his employment, but provided that for the purposes of the arbitration he is not acting as an employee (for instance, in a dispute with a club). In this case, the clause will be overridden by Article L. 1411-4 of the Labour laws (Code du Travail).[8]

The arbitration clause will also be null and void if it is not set down in writing in the main agreement, or in a document to which this refers, or when it does not designate the arbitrators or provide for their method of appointment.[9] In the latter case, designation by the CAS will be sufficient.

Effects of the agreement. The arbitration agreement confers on the arbitrator the authority to settle disputes. If a dispute is brought before a state judge, the latter may declare himself/herself not qualified to hear the case[10]; and if one of the parties dispute the jurisdictional authority of the arbitrator, the latter will decide on the validity or the limits of his/her appointment.[11]

Disputes are heard before the CAS by an arbitrator or a panel of three arbitrators chosen freely by the parties. If not covered by the arbitration agreement, the CAS' Rules of Procedure state that the Appointments Committee will take this decision. If the parties decide that the dispute will be heard before a panel of arbitrators, each party designates an arbitrator chosen from a list of three arbitrators, with a Appointments Committee taking the decision in the event of disagreement or omission by the parties in this respect. A third arbitrator is appointed by the two appointed arbitrators, or by the committee if the two arbitrators disagree.[12]

B - The arbitration procedure

Unfolding of a procedure. In accordance with Article 1460 of the Code of Civil Procedure, the arbitrators will decide on the arbitration procedure without being obliged to follow the rules laid down by the courts. However, certain procedural guidelines are always applied.

According to the CAS' Rules of Procedure, the arbitration panel establishes a brief describing the claims and any documents communicated by the parties. This brief gives the timetable for the procedure. The procedure enables the panel to hear any witnesses and experts designated by the parties. It may also order any investigation if it feels necessary, or take any measures of a provisional or protective nature.[13]

When it considers that it has received sufficient information, the panel closes the proceedings and fixes the dates for hearing the arguments of the parties.[14]

The award. The CAS decision takes the form of an award, which is a sort of judgement. It is delivered within six months of notification of the brief, based on a majority decision by panel members when there are several arbitrators.[15]

The arbitration procedure is governed by the legal system chosen by the parties or when no system has been chosen, according to French law.[16] If the parties so desire, it will also rule on the fundamental fairness of the case as *"amiable compositeur"*, as authorized by article 1474 of the Code of Civil Procedure.

Lastly, it has to be remembered that the effect of the award is to release the arbitrator and, once made known, constitutes a conclusive judgement binding on the parties *(res judicata)*. In theory, the parties may file an appeal before the state courts, but CAS rules stipulate that the parties are assumed to have waived all lines of appeal that it is in their powers to waive. Only an action to set aside the award remains open to the parties before the Court of Appeal and within the limits stipulated by article 1484 of the Code of Civil Procedure.

Finally, there is no doubt that the CAS will contribute to the general process of creating *de jure* standards applicable to the sports world. Whatever the outcome, it is hoped that it will have sufficient legitimacy for its awards to contribute to the growth of arbitration case law and the development of general principles forming a sort of *lex sportiva à la française.*

8 F. Buy, *L'organisation contractuelle du spectacle sportif,* PUAM, 2002, no. 491. - M. Maisonneuve, "La chambre arbitrale française du sport", *Rev.jur. éco. sport* 2008, no. 88, p.17.
9 Art. 1443, CPC.
10 Art. 1458, CPC.
11 Art. 1466, CPC.
12 Art. 8, CAS Rules.
13 Art. 18, CAS Rules.
14 Art. 20, CAS Rules.
15 Art. 1456 and 1470, CPC. -Art. 21 and 22, CAS Rules.
16 Art. 17, CAS Rules.

The Application of Criminal Law on Doping Infractions and the 'Whereabouts Information' Rule: State Regulation v Self-Regulation

by **Gregory Ioannidis***

Introduction

Much discussion has been generated with the introduction of a rule to combat the use of performance enhancing substances and methods in sport. This discussion has been initiated and subsequently became an integral part of the sporting public opinion, as a result of the application of this rule on high profile professional athletes, such as the Greek sprinters Kenteris and Thanou, the British 800m athlete Christine Ohuruogou, as well as FIFA's disagreement to incorporate the rule in its regulatory framework.

The "Whereabouts Information" Rule [thereafter WIR] concerns the so-called "non-analytical finding" cases, which do not require a finding of a positive result of an anti-doping test for the application of sanctions on anti-doping rules violations. Instead, they require that the athlete fail to submit whereabouts information and/or fail to be present, for an anti-doping test, during the chosen time and place of his/her whereabouts information. The WIR, therefore, is a prerequisite for a "missed test"; before the sanction of an anti-doping violation could be applied on an athlete and during the analysis the reader must always keep the two together.[1]

The consequences, for an athlete, of failing to adopt, apply and follow the WIR are immense. When an athlete fails to submit up to dated whereabouts information or is not where his information states he should be and an officer attempts to test the athlete unsuccessfully, the athlete, according to the World Anti-Doping Code [thereafter WADC], is deemed to have missed the test and he would be the subject of an evaluation of a missed test. Three missed tests in a consecutive period of eighteen [18] months constitute an anti-doping violation, which carries a sanction of ineligibility from all competitions.

The historical framework

The creation of the WIR dates back to June 2004. It was the International Association of Athletics Federation [thereafter IAAF], that first incorporated such rule into its regulatory framework. This rule came into force in June 2004 and all National Olympic Committees and National Governing Bodies had been notified as to the existence and application of this rule during the last week of June 2004. This was almost 7 weeks before the opening of the Athens Olympiad in August 2004.[2]

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1 For more information on missed tests see Dr Gregory Ioannidis, *"Doping in Sport: The Rules on Missed Tests, 'Non-Analytical Finding' Cases and the Legal Implications"*, International Sports Law Journal, 2007/3-4, 19-27.

This Rule came into force for one obvious and well documented reason: that is, to enhance the ability of the sporting governing bodies towards detection of those who attempt to refuse and/or avoid the anti-doping test. Applying the strict liability standard, the result, of the intended aim of the rule, is also obvious: to create an anti-doping violation [in a form of a positive test for performance enhancing substances] even where the athlete has not tested positive for the use of performance enhancing substances and/or methods of enhancing one's performance.

Once the legality of such rule has been established, there is little question as to the ethics of its application. Despite the fact that there are concerns as to the serious detriment to an athlete's career if this rule is applied in an arbitrary and capricious way, the aim of its inception and application appears to be defeating all arguments against its use. Once a justification for the ban on doping practices has been established, all arguments on ethicality and morality tend to become weak in rebuttal.

I would not argue as to the ethicality or morality of the existence of this rule. To do so, would require me to consider the highly subjective contention of *"what is wrong with drugs and doping in sport."* The justifications of the ban on doping in sport are well documented elsewhere and another analysis, here, to this effect, would simply leave me repeating the point. What is important, however, for the purposes of this work, is to examine and critically analyse the practicalities of the application of the WIR. It is not only important that gaps in knowledge must be filled, but it is equally important and thought provoking, to enhance practice in this area of sports law. This will assist not only those who practice sports law, but also the ones who practice different sports and, in particular, those who are responsible for the governance of these sports.

I would aim to further analyse and constructively criticise the inefficiency of the operation of the said rule in practice. In doing so, I would analyse the theoretical framework, the intention of the legislator for the creation of this rule, the response of the governing bodies and that of the state governments. The latter will help us consider the argument for criminalising doping methods and practices in sport.

The theoretical framework

It is submitted that the WIR is controversial not only because of its apparent subjectivity in its application, but also because it fails to consider principles of privacy and human rights. It also fails to address issues of transparency and equality. Its operation in practice does not consider due process and natural justice and violates general principles of law.

There are, at the moment, significant gaps in the knowledge and omissions that emanate from lack of practice. The rule appears to be problematic and creates significant gaps in its application. These gaps reveal significant findings, which they would, without a doubt, call for a review and re-examination of the propriety and fairness towards the application of the general anti-doping rules. It would come as no surprise when the time arrives where a case attempts to test the legality and fairness of these rules before a national court of law. Despite the fact that certain regulations of sporting governing bodies attempt to exclude the resolution of a private dispute before national courts of law, it is submitted that where an error of law and/or injustice have occurred, immunisation from judicial intervention may not so easily be achieved.

