UNIVERSITY OF NAIROBI

SCHOOL OF LAW

REGULATION OF DOPING IN SPORTS:
IMPLICATIONS FOR KENYA

By

Moni Wekesa

SUPERVISORS

Prof. Patricia Kameri-Mbote
LL.B (NRB), LL.M (Warwick), JSM (Stanford) JSD (Stanford)

Prof. Anastasia Nkatha Guantai
B.Pharm (NRB), M.Pharm (NRB), Ph.D (NRB)

Dr. Migai Akech
LL.B (NRB), LL.M (Cambridge), LL.M (NYU), JSD (NYU)

Thesis submitted in fulfillment of the requirements for the degree of Doctor of Philosophy in Law, School of Law, University of Nairobi
Declaration

I, Moni Wekesa, do hereby declare that this is my original work and that it has not been submitted and is not currently being submitted for a doctorate degree in any other University.

Moni Wekesa (G80/80216/2010)  
Signature  12 Nov 2010  
Date

This thesis has been submitted with our approval as University Supervisors

Prof. Patricia Kameri- Mbote  
School of Law,  
University of Nairobi

Signature  17 Nov 2010  
Date

Prof. Anastasia Nkatha Guantai  
School of Pharmacy,  
University of Nairobi

Signature  15/11/2010  
Date

Dr. Migai Akech

Signature  15/11/2010  
Date
"A society's recreation is charged with moral significance. Sport- and a society that take it seriously should be debased if it did not strictly forbid things that blur the distinction between the triumph of character and the triumph of the chemistry".

George Will
To my late daughter, Vakhoya, who never lived long enough to read this work
ACKNOWLEDGEMENTS

I wish to thank my supervisors Prof. Patricia Kameri-Mbote, Prof. Anastasia Nkatha Guantai and Dr. Migai Akech for taking the bold step of supervising this work. Bold because for the two legal experts (Prof. Kameri-Mbote and Dr. Akech) it was a trip through the world of science (largely pharmacological) and sports. For the expert from Pharmacy (Prof. Guantai)– it was a trip through law and sports. Most importantly, I am thankful to them for having trust in my ability to accomplish this task and their willingness to walk with me through the work. Their insightful comments have resulted in what may impress many readers as a good piece of work. I am thankful to the late Dr. Adronico Aduogo AdeDe for his interest in this work.

My wife Roselyn, son Wangia and daughter Kgaborone deserve mention for their support in the course of this project. Academic adventures of the nature of Ph.D studies are fraught with innumerable dangers the least of which is mental incapacitation. My family contributed immensely to my mental stability throughout this period.

I am indebted to the late Prof. Dr. rer nat Manfred Donike (formerly Director of the IOC accredited Doping Laboratory in Cologne and Director of the Institute of Biochemistry, Deutsche Sporthochschule Cologne) who imparted in me vital analytical skills of doping control and taught me how to use science to catch the “cheats” in sports. I am thankful to Prof. Dr.med Heinz Liesen (formerly team doctor of the German football team, Hockey team and Skiing team, and former Director of the Institute of Sports Medicine, University of Paderborn and part-time Professor, Deutsche Sporthochschule, Cologne) who taught me the art of doping athletes. Through the contrasting contributions of these two professors, I came to appreciate the magnitude of the ‘Cat-and-Mouse’ game that is doping control. I am grateful to Prof. Dr. med Dr. h.c. Wildor Holmann
(formerly Director of the Institute of Cardiology and Sports Medicine, Deutsche Sporthochschule Cologne) who provided a sobering balance between Professors Donike and Liesen.

A special mention goes to Prof. Dr. psychol Dr.med Georg Hoermann, his brother Prof. Dr.mus Dr.paed Karl Hoermann, Prof. Dr. med Dr. h.c. Wildor Hollmann and others who had multiple doctoral degrees in the mid-eighties for inspiring me to work and study at the same time. When I earned my first doctoral degree in sports medicine in 1989 I knew that it was but the beginning of a long engagement with academic work. How nice it would have been to surpass the academic accomplishments of my role models by way of 'breaking a record'. Should I not accomplish this desire myself, I hope to live long enough to inspire others to do so. Hopefully, some of my readers will feel sufficiently provoked to set higher standards.

The School of Law - University of Nairobi deserves mention for breaking with tradition to allow this work - that represents a fusion of Law, Medicine and Sports.
CONTENTS
Title Page i
Declaration ii
Dedication iv
Acknowledgement v
Table of Contents vii
Abstract xiii
Table of Abbreviations xiv

CHAPTER ONE: INTRODUCTION 1
1.0 Background 1
1.1 The Nature of Sport 2
1.2 Doping 10
1.2.1 Definition of Doping 10
1.2.2 History of Doping 11
1.2.3 Doping as Biotechnology 14
1.2.4 Parties involved in doping control 17
1.2.5 Nature of doping control 18
1.3 Rationale for Regulating Doping in Kenya 22
1.4 Attempts at regulation 31
Statement of the Problem 33
Research Question 33
Objectives of the Study 33
Hypotheses 34
Research Methodology 34
Justification of the Study 35
Outline of the work 35

CHAPTER TWO: LITERATURE REVIEW 39
2.0 Introduction 39
2.1 Doping Substances and Methods
2.2 Regulation of Doping Substances and methods in Sports
2.3 Summary

CHAPTER THREE: CONCEPTUAL FRAMEWORK
3.0 Introduction
3.1 Relationship Between Law and Science
3.2 The Need to Regulate Science and Technology including Doping
3.3 The Role of Science in Regulation of Science and Technology
3.4 The Role of Law in regulating Science and Technology
3.4.1 Constitutions and Legislative Law
3.4.2 The Judiciary
3.4.3 Administrative Law
3.4.4 Sports Rules
3.4.4.1 Regulation by IOC and her affiliates
3.4.4.2 The Court of Arbitration for Sport
3.4.4.3 Disciplinary Panels of Sports Bodies
3.5 Public Participation
3.6 Risks of Regulation
3.7 Summary

CHAPTER FOUR: FACTORS THAT CONTRIBUTE TO DOPING IN SPORTS
4.0 Introduction
4.1 Commercialization of Sport
4.2 Drug trafficking
4.3 The problem with Pharmaceutical
Multinational Firms: the case of Serono

4.4 The Internet as a Market Place

4.5 Doping Technology ahead of Testing Technology

4.5.1 Human Growth Hormone

4.5.2 Gene Doping

4.6 Political interests of certain countries

4.6.1 Proliferation of doping substances and methods in the Western World - The Case of Italy

4.6.2 Doping in the Eastern Bloc: The Case of the German Democratic Republic (GDR)

4.6.2.1 Testosterone

4.7 Summary

CHAPTER FIVE: REGULATION OF DOPING IN KENYA

5.0 Introduction

5.1 Sports Policy Framework

5.2 International Legal Framework

5.3 National Legislative Framework

5.3.1 The Constitution

5.3.2 The Pharmacy and Poisons Act (Cap 244)

5.3.3 The Medical Practitioners and Dentists Act (Cap 253)

5.3.4 The Public Health Act (Cap 242)

5.3.5 The Science and Technology Act (Cap 250)

5.3.6 The Use of Poisonous Substances Act (Cap 247)

5.3.7 The Narcotic Drugs and Psychotropic Substances (Control) Act, 1994
5.3.8 The Children Act, 2001 169
5.3.9 The Penal Code (Cap 63) 170
5.3.10 The Societies Act (Cap 108) 170
5.3.11 The Information and Communications (Amendment) Act 2008 170
5.4 Judicial Approaches to Sports in Kenya 171
5.5 Regulation of Doping by Sports Federations in Kenya 176
5.6 Institutional Framework 179
5.7 Summary 179

CHAPTER SIX: HARMONIZATION OF DOPING REGULATION IN SPORTS 182

6.1 Regulation by Sports Bodies 182
6.1.1 1999 Lausanne Declaration on Doping in Sport – The Birth of WADA 182
6.1.2 2003 The World Anti-Doping Code (Revised 2009) 189
6.1.3 Issues of Regulation of Doping by Sports Bodies 192
6.1.3.1 Conflict of Interest 192
6.1.3.2 Jurisdiction 201
6.1.3.3 Therapeutic Use Exemption (TUE) 205
6.1.3.4 Restriction of sanctions to members 211
6.1.3.5 Commercialization of sport 212
6.1.3.6 Doping Technology 212
6.1.3.7 Lack of labelling of doping substances 212
6.1.3.8 Overproduction of Prohibited Substances 215
6.2 Efforts by Public Authorities 217
6.2.0 Introduction 217
6.2.1 2003 General Conference of UNESCO, 32nd Session, Paris 221
6.2.2 2005 International Convention Against Doping
CHAPTER SEVEN: COMPARATIVE ANALYSIS OF REGULATION OF DOPING IN OTHER JURISDICTIONS

7.0 Introduction
7.1 Model I: Amending various Statutes to Accommodate the Convention: The Case of The German Anti-Doping Law
7.2 Model II: Establishment of an Anti-Doping Agency together with Enactment of Drug Specific Legislation: The Case of The United States of America
7.2.1 United States Anti-Doping Agency (USADA)
7.3 Model III: A stand alone anti-doping legislation: The Case of France
7.4 Policy Options for Regulating Doping in Sports in Kenya
7.4.1 Self-regulation
7.4.2 Co-regulation
7.4.3 Direct Government Regulation
7.4.4 Which is the ideal policy model for Kenya?
7.5 Summary

CHAPTER EIGHT: SUMMARY AND CONCLUSIONS

8.1 Summary
8.2 Conclusions

SELECTED BIBLIOGRAPHY

TABLE OF CASES

TABLE OF STATUTES AND POLICY DOCUMENTS

APPENDIX I: KENYAN ATHLETES WHO HAD TESTED
ABSTRACT

Doping in sport is a global menace. By end of 2009, fourteen Kenyans from diverse sports disciplines had tested positive for various prohibited substances. The need for regulation is informed by the desire to protect the health of athletes, to protect the spirit of sport and to protect Kenya’s reputation as a top sporting nation. Efforts at regulation by sports bodies alone have been unsuccessful. Kenya has no anti-doping law in place. This work seeks to answer two questions: firstly, whether anti-doping law is necessary to regulate doping in sport, and, secondly, whether, in the case of Kenya, anti-doping law is necessary. This work is a desk study in which books, journal articles, Newspaper articles, international instruments, statutes and case law were analysed. Interviews with selected renowned sportspersons were also conducted. This work explores the interplay between law, science and sport. This work made several key findings which include, firstly, that none of the authors on the subject of doping and or regulation of doping has considered anti-doping law. Secondly, sports bodies have inherent structural weaknesses which make their anti-doping efforts ineffective. Thirdly, some of the causes of doping in sport such as commercialization and overproduction of prohibited substances have not been addressed in the current anti-doping efforts. Sixthly, that Kenya has no regulatory framework for anti-doping in place. It is concluded that anti-doping law is necessary in the regulation of doping in sport and that much more needs to be done besides the law. It is recommended that Kenya formulates a broad based anti-doping policy to facilitate the development of an anti-doping law.
# TABLE OF ABBREVIATIONS

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>AAA</td>
<td>American Arbitration Association</td>
</tr>
<tr>
<td>AAV</td>
<td>Adeno-associated virus</td>
</tr>
<tr>
<td>AIDS</td>
<td>Acquired immunodeficiency syndrome</td>
</tr>
<tr>
<td>AOC</td>
<td>Australian Olympic Committee</td>
</tr>
<tr>
<td>ARU</td>
<td>Australian Rugby Union Limited</td>
</tr>
<tr>
<td>ASA</td>
<td>Amateur Sports Act</td>
</tr>
<tr>
<td>AWF</td>
<td>Azerbaijan Wrestling Federation</td>
</tr>
<tr>
<td>BALCO</td>
<td>Bay Area Laboratory Cooperative</td>
</tr>
<tr>
<td>BBC</td>
<td>British Broadcasting Corporation</td>
</tr>
<tr>
<td>CA</td>
<td>Court of Appeal</td>
</tr>
<tr>
<td>CAP</td>
<td>Chapter</td>
</tr>
<tr>
<td>CAS:</td>
<td>Court of Arbitration for Sport</td>
</tr>
<tr>
<td>CBDA</td>
<td>Confederacao Brasiliera de Desportivos Aquaticos</td>
</tr>
<tr>
<td>CEO</td>
<td>Chief Executive Officer</td>
</tr>
<tr>
<td>CONI</td>
<td>Comitato Olimpico Nazionale Italiano</td>
</tr>
<tr>
<td>CPC</td>
<td>Criminal Procedure Code</td>
</tr>
<tr>
<td>DNA</td>
<td>Deoxyribonucleic acid</td>
</tr>
<tr>
<td>DGV</td>
<td>Deutscher Gewichtheberverband – German Weight Lifting Federation</td>
</tr>
<tr>
<td>EC</td>
<td>European Commission</td>
</tr>
<tr>
<td>ECJ</td>
<td>European Court of Justice</td>
</tr>
<tr>
<td>EEC</td>
<td>European Economic Community</td>
</tr>
<tr>
<td>EPO</td>
<td>Erythropoietin</td>
</tr>
<tr>
<td>EU</td>
<td>European Union</td>
</tr>
<tr>
<td>FADA</td>
<td>French Anti-Doping Agency</td>
</tr>
<tr>
<td>FEI:</td>
<td>International Equestrian Federation</td>
</tr>
<tr>
<td>FIBA</td>
<td>International Federation of Basketball Associations</td>
</tr>
<tr>
<td>FIBT</td>
<td>Federation Internationale de Bobsleigh et de Tobogganinig</td>
</tr>
<tr>
<td>FIFA:</td>
<td>Federation Internationale de Football Association</td>
</tr>
<tr>
<td>Acronym</td>
<td>Description</td>
</tr>
<tr>
<td>---------</td>
<td>-------------</td>
</tr>
<tr>
<td>FILA</td>
<td>Federation Internationale des Luttes Associees [International Federation of Associated Wrestling Styles]</td>
</tr>
<tr>
<td>FINA:</td>
<td>Federation Internationale de Natation</td>
</tr>
<tr>
<td>FISI</td>
<td>Federazione Italiano Sport Invernali</td>
</tr>
<tr>
<td>FPF</td>
<td>Portuguese Football Federation</td>
</tr>
<tr>
<td>GDR</td>
<td>German Democratic Republic</td>
</tr>
<tr>
<td>hGH</td>
<td>Human growth hormone</td>
</tr>
<tr>
<td>IAAF:</td>
<td>International Amateur Athletics Federation</td>
</tr>
<tr>
<td>IADA</td>
<td>International Anti-Doping Arrangement</td>
</tr>
<tr>
<td>IF:</td>
<td>International Sports Federation</td>
</tr>
<tr>
<td>IGF-I</td>
<td>Insulin like growth factor 1</td>
</tr>
<tr>
<td>IOC:</td>
<td>International Olympic Committee</td>
</tr>
<tr>
<td>IPR</td>
<td>Intellectual property rights</td>
</tr>
<tr>
<td>ISO</td>
<td>International Standard Organisation</td>
</tr>
<tr>
<td>ITF</td>
<td>International Tennis Federation</td>
</tr>
<tr>
<td>IV</td>
<td>Intravenous</td>
</tr>
<tr>
<td>IWF</td>
<td>International Wrestling Federation</td>
</tr>
<tr>
<td>KFF</td>
<td>Kenya Football Federation</td>
</tr>
<tr>
<td>KSHS</td>
<td>Kenya Shillings</td>
</tr>
<tr>
<td>LEN</td>
<td>Ligue Europeenne de Natation</td>
</tr>
<tr>
<td>LPFP</td>
<td>Portuguese Professional Football League</td>
</tr>
<tr>
<td>MGF</td>
<td>Mechano growth factor</td>
</tr>
<tr>
<td>MLB</td>
<td>Major League Baseball</td>
</tr>
<tr>
<td>MRS</td>
<td>Magnetic resonance spectroscopy</td>
</tr>
<tr>
<td>mtDNA</td>
<td>Mitochondrial deoxyribonucleic acid</td>
</tr>
<tr>
<td>mtPTP</td>
<td>Mitochondrial permeability transition</td>
</tr>
<tr>
<td>NBA</td>
<td>National Basketball Association</td>
</tr>
<tr>
<td>NFL</td>
<td>National Football League</td>
</tr>
<tr>
<td>NGB</td>
<td>National [sports] governing body</td>
</tr>
<tr>
<td>NOC</td>
<td>National Olympic Committee</td>
</tr>
<tr>
<td>NSAM</td>
<td>National Shooting Association of Malaysia</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Full Form</td>
</tr>
<tr>
<td>--------------</td>
<td>-----------</td>
</tr>
<tr>
<td>OG</td>
<td>Olympic Games</td>
</tr>
<tr>
<td>PAS</td>
<td>Publicly Available Standard</td>
</tr>
<tr>
<td>PET</td>
<td>Positron emission tomography</td>
</tr>
<tr>
<td>R&amp;D</td>
<td>Research and Development</td>
</tr>
<tr>
<td>REFA</td>
<td>Spanish Athletics Federation</td>
</tr>
<tr>
<td>ROS</td>
<td>Reactive oxygen species</td>
</tr>
<tr>
<td>RSA</td>
<td>Republic of South Africa</td>
</tr>
<tr>
<td>SPECT</td>
<td>Single photon emission computed tomography</td>
</tr>
<tr>
<td>TAC</td>
<td>The Athletic Congress</td>
</tr>
<tr>
<td>TAF</td>
<td>Turkish Athletics Federation</td>
</tr>
<tr>
<td>THG</td>
<td>Tetrahydrogestrinone</td>
</tr>
<tr>
<td>TUE</td>
<td>Therapeutic Use Exemption</td>
</tr>
<tr>
<td>UCI</td>
<td>International Cycling Union</td>
</tr>
<tr>
<td>UEFA</td>
<td>Union des Associations Europeennes de Football</td>
</tr>
<tr>
<td>UM</td>
<td>unterstuetzendes Mittel – the term given to doping substances</td>
</tr>
<tr>
<td>UNESCO</td>
<td>United Nations Educational Scientific and Cultural Organisation</td>
</tr>
<tr>
<td>USADA</td>
<td>United States Anti-Doping Agency</td>
</tr>
<tr>
<td>USATF</td>
<td>United States of America Track and Field Federation</td>
</tr>
<tr>
<td>USBSF</td>
<td>United States Bobsleigh and Skeleton Federation</td>
</tr>
<tr>
<td>USD</td>
<td>United States Dollar</td>
</tr>
<tr>
<td>USOC</td>
<td>United States Olympic Committee</td>
</tr>
<tr>
<td>USWF</td>
<td>United States Wrestling Federation</td>
</tr>
<tr>
<td>VEGF</td>
<td>Vascular endothelial growth factor</td>
</tr>
<tr>
<td>WADA</td>
<td>World Anti-Doping Agency</td>
</tr>
<tr>
<td>WADC</td>
<td>World Anti-Doping Code</td>
</tr>
<tr>
<td>WHO</td>
<td>World Health Organisation</td>
</tr>
</tbody>
</table>
CHAPTER ONE: INTRODUCTION

1.0 Background

Kenya is internationally renowned for her sporting prowess. Although the country has achieved a lot of success in sports such as Tennis, Swimming, Volleyball, Hockey and Rugby, her most remarkable success has been in track and field (athletics). Kenyan athletes (male and female) have dominated in all major competitions since the 1960’s. 1 Of the 204 countries that participated in the 2008 Beijing Olympics, 117 did not win any medal at all. Only 56 countries won at least one Gold medal. Kenya won five Gold medals and 14 medals in total. Kenya was the top African country and it was placed 15th in the whole world. 2 In the Paralympics hosted by the same City in 2008, Kenya won five Gold, three Silver and one Bronze to emerge at position 25 out of 147 competing nations. 3 In 2008 sensational 18 year-old Kenyan female 800 m runner Pamela Jelimo won at the Golden League races in Berlin, Oslo, Rome, Paris, Zurich and Brussels, 4 in addition to victories at the Beijing Olympics 5 and at the World Athletics Final competition in Stuttgart. 6 Lydia Cheromei and Paul Kirui won the women’s and men’s marathon in Amsterdam on 19 October

---

1 In April 2008, a Kenyan, Martin LeL won the London Marathon and in the process carried away Kshs. 8 million. another Kenyan, Cheruiyot won the Boston Marathon and walked off with Kshs. 9.3 million.
2 K Murugu – Games Review. The 2008 Beijing Olympic Games – the last words, Saturday Standard, Sept., 6th, 2008, p 33
3 Standard on Sunday – Feverpitch, September 21, 2008
4 ‘Gracious Talented’ The Standard, Nairobi Sunday September 7, 200, p 45
5 K Murugu, supra note 2 p 33
6 Saturday Standard, September 13, 2008, FeverPitch Extra, p 4
2008. Not to be left behind was the Kenya National soccer team ‘Harambee Stars’ which qualified for the 2010 Africa Cup of Nations championship.

This sustained interest in sports in general and in athletics in particular appears to be fuelled in part by the increasing commercialization in sport. Winners at various competitions are known to earn as much as Kshs. 5 Million in cash prizes at one athletics meeting/competition. Some top class athletes amongst whom many Kenyans rank earn over KShs. 20 Million a year, while others like soccer players earn over KShs. 10 million a week. Martin Lel won Kshs 38 million in the Marathon Majors consisting of events in Berlin, Boston, Chicago, London and New York. Pamela Jelimo exceeded this mark by earning over KShs 70 million (over USD 1 million). Excellence in sports is an avenue to fame and riches. Since prizes and endorsements are only available to winners, many athletes have resorted to using drugs in order to excel.

1.1 The nature of Sport

Sports activities are thought to have developed on the sidelines of public authority. Since time immemorial, sports developed its own rules. In the fullness of time, these sports bodies formed international entities. For example, whereas various forms of football are reported to have emerged at different times in different parts of the world, the International Federation of

---

7 E Makori ‘Cheromie wins debut marathon n Amsterdam Daily Nation (Nairobi Monday 20 October 2008), p 43
8 English footballer David Beckham reportedly earns over KShs. 100 million a week at a club in California while Ghana’s Michael Essien who plays soccer for Chelsea Football Club in the UK is said to earn KShs. 10 million a week [Daily Nation Monday 28 January 2008, pp VI-VII]. Kenyan footballers are paid between KShs. 20,000-50,000 a month in Kenya which compares well with income paid to civil servants majority of whom are University graduates.
9 C Musumba ‘Lel captures Sh. 38 million Majors Prize’, Sunday Nation, October 19, 2008.
Associations (FIFA) was founded in 1904 to regulate soccer worldwide. Consequently, football or soccer is played following rules of FIFA. FIFA has specified the size of the ball, size of the field, number of players, field of play, officials, offences and mode of scoring. All affiliates have an obligation to follow these rules. This is provided for in article 13 of the FIFA Statutes which requires members to comply with statutes, directives, regulations and decisions of FIFA. Football is thus governed by private law.

