Rugby Football Union [6. Para. 42], held that New Zealand Bill of Rights did not apply to sports disciplinary tribunal. Dutch scholars, sports law specialists and international sports law congress held in November 1999 recommend application of criminal law [14].

However, jurisprudence of the European Court of Human Rights and Art. 52(1) of the EU charter of fundamental Rights subjects restrictions to three conditions: legal basics that must be accessible and predictable to persons concerned [11]; protection of a legitimate public interest [3]. In the case of governing bodies, the legitimate interest may consist of specific sporting interests and proportionality divided into four sub-conditions: capacity to achieve the aim it pursues; necessity and stricts sensu proportionality i.e. balancing of individual and body need as required under Art. 8 of 11th ECHR, measures necessary in democratic society.

However, it is the personal duty and responsibilities of an athlete to ensure no prohibited substance are not found in their bodily specimens. Art. 2.1 makes it clear that a doping offence occurs whenever prohibited substance is found in the bodily specimen regardless of intent, fault, negligence or knowing use. Under liability regime exculpatory evidence presented by an athlete is irrelevant [6]. Sports lawyers and scholars have argued that this violates the fundamental rights of a suspect especially the presumption of innocence [12] an important element of the right to a fair hearing in criminal matters.

The challenges posed are: sports bodies cannot establish how that substance was administered they have no means or power of conducting its own investigation or compelling witness to give evidence the preserve of public prosecutors in criminal proceedings. Hence, departing from strict liability offense would make it difficult to fight doping (Art. 10.5.5 WADA code). This enables us to conclude that strict liability doping offences are consistent with universally recognized rights and general principles of law. Art. 2.1 of the code should therefore be valid and enforceable and that

acceptability of strict liability should be assessed in the light of Art. 9, the consequences that a violation will bring about: «An anti-doping rule violation in connection with an in-competition test automatically leads to disqualification of the individual result obtained in the competition with all resulting consequences, including forfeiting of any medals, points and prizes...».

Disqualification in this case is considered as the removal of illegally acquired advantage in competition. The advantage gained in objective terms unfairly. This leads to another question, should disqualification of all other individual results, medals, points and prizes (multi-competition disqualification) be sanctioned?

Art. 10.1 of the CAS code provide that: Anti-Doping Violation... lead to disqualification of all of the athlete's individual results obtained in the event with all consequences, including forfeiture of all medals, points and prizes. The CAS code is clear in the fact that an offence during a competition and the results in another competition must be established by the sports authority. Even though the code refers to «likelihood» proof that the results in the other competition have been affected and must rely on scientific data. Only in this case will competition be justified by sporting bodies. On the other hand suspension of an athlete refers to specific time provided by the code as follows: the period of ineligibility in Article 10.3, the period of ineligibility imposed for violation of article 2.1 (presence of prohibited substance), 2.2 (use of prohibited substance) and 2.6 (possession of prohibited substances) shall result to Two (2) years ineligibility for the first time offender and second time offender, lifetime ineligibility.

The principle of *nulla poena sine culpa* (principle of law where a person may be punished for an offence if he or she has knowingly or negligently committed an offence). Some national courts, arbitral tribunals and World Anti-Doping Agency (WADA) agree that the principle is applicable to doping sanctions. While the principle of *nulla poena sine culpa* requires that an innocent athlete be able to establish how the prohibited substance entered his or her system [1. P. 22], a heavy burden placed on the athletes.

Under Art. 10.2 and 10.5 there is a clear presumption of fault on the part of the athlete who violates the presumption of innocence [13. P. 5]. However, it should be noted that sports federations are private bodies that lack powers of coercion necessary to discharge such burden. The presumption of fault and resulting reversal in the burden of proof is appropriate and essential in order to pursue an efficient anti-doping policy [2]. Without proof facilitation, a sport federation would have no chance to effectively combat doping thus the presumption of innocence cannot be transposed in sports disciplinary matters. The presumption of faults remains a reasonable way to conduct evidentiary matters in the context of doping sanctions (British Human Rights Act 1998). The IAAF has presumptions of ingestion from a high T/E ratio in athlete's urine.

The presumption of the athletes fault provided in Art. 10.2 and 10.5 is compatible with the presumption of innocence, and the human rights principles. For further understanding we analyze issues of length and fixed mandatory compatibility of sanctions verses athlete's human rights. The imposition of a suspension on an athlete may encroach on the freedom of movement for workers within the meaning of Art. 39 and

self-employed athletes of Art. 43 of the EC Treaty. It has been argued by human rights lawyers that two year suspension violates the fundamental principle of proportionality, which states that the severity of penalty must be proportionate to the offence committed.

The question that follows is if there is a legitimate requirement in a two year suspension period. This received a backing of EU ministers of sports made in June 1999: «Effective doping prevention cannot do without deterring sanctions and that therefore a system of internationally applicable and equivalent sanctions is needed, such as a two-year minimum ban for a first-time offender» [8].

Conclusion

State authorities should tighten their control, as an obligation, the violation by which should be condemned by IAAF. There also should be broad consultation of all stake holders as a result fundamental human rights will duly be taken into account instead of leaving such rights to courts. The athletes/sportsmen and women who are bound to benefit from the human rights incorporated into the code. Doping obstructs implementation of human rights projects, rights and human resource development.

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**ДОПИНГ В СПОРТЕ:
ДИЛЕММА ДУХА СПОРТА, ПРАВ ЧЕЛОВЕКА
И РАЗВИТИЯ ЛЮДСКИХ РЕСУРСОВ**

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Статья посвящена изучению понятий, формирующих дух спорта, а именно честной игры, этики, здоровья, превосходного исполнения, а также определяет взаимосвязь международного права и человеческого развития. В статье рассматриваются основные права, их применимость и возможность оспаривания в рамках судебных споров, касающихся допинга. В исследовании проведен анализ влияния решений по делам, касающимся допинга, на осуществление основных прав человека и развитие людских ресурсов.

Ключевые слова: дух спорта, допинг, судебное разбирательство, права человека, развитие людских ресурсов.