Under English law, an attempt to exclude the courts from their effort to interpret the law is considered to be against public policy. To this effect, Lynskey J has argued in the past*: "The parties can, of course, make a tribunal or council the final arbiter on quotations of fact. They can leave questions of law to the decision of a tribunal, but they cannot make it the final arbiter on a question of law."*[3]

This is obviously an encouraging statement which should allow some latitude for the accused athlete, where an obvious error of law has occurred, or some other principles of law have not been observed. The truth of the matter, however, is that the Court of Arbitration for Sport in Lausanne (CAS) remains the final arbiter, for both the facts and the law, and as such is followed by the parties to a dispute.[4] Lynskey J's statement, however, would not find application in practice, if the accused athlete feels that his rights have been breached and CAS has failed to produce an appropriate remedy. In my experience and in recent cases before CAS, the panel has remained silent on questions relating to human rights.[5] On a different issue, that of the lifting of the provisional suspension, the Panel suggested that CAS is not a court of law, but a tribunal, and therefore not the appropriate forum to deal with complex legal issues, such as the one raised by counsel for the accused athletes! And with the ECJ's recent decision in **Meca-Medina v Commission of the European Communities [C519/04]**[6] it is clear that actions that take a different road from that to Lausanne may also conventionally fail.

The consequences for failing to submit 'Whereabouts Information" and/or missing tests

Article 2.4 of the WADC states: "*Violation of applicable requirements regarding Athlete availability for Out-of-Competition Testing, including failure to file required whereabouts information and missed tests which are declared based on rules which comply with the International Standard for Testing. Any combination of three missed tests and/or filing failures within an eighteen-month period as determined by Anti-Doping Organizations with jurisdiction over the Athlete shall constitute an anti-doping rule violation."*

This regulation was further implemented with some important changes applicable as of 1 January 2009. The two major changes that resulted from the revision of the WADC and the International Standards for Testing in relation to whereabouts information and missed tests are as follows:

- The requirement for top-level athletes included in the registered testing pool of either their International Federation or National Anti-Doping Organisation to specify 1 hour each day (between 6 a.m. and 11p.m.) during which they can be located at a specified location for testing. These athletes do not have to identify the 60-minute time-slot at a home address, but they can if they wish to.
- The harmonization of what constitutes an anti-doping rule violation in relation to whereabouts and missed tests and what potential sanctions can be applied. Any combination of 3 missed tests and/or failures to provide accurate whereabouts information within an 18-month period now leads to the opening of a disciplinary proceeding by the ADO with jurisdiction over the athlete. Sanctions range between 1 and 2 years depending on the circumstances of the case. Previously this was discretionary for ADOs with a suggested range of between 3 months to 2 years.

As it was submitted earlier, the significance of this regulation lies in the fact that it does not concern positive tests for the use of performance enhancing substances, but instead the so-called "non-analytical finding" cases.[7] Such cases, as mentioned above, do not include positive tests on behalf of the athletes, but rather anti-doping violations, in a form of a strict liability offence, where the accused athlete failed to submit whereabouts information and/or missed the anti-doping test. There may be an argument that these two offenses are similar and they must be kept together when one applies sanctions, which may

2 I remember the facts well as this rule was interpreted and tested rigorously in the case of *IAAF v Kenteris & Thanou* before the Court of Arbitration for Sport, where I acted as Counsel for the Greek sprinters. One of the submissions made concerned the lack of knowledge and understanding of the application of the rule on behalf of the athletes, as the rule was so fresh and new in its inception and application in practice. It was accepted that on the eve of 12th August 2004, where the third missed test had occurred, the authorities had failed to notify the sprinters as to the previous two tests, with the result that the sprinters did not have knowledge as to the number of missed tests they had at the time.

3 *Baker v Jones [1954] 2 All Er 553*, p. 558.

4 *See Dr. Gregory Ioannidis* "WADA Code draft revision: questions remain", World Sports Law Report, January 2007, pp 14-15.

5 *IAAF v SEGAS, Kenteris & Thanou CAS A/887/2006* [unreported].

6 *The ECJ dealt with the issue as to whether sporting governing bodies' anti-doping rules were exempt from review under EC competition law because they concerned purely sporting matters which did not affect economic activity.*

well be the case; it will be shown, however, that these provisions not only are they mutually incompatible, but they are also unworkable because of their specific definitions and applications in practice.

An independent observer would produce, not surprisingly, the following questions: what are a WIR and a "missed test?" How do they operate? Are they strict liability offences? Do they require knowledge (of the test) on behalf of the athlete? Do they create injustice? Do they breach recognised principles of law? Do they violate rules of natural justice and due process? Do they breach human rights? Are the Doping Control Officers, responsible for conducting the tests, adequately trained for the application of the rules and most importantly, are they independent, fair and unbiased?

These questions cannot be answered unless we consider some kind of uncontroversial and well tested data from practice. Those of us, who had the opportunity to test the theory and interpret the regulations before the CAS, have come to the conclusion that these regulations can, indeed, produce great injustices with immeasurable consequences, particularly where the athlete is at no fault. Are there such examples? To our dissatisfaction, the answer is unfortunately affirmative.

This brings us to the point where an inevitable distinction between self regulation and state regulation has to be made. The latter, it is submitted, could take the form of a criminal law, whereby effective, transparent and, above all, consistent application of the rules could be achieved.

The regulation of anti-doping is now days left with the appropriate sporting governing bodies. Where there is a dispute between a SGB and an athlete, or a breach of the rules[8] by the athlete, the SGB is left to play the role of the investigator, jury and judge. This, in theory, is enough to raise eye-brows and, in practice, the examples that justify this contention are nothing short of plenty. In no more than a handful of cases, it was accepted that it is not always the athletes who find themselves at fault, as a result of an alleged missed test, or, indeed, failure to provide the authorities with adequate and up to dated whereabouts information. This serves as a catalyst towards an extremely ineffective application of these rules and to the detriment of the athletes.

Let us consider now some of the situations where sporting governing bodies are responsible for the missed tests of athletes and/or failure to submit [I would argue failure to receive] the whereabouts information.[9] Some examples include the following:

1. An athlete submits his whereabouts information in a timely manner, but the SGB fails to receive, file, or analyse this information in a timely manner. Days later, the athlete, due to an emergency, changes his whereabouts information, but the SGB fails again to note these changes. As a result, the DCO attempts to test the athlete at a place and time that are not applicable. Result: Missed test.
2. A DCO attempts to test an athlete at the correct place and time, however, the DCO is unaware of the true identify of the athlete. As a result, the DCO cannot find the athlete. Result: Missed test.
3. A DCO arrives at the training camp to test an athlete. The athlete's whereabouts information state that the training will take place between 6-8pm. The DCO arrives at 6pm and identifies the athlete without approaching the athlete yet. At 7:10pm the athlete has an emergency and needs to be rushed to the dentist. The DCO records this as a missed test and also evasion.
4. The DCO arrives at the location of the athlete, according to the whereabouts information. The athlete cannot be found, but before the allotted time has expired, the DCO hands in a notification form to the coach of the athlete, stating that the athlete has been notified of the test and if the athlete is not back by the end of the training, he would be deemed to have missed the test.
5. The athlete falls asleep and forgets to go to the training camp on time. The DCO records another situation of a missed test and adds the charges of refusal and evasion! One of course would argue that it is impossible to miss a test and refuse it at the same time! Well, it has been recorded as such!
6. The athlete has an emergency and needs to be rushed to the hospital. He does not know how to send a text message nor does he have a fax to notify the authorities on time. Result: a missed test.
7. The NADO attempts to test the athlete at 8:25pm. The athlete finished his training at 8pm according to the whereabouts information. Result: a missed test.

There may be a contention that these situations are far-fetched[10]. That may well be the case and to someone who listens to a press conference produced by a SGB into an allegation of a missed test, it may appear as an intentional attempt of the athlete to evade the test. It all of course depends on the evidence; however, the application of these rules in the above circumstances can create unwanted and unwelcome consequences for innocent athletes. Once the name of the athlete brakes the news, the athlete automatically is considered presumed guilty. This cannot be right and it offends against fairness and justice.

These reasons serve to justify the contention that not always the SGBs are able to properly regulate anti-doping in sport. Worse still, sometimes they are unable to properly interpret and apply these regulations. It is submitted that self regulation, in this context, is rather ineffective, discriminatory and arbitrary. This criticism could also be compounded by the application of the established burden of proof.