In essence, the law under which sports bodies operate can be divided into main parts, firstly, sports rules, i.e. laws of the game (including playing rules), secondly, rules on the integrity of sport/ethics of sport, international sports law (rules and regulations gleaned from practices of jurisdictions e.g. right to a hearing, right to be represented by counsel, right to be informed among others) and, fourthly, global sports law or legislativa, i.e. rules and regulations that relate to membership of sports associations such as FIFA, followed by continental federations in the middle, national federations and clubs at the bottom. The latter two are under an

---

Members' Obligations: "I Members have the following obligations: (a) to comply fully with the statutes, directives and decisions of FIFA bodies at any time as well as the decisions of the Court of Arbitration for Sport (CAS) passed on appeal on the basis of art.60 par.1 of the FIFA Statutes, ...." FIFA Statutes

...the Federation Internationale de Basketball (FIBA) that controls the game of basketball performs her supervisory functions through the FIBA General Statutes 2006-2010 and the Internal Regulations and other regulations and directives.

Is there a global sports law?" (2003) 2 Entertainment Law 1,18
Football Associations (FIFA) was founded in 1904 to regulate soccer development worldwide. Consequently, football or soccer is played following the rules of FIFA. FIFA has specified the size of the ball, size of the field, number of players, field of play, officials, offences and mode of scoring. All National affiliates have an obligation to follow these rules. This is provided for under article 13 of the FIFA Statutes which requires members to comply with the statutes, directives, regulations and decisions of FIFA. Football is thus governed by private law.

In essence, the law under which sports bodies operate can be divided into four main parts, firstly, sports rules, i.e. laws of the game (including anti-doping rules), secondly, rules on the integrity of sport/ethics of sport, thirdly, international sports law (rules and regulations gleaned from practices in various jurisdictions e.g. right to a hearing, right to be represented by counsel, right to be informed among others) and, fourthly, global sports law or lex sportiva, i.e. rules and regulations that relate to membership of sports bodies. In terms of organisation, a pyramidal structure emerges with the International Olympic Committee (IOC) at the apex, then international sports federations such as FIFA, followed by continental federations in the middle, national federations and clubs at the bottom. The latter two are under an

---

11 Article 13 Members' Obligations: "I Members have the following obligations: (a) to comply fully with the Statutes, regulations, directives and decisions of FIFA bodies at any time as well as the decisions of the Court of Arbitration for Sport (CAS) passed on appeal on the basis of art.60 par.1 of the FIFA Statutes,....." FIFA Statutes 2007

12 Similarly the Federation Internationale de Basketball (FIBA) that controls the game of basketball performs her regulatory and supervisory functions through the FIBA General Statutes 2006-2010 and the Internal Regulations 2008 amongst other regulations and directives.

13 K Forster 'Is there a global sports law?' (2003) 2 Entertainment Law 1,18
obligation to incorporate the statutes of FIFA in their own constitutions. Additionally, national federations also affiliate to IOC through the National Olympic Committee. Besides, national federations are registered using municipal law. A national football federation therefore owes allegiance to FIFA, IOC and municipal law. The Swiss Federal Tribunal \(^{14}\) has observed that:

Competitive sport is characterized by a very hierarchical structure at both national and international levels. Established on a vertical basis, the relations between athletes and the organizations that govern the different sporting disciplines are different from the horizontal relations between parties to a contract. This structural difference between the two types of relations has an impact on the volitional process that leads to the conclusion of an agreement. [...] Most of the time, athletes do not have a great deal of power over their federation and have to adhere to its wishes whether they like it or not. Therefore, an athlete who wishes to participate in a competition organized under the auspices of a sports federation whose regulations include an arbitration clause has no option but to accept such a clause, particularly by adhering to the statutes of the sports federation in question in which the clause appears.

In the matter of Modahl, \(^{15}\) the court of appeal in the UK held that the athlete had no contract with the National athletics association. It has also been held that US courts may not have personal jurisdiction over international sporting bodies. \(^{16}\) And where personal jurisdiction exists, US courts may be reluctant to apply US Federal and state public laws to resolve international sports disputes.\(^{17}\)

A major bone of contention is the point at which public authorities can come in to regulate sports, if at all. Sports bodies are generally averse to

---

\(^{14}\) Canas v ATP Tour 4P.172/2006 (1st Civil Ct., 22 March 2007) ATF 133 III 235

\(^{15}\) Modahl v British Athletic Association Ltd [2002] 1 WLR 1192, 1232 (CA)

\(^{16}\) Reynolds v International Amateur Athletics Federation 23F.3d 1110 (6th Circ. 1994)

\(^{17}\) Martin v International Olympic Committee 740 F.2d 670 (9th Circ. 1984)
interference by public authorities in their affairs. In the Bosman case a reference from the court of appeal of Belgium to the European Court of Justice (ECJ) for interpretation of the compatibility of football rules with [EU] Treaty provisions was made. The question was whether sport was subject to [EU] Community law in relation to free movement of labour. Jean-Marc Bosman was a professional footballer of Belgian nationality. He sought to transfer from a club in Belgium to another one in France. Transfer rules of FIFA and UEFA provide for payment of a transfer fee. The French club failed to raise the transfer fee demanded by the Belgium club. Hence, Bosman could not take up 'employment' at the French club. ECJ held that sport is subject to community law in so far as it constitutes an economic activity like in the case of (semi-)professional football. The court rejected the argument that sports rules were purely an internal matter not requiring intervention of the courts [i.e. autonomy of sports]. The court held that the rules [of UEFA and FIFA] on transfer of players as well as on nationality violated the spirit and letter of the [EU] Treaty.

This ruling caused both FIFA and UEFA barons to engage the European Council with a view to having sport recognised as both specific and autonomous of public regulation. By specificity, they persuaded the EU Council that sport had social and economic functions and that the commercial

---

18 On several occasions FIFA has threatened to ban Kenya on account of interference in the management of the local body by government. On 29 July 2008 FIFA suspended the Ethiopian Football Federation because of perceived government interference [at http://nazret.com/blog/index.php?title=ethiopia_suspended, 9 April 2009]
19 Union Royale Belge des Societes de Football Association ASBL v Jean-Marc Bosman, Royal Club Liegeois SA v Jean-Marc Bosman and Others and Union des Associations Europeennes de Football (UEFA) v Jean-Marc Bosman [1995] C-415/93
aspect of it (professional sport) was a tiny part of it. By autonomy, they reminded the EU of the origins of sport as civil society that sought to limit government intervention and to allow the citizenry freedom from government control. They therefore argued that sport should remain self-governed by the structures and bodies that have done so over the years (organisations such as the IOC, FIFA for football and FIBA for Basketball) with minimal intrusion by public authorities. \(^20\) The EU Council accepted and this is reflected in subsequent rulings of the ECJ. \(^21\)

In general, it is accepted that the laws of the game as well as ethical principles are less amenable to judicial challenge. In the matter of *Mary Slaney*, a US athlete, she qualified for the 1996 Atlanta Olympic Games during the US Olympic Track and Field Trials at which games she posted a positive dope test for testosterone. News of Slaney's positive test became public in 1997 and the IAAF suspended her. The USA T & F suspended her later and set a hearing process in motion. After the hearing, USA T & F ruled that the six-to-one ratio of testosterone to epitestosterone was unreliable in women and lifted her suspension. The IAAF declined to recognize the outcome and instead set its own procedures in motion. The athlete refused to appear. The IAAF Panel ruled against Slaney and suspended her for two years. Slaney filed suit

---

\(^20\) B Garcia, From regulation to governance and representation: agenda setting and the EU involvement in sport, ESLJ Vol. 5, No. 1, pp 1-22

\(^21\) For example in *Meca-Medina & Majcen v Commission of European Community* [2006] C-519/04 the ECJ held that anti-doping rules which punished offenders through suspension from sport (and therefore work) were geared towards ensuring parity in competition, were rules of a non-economic nature and therefore they did not violate the EU treaty on freedom to provide services.
against IAAF in an Indiana Federal District Court. \textsuperscript{22} The suit was dismissed. She appealed. The Seventh Circuit Court of Appeals \textsuperscript{23} found that the claims had already been dealt with by the IAAF’s arbitration Panel, and thereby banned from re-litigation by the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).\textsuperscript{24}

In \textit{Meca-Medina and Majcen v Commission of European Communities} \textsuperscript{25} the appellants tested positive for nandrolone on 31 January 1999 during the World Cup Swimming at Salvador de Bahia (Brazil). FINA’s panel suspended them on 8\textsuperscript{th} August 1999 for four years. On appeal, CAS upheld the suspensions. Upon review, CAS subsequently reduced the suspensions to two years on 23\textsuperscript{rd} May 2001. The appellants filed an appeal alleging that the anti-doping regulations adopted by the IOC and enforced by FINA were incompatible with EC Treaty provisions on competition and freedom to provide services. They alleged \textit{inter alia} that the IOC’s mechanism of strict liability and the establishment of tribunals responsible for the settlement of sports disputes by arbitration which are not independent of the IOC is anti-competition. The ECJ observed that since penalties are necessary in enforcing the doping ban, their effect on athletes’ freedoms must be seen to be inherent itself in anti-doping rules. These rules do not therefore constitute a restriction of competition.

\textsuperscript{22} 244 F. 3d at 584
\textsuperscript{23} 9 U.S.C. 201
\textsuperscript{24} Similarly in the matter of \textit{Nyamweya and others v Hatimi and others} which involved a dispute in leadership between the plaintiffs (who were duly registered officials under Kenyan law) and the defendants (who though not recognized under Municipal law were nevertheless recognized by FIFA), the High Court of Kenya held that football in Kenya can only run under the leadership of the defendants – thereby deferring to \textit{lex sportiva}.
\textsuperscript{25} [2006] C-519/04; FINA: International Federation for Aquatic sports including swimming
incompatible with EC rules. They are justified by a legitimate objective to ensure healthy rivalry between athletes. The appeal was dismissed.26

On international sports rules, it is worth noting that sports federations have attempted to incorporate principles of law from diverse legal backgrounds in an attempt to assure justice. With respect to doping regulation, an accused cannot be adjudged guilty until a hearing so determines or unless the accused forfeits of a hearing. In the matter of The Australian Olympic Committee v Federation Internationale de Bobsleigh et de Tobogganing (FIBT) and Brazilian Bobsleigh Association27 a member of the Brazilian team had tested positive for Nandrolone in an out-of-competition test just before the qualifying competition. This information was relayed during the qualification rounds. No hearing had been held. The Australian Olympic Committee (AOC) applied for an order that the Brazilian four-man bobsleigh team be disqualified from the Olympic Winter Games and that the Australian four-man bobsleigh team be declared eligible. The respondents FIBT argued that a mere positive finding was not conclusive of a doping rule violation. It was argued in favour of the respondents that the Brazilian athlete had not yet been given a hearing to determine the extent of his guilt. The Panel said that a determination for disqualification can only be made after the athlete in question has gone through the whole adjudicatory process.

26 This ruling is a clear reflection of the understanding between the EU Council and sports bodies. This understanding as reflected through this ruling gives sports bodies plenty of room for self-reflection.
27 Ad hoc Division – XX Olympic Winter Games in Turin, CAS arbitration No. CAS OG 06/010
It is the practice of international sports federations to suspend an athlete before a hearing is held. In *USADA v Joe Warren* a US and World amateur wrestling champion in the 60 kg class tested positive for marijuana in an in-competition test on 10th June 2007. He was suspended from all competitions on 23rd June 2007 and the hearing of his matter conducted on 3rd January 2008 at the conclusion of which he was handed a two year suspension effective 27th June 2007. Such action by sports bodies can be defended on account of protecting the integrity of sport.

Some legal scholars think that sports bodies wield enormous power which is not being applied judiciously. For instance, DL Koller avers that USOC and USADA serve as 'private' Olympic movement regulators and that in this role, they deny athletes due process protections. And that this private sector approach to sport regulation in USA has created a discernible accountability vacuum. The author therefore argues for enhanced accountability to protect the rights of athletes. Based on the Kenyan experience, Migai Akech holds the view that decisions of sports bodies must be subject to judicial review. His main argument appears to be that sports bodies wield enormous powers that impact the livelihood of athletes.

Considering the continuum for rules of the Game through *lex sportiva*, Migai

---

28 AAA/North American CAS No. 30 190 00782 07
29 Where an athlete is eventually found 'guilty' the period of suspension has been worked out to include the period before the suspension. But where an athlete has been 'acquitted' of doping related charges there is no clear mechanism for redress by way of compensation built in the anti-doping rules. In criminal law an aggrieved party can sue for
Akech argues that national courts should be able to intervene in decisions touching on international sports rules and global sports rules (*lex sportiva*). With respect, this argument ignores the fact that sport has both economic and sport specific characteristics – the so called spirit of sport. As the ECJ in *Meca-Medina* observed sports bodies have a right to discipline their members, economic inconveniences notwithstanding. In any case, allowing national courts to intervene at the proposed stages of the continuum would be tantamount to introducing too much government in the lives of the citizenry.

The jurisprudence that emerges from the foregoing analysis is that sports bodies play a valuable role in regulation of sports, including the regulation of doping and that anti-doping rules are sports rules that are specific to sport.

### 1.2 Doping

#### 1.2.1 Definition of doping

Doping is defined as the use of performance enhancing substances or methods to gain an unfair advantage over other competitors. The substances and methods used for doping have useful clinical applications when their use is well regulated. It is only those substances and methods

---

32 M Akech *supra* note 31 p 1

that help to improve sports performance whose use in sports has been prohibited.

The question whether an analytical positive test is conclusive of a doping rule violation arose in the matter of *The Australian Olympic Committee v Federation Internationale de Bobsleigh et de Tobogganing (FIBT) and Brazilian Bobsleigh Association*. The Court of Arbitration for Sport (CAS) distinguished between an adverse analytical finding and a doping rule violation saying that:

An adverse analytical finding was simply a report by an anti-doping laboratory that a sample is positive for a prohibited substance. Thereafter, the applicable Anti-Doping regulations ... provide for an extensive process, including the athlete's rights: to ask for a B sample test, be present at the testing of the B sample, and to have a hearing to contest the adverse analytical finding. Only after that process has been completed and the adverse analytical finding is confirmed is an anti-doping rule violation found. As a result, a sanction is imposed on the athlete in the form of consequences ....

CAS said that it is not merely a positive test for which an athlete is punished but for violating specific anti-doping rules. This holding reinforces the medico-legal nature of doping control.

### 1.2.2 History of doping

The desire to gain an unfair advantage over other competitors in sport can be traced to the ancient Greek games. It has been documented that an Olympic victory at that time was worth the modern day equivalent of USD 500,000 (Kshs. 40 million). At that time, many athletes ate frogs and

---

34 Ad hoc Division – XX Olympic Winter Games in Turin, CAS arbitration No. CAS OG 06/010
35 'Witness - Dying to Win': History of Doping in Sport, p.1
testicles of some animals in an attempt to outperform their opponents. Presently top athletes earn in the region of KShs. 480 million a year.

Doping substances such as amphetamines, anabolic steroids, growth hormone etc are produced by pharmaceutical companies and used in the clinical management of various diseases. Certain drugs were, however, produced for specific “doping” purposes, such as anabolic steroids to increase aggressiveness of German soldiers and stimulants for US military pilots. Cases of designer drugs in sports are more recent. Doping among soldiers has never ceased. It is widespread amongst disciplined forces. Body builders took to doping in the 1950s. From the 1970s actors and actresses also joined in. In sports, doping developed alongside the sport. This has become increasingly sophisticated and widespread. Cases of doping came to light as early as during the Olympic Games of 1904 in Saint Louis. Pharmaceutical companies became aware that healthy individuals in the military, show business, body building and sports were willing to consume large quantities of drugs meant for various diseases just to look good or to perform better. Pharmaceutical companies filled the market with huge quantities of drugs, mainly hormones, which they advertised as supplementary treatment for serious diseases, dietary supplements or anti-aging remedies.

---

38 BALCO produced a modified steroid tetrahydrogestrinone (THG) soas to evade detection; Italian police intercepted boxes of modified anabolic steroids from China.
39 A Donati, supra note 37
The first organised anti-doping tests were carried out at the 1965 Pan Am Games in Mexico.\textsuperscript{40} The International Olympic Committee (IOC) carried out their first anti-doping tests during the 1968 Olympic Games in Mexico City in which only one athlete was caught. At the next Games in 1972 in Munich, seven athletes tested positive. The numbers of those who test positive have continued to rise with increasing numbers of participating athletes. It is even more worrying that many different drugs are finding use in sports.

The first Kenyan to come into the limelight in connection with doping was former five times world cross-country champion John Ngugi.\textsuperscript{41} He was initially banned for two years for refusing to take a dope test but he was later cleared. In March 2003, Pamela Chepchumba, a track and field athlete was banned for two years after testing positive for erythropoietin (EPO).\textsuperscript{42} At the Olympic Games in Athens in 2004, Kenya bantamweight boxer, David Munyasa, tested positive for cathine (local name: miraa) \textsuperscript{43} and was expelled from the Games. In 2005, Lydia Cheromei, a former world cross country junior champion tested positive for clomiphene metabolite, an active ingredient in fertility drugs, in an out-of-competition test taken on 24 February 2005 in

\textsuperscript{40} CE Yesalis et al. History of anabolic steroid use in sport and exercise, In: CE Yesalis (ed); \textit{Anabolic Steroids in Sport and Exercise}, Human Kinetics Publishers, Champaign, IL, 1993, p. 35

\textsuperscript{41} Doping Control Officers sent by the IAAF went to his rural home and asked him to supply them with urine. He refused. He was later to argue that it was contrary to African customs for an adult to carry his own urine. At the time (around 1992), very little was known, let alone understood, by athletes on doping.

\textsuperscript{42} www.news.bbc.co.uk 2004 (13 June 2008)

\textsuperscript{43} S Aletta ‘How miraa cost Munyasa chance in the Olympic Games’. \textit{The Standard}, May 23 2005, p 28. None of the officials who accompanied the Kenyan team to the Olympics knew that cathine was on the list of banned substances. No doping tests were conducted on the athletes. The athletes did not have any information on banned substances (never mind that such information is posted on the internet!). The boxer was subsequently suspended for two years according to WADA rules.
Eldoret. She was banned for two years.\textsuperscript{44} Other Kenyans who have tested positive include Susan Chepkemei (Salbutamol, 2007) and Elizabeth Muthoka (Nandrolone, 2008). Doping is therefore a Kenyan problem just like it is a global one.

It has been observed that although athletes know the sanctions and penalties for being caught, the use of drugs in sports continues.\textsuperscript{45} Some sceptics say that doping may never disappear.\textsuperscript{46}

1.2.3 \textbf{Doping as Biotechnology}

Doping involves the application of science and medicine to sport. Biotechnology is used in the manufacture of drugs that also find use in sport. Article 2 of the Convention on Biological Diversity defines biotechnology as:

\begin{quote}
[\textit{Any} technological application that uses biological systems, living organisms, or derivatives thereof to make or modify products or processes for specific uses.
\end{quote}

The evolution of modern biotechnology is attributed to the discovery of the structure of the DNA molecule in the 1950s. Since then, the science of genetic engineering has developed.\textsuperscript{47} The scientific disciplines behind modern biotechnology are molecular, micro and cell biology in combination with biochemistry.

\textsuperscript{44} A TUE is usually given to athletes to enable them use drugs for treatment which are otherwise prohibited in sports or have performance enhancing characteristics in sports. Cheromei failed to apply for a TUE.

\textsuperscript{45} Delbeke supra note 33 p 434

\textsuperscript{46} Globe and Mail update (2003), http://sympatico.globeandmail.com/servlet/story/

Sporting activity puts heavy physiological demands on muscles, compelling them to enlarge (hypertrophy).[^48] This hypertrophy results in "bigger" muscles that can do work faster and better. This is achieved through the proliferation of local satellite cells outside of muscle fibres. Using normal cell division these muscle-specific stem cells proliferate and then some of their progeny fuse with muscle fibres.[^49] These satellite cells respond to insulin like growth factor I, or IGF-I by undergoing a greater number of cell divisions. IGF-I can therefore alter muscle size and function. When a gene enters a cell, it should keep functioning for the life of that cell. The virus called adeno-associated virus (AAV) has been successfully used to deliver IGF-I to the muscles. Injecting AAV-IGF-I into mice led to enlarged muscles. This scientific breakthrough portends well for the treatment of muscular degeneration. There is evidence that AAV-IGF-I has similar effects in normal muscle. This makes it attractive for doping purposes. Additionally, it is difficult to test for this. Certainly, it is not detectable through urine and blood samples, the preferred samples for dope testing. It would require muscle biopsy to establish it. Other tissues could easily become the subject of gene modification.[^50]

Endurance capacity as required in long distance running, swimming, cycling and a host of sports is affected by the amount of oxygen reaching the muscles.[^51] Erythropoietin is a naturally occurring protein that spurs the

[^48]: W Hollmann & Th Hettinger, *Sportmedizin: Arbeits- und Trainingsgrundlagen* (Schattauer Stuttgart 1990) 442,512
[^50]: ibid.
[^51]: Hollmann & Hettinger, supra note 48
development of red blood cells. Its synthetic form Erythropoietin or EPO was developed to treat anaemia but has been widely abused by athletes, especially cyclists. Biotechnological developments in agriculture could easily find use in sports by way of doping. Already, food supplements in which performance enhancing drugs are included are popular with athletes. It is therefore apparent that developments in genetic engineering whether in medicine or agriculture can be brought to bear directly on doping in sport.

Doping, just like biotechnology is science intensive. The analytical procedures require highly equipped laboratories in which the sciences of analytical chemistry and biochemistry are used to analyse the presence of drugs or their metabolites in the body. For example, abnormally high concentrations of human chorionic gonadotropin (hCG) were found in the urine sample of swimmer Marko Strahija of the Croatian Swimming Federation in March 2002. Other chemical compounds found in athletes' samples include the anabolic steroid metenolone, 19-norandrosterone, and 3'-hydroxystanozolol. Tetrahydrogestrinone (THG) is a specially designed anabolic steroid which has been tweaked by chemists to make it undetectable under normal dope testing. A new drug, "Clear III" is out and circulating.

---

52 Anon 'Drugs and the Olympics' *The Economist* August 7th – 13th 2004, p.20
53 Witness - Dying to Win 6: Sports and Drugs - a lethal team: At the RAI.CO Laboratory, athletes could purchase food supplements fortified with the tweaked anabolic steroid 'Tetrahydrogestrinone
54 Re Marko Strahija, FINA Doping Panel 1/02
55 Re Mahmoud Jadaan, FINA Doping Panel 5/02
56 Re Katerina Bliamou, FINA Doping Panel 3/02
57 Re Yuliya Pidlisna, FINA Doping Panel 5/03
among professional sportsmen and women who have the money and the urge to buy it. This new drug is believed to contain THG, EPO and insulin.\textsuperscript{59}

After careful scientific analysis, the World Anti-Doping Agency (WADA) prepares annually a list of prohibited substances and methods, \textsuperscript{60} which list is reviewed annually to keep pace with scientific developments. Offences relating to doping take into account both analytical findings (i.e. positive dope test) and non-analytical (i.e. mere admission of use or proof of having used prohibited substances) into account. Doping control is therefore an attempt to use law to solve a problem of science and technology.

\subsection*{1.2.4 Parties involved in doping control}

There are two sets of parties involved in doping matters. The first set is described in the Olympic Charter \textsuperscript{61} (hereinafter referred to only as the Charter) to include the IOC, international sports federations (IFs), National Olympic Committees (NOCs) as well as the Organising Committees for the Olympic Games. The Charter is directed at the IOC, international federations, national Olympic Committees, national governing bodies (NGBs) and individuals involved in sports in various roles such as athletes, coaches, doctors, managers, horses etc. The World Anti-Doping Agency (WADA) was created in 1999 to handle all matters related to doping. Its composition includes both the

\begin{thebibliography}{9}
\setlength{\itemsep}{0pt}
\item \textsuperscript{59} R Hughes ‘Drugs in Sports: what do we tell the kids?’ \textit{The East African}, Dec. 13-19, 2004\textsuperscript{VIII}
\item \textsuperscript{60} The Prohibited List contains a wide range of substances which are classified as stimulants, narcotics, cannabinoids, anabolic agents, peptide hormones, beta-2 agonists, agents with anti-estrogenic activity, masking agents, glucocorticosteroids, and methods such as enhancement of oxygen transfer, gene doping, and pharmacological, chemical and physical manipulation
\item \textsuperscript{61} International Olympic Committee: The Olympic Charter, In force as from 1 September 2004, encodes the fundamental principles of Olympism, Rules and Bye-Laws adopted by the International Olympic Committee (IOC). The Charter serves both as a statute for the IOC and as a basic instrument of a constitutional nature and it defines the main reciprocal rights and obligations of the three main constituents of the Olympic Movement
\end{thebibliography}
IOC and world governments. All sports federations affiliated to the IOC are required to recognise and abide by the rules of WADA. Therefore the IOC and her members together with WADA constitute one set of parties in doping matters.

The second set of “parties” to doping includes all those actors who do not fall under the purview of the sports federations such as parents and relatives of athletes, food manufacturers, pharmaceutical companies, drug traffickers, and non-athletic users of dope materials.

1.2.5 Nature of doping: criminal or civil?

Offences related to doping are contained in Article 2 of the World Anti-Doping Agency Code (WADC) hereinafter referred to as the Code. These include:

Article 2: ANTI-DOPING RULE VIOLATIONS

2.1 The presence of a Prohibited Substance or its Metabolites or Markers in an Athlete’s bodily specimen.

2.2 Use or attempted Use of a Prohibited Substance or a Prohibited Method.

2.3 Refusing, or failing without compelling justification, to submit to Sample collection after notification as authorized in applicable anti-doping rules or otherwise evading Sample collection.

World Anti-Doping Code 2009

Non-athletic dope users include gym-goers who want to have a “good” body, those in show business such as musicians and movies, military personnel and law enforcement officers.

In ITF v M Charles Irie (decided 13 Oct. 2008) the defendant while admitting the presence of the stimulant, nikethamide or a metabolite thereof, in his urine sample, said that he did not know how the prohibited substance entered his body. He was suspended for two years together with cancellation of all his results and prizes from the date of the infraction.

In USADA v Kayle Leogrande (AAA No. 77 190 00111 08), the athlete, a cyclist confessed to a friend his having used EPO and other prohibited substances. Upon corroboration, he was found guilty of a doping rule violation and suspended for two years.

In USADA v Jonathan Page (AAA No. 77 190 16 09 JENF) the athlete declined to give out a sample but proved that he had a compelling reason for the omission. He was not sanctioned.
2.4 Violation of applicable requirements regarding Athlete availability for Out-of-Competition Testing including failure to provide required whereabouts information and missed tests which are declared based on reasonable rules

2.5 Tampering, or Attempting to tamper, with any part of Doping Control. 67

2.6 Possession of Prohibited Substances and Methods

2.7 Trafficking in any Prohibited Substance or Prohibited Method

2.8 Administration or Attempted administration of a Prohibited Substance or Prohibited Method to any Athlete, or assisting, encouraging, aiding, abetting, covering up or any other type of complicity involving an anti-doping rule violation or any Attempted violation.

The Code adopts a strict liability rule. Under this principle, an anti-doping rule violation occurs whenever a Prohibited Substance is found in an Athlete's bodily specimen. It is immaterial under such a rule whether or not an athlete intentionally or unintentionally used a Prohibited Substance or was negligent or otherwise at fault. In USADA v Nathan Piasecki 68 it was stated that “a doping control cannot reveal what the intent of the athlete was”.

In the Claudia Poll case, the Court of Arbitration for Sport (CAS) 69 stated that:

[It] is a matter for the sports Federation to prove the presence of a banned substance in the athlete's body; if the Federation is successful in proving this element, there is a legal presumption that the athlete committed an offence, whatever the intention of the athlete to commit such offence; the athlete can reverse this presumption of guilt by showing that the case is not one of doping.

---

67 In USADA v Kayle Leogrande, the respondent was indicted for contaminating his urine sample with soap
68 AAA/ North American CAS No. 30 190 00358 07. The defendant in this case had sought to argue that his accusers had not proved the mens rea of his alleged offence.
69 Claudia Poll v FINA, FINA Doping Panel 1/02; CAS 2001/A/317, A v/ FILA; Juan Jose Veloz v FINA, FINA Doping Panel 1/03; IOC Decision in Re Mr. Alain Baxter, Great Britain, Men's Alpine Skiing, Slalom (2002)
and that he/she is innocent but it is for him/her to produce that proof.

Subsequent cases have followed this strict liability principle.

In the matter of FINA \textsuperscript{70} \textit{v Vasileuos Demetis}, \textsuperscript{71} Demetis, a swimmer of Greek nationality tested positive for 19-Norandrosterone with a concentration of 36.5 ng/ml on the 5\textsuperscript{th} of September 2001. He averred that his doctor used to inject him with "Actovegin" but he did not know whether this contained a prohibited substance. The Panel held that the explanations given by the swimmer were insufficient to rebut the presumption of fault.

In \textit{FINA v Yuliya Pidlisna},\textsuperscript{72} the defendant, a 16 year old Ukrainian swimmer tested positive for 3-hydroxystanozolol on 19\textsuperscript{th} August 2003. She did not even know the name of any of the medicines she took. The Panel found that she had committed an anti-doping offence as she is responsible for any prohibited substance or its metabolites found to be present in her bodily specimen.

In \textit{FINA v Juan Jose Veloz},\textsuperscript{73} Veloz, a swimmer of Mexican nationality tested positive for 19-Norandrosterone on 28\textsuperscript{th} August 2001. He denied ever having taken any prohibited substances. He, however, admitted to taking

\textsuperscript{70} FINA stands for Federation Internationale de Natation – the international body responsible for swimming and other aquatic sports
\textsuperscript{71} FINA Doping Panel 2/02; In \textit{FINA v Yuliya Pidlisna} [FINA Doping Panel 5/03], the defendant, a 16 year old Ukrainian swimmer tested positive for 3-hydroxystanozolol on 19\textsuperscript{th} August 2003. It was urged for her that she developed a fever in May 2003 upon which some medicines were prescribed for her. She continued to take these medicines up to August 2003. Neither herself nor her parents investigated the ingredients of the medicines. She did not even know the name of any of the medicines she took. Neither herself nor her parents informed either the coach or the national team doctor about her treatment. The Panel found that she had committed an anti-doping offence as she is responsible for any prohibited substance or its metabolites found to be present in her bodily specimen.
\textsuperscript{72} FINA Doping Panel 5/03
\textsuperscript{73} FINA Doping Panel 1/03
"ISODINE" and "MULTIVIT" both of which are food supplements. "ISODINE" produced in USA is known to contain Nandrolone. The Panel found that Veloz took a product which contained the prohibited substance 19-Norandrosterone. In finding that an infringement of doping rules has occurred in this case, the Anti-Doping Panel observed that:

It has been known and widely publicised for several years that food supplements can be and sometimes intentionally are contaminated with products which are prohibited in sports. An athlete who ignores this fact, does so on his own risk. 74

In order to avoid unfairness under the strict liability principle, an athlete has the possibility to avoid or reduce sanctions if he or she can demonstrate that he/she was not at fault or significant fault. 75

Be that as it may, the application of the concept of strict liability has been challenged by local courts in USA and Germany. 76 In USA, a swimmer, Jessica Foschi, tested positive for the anabolic steroid mesterolone in 1995 and was penalised under the rules of FINA. She appealed against the penalty to the American Arbitration Association (AAA). The AAA rejected the idea of 'strict liability' saying:

[H]aving concluded that the claimant and all those connected with her are innocent and without fault, we unanimously conclude that the imposition of any sanction on the claimant so offends our

74 FINA Doping Panel 1/03, par. 14.3
75 WADA Code 2009 Comment to article 10.5.1 and 10.5.2. "The Code provides for the possible reduction or elimination of the period of ineligibility in the unique circumstances where the Athlete can establish that he or she had No Fault or Negligence in connection with the violation. This approach is consistent with basic principles of human rights and provides a balance ....Articles 10.5.1 and 10.5.2 are meant to have an impact only where the circumstances are truly exceptional and not in a majority of cases."
76 B Houlihan (1999). Anti-Doping political measures: the new approaches after the Lausanne meeting on doping. IEC Conference.
deeply rooted and historical concepts of fundamental fairness so as to be arbitrary and capricious.

German courts have argued that the maxim 'nulla poena sine culpa' (no penalty without fault) has the status of a constitutional principle. Hence, the application of the strict liability approach violates the constitutional principle and therefore cannot be enforced.

1.3 Rationale for Regulating Doping in Kenya

There are several compelling reasons why Kenya needs to play along in the fight against doping in sport. Firstly, Kenya's international reputation as a sporting nation cannot be gainsaid. Kenya's sportspersons have consistently performed well in international competitions worldwide. They have been consistent winners and for a long time especially in track and field. There is therefore need to protect this image. Kenya is likely to suffer irreparable loss if it were to be established that all those winners rely on prohibited substances or that they are drug cheats.

Secondly, successful athletes serve as role models to others. One of the effects of success in sports is fame. Most world and Olympic champions in various sporting activities become an instant celebrity, thanks to the media. Such fame also means recognition in high socialite circles. It is human nature for one to want to associate with the famous. Most importantly, such fame tends to open doors in the corporate world for endorsements. Fame therefore leads to big monies by way of endorsements. In Kenya, this is witnessed by the

---

77 Johnson v Athletic Canada & IAAF (1997) O.J. 3201
great depth of talent in long distance running. A winner at one event is not
guaranteed success at the next event. This probably partly explains why
among track athletes Kenya has different persons winning at the Olympics,
World Championships, Commonwealth Games and at other competitions. A
joke in Kenya is that the National athletics competition in Kenya is tougher
than even the World Championships. It is vital that the role models be real
human beings but not those adept at cheating through the pharmacological
manipulation.

Thirdly, the need to maintain the integrity of sport through fairness of
competition. This was captured in both the Johnson and Meca-Medina cases. Kenya, being a developing country is not as technically advanced as the
developed countries. Developed countries invest a lot in research and
development. It is noteworthy that almost all substances and methods of
doping emanate from pharmaceutical firms located in these countries. It would
therefore be to Kenya’s disadvantage if there was no regulation of doping in
sport.

Fourthly, commercial interests of athletes are likely to suffer if cheating
through doping is not regulated. One of the effects of success in sports is the
prize money and other payments directly connected to sports performance. For

78 Kipchoge Keino, a legendary Kenyan runner who has himself won Gold for Kenya in the 1,500 m says that the
immense athletic talent in Kenya is to a large extent sustained by the role modeling of the successful athletes. And
that many young people see in athletics an alternative career path since there is a lot of money available to winners
at the moment. The question of role modeling was also referred to by the Supreme Court of Canada in the matter of
79 Johnson case supra note 78
80 Meca-Medina & Majcen v Commission of European Community [2006] C-519/04 in which the court observed
that it was in the interest of sport that the integrity of sport be assured through doping control.
example, English Footballer, Beckham is reported to be earning over Kshs. 100 million a week in California. In Tennis, a winner of one of the Grand Slam tournaments can expect to earn over Kshs. 500 million a year in prizes and endorsements. In professional leagues like Major League Baseball and National Basketball Association, top players earn over Kshs. 300 million a month. It has been reported that in the period July 2006-June 2007 American Golfer Tiger Woods earned USD 100 million, German Auto racer Michael Schumacher earned USD 36 million, Brazilian footballer Ronaldinho earned USD 31 million and Italian motorcyclist Valentino Rossi earned USD 30 million. In October 2008, Kenyan Martin Lel won Kshs. 38 million in the Marathon Majors. Pamela Jelimo earned USD one million (Kshs. 70 million), USD 30,000 (Kshs. 2.1 million) for winning 800 m at the World Athletics Final held in Stuttgart, Germany, and also USD 35,700 (Kshs. 2.5 million) from the Government of Kenya for having won Gold. Kenyan winners have in addition been rewarded fairly handsomely by the government after a successful competition. Success in sports therefore opens doors to immense wealth. If doping in sport is not controlled, Kenya’s athletes are likely to loose out because the doping technology out there is far superior to what Kenya can afford.

---

81 K Badenhausen The World’s Top-Earning Athletes in Forbes.com (26 October 2008)
84 Saturday Standard, September 13, 2008, FeverPitch Extra, p.4
85 M Gakii (2008) Champ Kirwa gets Kshs. 6 million gift, Sunday Nation September 21, 2008, p.44 - The government of Kenya gave out USD 35,700 (Kshs. 2.5 million) for each Gold medal won, USD 20,000 (Kshs. 1.4 million) for Silver and USD 10,700 (Kshs. 750,000) for bronze. The athletes who participated in the Paralympic Games were rewarded with USD 28,500 (Kshs. 2.01 million) for Gold, USD 17,100 (1.2 million) for Silver and USD 9,300 (Kshs. 655,000) for Bronze.
Also, the private sector is willing to invest in sport. Sport is viewed as a huge international business with a total world market estimated at USD 111 billion in 2009. The President of the International Federation of Football Associations (FIFA) is on record as saying 'The FIFA World Cup is a competition staged on a scale of massive proportions and it is abundantly clear that this could not be achieved and with such success without the support of our commercial partners'. In Kenya, the Kenyan Premier League is enjoying a four year media sponsorship from Supersport to the tune of KShs. 100 million (USD 1.04 million) a year, Sofapaka football club received a sponsorship of KShs. 15 million (USD 214,300) from cement manufacturer Blue Triangle, Mathare United Football Club received KShs. 20 million (USD 285,700) from Kenya Data Networks. Corporate persons also want to associate with success that is not tainted with scandal. In the matter of Floyd Landis it came out clearly that his sponsors cancelled contracts with him after word got out that Floyd had tested positive for drugs. Kenya therefore needs to regulate doping into to sustain the interest of the private sector in sports.

The fifth reason is the need to protect the health of athletes. The substances prohibited in sport are medications for known conditions. However, their use in sports, especially in the absence of disease and in the large quantities required to give competitive advantage in competition can

---

86 R. Mosey. Rigorous Sport BBC Newswatch 3 April 2006
88 This information was obtained from Bob Munro then Chairman of the Kenyan Premier League Ltd in March 2010.
89 CAS 2007/A/1394 Floyd Landis vs USADA
result in harmful side effects. Some of the side effects of the dope used include liver damage, reproductive disorders, behavioural disturbances, addiction, kidney ailments, growth of breasts in men, cancer, heart disease, severe birth defects and sudden death. 90 It is also documented that several Dutch cyclists died in the late 1980’s after taking too much erythropoietin (EPO) thereby thickening their blood. 91 Kenya’s new constitution enjoins the government to guarantee the right to health.92 Regulation of doping can thus be seen as one of Kenya’s obligations under the new constitution.

The sixth reason is that Kenya ratified the 2005 International Convention Against Doping in Sport on 17th August Two Thousand and Nine. 93 Kenya’s new Constitution 94 provides that

2. (6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution

Kenya therefore has a constitutional obligation to fight against doping in sport.

The seventh reason is that regulation of doping in sport is informed by the need to uphold a compelling public interest. In Schaffluetzel and Zoellig v Federation Suisse de courses de chevaux (FSC), 95 the Swiss Federal Supreme Court stated that the fight against doping does indeed constitute an overriding

91 P Hersh French-fired Conundrum Landis Doping Case not at all clear-cut, Chicago Tribune, July 31, 2006
92 Art. 43.(1) Every person has the right – (a) to the highest attainable standard of health, which includes the right to health care services [...]
93 See Appendices II & III
94 This new Constitution was promulgated into law on 27th August 2010
95 5C. 248/2006 (Decision of 23 August 2007) ATF 134 III 193, 200
public interest, thereby justifying an infringement of athlete's personality rights through the imposition of punitive measures. In particular the court said:

4.6.2 With respect to the overriding public interest which would justify the infringement [of personality rights], the analysis to be effected requires a weighing of the interests at stake, namely, on the one hand, the interest of the victim not to suffer an infringement of his personality rights, and, on the other hand, that of the perpetrator to achieve a certain objective [...]

4.6.3.2.2 One can only agree that [anti-doping] regulations such as the ones under consideration in this case are justified by an overriding public interest. Indeed, the fight against doping aims at maintaining an equal playing field among competitors, to ensure the fairness of competitions [...], to fight against the use of dangerous substances, to keep the practice of sports clean and to preserve its educational function for young people. These objectives are unanimously recognized by sports organizations and public authorities [...].

The public interest demonstrated in this case equally applies to Kenya. It cannot be gainsaid that athletes, their parents/friends/relatives, the corporate world and other spectators are interested in competition free of drug use.

The eighth reason relates to the pharmaceutical industry which manufactures the drugs. It has been stated that this industry produces far more drugs than are needed by patients. Indirectly, this is to say that the drugs meant for the sick end up being used by others who do not need them for clinical purposes. In certain cases, the pharmaceutical industry has attempted to use unorthodox business practices to boost sales and profits. It is reported that on 17 October 2005 before Boston courts, the Swiss

---

96 A Donati supra note 37
97 ibid.
Pharmaceutical multinational, Serono,98 accepted liability for fraud and was fined USD 704 million for having illegally promoted and marketed among AIDS patients, the growth hormone-based drug Serostim. The company used fake “experimental results”, treated doctors to special trips and required of them to issue many prescriptions for the drug. The pharmaceutical industry is therefore a major player in doping. It is observed that Kenya is largely a net importer of drugs, some of which are abused by athletes. Kenya is not immune to manipulations by this industry. There is therefore need to regulate this industry more keenly.

The ninth reason is the Internet.99 Many people use the anonymity of the Internet to fake prescriptions and have drugs delivered to them. This way, the drugs evade detection and the strict requirement of a prescription. Kenya has made a lot of strides in the development of the information communications sector, which includes the Internet. This sector is ever expanding in Kenya. Kenya has in fact put legislation in place to regulate e-commerce.100 This statute does not mention doping in sports at all. In view of the likely abuse of the Internet by athletes who may want to cheat in competition, there is need to regulate this sector to rule out its abuse by such people.

The tenth reason is that law enforcement officers such as policemen, prison warders and military personnel also use these doping substances to

98 A Donati supra note 37.
99 In IOC v Fani Chalkia [IOC Disciplinary Commission of 18 August 2008 ] the defendant purchased steroids through the Internet.
100 Kenya Information and Communications (Amendment) Act 2008
enhance their bodies.\textsuperscript{101} It is a requirement not only of recruitment but also generally of the job that personnel in such occupations must display certain physical characteristics. PJ Sweitzer (2004) \textsuperscript{102} says a huge muscular body of a police officer can serve as a deterrent. Besides, for police to struggle with and overpower “bad guys”, they need the advantage of big muscles, which can be obtained from anabolic steroids. This casts a shadow of doubt on whether the same law enforcement officers can be relied upon to enforce laws that prohibit the use of the prohibited substances. Closely connected to this is the fact that the disciplined forces in Kenya are very active in sports.\textsuperscript{103} Linked to this is the fact of “other users” apart from athletes, for example, those involved in “show business”.\textsuperscript{104} Most of these groups get their supplies through gyms. To complicate issues, some of them double up as “athletes”. The factor of “other users” means prohibited drugs could follow this avenue to get to athletes. The use of prohibited substances by these groups can easily spill over into sports.

The eleventh reason is one of morality.\textsuperscript{105} We live in a corrupt society in which competition for fame and wealth is done using “short cuts” and “cutting of corners”. The rich and wealthy are worshipped by society irrespective of how they got their wealth. In similar fashion, the sports world has a reward system that favours those considered to be the best. This concept of “best” means


\textsuperscript{102} PJ Sweitzer supra note 101

\textsuperscript{103} Bob Munro (supra) observes that in the Kenyan Premier League there are two teams from the disciplined forces, namely, Ulinzi stars (from the Armed Forces) and Red Berets (from the Police). These and other categories of forces also have teams participating in an array of sports in Kenya.

\textsuperscript{104} A Donati supra note 37

\textsuperscript{105} WADA has a programme on education aimed at influencing morality [wada-ama.org]
more and more money from corporate sponsorships and unparalleled attention from the media. The question of "value system" deserves attention if the war against doping is to be won. Whether society at large is ready to reform and follow the straight path is the big question.

The twelfth and last, but not least reason relates to doping technology. Doping technology here can be looked at in two ways. On the one part testing technology seems to lack behind that of the cheats. Many are busy designing drugs that cannot be easily detected. For example, erythropoietin was used for a very long time in sports before an appropriate test was designed. Several Kenyans have tested positive for a variety of drugs. Kenyan Boxer Munyasa tested positive for cathine at the 2004 Athens Olympic Games, Lydia Cheromei tested positive for clomiphene, a fertility drug in 2007, In total by end of 2009 fourteen Kenyan athletes from various sports codes had tested positive for prohibited substances. These numbers may not reflect the true position because of the differences between the state of testing technology and the technology of the available drugs. On the other part Kenya does not have the requisite technology for testing. This indicates that a number of sportspersons who may be using drugs cannot even be tested. Therefore, the numbers indicated above only indicate that Kenyan

---


107 S Aletta 'How miraa cost Munyasa chance in the Olympic Games' The Standard (Nairobi 23 May 2005), p. 28

108 See Appendix I

109 See Appendix I for a full list
sportspersons are also using prohibited substances. In view of this fact and other reasons given hereinbefore it is necessary that Kenya joins in the war against doping in sport.

From the foregoing there are strong compelling reasons why Kenya should be concerned about regulation of doping in sport.