The burden of proof in doping trials

There is no doubt that the aims of the rules of sporting governing bodies are simple: healthy competition, equal or level-playing field for all and punishment for those who do not obey the rules. The rules themselves, however, are not always straightforward. As my learned friend, Michael Beloff QC suggests: *"In my experience, rules of domestic or international federations tend to resemble the architecture of an ancient building: a wing added here, a loft there, a buttress elsewhere, without adequate consideration of whether the additional parts affect adversely the symmetry of the whole."*[11] This is an element which gives rise to intense criticism, particularly from the penalties' point of view. The issue of proportionality or the argument that the punishment is disproportionate to the offence committed has given rise to many different interpretations before national courts of law. It has been suggested that a four year ban is contrary to German law[12], whereas it was held valid under English law.[13] The case of **Meca-Medina** certainly confirms that a ban which is over a certain number of years could be held disproportionate. The introduction of WADA, with the main aim to harmonise different rules and penalties from different sports, suggests that a two year ban could be upheld as reasonable and proportionate to the offence committed. The European Court of Justice appears to agree. There are, however, exceptions to this general rule. If a second offence is committed and the accused is found guilty, then the ban takes the form of life ineligibility from international and national competitions.[14] There may be cases where the accused athlete is able to establish "exceptional circumstances" and have his lifetime ban reduced to 8 years.[15] Or there may be a case where an athlete is found to have committed two separate anti-doping rule violations, which have not arisen from the same test, and could receive a sanction of a three-year ban.[16]

7 *Examples include the cases of the American sprinters Tim Montgomery, Chirstie Gaines, Kelly White and the well-known and highly publicised case which arose out of the Athens Olympic Games with the Greek sprinters Konstantinos Kenteris and Katerina Thanou.*

8 Breach of rules by SGBs is almost never acknowledged.

9 These are examples stemming directly from litigation before the CAS or from the pre-trial stage and/or the stage of disclosure. As some of these cases have been dealt with in confidence, or settled out of court, I am unable to produce names or dates. They need, however, to be taken at face value, as they are real cases and serve to illustrate that sometimes the SGBs are unable or incompetent to deal with the correct application of these rules.

10 These examples are based on real scenarios of cases that were decided between 2004-2009.

11 "Drugs, Laws and Verspapaks", in "Drugs and Doping in Sport: Socio-Legal Perspectives", Cavendish, 2000, p. 42.

12 *That was the view of the German Federal Court in the case of* Katrin Krabbe against the IAAF [1992], unreported, 28 June.

13 *In the case of* Paul Edwards v BAF & IAAF [1997] Eu LR 721, Ch D.

14 *Not always the sporting governing bodies appear to follow the application of this regulation as it could be seen in the recent case of the American sprinter and former world record holder Justin Gatlin.*

15 *See IAAF Rule 40.3.e.*

16 *See IAAF Rule 40.8.*

To make things even more complicated and perhaps disadvantageous for the accused athlete, the sporting governing bodies, with the assistance of CAS, have devised a specific **standard of proof**. This indicates that the standard of proof in doping cases should be below the criminal standard but above the civil standard.[17] In addition, the CAS has already argued[18] that the ingredients of the offence must be established "to the comfortable satisfaction" of the court, bearing in mind "the seriousness of the allegation" made. The CAS has also suggested that the more serious the allegation, the greater the degree of evidence required to achieve comfortable satisfaction.[19] The "comfortable satisfaction" standard of proof is rather subjective and is not always the same for prosecution and defence. As Michael Beloff suggests[20]: *"The CAS held in the Chinese swimmers cases that the standard of proof required of the regulator, FINA, is high: less than the criminal standard, but more than the ordinary civil standard.*[21]The Panel was also content to adopt the test, set out in Korneev and Gouliev v IOC[22], that ingredients must be established to the comfortable satisfaction of the court, bearing in mind the seriousness of the allegation made. To adopt a criminal standard [at any rate, where the disciplinary charge is not one of a criminal offence] is to confuse the public law of the State with the private law of an association. The CAS went on, in Korneev, to reiterate the proposition that the more serious the allegation, the greater the degree of evidence required to achieve 'comfortable satisfaction'."

This statement, could give rise to different accounts of interpretation, regarding the disciplinary nature of the anti-doping offences. In my personal view, the disciplinary charge and the sanction that follows such a charge, produce elements of a criminal law regulation. If one considers the penalties that follow the exclusion of an athlete from his trade, one would arrive at the safe conclusion that such penalties not only exclude the offender from his trade, but they also have as an aim to "exhaust" him financially. The harshness of the rules in relation to the application of the penalties[23] not only is disproportionate to the offence committed, within the disciplinary framework, but it also creates an anathema of a kind that usually the criminal law regulates. It follows that the nature of the disciplinary proceedings and the subsequent penalties imposed on the offender meet the criteria established in many criminal codes, whether in common law jurisdictions or civil law ones.[24]

But what is the standard of proof required of prosecutor and defendant where the burden shifts? Although in English criminal law the defendant could use the civil standard when making out his defence, the matter before CAS is still open to interpretation. And the "degree of evidence" is also an issue which could cause legal "headaches". For example, what is the degree of evidence required to achieve comfortable satisfaction? What is the admissibility of such evidence? How do you assess its probity? What rules do you apply in relation to disclosure of such evidence?

Despite the fact that professional athletes are now considered employees[25], or self employed in the case of many individual sportspeople and should be treated in the same way as other professionals, it is submitted that the special nature of sport has led tribunals to adopt different ways of dealing with issues of disclosure and admissibility of evidence. It is evident from the CAS' jurisprudence, that the sporting tribunal is not bound by the rules of evidence which apply in English courts or indeed in any other common law or civil law jurisdiction. It is hardly ever the issue before the CAS as to whether there is a distinction between relevance and admissibility. Whatever is relevant to the issues of the case could be admissible, as long as the evidence is direct, which of course carries more weight than the indirect evidence. In certain circumstances, and I have certainly been privy to such development, the sporting tribunal may even allow hearsay evidence to be admitted, as long as it is fair. This, in essence, may prove to be helpful towards establishing a stronger case for the prosecution, but it violates procedural rights afforded to the defendant, that would, otherwise, have been protected in a procedure before a national court of law.

Finally, there is another obstacle for the athletes when they prepare their defence. The majority of the offences covered in the sporting governing bodies' regulations are strict liability offences. Athletes are responsible for the substances found in their bodies, but strict liability could operate rather unfairly where the rules themselves are unclear and their applicability to the facts of the cases doubtful. This is certainly the issue in the majority of the circumstances[26], as the rules in force do not clearly and in a concise way establish the intention of the legislator or their actual, correct and proper application. Although there may be an opportunity, for an athlete, to put a case in rebuttal, it is submitted that in cases where there is a prohibited substance present, the athlete may find himself in a very difficult situation rebutting the allegation. Testing laboratories usually operate under the auspices of the sporting governing bodies and there may be cases where issues of independence and bias may be put into question.

It is submitted that the above analysis indicates the degree of difficulty accused athletes face when they are against charges of anti-doping violations. The reason behind such difficulty relates to the argument that without rules supporting strict liability, the prosecuting authorities will never be able to prove the charges and therefore the war against doping in sport would become futile. Furthermore, the whole process would become unnecessarily expensive and sporting governing bodies could face the threat of legal action being taken against them. The issue of bankruptcy is not a new one for sporting governing bodies.

The CAS seems to support the idea of strict liability and has in the past rejected the principle of nulla poena cine culpa, or at least, tried not to apply it or interpret it too literally.[27] To a certain extent, the use of strict liability rules on behalf of sporting governing bodies, or at least, the reasoning behind their use, could be understood. What would, however, find itself labouring under great difficulty, is the argument that the CAS should be seen to support the operation of strict liability rules. This, however, appears to support the contention that if the non-intentional use of performance enhancing substances were to be allowed, it would then create a legal minefield and would eventually bankrupt the sporting governing bodies. This would appear to be the reason as to the CAS' propensity to support the operation of strict liability rules. But where is the balance to be struck? Strict liability rules are arbitrary and capricious and when the rights of the individual are breached and general principles of law are violated, the accused is left with no remedy and the whole system becomes

17 *See the CAS' decision in* Wang v FINA CAS 98/208, *22 December 1998, para 5.6.*

18 *In the case of Korneev and Russian NOC v IOC; Gouliev and Russian NOC v IOC, Mealey's International Arbitration Report, 1997, pp 28-29.*

19 *Ibid.*

20 "Drugs, Laws and Verspapaks", in "Drugs and Doping in Sport: Socio-Legal Perspectives", Cavendish, 2000, p. 50.

21 Wang v FINA CAS 98/208, 22 December 1998, para 5.6.

22 Korneev and Russian NOC v IOC; Gouliev and Russian NOC v IOC, *reported in* Mealey's International Arbitration Report, *February 1997, pp 28-29.*

23 See the case of Torri Edwards v IAAF & USATF CAS OG 04/003, where the Panel notes: "The Panel is of the view that this case provides an example of the harshness of the operation of the IAAF Rules relating to the imposition of a mandatory two-year sanction."

24 See the arguments in favour of criminalization of doping below.

25 *See the decision of the European Court of Justice in* Case C-415/93 Union Royale Belge des Societies de Football Association ASBL v Jean-Marc Bosman [1996] 1 CMLR 645

26 Consider the examples above.

27 Quigley v UIT CAS 94/129, *para 14. The Panel notes: "Furthermore, it appears to be a laudable policy objective not to repair an accidental unfairness to an individual by creating an intentional unfairness to the whole body of other competitors. This is what would happen if banned performance enhancing substances were tolerated when absorbed inadvertently. Moreover, it is likely that even intentional abuse would in many cases escape sanction for lack of proof of guilty intent. And it is certain that a requirement of intent would invite costly litigation that may well cripple federations - particularly those run on model budgets - in their fight against doping. For those reasons, the Panel would as a matter of principle be prepared to apply a strict liability test. The Panel is aware that arguments have been raised that a strict liability standard is unreasonable, and indeed contrary to natural justice, because it does not permit the accused to establish moral innocence. It has even been argued that it is an excessive restraint of trade.* The Panel is unconvinced by such objections and considers that in principle the high objectives and practical necessities of the fight against doping amply justify the application of a strict liability standard.