### 1.4 Attempts at Regulation

Attempts at doping control in sports started at the 1968 Olympics. To date more and more athletes seem to be using drugs than ever before. More and more new drugs appear to be entering the sports arena. Herein lies the dilemma of doping control. Sports bodies are limited in the extent of their jurisdiction. They are unable to exert any influence on non-members of their federations. Unfortunately, even countries that have had anti-doping legislation in place for a long time such as France and Denmark have not succeeded in the fight against doping.

It has been admitted that:

Neither the United States, nor any other single nation, can adequately confront and tackle the multi-faceted challenges posed by doping alone. Sport continues to grow increasingly international in nature. Athletes and coaches compete and train internationally and are impacted by global trends. Recent high-profile steroid trafficking prosecutions in the United States confirm that the trafficking of performance-enhancing drugs is international in scope as well. The source of the steroids and the drug trafficking organisations involved in these prosecutions demonstrates the international nature of this problem. As a result, the 2008 National Drug Control Strategy identified international
cooperation and partnership as a core element of the United States' efforts in combating doping in sport.\textsuperscript{110}

Such an admission coming from the United States serves to illustrate the magnitude of the problem. Since 2005\textsuperscript{111} there is an international legal framework binding nations to fight doping in sports. This Convention calls for cooperation between sports bodies and governments, and government to government. The Convention lays the foundation for a two-pronged approach to regulation. Firstly, sports bodies are left with the mandate to regulate doping on their own, and secondly, public authorities are called upon to put regulatory measures in place. Further, this Convention seeks to harmonise anti-doping efforts globally.

Kenya, despite her fame in the world of sports, has no legal framework within which doping in sports can be regulated. Most of the dope tests have been handled outside of Kenya due to the absence of relevant structures within sports federations.

**Statement of the Problem**

The problem of doping in sport has become a global menace. Previous efforts at regulating doping by sports bodies alone have not addressed the causative factors adequately. Legislative, judicial and administrative law are

\textsuperscript{110} SM. Burns Deputy Director of the Office of National Drug Control Policy, in his submissions before the Congressional Senate Committee on Foreign Relations on “Hearings on the International Convention Against Doping in Sport” on May 22, 2008.

\textsuperscript{111} UNESCO sponsored the International Convention Against Doping in Sport 2005. This Convention was unanimously adopted by 191 States present at the General Conference of UNESCO in Paris, France, on October 19, 2005 and it entered into force on February 1, 2007
required in order to fully address the causes of doping. The 2005 International Convention Against Doping in Sport provides an international legal framework for legislative, judicial and administrative intervention. This convention has not been ratified by Kenya. Kenya has no national regulatory mechanism in place. Kenyans who test positive must suffer huge expenses to defend themselves in foreign countries. There is no mechanism for doping education in Kenya. There is therefore need for a legislative, judicial and administrative system of regulation to check doping in sports in Kenya.

**Research Questions**

This research work focused on two major questions. Firstly, whether a coordinated effort between the legislative, judicial and administrative law is necessary to regulate doping in sport. And secondly, whether Kenya needs a system of regulation which includes legislative judicial and administrative law necessary to regulate doping in sport

**Objectives of the Study**

The first objective was to examine the need for a legislative, judicial and administrative law approach to regulation of doping. And the second objective was to find out whether Kenya needs a regulatory system comprising of legislative, judicial and administrative law.

**Hypotheses**

Two hypotheses were formulated for this work. First, that a regulatory approach encompassing legislative, judicial and administrative law is necessary to combat doping in sports. Second, that Kenya needs a
regulatory framework for doping control that integrates legislative, judicial and administrative law.

**Research Methodology**

This work critically examines international instruments, statutes, case law, Legal opinions, commentaries by legal experts, policy documents, and other writings in the area of regulation of doping substances. This work is a literature study covering both primary and secondary sources of information. Sources of information used include international conventions, statutes, case law and policy documents. Other sources of information used include books, journal articles, newspapers, TV and DVD films and commentaries. The Internet as a virtual library was extensively used, together with other libraries. Face to Face interviews were conducted with selected sports administrators most of whom were former athletes. These were purposely selected on account of their vast and unique experience in sports.

**Justification**

There is a paucity of literature that fuses law, medicine and sport in Kenya. The major output expected from this research is a set of recommendations on the form of regulation that Kenya should adopt to

---

112 Those interviewed include Mr. Bob Munro, past Chairman of the Kenyan Premier League Ltd and Chairman of Xcell Africa Ltd which manages Mathare United Football Club and Mathare Youth Football Club; Mr. Joe Kadenge, a former Kenya International soccer player and former team manager of the National soccer team 'Harambee Stars'; Dr. Kipchoge Keino, former international track athlete and current chair of the National Olympic Committee of Kenya and the Regional Anti-Doping Organisation (RADO), and Ms Valerie Onyango, former administrator at RADO
effectively combat doping in sports. This work therefore seeks to contribute new knowledge in this field and to fill gaps in existing knowledge. Additionally, it is hoped that the findings of this work can inform policy formulation on anti-doping in Kenya.

Outline of the work

This work is made up of several chapters. Chapter two reviews selected works. This is divided into two main parts, proliferation of prohibited substances and regulation. On proliferation several authors explain how various drugs have found their way into sports. The section on regulation largely considers regulation in the area of sports bodies. It is noted that sports bodies on their own are unable to come to terms with the problem of regulation because of their relatively limited mandate.

Chapter three is on the conceptual framework. It is noted that a legal system comprises of legislative, judicial and administrative law. This chapter examines how each of these influences regulation of doping in sports. The point is also made that law can be used to regulate science and sport.

Chapter four deals with factors that fuel doping in sports. This chapter looks at factors such as political interests of various countries, drug trafficking, overproduction and false marketing strategies by pharmaceutical firms, the Internet as a market, doping technology being ahead of testing technology, commercialization in sport and ethical issues. Doping in sports seems to persist largely because the strategies used by sports do not address all the
factors responsible for its persistence. Hence, the need for legislative and judicial law to complement such efforts.

Chapter five looks at the Kenyan legal and institutional framework. It can be noted that none of the existing legislation in Kenya is concerned with doping. Various pieces of legislation have been considered and proposals made of sections that can be amended to include doping. These include The Pharmacy and Poisons Act (Cap 244), The Medical Practitioners and Dentists Act (Cap 253), The Public Health Act (Cap 242), The Science and Technology Act (Cap 250), The Use of Poisonous Substances Act (Cap 247), The Narcotic Drugs and Psychotropic Substances (Control) Act, 1994, The Children Act, 2001, and the Penal Code (Cap 63). It is argued that in order for Kenya to have an integrated system of regulation there is need to use model three approach but improve upon it to capture all the causative factors for continued drug use in sports. Chapter six looks at efforts at harmonising regulation of doping in sports. Sports bodies worked independent of public authorities. They did not succeed because of various issues, key among them being an apparent conflict of interest and their inability to discipline non-members of sports federations. The formation of the World Anti-Doping Agency is hailed as a major breakthrough in the cooperation between sports bodies and governments. The WADA Code is seen as a major step in harmonising regulation of doping within sports federations. The 2005 UNESCO Convention Against Doping in Sport is considered as a landmark Convention that provides an international legal framework upon which nations can base their domestic legislation. That this
Convention incorporates the WADA Code is indeed a big statement on the
hitherto thawed relations between sports bodies and governments. However,
this Convention does not tackle all the causative factors of doping such as
commercialisation of sport and ethical issues. Besides, its limitation to
amateur sport is considered as a major drawback in the fight of doping in
sport. The search for an integrated approach to regulation must therefore look
beyond this Convention.

Chapter seven interrogates three models adopted by various countries in
their attempts to domesticate the 2005 UNESCO Convention. Under Model one
some countries have simply gone ahead to modify their existing statutes to
bring them in line with the Convention. This works well in countries that
already have institutions that can carry those responsibilities. Model two
establishes a national anti-doping institution along the lines of the World Anti-
Doping Agency (WADA) together with specific legislation targeting certain
substances that are more commonly abused in sports such as anabolic
steroids. Model three creates a stand alone legislation under which an
institution is created and which clearly demarcates areas for sports operations
and those of public operations. None of these models completely addresses all
the factors that cause continued drug use in sports, especially
commercialization of sport, lack of public participation and ethical values.
These models therefore are not comprehensive enough in their approach.

Chapter eight handles the summary, conclusions and recommendations.
The position is maintained that Kenya being not only a top sporting nation but
also one whose athletes have tested positive for various prohibited substances should be on the forefront in the fight against doping in sport. It is recommended that Kenya formulates a comprehensive anti-doping policy and domesticates the 2005 International Convention Against Doping in Sport as a basis for legislative, judicial and administrative law framework to regulating doping in sports in Kenya.
CHAPTER TWO: LITERATURE REVIEW

2.0 Introduction

This chapter is divided into two parts, namely doping substances and methods, and regulation. The sub-topic of doping substances and methods was chosen because this is the raison detre of doping. Performance in sports can be increased unfairly largely through the use of prohibited drugs and methods. The literature reviewed on this sub-topic seeks to show the complexity of the use of prohibited substances and methods. It is noted that doping materials continue to be used in sports as if there are no controls at all. Sportspersons are constantly trying out new and undetectable drugs and doping methods, the latest being genetic modification. The section on regulation was chosen to show the some of the efforts employed by various actors in an attempt to eliminate doping in sports. It is observed that sports federations have attempted to regulate doping in sports to the exclusion of public authorities for a long time. This has seen the abuse of drugs in sports continue. This chapter considered nearly all literature that touches on the use of prohibited substances and on regulation of doping in sport was included in this chapter. From the reviewed literature it is apparent that a new paradigm to regulation is needed. The need for anti-doping law is reinforced.
2.1 Doping substances and methods

Toni Schumacher gives details of how the German soccer team participating at the World Cup in Mexico in 1986 was pumped with drugs. Toni, a former German international goalkeeper, says the team was given high doses of iron, magnesium, vitamin B, vitamin E, a few hormones and highly enriched mineral water. The players were required to swallow about 10 tablets alongside their lunch daily. In the evenings they would be injected with a cocktail of plant extracts, honey extracts, blood from calves and occasionally they would be given the stimulant ephedrine. He reckons that over 3,000 injections were administered to the team (of 30 players) during their stay in Mexico. According to him, doping in German football has a long tradition. He recollects that as a young player he used to chauffeur senior players to clinics to receive medications before an important match. He even knows some players who were nicknamed “roving pharmacies”.

Schumacher clearly illustrates the complicity of sports officials in doping. The drugs were administered by medical personnel who were entrusted with the health of the footballers. The German soccer federation was a party to this episode of drug use in sports albeit vicariously. In this work it can be seen that a sports body that has a dual role of presenting the best national players at the world cup and of regulating doping in football in the country, promoting the use of drugs. Indeed, a case of conflict of interest is made out. This work exemplifies the folly of relying on sports federations to regulate doping in

sports. Clearly, there is need to free sports bodies from the role of doping control. Time has come for an independent body in each country to take charge of regulation of doping. At the time of the World Cup in Mexico City (1986), sports rules allowed for testing and punishing only those who tested positive. Team doctors and other support personnel would not be netted in such a system. It is worth observing that this has since changed through the revised WADA Code 2009. Nevertheless, there's need to have a regulatory system that nets all persons, both natural and legal, involved in doping of athletes.

In an article on genetic engineering, Maxwell J. Mehlman notes that genetically engineered products are also used by healthy people to gain physical advantage in sports. He points out that genetic enhancement could be perpetuated over generations where such genetic manipulation affects the germ-cell. Such manoeuvres, he states, are bound to bring about inequality in society. This article does not indicate that most of the genetically modified products and processes are likely to be inaccessible to people in the South due to the related intellectual property rights in them. Furthermore, whereas the author does indeed acknowledge that genetic manipulation is likely to worsen the state of existing inequalities, he fails to address the impact of such scientific breakthroughs to athletes in the South. Mehlman likewise does not address the issue of regulation. In fact genetic engineering is a big threat to

---

efforts at doping control as forms of it may never be detectable in the laboratory.

Ken Marie \(^{115}\) reviewed the proliferation of steroid abuse in sports. He notes that steroids were initially processed in the 1930’s to treat cases of muscular dystrophy and sexual dysfunction. Over time athletes took over the use of steroids as a short-cut to bigger and stronger muscles using doses that are 10-100 times greater than those used in clinical applications. He contents that there are more ordinary folk out there using steroids than athletes. He says the US 1990 Anabolic Steroid Control Act overlooked “pro-steroids” and “precursor steroids” which produce effects similar to those of anabolic steroids. These last two compounds are used in food supplements and sold over the counter in alarming numbers.\(^{116}\) He recommends that testing technology should stay ahead of clandestine laboratories; the best testing procedures should be used in year-round, random and unannounced tests; the need for strict penalties for athletes who test positive for anabolic drugs; that regulators should be vigilant with over the counter food supplements; and that there is need to intensify educational programmes. The author also gives a catalogue of possible hazardous side-effects of anabolic steroid abuse. This article does not deal with other drugs that are commonly abused in sports. Ken Marie did not interrogate the factors that lead to an ever increasing abuse of anabolic


\(^{116}\) The new ‘Anabolic Steroid Control Act of 2004’ which came into effect on January 20, 2005, adds many new steroids and formerly over-the-counter ‘prohormone’ dietary supplements androstenedione, andresterediol, and THG. It is a crime to be in possession of prohormones.
steroids in sports. With respect, the author does not clearly address all the causes of such use in his recommendations. Although he notes that there may be other users outside of the sports arena, he fails to suggest how abuse of anabolic steroids by non-athletes can be checked. Most critically, the author does not address the issue of public involvement in regulation. It is apparent that the traditional approach of regulating doping is insufficient to control the proliferation of anabolic steroids in sports. There is need for an integrated approach to regulation of doping.

HL Sweeney writes that athletes are eagerly waiting in the wings to grab and use undetectable genetic engineering. He says insulin-like growth factor I (IGF-I) is capable of inducing 20-40% muscle enlargement and probably a higher percentage where this is combined with training. IGF-I is said to induce satellite cells to undergo a greater number of cell divisions and can therefore lead to bulky muscles. The gene for IGF-I can be introduced into muscle (either skeletal or cardiac) using the adeno-associated virus (AAV). The AAV-IGF-I procedure therefore represents a form of gene doping that cannot be easily detected using conventional testing methods. He says that this form of gene doping could achieve the same if not better results than are currently obtained through the use of anabolic steroids. What is most exciting for athletes is that there is so far no known method of detecting its use. He also says that genomic studies revealed that some athletes have true genetic mutations that amount to genetic enhancement. For example, Finnish cross-

H Sweeney and HLS Lee 'Gene Doping' (2004) 291(1) Scientific American 62
country skier Eero Mantyranta, who won two gold medals in the 1964 Winter Olympics was found, together with his family members to have a genetic mutation that led to the production of extraordinarily high numbers of red blood cells. Little wonder then that some of his family members were champion athletes in endurance races. The whole family has a much higher oxygen carrying capacity than can be achieved through the use of erythropoietin. The combined use of single gene therapy as well as genomic findings open up possibilities that are a real challenge to doping control. The author hopes that one day the detecting technology may be able to catch up. Even then, this may cause problems in cases of natural mutation like the case of the Finnish skier. The example the author gives of natural gene mutation in the family of Eero Manyranta also opens up possibilities of induced genetic mutation which can be achieved through injections. Indeed, this looks like it is going to be the focus of those keen on cheating in sports.

Sweeney’s optimism of testing technology being available to detect genetic engineering leads to the inference that he only has athletes in mind. The writer does not appreciate that the approach of testing athletes has failed to control the proliferation of doping substances in sports. There is need to influence the value system of scientists so that they do not submit their innovations to abuse. Clearly, a regulatory system for genetic engineering in sports must consider all the players involved.

---

118 Red blood cells carry oxygen in the blood to the working muscles. It is such oxygen that determines fatigue. The more the red blood cells the better for sporting activities that require longer periods of activity such as long distance running or marathon skiing.
Ronald M Evans \textsuperscript{119} says it has been established that the PPARdelta transgene is capable of increasing slow twitch muscles (responsible for endurance), resistance to weight gain and suppress inflammation. It is therefore thought to be an effective therapeutic target in controlling atherosclerosis and other inflammatory diseases. Mice with PPARdelta transgene in muscle show increased generation of type I (slow twitch) fibres and therefore increased energy generation. These mice, also known as the “Marathon” mice were able to run twice the distance of non-transgenic littermates. “Marathon” mice are fertile and are capable of passing on the running capacity to their offsprings. This is likely to be one of the avenues of gene doping.\textsuperscript{120} A serious challenge lies in the inheritance of running capacity. The author does not address the issue of testing for gene doping.

Evans does not even bother to discuss ways of testing for PPARdelta transgene. More worrying is the scenario of an initial mechanical manipulation translating into inheritance. It would be difficult to hold persons who have inherited certain athletic traits to account since the act of inheritance would have been initiated by their parents. Such persons can easily draw upon human rights provisions that prohibit discrimination. This fact of possible inheritance can be better arrested through cultivation of values and ethics that promote the spirit of sport. Regulation therefore should involve the public to achieve this.

\textsuperscript{119} The Marathon Mouse and genetically engineered Endurance. Presented at the Gene Doping Symposium held in Stockholm, Sweden, 3-5 Dec. 2005
\textsuperscript{120} RM Evans The Marathon Mouse and genetically engineered Endurance. Presented at the Gene Doping Symposium held in Stockholm, Sweden, 3-5 Dec. 2005
The use of products of genetic engineering in sports questions the value system of society and individuals – whether they believe in cheating or not. Regulation of doping related to genetic engineering calls for intensive research and an evaluation of the values society and individuals hold dearly. Intensive research is needed in order to understand how genetic doping works and how it can be detected through appropriate tests. It is at the individual and societal levels that values of honesty can be inculcated into both the athlete and the scientist in order to prevent increased use of genetic engineering in sports. For society to agree on a value system requires mounting efforts aimed at public participation in policy formulation. This is a clear case where values and ethics can be called upon to moderate law and science as applied to sports. It is submitted that genetic engineering poses a real challenge to testing technology, and that any efforts aimed at developing tests should go in tandem with inculcation of values and ethics that would in turn enable individuals to police themselves.

Douglas C Wallace¹²¹ looks at the mitochondria as another likely avenue for gene doping. Mitochondria produce energy for work and for maintaining body temperature. Mitochondria also produce reactive oxygen species (ROS). ROS mutates with maternally encoded DNA (mtDNA) resulting in new strains of DNA that are responsible for age related diseases. Metabolic and genetic interventions can therefore enhance individual performance. Metabolic interventions are directed at increasing energy output, reducing ROS

production, and stabilizing the mitochondrial permeability transition (mtPTP).

Genetic interventions include an introduction of engineered mtDNA into the nucleus. These approaches cannot only help improve performance but they are also difficult to detect.\textsuperscript{122} It is proposed that a combination of detection methods and a clear education programme on associated risks be used as preventive methods.\textsuperscript{123} This calls for an integrated approach to regulation involving legislative, judicial and administrative bodies.

HJ Haisma \textsuperscript{124} says Gene therapy involves the delivery of a therapeutic gene to replace an absent or abnormal gene. In sports injuries, treatment for muscle injuries, ligament, and tendon tears as well as ruptures to other structures is usually laborious and takes long to heal. It may as well be possible using the transfer of defined genes into the injured tissue to induce healing following trauma. Genes can be easily transferred into muscles using the adeno-associated virus (AAV) and thereby help to treat muscle dystrophy due to disease, disuse or aging. These methods are in danger of being used by healthy athletes to enhance their performance.\textsuperscript{125} Gene therapy is offering success in patients with x-linked severe combined immunodeficiency disease, haemophilia B and heart disease. Gene therapy can be used in sports to speed up healing of injuries to muscles, ligaments, tendons and bones. Genes encoding for erythropoietin (EPO), insulin-like growth factor (IGF-1) or vascular
endothelial growth factor (VEGF) may be misused in sports to boost red blood cells, muscle mass or blood supply respectively.\textsuperscript{126} The author opines that using detection methods based on proteomics and clear education of associated risks may serve to deter the use of gene doping. The author does not state whether the detection methods have been sufficiently well developed to stand scrutiny of a courts. Additionally, the author does not touch on the subject of genetic inheritance where a select gene may be transferred into an embryo following fertilization. Nonetheless, combined efforts at research, education and public participation may be useful in regulating gene doping.

Some authors\textsuperscript{127} distinguish between two sets of IGF-I, namely one responsible for increased muscle size called "mechano growth factor (MGF)" and systemic or liver type (IGF-IEa). These two differ in their protein sequences. MGF is used to treat a wide range of medical conditions involving muscle loss. Using white blood cells as well as using specific antibodies, its possible to detect exogenous use of IGF-I. The authors do not state whether the changes due to IGF-I are inherited or not, and whether such changes in progeny can be detected. The only hint at regulation in this article is testing methods. The authors do not address the question of how to prevent scientists from abusing their technology. It is submitted that self-restraint on the part of athletes and scientists aquired through a directed value system may be useful.

\textsuperscript{126} HJ Haisma supra note 123
\textsuperscript{127} G Goldspink, C Velloso, S Beech A Janmohamed & SY Young. ‘Molecular Regulation of Muscle Hypertrophy and Gene Doping’. Presented at a WADA Symposium on Gene Doping, Dec. 2005, Stockholm
KR Zinn, TR Chaudry and SJ Frank report on a possible way of detecting gene doping through imaging techniques. It has been known that gene doping may result in inflammation or other disturbances of receptor cells. Non-invasive imaging can be used to follow long term and stable gene expression resulting from gene transfer. Magnetic resonance spectroscopy (MRS) can detect metabolites at rest and following recovery from exercise. Where normal ranges have been established, changes in metabolites at rest or after exercise may be indicative of doping. Positron emission tomography (PET) and Single Photon emission computed tomography (SPECT) can detect localized but specific accumulation of radioactive tracers. Both PET and SPECT are capable of detecting changes in receptor expression. Gene doping results in disturbances of receptors which can then be detected by these methods. Both PET and SPECT are highly sensitive. Their only disadvantage is the use of radioactive tracers. Bioluminescence and fluorescence modalities are optical imaging technologies that can detect the presence of vectors used to carry genes into cells. All this appears to be useful technological innovations. However, the authors describe procedures that require sophisticated equipment and ones which require the presence of an athlete at a big medical facility. None of these methods may be suitable for out-of-competition testing. The authors are also silent on the issue of testing inherited genetic traits. Even then, their suggested methods may not be suitable where genetic manipulation

---

128 'Potential for non-invasive imaging in anti-doping efforts'. Presented at the WADA Symposium, Dec. 2005, Stockholm
is done at embryonic stages\(^{129}\). The authors fail to address the wider picture of regulation of products of genetic engineering by the larger society.