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Professor Ian S. BLACKSHAW is a Member of the Court of Arbitration for Sport in Lausanne, Switzerland.

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Alexandre Miguel Mestre

With a Foreword by Professor Wang Xiaoping, Research Center for Sports Law, China University of Political Science and Law (CUPSL) in Beijing

This book examines, from a legal perspective, the numerous developments in the rules and institutions of the Olympic Games from the Antiquity to the Modern Era. It offers a well-informed and insightful description and explanation of the so-called *Lex Olympica*. The book analyses the legal and institutional aspects that arise in the Olympic Movement, like its definition, composition and general organisation, its three principal constituents, its three 'Satellite Organisations' and its organs. Further it addresses contemporary legal questions and inherent consequences the Olympic Movement encounters, such as eligibility criteria, legal protection of the Olympic symbol, protection of the environment, advertising and ambush marketing, athletes' freedom of expression and Olympic boycotts.
The book also contains a section of Basic Documents and a list of Selected Writings on the Law of the Olympic Games. It is a valuable tool for sports lawyers, sports managers, sports administrators, governmental and sports officials, as well as researchers and academics with an interest in this field.

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unfair, unjust and offensive. This as a result offends against fairness and justice. So far the decided cases serve to confirm that there is not a balance between the fight for a healthy and fair competition and the rights of the accused athletes. Is there a solution?

The application of criminal law on doping infractions: can a coercive response be justified?

The jurisprudential and philosophical analysis suggests that it is only when the basis of why doping is dangerous and contrary to sporting ethics has been established, can a coercive response be justified.

It is submitted that the invocation of such powerful machinery, such as the criminal law, needs to be made with reference to sufficient reasons that can justify its application in the area of doping in sport. It is not my intention to fully consider theories of liberalism and paternalism in the current work. These are well known and well documented elsewhere. I intend, however, to develop and explain further the theory of "public interest" with reference to the application of criminal law on anti-doping violations. This analysis will help us understand as to how such a coercive response can be justified and assist us towards rebutting the current self regulation of the anti-doping mechanisms.

Once a coercive response has been justified, this lays the ground for the creation of a framework, built with reliable, transparent and efficient legal foundations. The creation of a legal framework is imperative. The current regulatory framework is weak, inefficient, and open to manipulation and it is not supported by legal certainty, which should strike a balance between the protection of the image of sport and the rights of the individual. The discussion, so far, has indicated that the sporting governing bodies are unable to regulate doping in sport and consequently, the current self regulation produces more harm than the damage it attempts to eradicate.

Main justifications

Much of the objection to the use of performance enhancing substances and other doping methods in sport is founded on issues of unfair competition and health. The application of criminal law on anti-doping violations considers these justifications, since the aim of criminal law is to protect the individual as well as society from harm. The application of criminal law, however, often receives intense criticism.[28] Such criticism relates to the rigid and often dogmatic nature of criminal law, with reference, primarily, to the rights of the individual. It does not, however, strike the required balance between the individual and society. It lacks factual certainty and it appears to include a substantial degree of subjectivity. It fails to consider the fact that doping is both dangerous and destructive and it also fails to take into account the coercive nature of doping that is at its most insidious at State level.

The creation of a criminal framework produces the elements that are currently missing from the sporting governing bodies' regulatory framework: certainty, consistency, and transparency. The purpose of a criminal framework is not retribution for an injustice, but the protection of athletes' health, as well as the protection of the social and cultural role of sports, the "fair-play" principle, the genuineness of the results and the general and specific prevention. General prevention relates to the argument that doping produces social harm to sports and this kind of prevention is imperative in order to prevent other athletes from using performance-enhancing substances. Specific prevention relates to the illegal conduct of the athlete or others who encourage and help the athlete with the use of such substances and suggests that punishment should be imposed on these specific individuals.

Criminalisation of doping in sport is a radical step and to a certain extent it creates highly elevated consequences for both the individual and the State. Such coercive response needs to be analysed, explained and justified. The incorporation and interpretation of the jurisprudence explains and, most importantly, counters the claims of liberal theorists. It also joins the Mill/Hart/Devlin[29] debate and it ensures that these proposals can withstand the rights-based agendas of jurists such as Dworkin[30]. It distinguishes and justifies the highly paternalistic approach of criminalising doping in sport and it shows that such an approach is inherent within the new proposals. A further justification, however, relates to the application of criminal law on the suppliers.[31] It is submitted that athletes may not possess the medical or chemical knowledge to assess the dosage or the optimum time for receiving performance-enhancing substances.[32] They turn, therefore, to doctors, physiotherapists or coaches for advice. In this case, all forms of participation can be established [complicity, accessory before the fact, etc.] and the paternalistic approach is not necessary for the application of criminal law. In addition, the application of criminal law can be justified in terms of proving joint responsibility for a common criminal purpose with the aim to aid and abet. Such a joint responsibility concerns the sporting officials, doctors or physiotherapists, who supply the athletes with performance-enhancing substances[33].

The Public Interest Theory

The main justification of the imposition of the criminal law on anti-doping violations relates to the illustration of the "public interest" theory. Here, it is not necessary to justify a paternalistic approach, as this approach needs to strike a balance between the individual autonomy and the rights of society. It is submitted, that the application of criminal law has a moral element in its enforcement. The distinguishing point here, however, is that these proposals, with regard to criminalisation of doping in sport, do not enforce the morality of a political or elitist will. These proposals enforce the will of society. [34] As a result, it is shown that these proposals do not discriminate against a minority, but they are, simply, acting in the public interest. They prove that State coercion is not only justified because of the "public interest" argument, but also because it is reserved for activities that pose a serious threat to the integrity and existence of sport, which is an activity, valued by society, such that it demands a public rather than private response.

This discussion also suggests that there are additional decisive factors to justify such a coercive regime, namely that the establishment

28 Jason Lowther, for example, submits that criminal controls, beyond those that one would expect for consumer protection, help neither the image of sport, nor the health of the non-competitive user. *"Criminal Law Regulation of Performance Enhancing Drugs: Welcome Formalisation or Knee Jerk Response", in "Drugs and Doping in Sport: Socio-Legal Perspectives", Cavendish, 2000.*

29 *See below, "The Application of Criminal Law on Doping Infractions: A Jurisprudential Justification".*

30 *Dworkin will not accept a dividing line between the law and morality, which characterises positivist interpretations of the law. He argues that a judge engaged in the process of adjudication may have to make moral judgments. He may have to balance principles and policies, and his decision is unlikely to be divorced from the community's general perceptions of 'right' and 'wrong' which constitute morality. The variety of abstract rights which, at any given time, epitomise communal morality are unlikely to be disregarded by a judge. "Law's Empire", 1986*

31 See the analysis of my proposals in relation to liability for suppliers and others below, where I propose that the penalties for suppliers of performance-enhancing substances should be heavier than those applied to athletes. Pre-requisite here, it is argued, would be the establishment of intent on part of the offenders.

32 See the example with the former East German athlete Rita Reinisch, in "Doping, Health and Sporting Values", Gregory Ioannidis and Edward Grayson, in "Drugs and Doping in Sport: Socio Legal Perspectives", Cavendish 2000, at p. 245. Also at note 53 below. I do not imply here that athletes are not clever enough to know what they are doing. I simply argue that with the increase of technological advances and the sophistication of new doping techniques, the athletes need the help of suitably qualified people in medicine and chemistry, in order to achieve the desired results for optimum performance.

33 It is submitted, that heavier penalties should be imposed on the doctors, coaches and sporting officials (from 3 to 6 years imprisonment) and lighter penalties on the athletes (1 to 2 years imprisonment). It is also necessary that the minimum sentence should be increased in situations where performance-enhancing substances and/or doping methods are prescribed to athletes who are below 18 years of age.

34 *In two surveys conducted by the author in the summer of 2001 and spring 2002 in Greece and the UK respectively, results showed that society is in favour of criminalisation of doping infractions. 350 people questioned about criminalisation of doping, and in Greece, a high percentage of 73% said they were in favour of criminalisation, whereas in the UK, a lower 53% said they would also support criminal*

of such a legal framework aims to restore public confidence and respect in this area of sports law that has fallen into disrepute and it also aims to ensure adherence to the essential values of fairness, justice and equality in terms of competitive sport. These issues support the hypothesis of this proposal, which states that the problem of doping in sport can only be resolved with the application of criminal law on doping infractions.