Anthony P Millar\(^{130}\) notes that initially mushrooms were used to enhance performance. Stimulants have continued to be used over the years and that this has led to the development of new pharmaceuticals. He also says that recent revelations about a specially designed drug testohydrogestrinone (THG) is an indication that the search for a perfect performance booster is still on. His main thesis is that athletes are seeking for better ways of cheating through doping in sports. Millar did not address the question of regulation. He also failed to examine the issues that favour the use of various drugs in sport. Nonetheless, the attempt by athletes to always try out new drugs speaks to the need for ethical education. Probably, athletes need to be educated to focus on their energies on training rather than on newer drugs.

### 2.2 Regulation of doping substances and methods in sports

Sheila Jasanoff \(^{131}\) observes that the state has set up advisory bodies made up of eminent scientists to advise government on matters of scientific and technological policy. This way government is able to consult with highly skilled practitioners in science and technology. Nonetheless, the regulatory decisions by these scientists have been subjected to legal challenges. She questions why a regulation system bent on using expert knowledge fails to provide consensus over the use of science. She identifies disagreement in the

---

\(^{129}\) KR Zinn TR Chaudhuri and SJ Frank supra note 128


\(^{131}\) S Jasanoff The fifth- Science Advisors as Policymakers Harvard College London 1990.
choice of experts, mode of framing issues to be determined by the experts and on how much not to give to their recommendations. This hinges on how to distribute power between experts and the lay public, citizens and the state. She observes that the use of expert advisors by government was intended to protect the public from harmful effects of products of science and technology. This approach came to be seen as hampering the progress of science. This approach was changed to require that regulation be based on trade-off between risks to health or environment and the economic and social progress. This approach has not resulted in consensus either. The experts have been accused of leaning on one mode or the other in order to achieve predetermined results. Revelation of research fraud and misrepresentation of data also hurt the credibility of regulatory agencies. Allegations of misconduct or incompetence also hurt the image of regulatory bodies. She contends that compelling interests by scientists bring them to exploit the gaps in knowledge to advance their own arguments. She says the American adversarial system highlights uncertainty, polarizes scientific opinion and prevents efficient resolution of disputes. These advisors are also considered by politicians to be constraining the exercise of political choice. The author did not consider how other forms of regulation including statutory and judicial aspects dovetail in the administrative aspects she deals with in this book.
Sheila Jasanoff\textsuperscript{132} states that the legal issues raised by science and technology test the courts' capacity to resolving disputes. Whereas science seeks the truth, courts seek justice. The rapid technological and scientific developments make it difficult for judicial officers to understand the complex information provided by experts. She considers that the courtroom has become an avenue for public awareness in matters of science and technology. For example, through cases touching on DNA and paternity, ICT technology, genetic research, malpractice, the citizen gets an opportunity to learn scientific and technological advances. The author takes the view that scientific claims implicated in legal controversies are highly centered and freighted with buried presumptions about the social world in which they operate. She says that the legal process is called upon to mediate amongst conflicting ‘scientific’ knowledge, divergent underlying values and competing views of experts. Law helps to shape the representation of legally relevant scientific claims. She says law is also useful in constructing the best relationship between products of technology and their social base. She distinguishes between ‘Science in Policy’ and ‘Policy of science’. On ‘Science in Policy’ she says this contains proposals on how to improve the use of science in decision-making through reformation of expert witnesses, reeducation of judicial officers and changing the standard for validation of science. It is claimed cross-examination and legal rules of evidence may operate to shun real science while the litigant’s choice of expert

witness may bring to court only extreme and unrepresentative opinions of science and technology. ‘Policy for Science’, considers the judiciary incapable of formulating progressive policy for science. The use of case law and precedent is seen as retrogressive and not likely to support progress in science. Both of these policy approaches support the notion that science and technology possesses autonomous guidelines for validation and control, and that it does not need to be subjected to the normative process by law. There are proposals to use science in the legal processes by either delegating scientific issues to scientists or by teaching science to legal actors, or the use of science mediators. She concludes by saying that the legal system/judiciary has helped to sustain the public’s understanding of science and technology. She focuses on the role of the judiciary in regulation of science and technology. She does not say anything about using statutes and administrative law. Although she does not tackle the question of doping, her observations about the judiciary and science may as well be applicable to doping.

In commenting on a possible integration of public regulation and regulation by sports bodies in the US, Michael S. Straubel observes that the Amateur Sports Act (ASA) of USA recognises arbitration of disputes in sports, including doping issues, based on the US principles of law. At the same time the National governing bodies (NGBs) of various sports are expected to carry out arbitral duties following the rules of their respective international federations (IFs). He points out that the doping control procedure of the US

---

NGBs and IFs violate or is in conflict with the Amateur Sports Act. A major point of departure between the Amateur Sports Act and rules of IFs regards procedure in doping matters. Whereas rules of IFs require that an athlete be suspended immediately the A sample tests positive, US law requires that an athlete be suspended only after due process. This article highlights the need to harmonize the requirements of domestic law to be in consonant with the rules of international federations. The author does not venture to explain why despite the regulations in place in the US, doping still persists.

Travis T Tygart (2003) examines the system of drug testing in the US. He notes that prior to the setting up of the United States Anti-Doping Agency (USADA), dope testing was in the hands of both the United States Olympic Committee (USOC) and the National Governing Bodies (NGBs). The USOC administered drug tests, while NGBs had the role of prosecuting and sanctioning those athletes who tested positive for prohibited substances. He acknowledges that this system led to the perception, even if it were not proved, that US drug testing was not serious as it appeared to be fraught with a conflict of interest. Here both the USOC and NGBs were charged with presenting the best athletes on their teams for competition. It was therefore inconceivable that these same bodies would want to sanction their best athletes. US sport therefore came under immense pressure to set up an independent body to take care of doping controls. Hence, USADA was born. USADA does all tests on behalf of USOC. All Olympic sports bodies are

affiliated to USOC and therefore under the jurisdiction of USADA. USADA also manages test results on behalf of NGBs where the latter are required to manage such results by their international federations. However, this leaves out professional leagues which are normally run like business entities and therefore are allowed to make their own rules. Nevertheless, athletes from these leagues who are selected for international competition must submit to the authority of USADA. Even if USADA is partly financed by USOC and partly by the US government, USOC does not control USADA. USADA is run by a Board with a CEO. When a sample tests positive, the CEO appoints three persons to constitute the USADA Review Board. From here the results may either end there or go for arbitration by persons who are not members of the Board. From here lies an appeal to the Court of Arbitration for Sport (CAS). This way it is presumed that an athlete can get a fair hearing. The author does not assess the impact of leaving out professional leagues from serious doping controls. Also the author does not address issues connected to business over the Internet, and unethical trading practices by the pharmaceutical industry. Tygart adopted a very narrow view of regulation – that by a sports body. The author missed out completely on the need for education and public participation. The author does not say how other users like those in the gyms and law enforcement officers can be brought into the net. Clearly, there is need for an integrated approach to regulation in order to be on top of things.
ET Walker 135 laments the fact that not much testing really takes place and therefore that many drug cheats are not caught. Further, he states that many dope cheats have devised ways of evading detection. He is of the view that regulation as conducted by sports bodies alone is not capable of deterring the continued use of drugs in sports. The author clearly addresses the issue of the ‘cat-and-mouse’ scenario. He, however, fails to see the bigger picture in which doping control ought to be done.

PJ Sweitzer 136 has looked at the problem of drug law enforcement. He notes that the dilemma of drug control is complicated by the fact that law enforcement officers use the same drugs the prohibition of whose use they are entrusted to enforce. The author notes that the earlier US legislation was based on criminalising possession for and distribution, read, trafficking of prohibited substances. To that end he asserts that the law was ineffective. Later legislation sought to criminalize steroid use without a medical prescription. He notes that this approach may have been the wrong one in that it drove steroid use underground. He says the recruitment of police officers considers strength and big muscles. In fact, according to the author, a huge muscular body of a police officer can serve as a deterrent. Besides, for police to struggle with, and fight off and arrest suspected criminals, they need the advantage of big bodies and huge muscles. Although these attributes can be

---


stained through conditioning the use of steroids affords the same at less rain. Hence, police, as law enforcers are also perpetrators of steroid use. Police officers are also involved in sporting activities such as wrestling, boxing, weightlifting amongst others. A majority of these sports require large muscles. So police officers as athletes also abuse steroids. The author therefore advances the view that legalisation of steroid use under controlled conditions may be a better way of regulating than absolute prohibition and criminalization. This author draws attention to the fact that drug abuse of doping substances is not restricted to athletes alone. Whereas the author's concern about the involvement of law enforcement officers in steroid abuse is well meaning, he does not clearly state how steroid abuse can be checked in amateur and Olympic sports. The author's proposal for non-prohibition of steroid use and enforcement of controlled use under supervision can only open floodgate of abuse especially through food supplements and misuse of the internet. Probably this is borne more out of frustration with the current system of regulation which is largely ineffective. A new approach is clearly called for.

Colin Latiner 137 examines the question of regulation of steroid use in sports. He notes that there have been several amendments to existing legislation in the US in an attempt to better control the use of steroids in sport. He states that the state has been generally reluctant to interfere with drug policies of professional leagues (sports bodies) as opposed to amateur sports.

largely because professional leagues are owned by private firms. And both the state and private firms have an interest in maximising profit. He thinks stringent doping policies in amateur sports are justified as a way of levelling competition among nations but he does not think the same standards should be applied to professional sport. He views the Clean Sports Bill 2005 as too harsh and unnecessary. The Clean Sports Bill 2005 sought to impose strict testing procedures in professional leagues the way it is done in Olympic sports. It provided for uniform adoption by the four major leagues (MLB, NBA, NFL and NHL) of rules similar to those of the Olympic Movement. Testing standards as stringent as those of USADA were to be adopted. This Bill never graduated into law. The author considers that rather than regulate steroid use in professional sport, the professional should be let to take care of themselves as the focus on regulation is laid on the health of the youth. Also he argues that the fact of steroids enhancing performance can be countered by another one that legal enhancements exist, i.e. weight machines, treadmills, better training programmes, better diets, computer diagnosed training etc. which are not uniformly available. In fact the solution the author proposes can be summed up as "no regulation for professional sport". With this "solution" one can say that the author fails to put the global monster that is drug use in sports in its proper perspective. In comparing drug enhancement to other forms of enhancement, the author overlooks one basic scientific fact, namely, that drugs act from within the body making an athlete appear like a human pharmacy.

---

This Bill did not eventually become law as the professional leagues decided to regulate themselves.
and the achieved sports performance a mere result of pharmacological manipulation.\textsuperscript{139} Other forms of enhancements act externally on the body of the athlete. Finally, the author also ignores the fact that the end destination and the dream of any amateur athlete is to turn professional, where the big money is. It is submitted that, it would be futile to expend a lot of resources in controlling drugs at lower leagues only for athletes to pick up drug use once they join professional ranks. The author considers that the better solution would be to directly attack the use of steroids and enhancements of youth, teenagers and college athletes only. However, this argument ignores the role-modelling function of professional athletes. It is argued that implementation of 'no regulation' could witness a paradigm shift in sport from the spirit of sport to the 'spirit of chemistry'.

P Ndlovu\textsuperscript{140} discusses anti-doping laws of South Africa. He observes that the South African Institute for Drug-Free Sport Act 14 of 1997 is the legal framework for anti-doping activities. He notes that South Africa attempted to put anti-doping measures in place before the birth of WADA. With the birth of WASA and the coming into force of the 2005 International Convention Against Doping in Sport there is now need for the law to be amended to bring it in line with the provisions of the Convention. The Act prohibits the use of drugs in sport. He says that it is necessary for South Africa to be considered for membership of UNESCO. He says that South Africa has an obligation to apply the WADA Code through the National Olympic Committee-South Africa. He says that there is need for harmonization and uniformity of laws relating to sport. The author does not address serious issues of institutionalization of

\textsuperscript{139} Besides, drugs have deleterious effects in the body which effects cannot be experienced through external use of machines.

\textsuperscript{140} P Ndlovu Anti-Doping Law in South Africa – the Challenges of the World Anti-Doping Code

http://www.thefreelibrary.com/
anti-doping efforts and, especially, the manner of cooperation expected amongst the various actors in anti-doping at national level. He does not clearly bring out the relationship between sports bodies and anti-doping authorities in South Africa. Most critically, he does not delve in challenges that touch on causative factors to doping such as commercialization and others related to doping technology. He dwells too much on regulation within sports. He does not give some insight on whether trafficking and use of prohibited substances on the periphery is to be handled – even when such trafficking and clandestine use by non-athletes can very easily reach the athletes.

E Parham 141 talks of the contributions of Australians in efforts to fight doping in sport. He narrates that nationals of Australia including Ministers in charge of sport have been on the forefront of international anti-doping efforts. And that they continue to do so at the level of the World Anti-Doping Agency as well as on the national front. At the national level, the author observes that Australians were the first to set up an anti-doping agency in line with the 2005 International Convention Against Doping in Sport. Australia set up the Australian Sports Doping Agency (ASADA) was set up in 2006 by an Act of Parliament.142 Under this Act the Government of Australia made submission to the operations of ASADA a key condition for funding sports organizations. Also sports bodies are required to enforce penalties imposed by ASADA and to refer all possible cases of doping to ASADA for investigation. In its investigatory functions, ASADA can use state agents. There is a positive response to the functions of ASADA. ASADA represents cooperation between sports bodies (through the Australian Olympic Committee) on one part and government on the other part. ASADA is an entity independent of sports federations. It is a quasi-government organization. It does not therefore suffer the problems that a sports body would otherwise suffer in an effort to fight doping. Clearly, the author has demonstrated the presence of a regulatory mechanism against doping in sport in Australia. However, the author does not attempt to link

---

142 Australian Sports Anti-Doping Authority Act 2006 (Cth)
commercialization or even trafficking of prohibited substances to doping in sport.

2.3 Summary

Whereas more conventional prohibited substances and methods continue to be used in sports in increasing proportions, the real threat to the fight against doping lies in the use of undetectable genetic and genomic manipulations. Indeed, approaches at regulation of various substances need to take a new approach in the form of doping law. In particular, research in genetic and genomic testing as well as value based education will be useful. In addition, public participation is likely to make the regulatory mechanisms more widely acceptable whereas values and ethics are likely to enable each individual to act with restraint with regard to drug abuse in sports. The studies on regulation point to the narrow approach taken by sports federations to combat doping. By 1999 it was clear that such an approach had failed. That there was need for public authorities to step in to widen the measures for regulation was not in doubt. None of the authors talked about the need for a directed value and ethical system premised upon public participation as part of the measures for regulating doping. More importantly, no study has so far advocated for the development of anti-doping law.

There are no studies in Kenya on anti-doping.
CHAPTER THREE: CONCEPTUAL FRAMEWORK

3.0 Introduction

This chapter examines the relationship between law, science and sports. It evaluates how law can contribute to regulation of science and sports in general, and doping in sports in Kenya in particular. It is argued that doping is a very complex science whose regulation requires the synthesis of the rules of law, science and sport. It is this synthesis for which the author coins the term "anti-doping law."

Law is generally used as a vehicle for social regulation. Law can play three major roles in regulation of science:\(^{143}\) the first such role is dispute resolution. This comes naturally due to differences that are likely to arise thereby requiring legal intervention. The second role is facilitation. According to PA Freund, for law to facilitate there must be rules of order that impose controls.\(^{144}\) In particular, he considers two approaches to be facilitative. The first is what he calls the model of voluntary association in which professionals approve the rules with checks and balances. For instance, there are guidelines for issuing therapeutic use exemptions (TUE).\(^ {145}\) A national federation or national anti-doping agency may issue a TUE following set guidelines.\(^ {146}\) The

---

\(^{143}\) PAA Andanda, The Law and Regulation of Clinical Research - Interplay with Public Policy and Bioethics, Nairobi: Focus 2006, pp.212-215


\(^{145}\) Guidelines on Therapeutic Use Exemption (TUE) at http://www.wada-ama.org

\(^{146}\) In WADA v USADA, Zachary Lund and FIBT (CAS Arbitration No. CAS OG 06/01) and in USADA v Reed (CAS 2008/A/1577) TUEs issued to athletes were meant to have both retrospective as well as prospective effect. These were overturned on grounds that the applicable TUE guidelines had not been followed. In any each case, a TUE had been issued to cover up for a positive dope test.
list Committee has guidelines to follow when deciding whether to include a
drug on the Prohibited List or not.147

The second is the imposition of extrinsic standards and sanctions. For
example, a doping control laboratory must meet certain ISO specifications, it
must have been accredited to carry out tests,148 the International Standard for
Testing must be adhered to.149 Besides, a doping hearing panel is required to
adopt procedures that guarantee adherence to rules of natural justice together
with other internationally accepted standards of conducting hearings.150

The third role of law in regulation of science is the discourse on rights. It
is not unexpected that questions of human rights are likely to arise in the
course of regulation of doping.151 It is generally appreciated that human rights
must be respected in all social interactions including sport. The Superior court
of Ontario152 has held that anti-doping rules are necessary:

147 In Calle Williams v IOC (CAS 2005/A/726) the panel found that Isometheptine (Heptaminol) to which the athlete
had tested positive had not been included on the Prohibited List by the specialist List Committee and acquitted the
athlete of doping charges.

148 In Tyler Hamilton v USADA & UCI (CAS 2005/A/726) the athlete tested positive for blood transfusion. The
analysis of his sample was done at a Laboratory in Lausanne, which at the time of the test, had not been accredited
to carry out HBT tests. However, the results obtained in this lab were corroborated by those from a laboratory
accredited to carry out HBT. On this account, the athletes attempt to fight his positive test was rejected

149 Although the athlete tested positive in USADA v LaTasha Jenkins (AAA NO. 30 190 00199 07), it was
established that the two laboratories in Ghent and Cologne that analysed the athlete's samples had not followed the
laid down laboratory procedures. It was held that the athlete could not be sanctioned based on results from
laboratories that did not follow the laid down rules.

150 G Kaufmann-Kohler G Malinverni and A Rigozzi 'Legal Opinion on the Conformity of Certain Provisions of
the Draft World Anti-Doping Code with Commonly Accepted Principles of International Law' [26 Feb 2003] at
http://www.wada-ama.org [08 Feb 2009], G Kaufmann-Kohler & A Rigozzi Legal Opinion on the Conformity of
Article 10.6 of the 2007 Draft World Anti-Doping Code with the Fundamental Rights of Athletes, 13 Nov 2007 at
http://www.wada-ama.org (10 Oct. 2009), RM McLaren Court of Arbitration for in Sport Doping jurisprudence:
What can we learn? [2006] I.S.L.R. 4 (Issue 1)

151 It has been held that the sanctions foreseen under the WADA Code do not violate human rights of athletes [G
Kaufmann-Kohler and A Rigozzi 'Legal Opinion on conformity of article 10.6 of the 2007 Draft World Anti-
November 2008)

152 Johnson v Athletic Canada and IAAF [1997] O.J. No. 3201 at 29
[To] protect the right of the athlete [...] to fair competition, to know that the race involves only his own skill, his own strength, his own spirit and not his own pharmacologist.

With respect to doping regulation, the most likely rights to be violated include the right to work,\(^\text{153}\) the right to privacy \(^\text{154}\) and the right to treatment.\(^\text{155}\)

Sport is said to have both economic and sport specific characteristics.\(^\text{156}\) It is the latter characteristics that gives sports bodies legitimacy to seek to regulate themselves. Regulation of doping therefore plays itself within the rules of sports bodies while at the same time employing known methods in other areas of science and technology. Sports bodies have committees on which scientists are represented to advise on medical and technological issues, and they also participate in tribunals set up to investigate violations of doping rules. Experts on science and law are invited by parties to present opinions on scientific issues.\(^\text{157}\)

Many factors fuel the proliferation of doping substances and methods in sport, key amongst them being commercialization in sport, trafficking of prohibited substances, a poor value and ethical system. So far, most of the

\(^{153}\) In *Meca-Medina & Majcen v Commission of European Community* [2006] C-519/04. The European Court of Justice held that Sport had a legitimate role to prohibit use of drugs because it has both economic and non-economic functions.

\(^{154}\) It has been held testing for doping control does not violate the privacy rights of athletes (*Miller v Cave City School* (US Ct of Appeals 8th circuit 31 March 1991))

\(^{155}\) In CAS 2006/A/1146 *WADA v Eder and Ski Austria* in which the athlete was sanctioned for performing an IV treatment on himself, it was held that such treatment was not medical treatment and that in sanctioning him, his right to treatment was not violated.

\(^{156}\) "Football is a universal sport based on the fundamental principles of discipline and respect for opponents and the Laws of the Game as well as on the spirit of competitiveness and rivalry, underpinned by the values of fair play and ethics. These principles and values must be applied not only on the field of play but also in the administration and governance of football, particularly in the area of sports politics." *FIFA President Sepp Blatter, 'Blatter urges fair play in elections*, www.fifa.com, April 15, 2009

\(^{157}\) CAS 2007/A/1394 *Floyd Landis v USADA* several experts were invited by both parties to express their opinions on various steps of the GC/MS. IRMS methods of laboratory analysis
methods for fighting doping do not pay attention to these factors thereby reducing the fight against doping to a 'cat-and-mouse' game. It is submitted that regulation of doping in sports requires an integrated approach involving legislative, judicial and administrative law (including sports rules and decisions of sports arbitral bodies).

Traditional approaches to regulation of doping in sports using either law or sports rules only have not borne the desired fruits. It is submitted that what is required is doping law. Doping law is here proposed to be a sub-branch of sports law. In particular, doping law would involve the integration of legislative, judicial and administrative law. Such integration is expected to consider the peculiarities of law, science and sport at all levels of engagement. It is this interplay of law, science and sports applied to doping that the author would like to refer to as "doping law".

3.1 Relationship between Law and Science

On the one hand, science is said to be after the truth, its descriptive, and emphasizes progress. Law, on the other hand is said to seek justice, its prescriptive and it emphasizes process. Both have rules. The two disciplines differ in their approaches to fact finding. Science endeavours to get the facts as they are whereas law (adjudication) is concerned with the correctness of the facts as a basis for settling disputes fairly. The fact finding in law takes place within the confines of time, that is, the process stops when the evidence has been exhaustively dealt with. A decision cannot be postponed pending further

---

138 S. Jasanoff supra note 132 p 7
evidence. The law must reach a conclusion based on the facts at hand.\textsuperscript{159} Rules of decision making in law such as the standard of proof ensure that a decision is always arrived at whereas science would be unwilling to make a conclusion in a borderline matter.\textsuperscript{160} The process of fact finding in law starts by filtering what the scientist knows and holds for the truth. Whereas the scientist's knowledge is informed by his observations and judgements, a legal practitioner's knowledge is a result of answers given by a witness in response to the lawyer's questions. In the eyes of the law, science is the composition of testimony presented in an adjudicatory process. This way the law (adjudication) can easily declare as the right conclusion one that contradicts science.\textsuperscript{161} In civil matters the legal system is beholden to values other than those of science and may make decisions that fly in the face of scientific knowledge. For example, in the matter of Baby K,\textsuperscript{162} Baby K was born with a congenital malformation known as anencephaly, in which a major portion of the brain, skull, and scalp are missing. Baby K had difficulties breathing on her own and only did so with the help of a mechanical ventilator. The doctors considered such a case useless and sought to discontinue the use of the machine. The court stated that the hospital had a duty to provide emergency care.

\begin{flushright}
\textsuperscript{159} S Jasanoff supra note 132 p 9
\textsuperscript{160} ibid
\textsuperscript{161} ibid
\end{flushright}
In the matter of LaTasha Jenkins, two WADA-Accredited doping control laboratories in Belgium and Germany returned positive dope tests on a sample submitted by the athlete. However, in arriving at the positive results, it was found that the two laboratories violated certain procedural rules, and on this account, the athlete was absolved of any doping offence.