The nature of anti-doping regulatory mechanisms

The nature of the current anti-doping framework of sports governing bodies is, without a doubt, of a disciplinary character. When an athlete wishes to participate in competitions, he would have to accept, unilaterally, the regulatory framework of his governing body. This, in a sense, creates a contractual relationship between the athlete and the governing body, which means that both parties are bound by the terms of the anti-doping regulatory framework. The terms, however, are drafted by the governing body and are imposed on the athlete. The athlete, therefore, submits to these terms and agrees to obey them, irrespective of whether this agreement is supported by a valid consent, based on an informed decision[35]. The athlete, consequently, agrees to submit to referential authority. If such authority is not obeyed or followed, by means of breaching the regulatory framework, the athlete is subject to disciplinary sanctions. This, opponents of criminalisation would argue, is enough to indicate the private nature of doping. This again is open to argument.

Unlike criminal law, the private nature of doping disciplinary proceedings, fails to take into account the required elements of certainty and transparency, towards a reliable disciplinary procedure, which would respect the rights of the accused athlete[36]. Although the proceedings are of a disciplinary nature, the actual prosecution of the anti-doping offence and its subsequent punishment resembles that of the criminal law[37]. The disciplinary proceedings of sports' governing bodies fail to address the aims of their penalties, or at least, consider the main principles of penology. An athlete who is disobedient to his federation could be disciplined, but an athlete who breaches the anti-doping framework would be excluded.[38] If one, however, considers the penalties that follow such exclusion, he would arrive to the safe conclusion that such penalties not only exclude the offender from his trade, but they also have as an aim to "exhaust" him financially. The harshness of the rules in relation to the application of the penalties[39], not only is disproportionate to the offence committed, within the disciplinary framework, but it also creates an anathema of a kind that usually the criminal law regulates. It follows, that the nature of the disciplinary proceedings and the subsequent penalties imposed on the offender, meet the criteria established in many criminal codes, whether in common law jurisdictions or civil law ones. As Simon Boyes suggests: *"…there are areas which are traditionally self-regulatory (in the truest sense of the term) that have become sufficiently important to warrant great concern over the extent to which their regulation is subject to scrutiny and required to adhere to constitutional standards. These sectors of activity, of which sport should be considered a foremost example, have, in effect, changed their nature to the extent that their activities can now be regarded as truly 'public' in practice and thus of constitutional significance."*[40]

The application of criminal law on doping infractions - a jurisprudential justification

This work not only examines and applies existing jurisprudence into its theme, but it also develops and expands the current theories, by creating, at the same time, a new jurisprudential and theoretical framework, which the new proposals, that this work proclaims, can be tested on.

It is undoubtedly logical to suggest that the application of the criminal law has a moral element in it. Certain academics and scholars of jurisprudence[41] would, without the slightest doubt, agree that morality does influence the law, but should not be the sole determinant of illegality. Debates about the legal enforcement of morality can be found in the works of many different philosophers[42] and scholars from all over the world.[43] These were rekindled in the middle of the last century by the publication of the Wolfenden Report on Prostitution and Homosexuality[44] and led to the Hart-Devlin debate[45], and continue today with the challenge of new moral problems, such as the one that is analysed in this work[46], and also gay marriages[47], surrogacy,[48] cloning[49] and assisted suicide.[50]

John Stuart Mill's position was that legal coercion could only be justified for the purpose of preventing harm to others[51], although he did accept a slight form of paternalism as well.[52]At this juncture, it has to be stated that Mill's thesis was disputed by the Victorian judge Stephen, in his work "Liberty, Equality and Fraternity."[53] Although this debate has never come to an end, it came to prominence again, in the late 1950s when the Wolfenden report observed that there was a realm of private life, which was not in the law's business.[54] A leading judge, Lord Devlin, attacked this position in a lecture in 1959 and returned to the theme a number of times.[55]

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sanctions on doping infractions. The surveys were conducted in two countries with different attitudes towards governance of sport - in Greece sport operates under the auspices of the government and it receives its full financial support, whereas in the UK, sport is independent from government intervention and it enjoys self-regulation - and suggest that despite these attitudinal differences, the public are resigned to the view that sport is so important [even in different societies], that doping should be criminalised.

35 As Carolyn Thomas suggests: "*The onus is on the athlete to consent to things that he or she would not otherwise consent to. Coercion, however, makes the athlete vulnerable. It also takes away the athlete's ability to act and choose freely with regard to informed consent." [1983], "Sport in a philosophic context", Philadelphia: Lea & Febiger.*

36 See the case of Squizatto v FINA CAS 2005/A/830 where the Panel notes*: "Aplying the above explained principle was all the more necessary within sport, because regulations of sport federations, especially their doping rules, were often too strict and did not leave enough room to weigh the interests of the federation against those of the athletes concerned, in particularly his personality rights (see i.e. Aanes v FILA, CAS 2001/A/317)."*

37 *In the case of* Kabaeva v Fig CAS 2002/A/386 *the Panel noted:* As to the standard of proof, the Panel appreciates that because of the drastic consequences of a doping suspension on a professional athlete's exercise of his/her trade (Article 28 Swiss Civil Code [ZGB] it is appropriate to apply a higher standard than the generally required in civil procedure, i.e. to convince the court on the balance of probabilities." *See also CAS OG/96/003, CAS OG/96/004, K. & G. v IOC, p.20; CAS 98/208, N. et al. v FINA, Award of 22 December 1998, CAS Digest II, p. 234, 248; confirmed by the Swiss Federal Tribunal, Judgment of 31 March 1999 [5P.83/1999], unpublished).*

38 *According to Janwillem Soek:* "The main difference between the punishment of say, rough play and that of the doping offence is that the punishment of the first aims to discipline, whereas that of the second aims to exclude. Penalties lasting two years and, in some cases, even four years, for a first offence cannot be considered as aiming to restore discipline." *In The International Sports Law Journal, 2002/2, p. 2, "The Legal Nature of Doping".*

39 *See the case of* Torri Edwards v IAAF & USATF CAS OG 04/003*, where the Panel notes:* "The Panel is of the view that this case provides an example of the harshness of the operation of the IAAF Rules relating to the imposition of a mandatory two-year sanction."

40 In *"Sports Law",* 2nd edition, Cavendish, 2001, p. 198.

41 *Devlin, Dworkin.*

42 Plato, Aristotle, Socrates, Thukidides.

43 A notable example of this, in Victorian England, concerns John Stuart Mill, and his work *"On Liberty" [1859],* which is the classic statement of the liberal position. R. Wacks*, "Law, Morality and the Private Domain" [2000]* may also be consulted.

44 *[1957] Cmnd. 247.* It is worth comparing the *"Report of Advisory Committee on Drug Dependence: Cannabis", [1968],* which quite relevant and central to the main arguments of this work.

45 Devlin's views can be also traced back to Durkheim, though there is no evidence that Devlin was knowingly deriving any such assistance (see W. Thomas [1994] 32 Amer. Crim. L. Rev. 49).

46 The application of criminal law on doping infractions is examined with reference to a principled justification of this coercive response towards doping.

47 See the debate between J. Finnis and A. Koppelman in (1997) 42 Amer. J. of Jurisprudence 51, 97. See also J. Finnis (1994) 69 Notre Dame L. Rev. 1049.

48 See D. Satz (1992) 21 Phil. And Public Affairs 107.

49 See J. Robertson (1998) 76 Texas L. Rev. 1371; M. Nussbaum and C. Sunstein (eds), *"Clones and Clones"* (1998).

50 See R. Weir (1992) 20 *"Law, Medicine and Health Care" 116,* and, in particular now, *J. Martel (2001) 10 Soc. & Legal Studies 147.*

51 See J. Riley, *"Mill on Liberty"* (1998) for a detailed exposition, although Lord Devlin's account on Mill, in his work *"The Enforcement of Morals",* is rather comprehensive and illustrative.

52 The liberty principle does not apply to children or *"barbarians"* in *"backward states of society." Mill, "On Liberty".*

53 First published in 1873 (the edition cited is edited by R.J. White in 1967).

54 This statement has caused much criticism and was attacked by Lord Devlin in his work *"The Enforcement of Morals".*

These theories play an important part in developing a jurisprudential justification of the application of criminal law on doping infractions. It is submitted that morality is a necessary condition and an appropriate justification for the imposition of a criminal legislation to regulate doping in sport. Such discussion, however, inevitably resurrects the subjectivity of the argument as to whose morality are we to apply, before a justification for the application of the criminal law on doping could be submitted. To avoid this vicious circle of subjectivity, I have decided to apply the new theory of "**public interest**" to doping. It is submitted that the introduction of criminal law on doping infractions will not discriminate against the minority. Its introduction has as a main aim the protection of the public interest, which is purely objective and does not appeal to any one particular moral code out of necessity.