Indeed, the decisions in these two cases fly in the face of scientific evidence.

3.2 The Need to Regulate Science and Technology including Doping

Regulation of science and technology is necessitated by the need to carry out scientific innovations within scientifically and socially acceptable parameters and by the fact that the products of science and technology can cause harm. Science and technology are responsible for availing new products useful to mankind. This has been evidenced in fields such as medicine, agriculture and engineering. Advances in electronic engineering are responsible for the ICT revolution now sweeping throughout the world. Communication has not only been simplified but also made affordable. In medicine, scientific innovation is responsible for the availability of a wide range of drugs for various diseases. In agriculture, biotechnology, involving genetic engineering, is being touted as a panacea for food security. In spite of all this, there appears to be a downside to each of these developments. Some

---

163 USADA v LaTasha Jenkins, AAA NO. 30 190 00199 07
164 S Jasenoff supra note 132 p. 3-4
People use the opportunity of cyberspace to commit crimes.\textsuperscript{166} In medicine, the
catastrophe associated with the drug thalidomide is very scaring.\textsuperscript{167} Prohibited
substances are associated with many adverse effects to health including but
not limited to a hoarse voice in females, cancer of the liver, loss of libido,
kidney ailments, severe birth defects, behavioural disorders, sudden deaths
and growth of breasts in men.\textsuperscript{168} It has been reported that several Dutch
cyclists died in the 1980’s after taking too much erythropoietin (EPO).\textsuperscript{169}
Deaths from doping substances have been reported from as early as the 19th
century.\textsuperscript{170} These substances have clinical relevance when used for clinical
purposes. However, they become harmful when used in quantities larger than
clinical requirements to enhance performance in sports. Hence, the need for
regulation.

There are four major reasons that inform the need for regulation of
doping in sports.\textsuperscript{171} Firstly, the substances and methods used for doping are
known to impact negatively on the health of athletes.\textsuperscript{172} Many athletes have
died while others have suffered irreversible medical conditions as a result of

\textsuperscript{166} Issues like stalking on the Internet and issuing of threatening e-mails are still be fine tuned by legislation with a
view to criminalizing them.

\textsuperscript{167} S Jasenoff supra note 132 p.115 : many babies were born with deformed arms due to their mother’s use of this
drug.

\textsuperscript{168} Mieth & Sorsa supra note 90

\textsuperscript{169} P Hersh ‘French-Fried Conundrum Landis Doping Case not All Clear-Cut’ Chicago Tribune July 31 2006

\textsuperscript{170} Anon ‘Drugs and The Olympics’ The Economist August 7th-13th 2005, p. 20

\textsuperscript{171} The European Court of Justice (Third Chamber) noted that the general object of anti-doping rules was “... to
combat doping in order for competitive sport to be conducted fairly and that it included the need to safeguard equal
chances for athletes, athletes’ health, the integrity and objectivity of competitive sport and ethical values of sport”.

\textsuperscript{172} Some of the side effects of the dope used include liver damage, reproductive disorders, behavioural
disturbances, addiction, kidney ailments, growth of breasts in men, cancer, heart disease, severe birth defects and
sudden death (see Mieth & Sorsa supra note 90 for a full discussion). It is also documented that several Dutch
cyclists died in the late 1980’s after taking too much erythropoietin (EPO) thereby thickening their blood (Hersh
supra note 169)
Doping, therefore, is not merely a concern of sport but a public health issue. The Ontario Court of Justice observed that:

Doping endangers the health of athletes, as they are using substances in ways that they were not designed for; sport is meant to be a life-enhancing activity not one that imperils life.... It is necessary to protect Mr. Johnson for the sake of his own health from the effects of consistently using prohibited substances.

The first death associated with doping occurred in 1886, when, Arthur Anton, a cyclist, overdosed on a drug called tri-methyl during a race. Fatal cases due to abuse of stimulants in cyclists forced several European countries including France and Belgium to enact anti-doping legislations in 1965. In 1967, Tom Simpson, another cyclist died during televised Tour de France competition.

Secondly, doping negates the spirit of fairplay as those who use dope seek to have an unfair advantage over their “undoped” competitors. It is generally held that sporting competitions are held on the basis of ethical values that include fairplay. Sports governing bodies view the main policy of anti-doping regulation as the need to level the playing field, i.e. provide equal chances. Thirdly, doping undermines the public belief in sport as it is likely to be seen as an avenue for “cheats”. In the case of Krabbe v IAAF and

---

173 Johnson case supra note 152 para. 29
174 Johnson case supra note 152., The Economist, Drugs and the Olympics, Aug. 7th-13th, 2004, p. 20
176 Delbeke ibid., The Economist, Drugs and the Olympics, Aug. 7th-13th, 2004, p. 20
177 Mieth & Sorsa supra note 90
179 In the case of Shoemaker v Handel there was an attempt to challenge prevailing regulations, which required jockeys to submit to drug testing for drug use. The court upheld the regulations saying that the nature of horse

69
the Regional High Court of Munich held that protecting the image of sports discipline in the public interest is a noble and legitimate goal of anti-doping rules. It further noted the need for a clean sport without pharmacological manipulations, and the damaging effect of doping offences on the image of the sport. These three reasons were captured in the matter of SADA v Josh Moreau. The respondent athlete tested positive for marijuana at a competition in USA. He was aged 26 years and it was his second positive test. He argued for a lenient sanction saying that he did not take marijuana to enhance performance. The Panel observed that:

[He] forgets that the anti-doping rules are not limited to enhancement of performance. Rather they are also meant to protect the health and safety of the athlete and to advance the spirit of sport.

The athletes plea for a lenient sanction failed.

The fourth reason is that sport provides role models. This sentiment was echoed by the Ontario Court of Justice in the Ben Johnson case as follows:

The elite athlete is viewed as a hero and his influence over the young athlete cannot be underestimated. When role models in sport, or in any other endeavour, are seen to cheat and prosper, then it is natural that young people will learn to do the same.

racing is highly regulated with people wagering on the outcome. Drug use by jockeys could erode public confidence in the integrity and legality of the sport (795 F. 2d 1135 (3rd Circuit 1986) 266, 273).


AAA/NCAS AAA No. 30 190 00825 07

Johnson case supra note 173
It is common knowledge that very successful athletes are highly visible public figures and that they enjoy a very special status in society. Therefore present examples worth emulating to the younger generations.

In regulating doping, one must seek an optimum interface between law, science and sport.

Opponents of regulating doping advance the view that drugs are not the only source of “unfairness” in competition as training methods, unequal availability of sports medicine support, obvious genetic variations, state of technical devices and obvious technological differences also impact on the nature of competition. They also argue that the cheaters are always ahead of the testers and that this “cat-and-mouse” game should stop. They also hold the view [erroneous as it appears] that the negative health effects mentioned in connection with doping substances have not been sufficiently researched to warrant using health as an argument in support of doping control. It is submitted that proponents of no doping controls overlook the following two main issues; firstly, it does not respect athletes who do not wish to resort to doping and would therefore lead to their discrimination, and secondly, it would trigger an uncontrollable build up since each athlete, not knowing the combination of substances his/her opponents are consuming in general secrecy, would be tempted to try out increasingly dangerous combinations and dosages.


\[^{184}\text{Several risks associated with drug use in sports have been reported by athletes to include shrinking breasts and male voices in women, various cancers, weaknesses of joint tissues, infertility, and death. So it is inaccurate to claim that the use of doping substances over a long period of time has no deleterious health effects.}\]
Indeed, an unregulated situation is feared by many but for different reasons. For instance, developing countries, with their meagre budgets for research and development would never be able to compete at par with developed countries. Also, the smaller economies of developing countries would not enable them to access the state of the art (bio-)technology available in developed countries. Furthermore, athletes who wish to compete naturally and free from doping materials would be greatly disadvantaged. Those generally opposed to doping in sports are likely to view sports as a competition of scientists, not athletes. The regulators would be at a great disadvantage and feel totally helpless. Finally, the moralists and ethicists in our society may need to work extra hard to convince people of the need for honest competition.

In sum, a lot speaks for regulation of doping in sports.

3.3 The Role of Science in Regulation of Science and Technology

Science plays a major role in shaping regulation. Science does this in two main ways. Firstly, in the assessment of technology and secondly, in the assessment of risk. In assessing technology, scientists can give advice on the appropriateness of a given technology, the cost benefit analyses, potential benefits, and available options. Scientific advice is key in decision making. In matters of doping, the World Anti-Doping Agency (WADA) has a scientific committee that sets the laboratory standards for testing of drugs. In the matter of *USADA v LaTasha Jenkins*, Jenkins is a US female sprinter who

---

1 Scoones (2002). *Science, Policy and Regulation: Challenges for agricultural biotechnology in developing countries*, p.2
2 AAA NO. 30 190 00199 07/Jan 2008
gave a sample for dope testing on 22 July 2006 in Housden, Belgium. She had come first in 100 m. The sample was analysed at the WADA accredited laboratory in Ghent using the Gas Chromatography Mass Spectrometry procedure and proved positive for norandrosterone. Part of the “A” sample was taken to the WADA accredited laboratory in Cologne, Germany, where it was tested using Isotope Ratio Mass Spectrometry (IRMS) and turned out positive for nandrolone. The athlete requested for the testing of the “B” sample. This was split and tested at both laboratories returning positive results as before.

The regulations for testing of samples provide in part as follows:

“ISL 5.2.4.3.2.2:
The B sample confirmation must be performed in the same laboratory as the “A” sample confirmation. A different analyst must perform the “B” analytical procedure. The same individuals that perform the “A” analysis may perform instrumental set-up and performance checks and verify results”.

Evidence showed that both laboratories used one and the same analyst to analyse both the “A” and “B” samples.187 The issue was whether violation of a laboratory standard should invalidate a positive dope test. USADA argued that violation of the laboratory standard did not cause the adverse analytical finding and that the athlete should be suspended from competition. It was urged for Jenkins that she should not be held strictly liable if the results of the laboratory are not strictly reliable. In setting aside the results, the Panel said

187 This requirement has been removed in the 2009 International Standard for Laboratories (http://www.wada-ama.org, last seen 17 Nov. 2009). Consequently, the appeal of lourieva and Akhatova based on this point could not be sustained (CAS 2009/A/1931 Ekaterina lourieva & Albina Akhatova v International Biathlon Union)
that WADA accredited laboratories will not be merely believed because of their status.

In another case involving the status of laboratories the appellant athlete was not as lucky. Tyler Hamilton, the appellant tested positive for blood transfusion, a method of doping prohibited under the doping rules. He sought to impugn the credibility of the Lausanne anti-doping laboratory arguing that it had not been accredited to carry out HBT - a test for detecting the presence of foreign antigens in patient's blood. It was found that indeed at the time of testing Tyler's samples, the Lausanne laboratory had not been accredited to carry out the HBT test. It was however, established that the results obtained from the Lausanne laboratory were consistent with those obtained in IOC accredited laboratories to carry out HBT tests such as Athens and Sydney. Further, it was stated that it was up to the Director of the Laboratory to determine whether the laboratory could carry out the HBT test or not. Additionally, the HBT was said to be an objective test, requiring specific threshold measurements. It was held that lack of accreditation could not invalidate positive test results for both A and B samples. The appeal was dismissed. These two cases on doping clearly illustrate the role of law in assessing technology.

Ian Scoones considers that another area in which science can play a role in regulation is in the assessment of risk. With respect to doping, risk

---

188 Tyler Hamilton v USADA & UCI, CAS 2005/A/884
assessment involves assessing a drug using three main criteria,\textsuperscript{189} firstly, whether the drug in question has the potential to enhance performance, secondly, whether the drug poses a health risk, and, thirdly, whether the use of the drug can be considered as a violation of the spirit of sport.\textsuperscript{190} The risk here is construed to mean risk to the integrity of competition and to the sport. Such determination is necessary and it is used in compiling what is now known as the Prohibited List.\textsuperscript{191} This List contains all the substances and methods an athlete may not use in sports.

In the matter of \textit{Ganaha},\textsuperscript{192} experts could not agree on the appropriateness of a certain treatment. Ganaha was treated for cold, sore throat, diarrhoea, sluggishness and loss of appetite using IV transfusion by his doctor on April 23, 2007. The IV consisted of 200 ml of normal saline and 100 ml of vitamin B. The doctor sent an application for a TUE for the IV treatment retrospectively. The Doping Committee of the Japanese Professional Football League was not satisfied that the treatment via IV was necessary. The Committee concluded that the infusion was not acute and legitimate medical treatment. This result was transmitted to the Disciplinary Committee at whose sitting the appellant was not invited. The player was banned from six matches and his club fined 10 million Yen. The appellant thought the treatment was

\textsuperscript{189} \textit{Calle Williams} supra note 147
\textsuperscript{190} The World Anti-Doping Code 2009 at p. 14 looks at the Spirit of Sport as including: 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; and community and solidarity
\textsuperscript{191} The Prohibited List (http://www.wada-ama.org) is published by WADA and revised annually after consulting experts and stake holders.
\textsuperscript{192} Kazuki Ganaha v Japan Professional League, CAS 2008/A/1452
necessary, and that he was not given a chance to defend himself. Hence, this appeal. The respondents stated that the IV given was unlikely to be effective, that it was unnecessary because there was no indication of dehydration and, in any case the player did drink some water on the field, and that the medical records were not detailed enough. It was common ground that the treatment was incapable of enhancing performance. Rule M2 of 2007 of the Japanese Professional League states:

Intravenous infusions are prohibited except as a legitimate medical treatment.

The issue was whether the IV infusion given to the appellant was legitimate medical treatment. Experts disagreed on the legitimacy of the treatment. The Panel found that the conduct of the player did not deserve any sanction.

WADA also has scientific committees that determine performance enhancing drugs and another one that provides exemption certificates to those athletes who must use the prohibited drugs for clinical treatment. In Maria-Luise Calle Williams v IOC, the athlete tested positive for Heptaminol after a cycling race at the 2004 Athens Olympics. The athlete had used the drug Neo-Saldina on her doctor's orders. This drug contains a stimulant Isometheptene which metabolizes in the body to Desmethyl-Isomehtepentene and converts to Heptaminol during laboratory analysis. At the time, Isometheptene

---

193 World Anti-Doping Code: TUE Guidelines provide for a committee of medical experts who decide on the necessity of granting a TUE
194 Calle Williams supra note 147
was not on the Prohibited List. However, the Prohibited List contained a provision forbidding all drugs similar to the listed stimulants. The issue was whether Isometheptene was a stimulant with a similar chemical structure and pharmacological effect to those on the Prohibited List. It was common ground that Isometheptene and Heptaminol have a similar chemical structure. Experts for the appellant athlete argued that Isometheptene was not similar to the stimulants on the Prohibited List. The IOC argued that Isometheptene was a stimulant that was similar in chemical structure and pharmacological effect to those stimulants listed. However, the experts for the IOC were not able to pinpoint the exact stimulant on the Prohibited List to which Isometheptene had a similar chemical structure and function. The CAS Panel in finding for the athlete stated that the Prohibited List was not an open list and that similarity must be found before a substance not on the List can be considered as similar. Most critically it was established that whereas the Prohibited List is compiled by a committee of scientific experts after rigorous research, the fact of similarity of substances is done administratively without the benefit of the expert committee. This case underlines the role of science in regulation.

3.4 The Role of Law in regulating Science and Technology

A legal system of a country is considered to consist of the constitution, international treaties, legislative law, judge made law and conventional customs or tradition. With respect to regulation of science, law creates an enabling environment – the system of peer reviews comes in handy. This is

---

195 Both Heptaminol and Isometheptene were placed on the Prohibited List from 2006
most applicable in areas that require inputs from scientists such as in accrediting laboratories for anti-doping and in the award of therapeutic use exemptions (TUEs) and the preparation of the Prohibited List.\textsuperscript{196} Law also assumes safety by awarding damages for injuries suffered.\textsuperscript{197} Law can use administrative controls by declaring certain values and interests as worthy of protecting. For example, honesty and fairplay.\textsuperscript{198} Law also comes in handy to provide sanctions for abuses and minimizes risks.\textsuperscript{199} Law secures clarity in handling of controversial areas of science. It does this by establishing rules of social interaction. This is through developing a legal framework of regulation.\textsuperscript{200}

Kenya, being a common law country, uses as processes of law – common law adjudication, legislation, administrative law making and constitutional adjudication.\textsuperscript{201} Under the common law system, judges use information from lawyers to make law on a case by case basis as they strive to resolve an existing dispute. Their decisions are influenced by analogy and precedent.\textsuperscript{202}

With respect to adjudication in science, RB Dworkin\textsuperscript{203} describes this approach as inexpert and undemocratic decision making. He explains that judges rely on lawyers for their decisions, that courts do not have facilities for

\textsuperscript{196} At http://www.wada-ama.org [9 Oct. 2009]
\textsuperscript{197} Kicker Vencil v Ultimate Nutrition Inc,(Seattle Times August 4, 2008)
\textsuperscript{198} Meca-Medina & Majcen v Commission of European Community [2006] C-519/04 -the EC held that sport had a legitimate reason to guarantee fairplay.
\textsuperscript{199} CAS 2007/A/1394 Floyd Landis v USADA
\textsuperscript{200} Andanda supra note 143 p244
\textsuperscript{201} Dworkin at 7
\textsuperscript{202} In Donoghue v Stevenson [1932] ER Rep 1 (HL) the House of Lords used the system of analogy to define a neighbour as a person who is likely to be affected by the actions of another irrespective of the geographical proximity.
\textsuperscript{203} Dworkin at 170
investigational hearings and that courts have no power to compel the
testimony of uninvolved persons who may have the expertise. This situation
is made worse by the fact that lawyers are paid to zealously protect the
interests of their clients. Constitutional adjudication is used to resolve a
matter definitively. This is law made by judges. The impact of the decisions
arrived at goes beyond the case at hand. Decisions by a constitutional court
are difficult to change.

Legislation or statutory law is the law made by elected representatives of
the people. Such law is informed by wide consultations and a large number of
sources. Legislation may produce criminal statutes, civil statutes and
administrative statutes. Administrative statutes are preferable in the
regulation of science as they leave room for flexibility. Administrative
courts are cost effective as they engage in both rule making and
adjudication. Unlike courts, such agencies can supervise activities on an on­
going basis. Many countries have set up anti-doping agencies under
administrative law. In France, the French Anti-Doping Agency (FADA) is

---

217 Andane at 217
218 Dworkin at p.12
219 In USA USADA was formed through a protocol to the Ted Stevens Act which Act established USOC. In
Australia, ASA DA is an offshoot of legislation on anti-doping
220 French Anti-Doping Legislation

79
established by legislation and it is required to consider sports rules and WADA Code in its operations. This way, FADA can implement the latest regulations agreed upon by sports bodies. In Kenya, such legislation is missing. All that sports federations currently use are rules set by international federations (IFs) and the World Anti-Doping Agency (WADA). There is no national regulation.

### 3.4.1 Constitutions and Legislative Law

Prior to 1989 very few countries had legislation on anti-doping. The 1989 Anti-Doping Convention of Europe[^208] had the effect of increasing countries with a uniform set of legislation on anti-doping. However, this was again a very small fraction looked at globally. Besides, the coordination between sports bodies and public authorities was not very clear. The 2005 UNESCO Convention compels States parties to have anti-doping legislation. This Convention provides a basis for uniformity of procedures and standards. States parties to the Convention are required to domesticate it. In legislating national laws States parties may enact statutes of a criminal and or civil nature, besides providing for administrative bodies. Kenya does not have anti-doping legislation.

Whereas the state has power to punish anyone who breaks the law, there have been arguments that the state machinery should not be relied upon to adjudicate matters of positive dope tests in sports. In a matter in which an appellant argued that he was innocent until proven guilty [in line with well European Treaty Series No. 135, Strasbourg, 16.IX.1989](#208)
established and widely accepted principles of criminal law, the Court of Arbitration for Sport said (at paragraph 52): \(^{209}\)

Par. 52: The presumption of innocence is a concept of criminal law. Disciplinary sanctions imposed by associations are subject to the civil law and must be clearly distinguished from criminal penalties. The shifting of the burden of proof to the athlete to demonstrate that he or she acted without (significant) fault does not conflict with the presumption of innocence. Athletes have a rigorous duty of care towards their competitors and the sports organization to keep their bodies free of prohibited substances.

On the question whether doping regulations are comparable to criminal law provisions, the Swiss Federal Supreme Court\(^ {210}\) had this to say:

> It is generally accepted that the penalty prescribed by regulations represents one of the forms of penalty fixed by contract, is therefore based on the autonomy (---) (and) has nothing to do with the power to punish reserved by the criminal courts, even if it is punishing behaviour which is also punished by the State.

A similar approach has been taken by courts in New Zealand. For example the District Court of Palmerstone North said:\(^ {211}\)

> His Honour appears to have accepted the concern expressed in the (disciplinary) Drugs Appeal Tribunal that criminal law principles may not automatically apply in the context of disciplinary rules of a sporting body, where membership was voluntary

In *Hawker v New Zealand Rugby Football Union*\(^ {212}\) it was said that:

> The criminal law applies to all citizens who have no opportunity to opt out. The liability created by these [sports]

\(^{209}\) CAS 2006/A/1102 *Johannes Eder and WADA v Ski Austria*


\(^{211}\) Fox v NZ Sports Drugs Agency (1999) DCR 1165

\(^{212}\) *Hawker v New Zealand Rugby Football union* (1999) Nzar 549
regulations arises essentially from contractual obligations express or implied by participation in rugby in New Zealand

On the one hand it has been argued that the criminal justice system cannot serve to resolve doping disputes in sports appropriately for several reasons. Firstly, the burden of proof required in doping matters is *one slightly above a balance of probabilities* but below the usual criminal standard of *beyond a reasonable doubt*. Secondly, the use of urine and/or blood from an athlete for testing would amount to self-incrimination under criminal law yet the use of such samples forms the basis of doping control. Thirdly, decisions on sport matters including doping need to be made very fast and sometimes within 24 hours, something that is not possible with the normal procedure followed in criminal matters. Courts normally take long to resolve disputes. While this is going on an athlete suspected of using prohibited substances may continue competing. This can definitely hurt the image of sport and the integrity of competition.

Fourthly, some sanctions in doping matters are meted out even before a hearing starts. These sanctions are not any different from criminal sanctions. However, in the criminal law systems of many countries several safeguards have been built in the procedure to guarantee fairness and justice. These include the presumption of innocence until proven guilty, punishment

---

213 USADA v Joe Warren [AAA/North American CAS No. 30 190 00782 07] a US and World amateur wrestling champion in the 60 kg class tested positive for marijuana in an in-competition test on 10th June 2007. He was suspended from all competitions on 23rd June 2007 and the hearing of his matter conducted on 3rd January 2008 at the conclusion of which he was handed a two year suspension effective 27th June 2007. Supposing he had proved no fault or negligence?
after due process, the right to cross-examine witnesses, the right to call witnesses, the right to counsel and the right to a hearing before a neutral arbiter. In particular, care is exercised not to violate the rights of the accused. With respect to adjudication of doping matters by sports bodies, certain safeguards have not been sufficiently catered for as illustrated in the matter of Joe Warren. Warren, a US and World amateur wrestling champion in the 60 kg class tested positive for marijuana in an in-competition test on 10th June 2007. He was suspended from all competitions on 23rd June 2007 and the hearing of his matter conducted on 3rd January 2008 at the conclusion of which he was handed a two year suspension effective 27th June 2007. The nature of doping offences and the mode of their adjudication can therefore be characterised as “quasi-criminal”. Therefore, the criminal law system as managed by the state is not suitable for use in anti-doping measures within sport. However, such criminal system can be useful when applied to other persons outside of sport.

On the other hand, state regulation is particularly unparalleled in civil matters. In *Modahl v British Athletic Federation Ltd [2002]*, the appellant was a British athlete who tested positive in an athletics meet in Lisbon. She was suspended from competition in line with the rules of the defendant and the International Amateur Athletics Federation. A disciplinary committee appointed by the defendant unanimously found the appellant had committed a doping infraction and suspended her for four years. She appealed and

---

214 Straubel supra note 133 p 28
215 1 WLR 1192, 1232 CA
adduced new evidence that was not available to the first disciplinary committee. Her appeal was allowed and the ban lifted. She brought an action for breach of contract and claimed damages for expenses and loss of income during the period of suspension. She alleged that the disciplinary committee had been biased against her. The Judge held that there was no contract between the appellant and the respondent and that the disciplinary committee had done its job conscientiously and fairly, and that the appeals panel had arrived to a different conclusion because of the new material she had introduced at that stage, and that the decision was proper on the facts before the committee.

In the matter of Lagat 216, Lagat lives in both Kenya and USA. He underwent an out-of-competition test in Tuebingen, Germany, and the samples were analysed at the WADA accredited laboratory in Cologne, the third defendant in the suit. Sample A turned out positive. This result was announced to the media by a Kenyan official, contrary to rules established by both the first and second defendant. Lagat brought a claim for compensation based, firstly, on restriction of trade practices under German law and, secondly, in tort. On the question of restriction of trade practices, the court observed that German Civil law applies if the effects of such restriction are felt on German soil. This was not the case as both the claimant and the first two defendants were not residents of Germany and the first two defendants carry out their activities globally. In tort, Lagat argued that the defendants were

216 Bernard Lagat v WADA, IAAF and Deutsche Sporthochschule 28 O (Kart) 38/05, 28th Civil Chamber of Cologne Regional Court
wrong in not handling his test carefully resulting in both a false negative test result and the announcement of the result of the A sample. The court found that the athlete had not been able to allocate responsibility of the breach of confidentiality to the defendants in two ways. Firstly, no experts were called to testify to the chain of custody of the samples and, secondly, the announcement of the A sample result was not done by any of the defendants but by a Kenyan official who was not made party to the proceedings.

Another issue with national legislation is that it may be difficult to accommodate all prohibited substances. For example, the US 1990 Anabolic Steroid Control Act 217 overlooked “pro-steroids” and “pre-cursor steroids” and yet these two are used in food supplements and once in the body they produce the same effects as the banned steroids. This omission means that manufacturers of these substances cannot be brought to justice. There is therefore need to consult widely in enacting national legislation. In the case of USA, however, an amendment to the 1990 statute prohibits prosteroids and precursors. 218

The 2005 UNESCO Convention and the 2009 WADA Code are specific “rules” that relate to doping. The European Court of Justice has recognised these (anti-doping) rules as sports rules.219 As States Parties to the Convention (which incorporates the WADA Code) domesticate the Convention, what will

---

217 Anabolic Steroid Control Act 1990 (USA)  
218 Anabolic Steroid Control Act 2004 (USA)  
emerge will be part of doping law. Such is the case with the French legislation against doping.

The French Anti-Doping Law\textsuperscript{220} can be considered as a modern masterpiece. Through this Act, criminal,\textsuperscript{221} civil \textsuperscript{222} and preventive measures\textsuperscript{223} are provided for. This Act allows both the state and sports bodies to operate without discernible conflict. The Act creates the French Anti-Doping Agency (FADA),\textsuperscript{224} an administrative body with powers to make rules and to sanction. The Act makes room for sports bodies by allowing athletes to be punished according to sports rules,\textsuperscript{225} and non-athletes by using general criminal law. Corporate bodies can also be sanctioned under the Act. The Act adopts the WADA Code (including all future modifications to the Code). Consequently, this Act fuses the rules of law, science and sports. The Act also provides for administrative measures.\textsuperscript{226} The French legislation on anti-doping therefore provides a good link between state agencies and sports bodies.

\subsection*{3.4.2 The Judiciary}

The Judiciary plays various roles in regulating science and technology. The first such role is through her rule making function, and secondly, through constitutional interpretation. It is a well known practice in the Commonwealth that Judges make law under the guise of filling gaps in the existing rules. This

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{220} Protection of Health of Athletes and the Fight Against Doping, French Legislation in Force since 1st October 2006
\item \textsuperscript{221} Articles L.232-25 to L.232-29
\item \textsuperscript{222} Article L. 232-30
\item \textsuperscript{223} Chapter 1 and Chapter 2 (Section 1) of the Act
\item \textsuperscript{224} Articles L.232-5 to L.232-7
\item \textsuperscript{225} Articles L.231-5 to L. 231-8
\item \textsuperscript{226} Articles L.232-21 to L.232-24
\end{itemize}
\end{footnotesize}
function of the Judiciary finds apt application in science and technology where the products of innovation and or their effects may not have been anticipated earlier by a statute.\textsuperscript{227} Courts therefore listen to experts, deconstruct the “values, biases and social assumptions that are embedded in many expert claims...”\textsuperscript{228} and then make their own findings and conclusions.

Courts can also serve the function of civic education.\textsuperscript{229} The way the Judiciary considers scientific uncertainty and controversy, whether the Judiciary constructs a statute narrowly or broadly and whether the Judiciary is consistent and clear in its rule making role can serve to inform all actors including members of the public on matters of science and technology.

Where harm results from scientific innovations, litigants may rush to courts seeking compensation. Courts can therefore be seen as vehicles for mitigation of dangers inherent in the products and or application of science and technology. In a case in which a customer suffered harm after consuming a product from a manufacturer, Lord Atkin\textsuperscript{230} stated that:

\begin{quote}
[A] manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the product will result in an injury to the consumer’s life or property, owes a duty to the consumer to take that reasonable care.
\end{quote}

\textsuperscript{227} In \textit{Donoghue v Stevenson} [1932] ER Rep 1 (HL) it was said that a manufacturer owes a duty of care to a consumer who opens the product after it was closed in the factory. The concept of neighbor was thus extended to cover those persons who are likely to be affected by one’s acts of commission and or omission

\textsuperscript{228} S Jasanoff supra note 132 p 20

\textsuperscript{229} S Jasanoff supra note 132 pp 20-21

\textsuperscript{230} \textit{Donoghue} supra note 227
Law is thus used to correct, nay, compensate for the harm caused by technology. This is based on the fact that courts only swing into action after they have been addressed.\textsuperscript{231} Whether through Judge made law or through legislation, law has the role of checking the harm resulting from science and technology. In doping, whether an athlete who deliberately uses prohibited substances to cheat in competition can turn around and sue the manufacturers for harm resulting from such use has not come to the fore as yet. This may be because doping is carried out clandestinely. The victims are likely to suffer in silence. However, there are cases where athletes buy food supplements believing them to be uncontaminated. In such cases, an athlete may sue a manufacturer.\textsuperscript{232}

There is a serious concern that product liability suits could make drug companies cease production fearing to shoulder the huge burden of hefty damages awarded in such suits.\textsuperscript{233} Concerned that product liability suits could negatively affect innovation and science, the European Union moved to limit the extent of liability of the manufacturer in which it provided that:\textsuperscript{234}

\begin{quote}
The producer shall not be liable... if he proves... (e) that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered.
\end{quote}

\textsuperscript{231} S Jasanoff supra note 132 p.11
\textsuperscript{232} This matter came up in a dispute involving Kicker Vencil. Vencil was a US swimmer who tested positive for steroids. In his evidence, he submitted that he had never taken steroids knowingly but admitted to having ingested food supplements supplied by Ultimate Nutrition Inc. of Farmington, Connecticut. He was suspended by USADA for two years and lost his appeal at CAS. He carried out independent tests which revealed that the products supplied to him by the manufacturer contained prohibited substances. He thereafter filed a suit against the manufacturers of the food supplements. The manufacturer was ordered to pay him USD 578,000 [KES 40 million] in damages. (CAS 2003/A/484 Kicker Vencil v USADA, and in Kicker Vencil v Ultimate Nutrition Inc. (Seattle Times August 4, 2008))
\textsuperscript{233} S Jasanoff supra note 132 p.13
\textsuperscript{234} Council Directive (EEC) 85/374 (Art. 7)
This Directive which has application in Europe has the effect of limiting the liability of a manufacturer.

Courts have demonstrated their willingness to promote science and technology. In *Diamond v Chakrabaty* in which Ananda Chakrabaty developed a bacteria that could be useful in clearing oil spills, the question arose whether such an invention was patentable. Initially, patentability was denied on grounds that bacteria are living organisms and therefore they cannot be a subject of invention. It was urged for Chakrabaty that he had used scientific skill in creating a form of bacteria that was hitherto non-existent in the environment. The Supreme Court in upholding the defendants arguments stated that everything under the sun was patentable.

In the matter of *Monsanto v Schmeizer*, Monsanto inspectors established that the defendant's crop contained a gene patented by Monsanto and which was contained in the seeds sold to his neighbours. McKay, J. put it thus:

A farmer whose yield contains seeds or plants originating from seeds spilled into them, or blown as seeds, in swaths from a neighbour's land or van flowing from germination by pollen carried

---

235 100 S.Ct. 2204 (1980)
236 Similarly, in *Moore v Regents of the University of California* [51 Cal 3d 120, 793 P2d 479, 249 Cal R Pir 494, 271 Cal R Pir 146 (1990), 499 US 936 (1991)], the plaintiff, George Moore consented to removal of his spleen as part of treatment for hairy-cell leukemia at the University of California Hospital, Los Angeles. His doctor discovered that the plaintiff's spleen produced an unusual blood protein which the doctor cultured and produced a unique T-lymphocyte line which he eventually patented. The plaintiff filed this suit arguing that he had not given consent for research but only for treatment and that his spleen had been converted ('stolen'). One of the issues before the court was whether the plaintiff owned rights in an excised body tissue. The California Supreme Court held that individuals do not have rights of ownership in excised tissue and that those cells were distinct from the resulting research product.
237 *F. Ct of Canada 2001*
238 *Monsanto v Schmeizer, F. Ct of Canada 2001*
into his field from elsewhere by insects, birds, or by wind, may own the seed or plants on his land even if he did not set about to plant them. He does not, however, own the right to the use of the patented gene, or of the seed or plant containing the patented gene or cell.

This is a novel ruling that favours the advancement of science and disregards those who resist scientific innovation.

Courts are also the forum where issues of human rights are ventilated. In the matter of *re Baby K*, the issue turned on the right to life. Medical specialists at the hospital urged that Baby K had no chances of surviving without the life support machine and that therefore the machine should be disconnected. The mother argued for her baby's right to life. The court found for the mother. In the matter of Meca-Medina who complained of his rights to provide services being violated through anti-doping sanctions, the European Court held that sports bodies had a legitimate reason to control the integrity of sports and that to that extent, the athlete's right to provide services were not violated.

The 2009 WADA Code whilst providing for sanctions for infringement does not provide for redress where an athlete's reputation may be wrongfully injured through the anti-doping process. Such a role is left to the courts. It therefore becomes apparent that sports rules alone are unable to cater for civil

---


claims from athletes.\textsuperscript{241} This underlines the important role that the judiciary can play in the regulation of doping.

It is thus clear that the Judiciary can play a central role in regulation of science, including doping. In so doing judge-made law may be created where gaps exist in a statute, compensation may be ordered for victims of science and technology or the Judiciary could also aid the development of science and technology.

\subsection*{3.4.3 Administrative Law}

This is created by legislation. However, the actual rule making, enforcement and adjudication is left to the bodies thereby created under the doctrine of delegated authority.\textsuperscript{242} Administrative bodies may make rules they intend to enforce. The administrative power exercised by such bodies is amenable to judicial review. For example, France has created the French Anti-Doping Agency (FADA) under the French Legislation.\textsuperscript{243} However, sports bodies have always resisted being viewed as appendages of government. In most cases, they act as agents of international federations. Hence, the administrative bodies envisaged under anti-doping law are those that relate to doping matters only. There are no such bodies dealing with doping in Kenya. Nonetheless, it is submitted that creation of such bodies would go a long way in contributing to doping law.

\footnote{Bernard Lagat v WADA, IAAF and Deutsche Sporthochschule, 28 O (Kart) 38/05, 28th Civil Chamber of Cologne Regional Court}
\footnote{French Legislation supra note 220}
3.4.4 Sports Rules

Sports bodies were left to develop a system of regulation that excludes supervision by public authorities. Hence, rules are made by international federations which are then adopted by national sports governing bodies and enforced as such in many different jurisdictions. Common to these rules is that they are of a uniform character.\textsuperscript{244} People who form a sports organisation only look to the rules of the international body. This is a clear case of what legal scholar Migai Akech calls 'privatisation from the bottom' in which citizens set up sports organisations away from public regulation.\textsuperscript{245} With time sports bodies grew into international organisations, and, by and large, out of control of individual governments. International sports federations enforce their rules globally. It has been observed that disciplinary panels of sports bodies are not established by law.\textsuperscript{246} Furthermore, in the exercise of their disciplinary powers, international sports bodies are not courts of law. The Court of Appeal of England has, however, recognised the disciplinary decisions of sports bodies.\textsuperscript{247} Sports bodies are registered as private bodies. In the area of doping, there is a new awakening that calls for public/private collaboration. Such a need requires the setting up of administrative structures by nation states to contribute to the regulation of doping in sports. In this sub-section, the

\textsuperscript{244} For example, FIFA has developed a template of a “constitution” to be adopted by all her 204 affiliates worldwide and to be enforced in those jurisdictions. [http://www.fifa.org last seen 10 Oct 2009]. All other international federations have similar approaches.

\textsuperscript{245} M Akech Privatization and Democracy in East Africa - The Promise of Administrative Law (East African Educational Publishers Ltd Nairobi 2009)


\textsuperscript{247} Wilander v Tobin [1997] 2 Lloyd's Rep. 293 (CA)
discussion will focus on regulatory activities by sports bodies. To their credit international sports federations have built procedural guarantees akin to those in public law such as the right to be heard, the right to call witnesses, the right to cross-examine witnesses amongst others.\textsuperscript{248}

Sports bodies have set up rules and administrative structures for regulating doping. These are in the form of committees and they allow for appeals before what is considered a final appeal to the Court of Arbitration for Sport (CAS).\textsuperscript{249} Decisions of CAS can be appealed in the Federal Court in Switzerland. In the regulation of doping, WADA has a right of appeal to CAS against a decision of either a national sports governing body (NGB) or an international sports federation (IF).\textsuperscript{250} The World Anti-Doping Agency (WADA) has committees that set parameters for regulation.\textsuperscript{251} These include the laboratory committee (for standardization of anti-doping laboratories), the List committee (for determination of prohibited substances and methods), the Therapeutic Use Exemption (TUE) committee (for determination of rules of awarding therapeutic use exemptions for certain drugs to deserving athletes),


\textsuperscript{249} At article 61 of the Olympic Charter, the IOC requires that "Any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport ....". In like manner all members of the IOC recognise the jurisdiction of CAS.

\textsuperscript{250} For instance, Article 63 par. 6 of the 2008 FIFA Statutes provides: "The World Anti-Doping Agency (WADA) is entitled to appeal to CAS against any internally final and binding doping-related decision passed by FIFA, the Confederations, its members or Leagues..."

\textsuperscript{251} These include the LIST Committee for preparing the Prohibited List, the TUE Committee for assessing therapeutic use exemptions (TUE), the Expert group on gene doping, the health, medical and scientific committee in charge of monitoring scientific developments in sport and overseeing the hereinbefore mentioned committees and expert groups, the education committee is responsible for education strategies in the anti-doping campaign and the athlete committee for bringing to the fore the concerns of athletes in the fight against drug use in sports (see http://www.wada-ama.org, last seen 14 Nov 2009)
the education committee (for determining appropriate interventions in the prevention of doping) amongst others. These committees are manned by experts in the fields of analytical chemistry, biochemistry, medicine, pharmacy, ethics, education and sport science.

In the absence of administrative law (created by parliament), what obtains in Kenya, as in many other jurisdictions without relevant laws, is the regulation of doping using sports rules (law). The following sections give an expose of how sports rules have worked in the regulation of doping in sports.

3.4.4.1 Regulation by IOC and her Affiliates

The Olympic Games present the major games competition in the world. This brings together athletes from across various sport disciplines such as Soccer, Athletics, Bowling, Tennis, and Swimming and from numerous countries.252 The International Olympic Committee (IOC) manages the Olympic Games. The entire management of the Olympics is governed by a set of rules enshrined in the Olympic Charter.253 Each country has a National Olympic Committee (NOC). The NOC is charged with organising and preparing teams for the Olympic Games. Such preparation includes ensuring that those to participate have met the minimum qualifying standards for the Games.254 All

252 For example at the 2008 Beijing Olympics there were 204 countries participating [http://www.Beijingolympics.com last visited on September 25, 2008]
253 Art 26 of the Olympic Charter provides for affiliation of all international sports federations to the IOC. It also establishes NOCs. All organisations affiliated to the IOC must obey the rules contained in the Charter, one of which is to adhere to the World Anti-Doping Code (WADC).
254 In Andrea Schuler v Swiss Olympic Association and Swiss Ski (CAS arbitration No.CAS 06/002) in which the applicant complaint of unfair selection procedures, the panel found that the Respondent exercised its discretion in a reasonable, fair and non-discriminatory manner, and in accordance with the rules In Isabelle Dal Balcon v Comitato Olimpico Nazionale Italiano (CON) and Federazione Italiana Sport Invernali (FISI) (CAS OG 06/008), in which the applicant
National Governing Bodies (NGBs) of various sports such as Athletics Kenya, Kenya Hockey Union, and Kenya Football Federation must be affiliated to the National Olympic Committee to be eligible to participate in the Olympic Games.

Each sport discipline such as soccer has an international federation (IF), in this case, the Federation International de Football Association (FIFA). Each IF sets the rules for her sport. Each IF in turn has a National Governing body (NGB). In the case of soccer, this is the Kenya Football Federation (KFF). At the international level, any sport interested in featuring at the Olympic Games must be affiliated to the IOC. The relationship between the IOC and IFs is best captured by Rule 26 of the Olympic Charter which provides:

26 Recognition of IFs

In order to develop and promote the Olympic Movement, the IOC may recognize as IFs international non-governmental organizations administering one or several sports at World level and encompassing organizations administering such sports at national level. The Statutes, practice and activities of the IFs within the Olympic Movement must be in conformity with the Olympic Charter, including the adoption and implementation of the World Anti-doping Code. Subject to the foregoing, each IF maintains its independence and autonomy in administration of its sport.

The hierarchy of power and control in doping control follows this same pyramidal structure. IOC determines the testing procedures and banned...
substances for the games, establishes a baseline or international norms for testing prohibited substances and determines/accredits the laboratories in which dope tests are to be carried out.

Each IF has authority to establish its own anti-doping rules which must conform to WADA List of Prohibited Substances and Methods.\(^{258}\) National Governing Bodies and National Olympic Committees are charged with first line responsibility for testing and enforcing the anti-doping rules established by IOC and International Federations. Such rules must either comply with or incorporate the WADA rules (the Code).\(^{259}\) The Court of Arbitration for Sport (CAS) has consistently held that the Code does not apply directly to national federations unless the rules of such a federation so expressly provide.\(^{260}\)

### 3.4.4.2 The Court of Arbitration for Sport (CAS)

The Court of Arbitration for Sport (CAS) was founded on 30 June 1984 to help resolve sports related disputes.\(^{261}\) It has its headquarters in Lausanne.\(^{262}\) CAS is made up of two divisions: the ordinary and the appeals division. A decision of the CAS ordinary division can be appealed to the CAS appeals.

---

*express clause that in case of divergence with the Constitution and Regulations of the UCI, only the latter shall apply*  
\(^{258}\) Straubel supra note 133 says that it is recognised that some prohibited substances are more useful in certain sports than in others for example, erythropoietin is more useful in endurance activities like long distance running than in wrestling while the converse is true of anabolic steroids; see also: CAS ADVISORY OPINION CAS 2005/C/976 & 986, FIFA & WADA.  
\(^{259}\) To facilitate the process of unifying anti-doping rules across all countries and across all sports, WADA has prepared a template of the anti-doping rules which is made up of two parts—a larger part that cannot be changed and a minor part that can be adapted to local conditions [personal communication from Rune Andersen, Director of Standards at WADA, Quebec’].  
\(^{260}\) See CAS 2008/A/1575 FIFA v Malta Football Association & Gilbert Martin and CAS 2008/A/1627 WADA v Malta Football Association & Gilbert Martin in which CAS held that WADA rules were not directly applicable to the Malta Football Association.  
\(^{261}\) Swiss Federal Tribunal: Judgement of 27 May 2003, 1\(^{st}\) Civil Chamber  
\(^{262}\) Swiss Federal Tribunal: Judgement of 27 May 2003, 1\(^{st}\) Civil Chamber
further appeal lies to the Swiss Federal Court. In the matter of Nathaniel O'Neill, an Australian cyclist, he tested positive for Phentermine, a stimulant during competition in Australia. This information was communicated to the athlete on 31 March 2008. He had argued that he knew Phentermine was a prohibited substance, that he ingested it and hoped it would clear out of the system before the day of competition. The CAS ordinary division suspended him for 15 months (instead of the mandatory two years for a first offence). The Australian Sports Anti-Doping Agency (ASADA), WADA and the International Cycling Union (UCI) all appealed against the sanction, arguing that there was nothing convincing to warrant reduction of the mandatory two year sentence. CAS appeals division upheld the appeals.