The Public Interest Theory and the Legal Enforcement of Morality

It has been argued that sport is strictly connected with society and it is one of the most important ingredients for its healthy development and existence. The ancient Greeks believed that a complete person is someone who is healthy in body, mind and soul. The Corinthian Ideals have always played an important role in the relationship between sport and society. For some countries sport is so important that it is supported and it operates under the auspices of their governments. In Greece, for example, sport has always been part of the Greek psyche and was one of the first aspects of cultural life to be protected in the Hellenic Constitution of 1974. [56]

Sport, therefore, promotes values that society creates, approves of and wishes to safeguard. These values relate to health, honesty, fairness, fitness and a series of other general values that promote the healthy development of individuals and subsequently, the healthy development of society. It is submitted here, that doping in sport threatens to destroy, and it does destroy all these values that society deems necessary for its existence. It is argued here that doping is immoral, is cheating and unhealthy and its use should be regulated by the criminal law, with the main aim to protect the public interest. The arguments above suggest that doping undermines sport and, therefore, aims to destroy one of society's important and necessary cornerstones. If we are, however, going to justify the introduction of criminal sanctions on doping infractions, it is, first of all, necessary to justify the connection between morality and sport. If doping is immoral and therefore cheating, then it is in the public interest to take action and stop it from undermining sport.

Sport, without a doubt, has a moral element and this is, perhaps, what causes difficulty in the legal moralism discussion. Problems of morality could be discovered in all spectrums of society and in different ways and we usually find ourselves at pains to define and connect the discussion of moralism to sport. Where general moral values can be identified in the area of sport, a reference to them is being made under the term of ethics in sport. According to Morgan[57] *"one philosophical perspective may be to apply, with sensitivity, those general moral standards and requirements (e.g., universality, consistency, impartiality, etc.) to sporting situations. For example, if the general moral standard is "do no harm" and it is applied to issues of violence in sport, it will raise questions about the way in which we would make moral judgments about these issues".*[58]

But why is doping so special, so different, that it requires criminalising? The arguments discussed above, suggest that any form of cheating has the potential to undermine and seriously damage sport. Doping's nature has an undisputable element of cheating and a certain degree of immorality in it. The "Public Interest" theory suggests, therefore, that, and without the invocation of morality, it is in the public's best interests to invoke the law and protect sport, from the disintegration it faces posed by an uncontrollable degree of cheating.[59] The introduction of legislation to control doping in an appropriate and efficient way is not the desire of the legislature, but the desire of society[60]. The adoption of such legislation is intended to reflect the important role sport plays in society and in citizen's lives[61]. In this legislation, the parties involved will accept responsibility for safeguarding the public interest in sport, which encompasses education, professionalism and the ideals of fairness, justice and equality. The legislation will also have to take into account the enormous public interest in sport as a means of promoting health and the vital role that sport plays in improving the health of a nation.[62] Doping, therefore, destroys the above principles and creates a field of uncertainty, confusion and destruction. Doping is special and different, because it also destroys sport as a whole. It is not difficult to point out the importance of sport for society. People like sport, they play sport and they consider sport to be one of the most important elements of pedagogic development. Sport is also important for the development of community in financial and social terms. The relationship between the community and the individual might be seen to be anachronistic, but on both sides of the Atlantic, pressure groups and politicians have pushed communitarianism to the forefront of the early 21st century political agenda.

Furthermore, the importance of sport in society has been argued and illustrated in a number of different sporting and non-sporting cases and it has always been connected to the public interest justification. The definition of the public interest argument suggests that in decision making processes which encompass large sectors of the population a unitary public interest has to be assumed, although there will always be some part of the population which disagrees with the consensus. Unitary public interest is very sensitive to the specific issue. The more controversial the issue, the more polarized public opinion becomes. The part of the population, however, that disagrees with the consensus would concentrate on an argument that illustrates, to a great extent, the need for individual freedom, free from State intervention or interference. State interference here, takes the form of the law.

But the question for our purposes is "how far should the law go in achieving a balance between the rights of society and the rights of the individual"? Or is there a need to achieve a balance? Over the years,

55 His essays are collected in *"The Enforcement of Morals" (1965).*

56 *"The Regulation of Sports Activities in Greece", Gregory Ioannidis, in "Professional Sport in the EU: Regulation and Re-Regulation", Andrew Caiger, TMC Asser Press, 2000.* Sport falls under the auspices of the government with regard to its organisation and operation. The government is responsible for the finance of sport and supervises it through the General Secretariat for Sport, which is a subdivision of the ministry of Culture.

57 *"Ethics in sport",* W. Morgan, 2001, Human Kinetics.

58 Morgan also believes that sport has its own set of moral standards. He argues that: *"Sport is interesting, however, in that it imposes its own set of moral standards and requirements on those who participate in it. Our shorthand way of referring to these standards and requirements is to talk of "fair play" and "being a good sport." These internal moral requirements are important for at least two reasons. First, they mean that general moral standards are usually applied to sport after due consideration has been given to sport's moral character. Second, the vast majority of people participate in sport because they enjoy it; therefore, people often have a built-in motivation to act morally and play fairly. The person who loves sporting competition will want that competition to be fair, or else he or she will not consider it sporting at all."* Ibid, note 32.

59 Thus The Council of Europe Resolution (67) 12 stressed the ethical implications of doping as an act of cheating and Resolution (76) 41 of 1975 said that doping was *"abusive and debasing."* Moreover, the Explanatory Report to the Anti-doping Convention (ETS no. 135) argued that *"Doping is contrary to the values of sport and the principles for which it stands: fair play, equal chances, loyal competition, healthy activity."*

60 Society's desire to protect sport and therefore regulate its existence derives through the legislative mechanisms of national and international organizations or governments. Evidence for this is the Tour De France 1998 and 2000, an event that exposed, in an unprecedented way, the pervasive nature of doping. 2000 was also the year in which, for the second time, following the example of Germany, a State [France] decided to investigate and prosecute the perpetrators with the full use of the criminal law. A criminal trial of 10 defendants connected with the FESTINA team indicted under a 1998 French statute criminalizing the supply of sporting drugs took place in October 2000.

61 Belgium [Flemish Community] was the first country to criminalize doping in 1967. Greece followed in 1986 with law 1646/1986 as amended by law 2725/1999 and 2002. France and Italy followed the example.

62 At this juncture, we may, perhaps, need to consider the view that criminalisation of doping concerns only a minority of sport participants and not the vast majority, who will never come into contact with doping control. That being the case, I submit that the same can be said for every criminal offence with a "special nature". Save to mention the offences of fraud or dishonesty that resemble doping,

the courts have established, on certain occasions that the public interest ought to outweigh the rights of the individuals. This justification has been illustrated in a number of sporting and non-sporting cases and it produces the ground on which criminalisation of doping infractions can be based on.

In the Canadian case of ***Jobidon v The Queen***[63] the accused was charged with manslaughter as a result of the death of the victim in the course of a fistfight. The trial judge found that the accused and the deceased agreed to a fight as a result of a prior altercation in a bar in which the deceased had beaten the accused. The trial judge found that the accused was not criminally negligent and he was acquitted. An appeal by the Crown to the Ontario Court of Appeal was allowed, the Court of Appeal holding that the Crown was not required to prove the absence of consent to assault where the accused intended to cause bodily harm. The Supreme Court of Canada also upheld the Court of Appeal's decision and stated: *"It is public policy which vitiates the consent in fist fights. The common law for policy reasons had always limited the legal effectiveness of consent to a fist fight and that limit persists in s. 265*. It is not in the public interest that adults should willingly cause harm to one another without a good reason. To erase long-standing limits on consent to assault would be a regressive step, one which would retard the advance of civilised norms of conduct. Such fist fights are valueless and may sometimes lead to larger brawls and to serious breaches of the peace. If aggressive individuals are permitted to get into consensual fist fights and they take advantage of that licence, then it may come to pass that they eventually loose all understanding that such activity is the subject of a powerful social taboo. It is unseemly from a moral point of view that the law would countenance such conduct."[64]

The respondents in this appeal produced similar arguments. In step with the Court of Appeal, the Crown argued that the overwhelming weight of common law authorities supports the position that one cannot validly consent to intentionally caused bodily harm in all circumstances and that the law prohibits consent to street brawls or fist fights. It is not in the public interest that people should engage in these sorts of activities, so on public policy grounds, the Crown argued, the word "consent" in s. 265 of the Code should be read in light of the common law, which limits its applicability as a defence to assault. The Crown also noted that fist fighting is without social value and has been outlawed in other common law jurisdictions.[65]

The Nova Scotia Supreme Court, Appeal Division, more broadly applied this approach in ***R v McIntosh***[66]. The sole issue in that appeal was whether a participant in a fist fight can give a legally effective consent to the intentional infliction of bodily harm upon himself. After reviewing the relevant jurisprudence, the unanimous court, speaking through MacDonald J.A., concluded that because it was not in the public interest that people should try to cause each other actual bodily harm for no good reason, most fights would be unlawful regardless of consent.

The issue of "public interest" has been used to a great extent as a justification for the invocation of the criminal law and as an argument against the freedom of an individual and his subsequent consent to the infliction of harm. Policy considerations have been analysed by the courts at great length. In the same case of ***R v Jobidon***[67], Gonthier J, explained: *"Foremost among the policy considerations supporting the Crown is the social uselessness of fist fights. As the English Court of Appeal noted in the* ***Attorney-General's Reference***[68], *it is not in the public interest that adults should willingly cause harm to one another without a good reason. There is precious little utility in fist fights or street brawls. These events are motivated by unchecked passion. They so often result in serious injury to the participants…Our social norms no longer correlate strength of character with prowess at fisticuffs. Indeed, when we pride ourselves for making positive ethical and social strides, it tends to be on the basis of our developing reason. This is particularly true of the law, where reason is cast in a privileged light. Erasing longstanding limits on consent to assault would be a regressive step, one which would retard the advance of civilised norms of conduct."*

Gonthier J, in the same case, goes on to consider the moral side of the law. He does not only base his decision on the public interest justification, but he argues that all criminal law is paternalistic to some degree. He states[69]: *"Wholly apart from deterrence, it is most unseemly from a moral point of view that the law would countenance, much less provide a backhanded sanction to the sort of interaction displayed by the facts of this appeal. The sanctity of the human body should militate against the validity of consent to bodily harm inflicted in a fight…All this is to say that the notion of policy-based limits on the effectiveness of consent to some level of inflicted harms is not foreign. Parliament as well as the courts have been mindful of the need for such limits. Autonomy is not the only value which our law seeks to protect. Some may see limiting the freedom of an adult to consent to applications of force in a fist fight as unduly paternalistic; a violation of individual self-rule. Yet while that view may commend itself to some, those persons cannot reasonably claim that the law does not know such limitations. All criminal law is 'paternalistic' to some degree - top-down guidance is inherent in any prohibitive rule. That the common law has developed a strong resistance to recognising the validity of consent to intentional applications of force in fist fights and brawls is merely one instance of the criminal law's concern that Canadian citizens treat each other humanely and with respect."*

Similar approaches have been illustrated in the UK. In ***A-G's Reference (No 6 of 1980)*** **[1981]**[70], Lord Lane CJ, delivering the judgment of the Court of Appeal, said: *"…it is not in the public interest that people should try to cause or should cause each other bodily harm for no good reason. Minor struggles are another matter. So, in our judgment, it is immaterial whether the act occurs in private or in public; it is an assault if actual bodily harm is intended and/or caused. This means that most fights will be unlawful regardless of consent. Nothing which we have said is intended to cast doubt on the accepted legality of property conducted games and sports, lawful chastisement or correction, reasonable surgical interference, dangerous exhibitions etc. These apparent exceptions can be justified as involving the exercise of a legal right, in the case of chastisement or correction, or as needed in the public interest, in other cases."*

The public interest justification, however, was supported in non-sporting cases too. In the landmark case of ***R v Brown***[71] the House of Lords ruled that consensual sado-masochistic homosexual encounters which occasioned actual bodily harm to the victim were assaults occasioning actual bodily harm, contrary to s 47 of the Offences Against the Person Act 1861, and unlawful wounding, contrary to s 20 of that Act. Lord Templeman stated that: *"counsel for the appellants argued that consent should provide a defence to charges under both ss 20* and *47* because, it was said, every person has a right to deal with his body as he pleases. I do not consider that this slogan provides a sufficient guide to the policy decision which must now be made. It is an offence for a person to abuse his own body and mind by taking drugs. Although the law is often broken, the criminal law restrains a practice which is regarded as dangerous and injurious to individuals and which if allowed and extended is harmful to society generally." In agreeing with Lord Templeman and in what I would argue applies to doping, Lord Jauncey said:[72] *"…in considering the public interest it would be wrong to look only at the activities of the appellants alone, there being no suggestion that they and their associates are the only prac-*

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the nature of the offence of insider dealing, also suggests that there is only a tiny minority of those who have the knowledge or the inside information in a company, to proceed with it. It is submitted that the number of offenders is not important in the consideration of establishing a criminal framework. What is important is the subject matter for protection, the nature of the offence and its impact on society, which justifies the imposition of such powerful legal machinery. In the end, the true justification for this offence, which resembles the case of doping, lies in the notion of gaining an unfair advantage, possibly yielding enormous profits, by a deliberate deviation from the rules of the market. In addition, this argument can be extended to, at least within the UK, to the criminal liability of obtaining a pecuniary advantage by deception under section 15 (1) of the Theft Act 1968.

63 Indexed as *R v Jobidon*, 66 CCC (3d), September 26, 1991.

64 Ibid, p. 455.

65 Ibid, p. 466.

66 [1991], 64 CCC (3d) 294, 102 NSR (2d) 56, 12 WCB (2d) 639.

67 Ibid, note 28, p. 491.

68 See below.

69 Ibid, note 28, p. 493 and 494.

70 2 All ER 1057 at 1059, [1981] QB 715 at 719.

71 [1993] 2 All ER

72 ibid, note 36, at pp. 91-92.

titioners of homosexual sado-masochism in England and Wales. This House must therefore consider the possibility that these activities are practiced by others and by others who are not so controlled or responsible as the appellants are claimed to be… When considering the public interest potential for harm is just as relevant as actual harm. As Mathew J said in R v Coney (1882) 8 QBD *534* at *547*: 'There is, however, abundant authority for saying that no consent can render that innocent which is in fact dangerous.'" It is submitted that this argument can be applied to doping in sport too. In the following pages there is evidence to suggest that doping is dangerous, not only because it poses a serious threat to the health of the athletes[73], but also because it threatens with its expansion amongst young athletes, who are influenced by the demands of the modern over-commercialised nature of sport. Society cannot remain inactive and passive when the result of drug taking in sport, is the creation of an injurious activity. I have provided, in the past, evidence[74] which explained graphically the adverse health consequences of doping violations both internationally and domestically. The evidence, in the next paragraph, also identified the fundamental interrelationship between the health and ethical sporting problems.

Although there is the argument that interference with the individual's liberty cannot be justified, it is submitted that this argument cannot rebut the fact that doping is both extremely dangerous and destructive. In particular, the "individual liberty" argument fails to take into account the coercive nature of doping that is at its most insidious at the state level[75]. The evidence, which follows, illustrates the above. Manfred Ewald, the former head of the East German Sports Federation, and his former medical director, Dr Manfred Hoppner, were charged with complicity in causing bodily harm for administering performance enhancing drugs to young athletes. They were both found guilty of doping and received suspended sentences in a trial that came to an end in July 2000. Ewald, was found guilty of making 142 East German sportswomen, mostly swimmers and athletes, take performance enhancing drugs. He was given a suspended prison sentence of 22 months. His co-accused, Hoppner, 67, was given 18 month suspended sentence.[76]

The use of doping, however, has as ultimate targets, apart from the obvious personal ones, to achieve financial and social rewards. In this case, and because the athlete enters a competition against fellow competitors, the issue becomes public and deserves the scrutiny of the public[77]. When an athlete uses banned substances, or resorts to prohibited doping practices, it is submitted, that he does not only injure himself, but he also injures society[78]. It is suggested that it is unlikely that the majority of parents or educators would wish to see their young athletes facing the dilemma of having to choose between glory and a serious injury to health. The third kind of doping that has been identified in the introduction fits in with this argument. The use of this paternalistic justification for the invocation of the criminal law is seen in the argument that use of drugs by role model athletes will set a bad example to the young, who will end up following their heroes and using drugs which will, in turn harm them. In addition, another paternalism-based argument suggests that doping is the result of coercion, and hence is a non-consensual and harmful action. Such coercion can be both literal and non-literal. It can be literal in cases where coaches provide athletes - including in the case of the former East Germany, very young athletes - with prohibited and harmful substances, without telling them what they are taking.[79] In such cases the law can and does step in by charging the coach or doctor with assault against the athlete.[80] Equally, in this, the focus of the law is the criminal act of the supplier rather than the self-harming action of the athlete.[81] This, in turn, illustrates the second kind of doping identified above and I submit that it is a very important justification for the application of the criminal law on doping infractions[82].

Furthermore, one needs to understand that the stakes at issue here are not only private. They are also public and are closely related to an element of society, namely sport, which is so important, unique and necessary for its healthy development and existence. In other words, these issues relate to the public interest.

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73 The horrendous examples from the former East Germany below illustrate the point, not only for the dangerous side effects of performance enhancing substances, but they also prove the active involvement of the criminal law on doping related offences. This is an important development, as Germany appears to be the first EU country to apply the law of the land [grevious bodily harm] on doping offences.

74 See below, following paragraph.

75 This argument also raises the possibility of assault which derives through lack of full, free and informed consent.

76 During the two-month trial, the prosecution had submitted that the two men ran a secret programme of doping during the 1960s and 1970s, providing athletes with performance enhancing substances. Part of the prosecution's case was that most of the athletes were unaware of the drugs they were receiving and, therefore, unaware of the health risks. Former athletes testified in order to substantiate and justify these arguments. According to the indictment, the female athletes who were given performance enhancing substances (mainly anabolic steroids) suffered side effects including hormonal disturbances, developing male characteristics such as excessive body hair, muscles and deep voices, and liver and kidney problems. Some of these athletes still suffer from menstrual and gynaecological problems.Details concerning East Germany's drugs programme began to emerge seven years ago in Berlin, when a special team of the Central Investigative Agency for Government and Institution poured over thousands of files seized from the Stasi, the German Democratic Republic's (GDR's) notorious State Security Service, and questioned dozens of former athletes. In all, 90 investigations are underway and 680 coaches, doctors and former officials are under suspicion. Nine of them have been prosecuted and two have been found guilty. The Stasi evidence suggests that, in the years since 1969, when the GDR made sports a priority to try to humiliate West Germany at its 1972 Munich Olympics, as many as 10,000 athletes received drugs. Many did not know what they were taking. When they found out, they were forced to sign pledges of silence. Giselher Spitzer, a Historian at Potsdam University suggests that: "There was this psychosis to prove that socialism was better than capitalism. The party was pathologically ambitious about beating West Germany and gave sports free rein and gobs of money. The only goal was brilliant results." The price was heavy, however. The cost of brilliance was physical damage, sometimes of grotesque proportions. In a 1977 report to the Stasi, Hoppner listed known side effects of performance enhancing drugs given to women, including growth of body hair, deepening voice and aggression resulting from unfulfilled sexual desire. But Hoppner concluded that sporting success could be achieved only with continued drug taking. Years later, Rita Reinisch, a GDR swimmer who won three gold medals at the 1980 Moscow Olympics, recalled: "Taking pills was normal, though I had no idea what I was taking. My coach told me, 'That's good for you, it will help your body recover quicker after training', and I trusted him blindly." He did not tell her that would also cause inflamed ovaries and the growth of cysts, forcing her to take premature retirement. Reinisch, now a TV sports broadcaster in Munich, was relatively lucky - she overcame the damage and had two children. Others ended up infertile and young gymnasts sometimes found themselves in wheelchairs when their bodies rebelled against unnatural regimes. Some men have grown breasts: under artificial stimulation, their own systems lost their capacity to produce sufficient male hormones. In one of the most important and unfortunate cases of all, a top East German shot putter, Heidi Krieger, European gold medallist in 1986, changed her sex after 10 years of drug taking in GDR. Unusually high doses of anabolic steroids - as much as 2,590mg per year - could be the reason why she not only started looking like a man, but also developed transsexual feelings. Krieger underwent sex change surgery in 1997. This evidence helps to identify the potentially dangerous and destructive nature of doping and the extent to which harm can be resulted from the use of performance enhancing drugs. Gregory Ioannidis and Edward Grayson, "Drugs, Health and Sporting Values", Cavendish, 2000.

77 In R v Coney [1862] Stephen J stated: *"…consent of the person who sustains the injury is no defence to the person who inflicts the injury, if the injury is of such a nature or is inflicted under such circumstances, that its infliction is injurious to the public as well as to the person injured. But, the injuries given and received in prize-fights are injurious to the public, both because it is against the public interest that the lives and the health of the combatants should be endangered by blows and because prize-fights are disorderly exhibitions, mischievous on many obvious grounds. Therefore the consent of the parties to the blows which they mutually receive does not prevent those blows from being assaults."*

78 It has been argued above that the use of doping threatens to destroy and does destroy important values for the healthy development of society. Sport promotes these values, namely, health, fairness, fitness and general Corinthian ideals, which represent the principle of fair play and the genuineness of the results. Sport also promotes health in body, mind and soul. Doping is also injurious and harms others.

79 See above the examples from the former East Germany.

80 See for example Galuzzi, *"The doping crisis in international athletic competition: lessons from the Chinese doping scandal in women's swimming" 10 (1) Seton Hall Journal of Sports Law, 2000 at p.94 for the view that…"many athletes are given drugs by doctors and coaches and are unaware that they are taking steroids."*

81 Even if the focus was the harm to the athlete, we would be able to classify this as permissible soft paternalism and

Conclusion

It has been argued that the main aims behind the creation of rules controlling anti-doping in sport, is to create a safe level playing field and to protect the image of sport. These justifications are well-documented and followed by the sporting governing bodies in public statements all over the world. In theory, there is nothing sinister in supporting and condoning such principles. In practice, however, the application of these rules causes exactly the opposite effect of the one they are supposed to protect: the sport and the individual athlete.

It is becoming increasing clear that there is dissatisfaction amongst many commentators and athletes, that the way anti-doping is organized and regulated today, is unfair and unjust and it lacks transparency and efficiency. It is also evident from decided doping cases, that not always the athletes' rights are observed. This argument serves as a catalyst for the introduction of criminal law on doping infractions. Before a State invokes such powerful machinery, however, a framework of co-operation and education must first be established.

It is submitted that healthy competition demands attention and action at every level, where medicine, sport and the law merge. Doctors, lawyers, parents, schools, club coaches and governing bodies must all address the issues raised and the implications for modern sport. The detrimental side effects of the use of performance enhancing substances must be constantly stressed in order that sports participants who are tempted to use them will understand that a better performance is not the only effect of this practice. To this effect the sporting governing bodies must ensure they create clear and concise rules that can be understood by all those concerned. Athletes, in particular, must be informed clearly about the behaviour they are required to follow. Rules such as the ones analysed in this work must be scrapped altogether, as they offend against fairness and justice, they fail to observe basic human rights and they violate the rules of natural justice and due process. They can only be described as "a relic from the middle ages" and they have no place in a democratic society which equally respects the rights of the individual and that of the public.

indeed Mill specifically does not apply his liberal theory when minors are at issue. Mill, p.69.

82 Alternatively, coercion can be non-literal where an athlete feels that because everyone else is on drugs, realistically, if he or she is to succeed, then he or she must do likewise.

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The Organization of Sports in France

by **Delphine Verheyden***

"Physical and sports activities are an important part of education, culture, integration and social life.

They especially contribute to fighting against academic failure and reducing social and cultural inequalities, in addition to their importance to health.

The promotion and development of physical and sports activities for all, especially for the disabled, are in the general interest."

This declaration of principles emphasizing the benefits of sports to society is in fact the first article of the French Sports Code, Article L. 100-1.

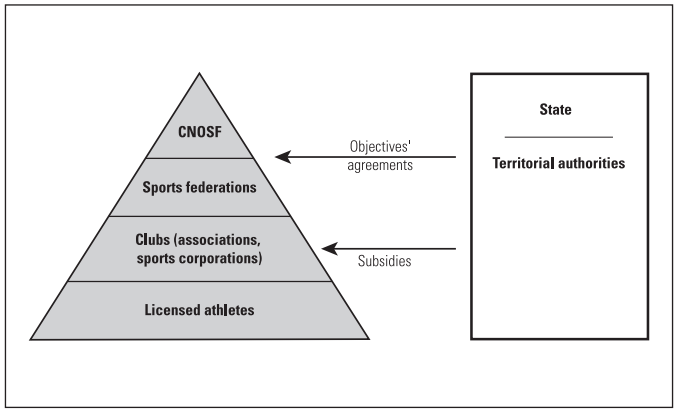
As French law recognizes the promotion and development of sports as being in the public interest, the State and its bodies naturally play a major role in the organization of sports in France.

Since 1936 and Léon Blum's Front Populaire government, France has had a government body specifically responsible for sports.

The current government includes a Ministry for Health and Sports, directed by Ms. Rosalyn Bachelot, which oversees a State Secretariat for Sports, under Ms. Rama Yade. This State Secretariat is responsible for implementing government policy on sports and all initiatives involving physical and sports activities, as well as their practice.

To do this, the State must count on the French sports world, a pyramid structure of sports associations with at its base licensed athletes and clubs, the clubs being grouped into sports federations which themselves are members of the CNOSF (*Comité National Olympique et Sportif Français*, or French National Olympic and Sports Committee).

The institutional organization of French sports can be represented as shown in the diagram.



Article L. 100-2 of the French Sports Code sets out that the State, territorial authorities and their groups, associations, sports federations, businesses and social institutions contribute to the promotion and development of physical and sports activities.

This article takes into account the reality of how sports are organized in France; this organization is based on cooperation between public authorities and private entities to achieve goals in the public interest - including those of promoting and developing physical and sports activities.

The uniqueness of how French sports are organized is especially apparent in light of its institutional structuring (I).

This organization necessarily calls for significant interaction between the public authorities and the sports world (II).

* Vivien & Associés, Paris, France.