In 1993, the Swiss Federal Supreme Court issued a judgement in which it expressed reservations about the independence of CAS vis-à-vis the IOC based on its organisational structure and financial links. This judgement led to the formation of the international Council of Arbitration for Sport (ICAS) in Paris on 22 June 1994 and the Code of Sports-related Arbitration came into force on 22 November 1994. The ICAS is a private law foundation subject to Swiss Law and it has its headquarters in Lausanne.

On the question of the independence of CAS after the above changes, some writers think it is now independent. Other scholars are not convinced

---

263 CAS 2008/A/1591 ASADA v Nathaniel O'Neill
264 CAS 2008/A/1592 WADA v Nathaniel O'Neill
265 CAS 2008/A/1616 UCI v Nathaniel O'Neill
266 ATF 119 II 271 rec. 36, p.280
267 Jean Francois Poudret and Sebastian Besson: Droit compare' de l'arbitrage international, note 106; Phillippe Meier and Ce'dric Aquet: "L'arbitrabilite' du recours contre la suspension prononce'e par une federation sportive
that CAS has become independent through the said changes at all. The independence of CAS was challenged based on its structure, mode of appointment of arbitrators and on its organisation, financing and functioning before a Swiss Federal Tribunal. It was argued that since CAS is financed by the IOC, and that the IOC and her affiliates appointed the arbitrators, that CAS was therefore not independent of the IOC, and further that CAS was likely to favour the IOC and her affiliates in dispute resolution. Based on the creation of ICAS which served to vet and appoint the presidents to the ordinary and appeals chambers and also to select arbitrators for a given matter in case of a withdrawal or rejection of an arbitrator, and also on the fact that the IOC was not directly involved in funding of the CAS, the Court held that CAS was independent.

CAS has indeed proven itself as an independent sports tribunal. It has ruled for and against the IOC, international sports federations and national federations just like it has done with athletes. In Pistorius v IAAF the IAAF banned the petitioner, a double leg amputee since age 11 months, from using a specially designed prosthesis arguing that the prosthesis gave the athlete an undue advantage over those not using it. It was found that the tests on which the respondent based the decision to ban the athlete were inconclusive and

---

268 Moni Wekesa

269 Ph.D Thesis

268 The independence of CAS was challenged based on its structure, mode of appointment of arbitrators and on its organisation, financing and functioning before a Swiss Federal Tribunal. It was argued that since CAS is financed by the IOC, and that the IOC and her affiliates appointed the arbitrators, that CAS was therefore not independent of the IOC, and further that CAS was likely to favour the IOC and her affiliates in dispute resolution. Based on the creation of ICAS which served to vet and appoint the presidents to the ordinary and appeals chambers and also to select arbitrators for a given matter in case of a withdrawal or rejection of an arbitrator, and also on the fact that the IOC was not directly involved in funding of the CAS, the Court held that CAS was independent.

CAS has indeed proven itself as an independent sports tribunal. It has ruled for and against the IOC, international sports federations and national federations just like it has done with athletes. In Pistorius v IAAF the IAAF banned the petitioner, a double leg amputee since age 11 months, from using a specially designed prosthesis arguing that the prosthesis gave the athlete an undue advantage over those not using it. It was found that the tests on which the respondent based the decision to ban the athlete were inconclusive and
therefore they could not be used to ban the athlete. In July 2008, the President of FIFA ordered clubs to release players to play for their national teams at the 2008 Beijing Olympics. Some clubs thought the order was in violation of FIFA rules and therefore they brought an action before CAS. CAS annulled the order by the FIFA President saying that it contravened FIFA rules. With regard to doping matters CAS hears appeals after local remedies within a sports federation have been exhausted. However, such appeals are heard *de novo*. CAS therefore represents a vital structure in the regulation of doping. Its jurisdiction is, however, limited to sports related matters only. Even then where rules of a sports body provide for final arbitration, CAS may not have appellate jurisdiction.

Access to CAS is governed by article R47 of the CAS Code and this sets out the conditions for such access as follows:

- there must be a “decision” of a federation, association or another sports-related body;
- the (internal) legal remedies available must have been exhausted prior to appealing to the CAS;
- the parties must have submitted to the competence of CAS.”

CAS has its seat in Switzerland and proceedings are governed by Swiss Law. A CAS panel has powers to look at matters *de novo*. This is believed to

---

271 CAS 2008/A/1622 FC Schalke 04 v FIFA, CAS 2008/A/1623 SV Werder Bremen v FIFA, CAS 2008/A/1624 FC Barcelona v FIFA
272 ICAS Rules of Arbitration
273 CAS 2008/A/1738 WADA v DEB & Busch
274 Code of the Court of Arbitration for Sport at http://www.tas.cas.org [5 August 2009]; this was confirmed in CAS 2008/A/1564 WADA v IIHF, CAS 2004/A/748 Róci Viatcheslav Ekimov v IOC, USOC & Tyler Hamilton, CAS 2008/A/1471 FINA v Tagliferri & Federazione Italiano Nuoto, CAS 2008/A/1486 WADA v CONI & Tagliferri
275 CAS 2008/A/1706 Deutsche Reiterliche Vereinigung e.V. v FEI & Christian Ahlmann, CAS 2008/A/1710 Christian Ahlmann v FEI
be an attempt at curing previous procedural errors that may have occurred at the preliminary stages.\textsuperscript{276} An Australian appellate court has said:\textsuperscript{277}

All these sets of rules [sports rules] ... are transnational, universal, global. Their application is not dependent on a territorial nexus, nor is it restricted territorially. This global substantive law is matched by a uniform procedural law thanks to the choice of a sole seat for all CAS arbitrations.

Over the years, CAS has established a substantial amount of case law on doping in sports and has therefore contributed and continues to contribute to doping jurisprudence. This jurisprudence from CAS is therefore a vital component of “doping law”.

3.4.4.3 Disciplinary Panels of Sports Bodies

Disciplinary panels of sports bodies have made some rulings that favour the development of science in anti-doping efforts. In the matter of Tyler Hamilton,\textsuperscript{278} a US cyclist and the appellant in this matter, Tyler tested positive for blood transfusion, a method of doping prohibited under the Doping Rules. He sought to impugn the credibility of the Lausanne Anti-Doping Laboratory where his sample had been analysed arguing that it had not been accredited to carry out the HBT test. It was, however, established that the results obtained from the Lausanne Laboratory were consistent with those obtained in IOC-accredited laboratories to carry out the HBT test such as Athens and Sydney. Further, it was stated that it was up to the Director of the Laboratory to ascertain whether the laboratory could carry out the HBT or not. Additionally,
the HBT was said to be an objective test, requiring no specific threshold measurements. It was held that lack of accreditation could not invalidate positive test results for both A and B samples. The appeal was therefore dismissed.

In FINA v Marko Strahija, Marko tested positive for human chorionic gonadotropin (hCG) on 26 March 2002 and on 22 July 2002 during out of competition tests. Samples were analysed in IOC accredited laboratories in Dresden and Barcelona respectively. He denied having taken any drugs and he instead took issue with the accuracy of the methodologies for sample analysis adopted by the two laboratories. He argued that whereas the two laboratories used the immunoassay method, it would have been more accurate to use a combination of methods to include gas-liquid chromatography with mass-spectrometry. He therefore stated that the reliance on only one method may have produced a “false positive result”. It was argued on behalf of FINA that mass-spectrometry as far as hCG is concerned is not reliable enough and IOC accredited laboratories have been advised against using that method. Further, IOC accredited laboratories are advised to make use of two different immunoassays in each specific case. According to FINA therefore, the application of two separate immunoassays completely eliminates the possibility of a “false positive” result for hCG. It was held that the analyses carried out in the IOC accredited laboratory in Barcelona conformed to IOC guidelines. The FINA Panel stated:

---

FINA Doping Panel 1/02
The presumption the laboratory to have conducted the analyses correctly in accordance with prevailing and acceptable standards of care has not been rebutted by the swimmer.

These decisions also illustrate the fact that law can be used to enhance developments in science and technology.

International sports federations have been averse to interference by state actors in their adjudicative role. In certain instances, rulings by national tribunals have been overruled by international federations. This was the case in the doping matter of FINA v Katerina Bliamou. Katerina, a member of the Hellenic Swimming Federation tested positive for 19-norandrosterone (anabolic steroid) during the Mediterranean Games 2001 following test samples taken on 6th September 2001. She was expelled from the Games. On 10th September 2001 she presented herself for testing in Greece which test turned out to be negative. The Board of Hellenic Swimming Federation after hearing the swimmer on 12th October 2001 decided to sanction her with a four year suspension plus retroactive cancellation of the results achieved by her in competitions during the period prior to the date of the decision and extending back to six (6) months before the collection of the positive sample. Katerina appealed against this decision to the Supreme Sports Arbitration Council of Greece on 22nd October 2001 seeking the annulment of the decision of 12th October 2001 by the Swimming Board. The Supreme Sports Arbitration Council referring to forensic reports as well as other expert submissions found

---

FINA Doping Panel 3/02
the test results of 6th September 2001 to be unreliable and therefore upheld the appeal by Katerina. The Federation Internationale de Natation (FINA), the International Federation in charge of swimming, in an executive meeting, decided that FINA rules were not followed in acquitting Katerina. FINA therefore invited her to a hearing of its Doping Control panel. Katerina contended that the FINA Doping Panel had no competence to review her case arguing that her case had been finally decided by the Supreme Sports Arbitration Council of Greece. The FINA Doping Panel held:

[A] judgement made by a national civil court may be - and probably is - binding on the National Swimming Federation in the domestic jurisdiction. .... However, in no case, the national judgement can be binding on FINA, World Governing Body for swimming, Open Water Swimming, Diving, Water Polo, Synchronized Swimming and Masters, especially in case FINA not having been part in the national proceedings.

The FINA Doping Panel also overturned the decision of a national arbitral tribunal in FINA v Vasileios Demetis which matter the Supreme Sports Arbitration Council of Greece in it's appeal judgement interfered with the sanctions meted to the Swimmer Vasileios. The FINA Panel is on record as saying:281

The FINA Doping Panel is well aware that the decision issued by the Supreme Sports Arbitration Council of Greece is made by the highest arbitration Council in this country, binding all national sport federations. And the FINA Doping Panel is also aware of the difficult situation arising for the Hellenic Swimming Federation out of this situation. As a member federation of FINA the Hellenic Swimming Federation is obliged to make sure that the swimmer is sanctioned in accordance with FINA Rules related to doping. At the same time it is banned from doing so because a final

281 FINA v Vasileios Demetis FINA Doping Panel 2/02
judgement made by the Supreme Sports Arbitration Council of Greece having decided a sanction for the swimmer which in the opinion of the Hellenic Swimming Federation is not in accordance with FINA Doping Control Rules.

The above two cases illustrate the desire of sports bodies to regulate themselves.

Where disciplinary matters in sports have gone to court, sports federations have vehemently fought off such cases. In the US, Reynolds tested positive for nandrolone in August 1990 at a competition in Monte Carlo and he was thereafter suspended from competition. Under IAAF rules at that time, Reynolds was entitled to a review hearing and his suspension would be stayed pending the results of the review. The IAAF overlooked this provision and suspended Reynolds as from 4th November, 1990. In March 1991 he brought an action in the Southern District Court of Ohio. It was urged for him that the drug test was not properly done and that therefore the results should not be relied upon to suspend him from competition. He sought to bar the respondents from conducting a hearing and from barring him to compete on account of the test results. He further averred that certain vital information necessary for the hearing had been kept away from him. He also alleged violation of his due process rights under the Fifth Amendment by suspending him before the hearing took place, that both the IOC and IAAF had breached his contract with them, that they had interfered with his business contracts and that they had intentionally and maliciously disclosed to the media that he

had tested positive. The defendants argued that Reynolds could not block the hearing because they were not a state actor. The defendants succeeded. Kinneary, J captured the frustration of local courts thus:

> It is simply an unacceptable position that the courts of this country cannot protect the rights of United States citizens where these rights are threatened by an association which has significant contracts with this country.\(^{283}\)

It was held that there was no contract between Reynolds and the IAAF.

In another matter, Michels,\(^{284}\) a US amateur weightlifter tested positive for testosterone and, was suspended by the International Wrestling Federation (IWF) from international competition for two years. Michels brought an action against United States Olympic Committee (USOC). It was urged for USOC that Michels had been suspended by the IWF, which was not under the control of USOC. The Seventh Circuit Court of Appeals found for USOC stating that, Michels had a dispute with IWF, which is a non-member of USOC. USOC prevailed.

These two cases point to the fact that municipal law has sometimes deferred to sports “law”. Such an occurrence has also been recorded in Kenya.\(^{285}\)

Some athletes have raised issues with the disciplinary mechanisms of sports bodies. This arose in *Meca-Medina and Majcen v Commission of*
European Communities\footnote{286} after the appellants had tested positive for nandrolone. FINA’s panel suspended them for four years. On appeal, CAS upheld the suspensions. They appealed to ECJ alleging that the anti-doping regulations adopted by the IOC and enforced by FINA were incompatible with EC Treaty provisions on competition and freedom to provide services. In particular, they alleged that the fixing of the threshold for nandrolone at 2 ng/ml by the IOC was scientifically unfounded and could lead to exclusion of innocent or merely negligent athletes. They further alleged that the IOC’s mechanism of strict liability and the establishment of tribunals responsible for the settlement of sports disputes by arbitration which are not independent of the IOC is anti-competition. It was urged for the appellants that the application of anti-doping rules at issue led to infringement of athletes’ economic freedom and violation of competition rules of the EC Community. The court held that since penalties are necessary in enforcing the doping ban, their effect on athletes’ freedoms must be seen to be inherent in anti-doping rules. The court said that these rules are justified by a legitimate objective to ensure healthy rivalry between athletes. The appeal was dismissed.

The strong opposition of sports bodies to what they consider to be government interference was probably best captured by the Federation Internationale de Football Association (FIFA) when FIFA said:\footnote{287}
[We] still have some problems of internal strife and of political interference from governments and sports ministers, and we have to be firm to stop anything that might jeopardize the independence of football associations.

Ironically, the same sports bodies do not have a broad enough mandate to effectively fight doping in sport, they rely on laboratories developed by public authorities, they also use sports facilities owned and or developed by governments, and they require the support of government to effectively fight doping. Whereas they [sports bodies] may be uncomfortable with government interference in their management, one area where they seem to have acknowledged the need for collaboration is in the regulation of doping. WADA itself, being composed of 50% government is a case in point.288

In cases where an NGB has been deemed not to have followed the rules of an international federation (IF), the IF has intervened to try the case de novo. This was the case in *FINA v Reza Ojagh.* Reza represented his country, the basic Islamic Republic of Iran at the "First Prince Feisel Swimming and Water Polo Championships" in Teheran. He underwent a doping control test on 4\textsuperscript{th} February 2002, which turned out positive. The NGB suspended him albeit for two years contrary to FINA Rules. The FINA Executive referred the matter to its Doping Panel to be heard de novo. The FINA Panel enhanced Reza's suspension to four years as the rules provided then. However, a similar

---

288 WADA has a 38 member Foundation Board which is the supreme decision making body and its made up of representatives from the Olympic Movement (50\%) and from government (50\%). It also has a 12-member Executive Committee which is responsible for the actual management and running of WADA and its composition is similar to that of the Foundation Board. In fact, WADA's Presidency rotates between the Olympic Movement and governments (see [http://www.wada-ama.org](http://www.wada-ama.org), last seen 14 Nov. 2009).

289 *FINA v Reza Ojagh*, FINA Doping Panel 2/03
attempt by FIFA to enforce her anti-doping rules on the Maltese Football Association (MFA) did not succeed.\textsuperscript{290} CAS held that the anti-doping rules of FIFA and the WADA were not directly applicable to MFA as the latter had her own elaborate anti-doping rules, even if these rules differed from those of FIFA and WADA. It is hoped that full compliance with the WADA Code by all sports actors will see to global harmonization of anti-doping rules.

3.5 Public Participation

Public participation in the discourse and policy formulation in environmental issues\textsuperscript{291} and biotechnology\textsuperscript{292} has been accepted. Some scholars think that public participation contributes to good governance as well as to sustainable development. This is premised on the fact that participation can contribute to "better-informed, more appropriate and effective, more legitimate and more broadly "owned" decisions and policies"\textsuperscript{293}. To date, the regulation of doping control has hardly involved the public. The public has been treated to a spectacle of "super human models" working races only for some to be disqualified on account of positive dope tests. Regulation as

\textsuperscript{290} CAS 2008/A/1588 FIFA v Malta Football Association & Claude Mattocks, CAS 2008/A/1629 WADA v Malta Football Association & Claude Mattocks; CAS 2008/A/1576 FIFA v Malta Football Association & Ryan Grech, CAS 2008/A/1628 WADA v Malta Football Association & Ryan Grech; CAS 2008/A/1575 FIFA v Malta Football Association & Gilbert Martin, CAS 2008/A/1627 WADA v Malta Football Association & Gilbert Martin. In all these cases it was held that the anti-doping rules of FIFA and WADA were not directly applicable to Malta Football Association. Contrast this with: CAS 2007/A/1446 WADA v Qatar Football Association & Hamad Rakea Humood Alanezi.


\textsuperscript{292} Cartegena Protocol of the Convention on Biological Diversity, Montreal 2000, art. 23 deals with public awareness and participation.

practised by sports bodies remains largely a matter between sports federations, athletes and support personnel.

In countries that have anti-doping legislation, provision has been made for education. How far-reaching and effective such education is meant to be only time will tell. However, education demands that people be provided with knowledge. It cannot be a substitute for public participation.

Some form of public participation was witnessed in efforts aimed at coming up with the 2005 UNESCO treaty on doping. Many governments and non-governmental bodies were involved.\(^{294}\) Needless to say that this manoeuvre was, firstly, aimed at getting States Parties to own the product, and secondly, this form of public participation played itself at an international level.

Public participation brings ethics and values to the debate on the regulation of science and technology. The question of values is thought to broaden the debate beyond the scientific facts and that these value-based issues constitute a vital part of the regulatory system.\(^{295}\) It has been said that ethics and values of individuals and societies play a big role in the acceptance or rejection of science and technology.\(^{296}\) In fact although the role of the public in regulation of doping was first recognised in the 1978 International Charter on Physical Education and Sport,\(^{297}\) in which inclusion of everyone was considered as important, this appears to have been lost along the way. Even

\(^{294}\) Many meetings were held between government officials and representatives of civil society/sports bodies which culminated in the 2003 Copenhagen Declaration that gave birth to WADA.

\(^{295}\) Scoones supra note 185 p.36


\(^{297}\) Adopted by the General Conference of UNESCO at its twentieth session, Paris, 21 November 1978. This Charter provided for involvement of the general public through awareness campaigns on doping issues.
then doping is attributed to among other reasons, the decision of athletes to be unfair or to cheat, too much money in sports, the greed of the pharmaceutical industry among other factors. And these issues are not addressed through testing of athletes. It takes much more to confront them. It is submitted that if the value system is to be modified towards promoting drug free sport, there is need for the public to be involved in policy formulation at all levels. This way, it will be possible to address all the causative factors for doping in sport and put an acceptable and believable system of regulation in place. The UNESCO Convention recognises this point and implores States Parties to promote education and research.  

In Kenya, in the absence of legislation on doping, sports bodies are expected to play a key role in regulation. However, the adjudication structures appear to be non-existent. Most of the athletes who have tested positive have had their cases adjudicated upon overseas. This has the effect of increasing costs for the accused, denying locals the benefit of following proceedings, and reducing access to justice due to associated costs.

3.6 Risks of Regulation

GJ Persley identifies two major risks associated with regulation in science and technology as the high cost of regulation and lack of public confidence in the system of regulation. The author addresses himself to science and technology in agriculture when he argues that the cost of

---

298 Articles 19-23 and 24-27 of the International Convention Against Doping in Sport provide for measures in education and research.
299 For example, David Obiero was invited to attend a hearing in Budapest after testing positive.
300 Persley supra note 296 p 34

110
regulation together with uncertainty in science and technology constitute a major barrier that hinders the participation in research and development of public institutions, poor countries and small enterprises.

The same situation obtains with regard to doping control. A laboratory for dope testing must fulfil the requirements outlined in the International Standards. The International Standards for Laboratories was prepared by an expert group together with WADA Laboratory Accreditation Committee. All signatories, governments, IOC accredited doping Laboratories and the IOC Sub-committee on Doping and Biochemistry in Sport were consulted. Laboratories seeking accreditation or to renew their accreditation are required to comply with the requirements of the International Standard for Laboratories and ISO/IEC 17025. According to the WADA Code, the purpose of the International Standard for Laboratories is to ensure laboratory production of valid test results and evidentiary data and to achieve uniform and harmonised results and reporting from all accredited Doping Control Laboratories.

Requirements for WADA accreditation include ISO/IEC 17025, letter of support to guarantee financial support for three years, sufficient numbers of samples annually for three years and guarantee of provision of necessary analytical facilities and instrumentation; adherence to a code of ethics set by WADA; successful participation in a proficiency testing programme in which a laboratory seeking accreditation must successfully analyse a minimum of four sets containing a minimum of five samples per set; ability and willingness to


111
share knowledge with other WADA-accredited laboratories; ability to spend at least 7% of its budget on doping research. The same conditions apply to a laboratory seeking to renew its accreditation.\textsuperscript{303}

These requirements present two major hurdles for Kenya. The first major hurdle for Kenya is a guarantee of the requisite instrumentation. The initial cost of acquisition of a doping control laboratory is estimated at around USD200 million (KES. 14 billion). This is the level of investment required for ISO/IEC 17025 certification. The second but related hurdle is that of a guarantee of financial support for the three year period of accreditation. This, in turn, is closely related to ability to carry out doping related research and to share information. The cost of maintaining such a laboratory has been estimated at around USD 1,000,000 (KES. 70 million) annually. Such budgets appear exorbitant for third world countries that are struggling with basic issues of food, disease and illiteracy. Besides, whereas laboratories at Universities and hospitals in the developed world are generally capable of conducting dope tests, those in the third world are ill equipped even for the most basic functions. Kenya has no laboratory capable of carrying out dope control tests.

Closely related to laboratories is the issue of human resources. Third world countries do not have the wherewithal to train a critical mass of scientists to man dope control laboratories. And where some have been trained, poor countries appear to be unable to retain them. For example, it is

\textsuperscript{303} WADA International Standard for Laboratories version 4.0 www.wada-ama.org (24 October 2008)
estimated that there are more top scientists and doctors working outside of Kenya than those in the country.\(^{304}\) Added to the question of laboratories and human resource is the issue of the slow pace at which third world countries are embracing information communication technologies (ICT). When Kenyan boxer Munyasa tested positive for cathine (miraa) at the 2004 Athens Olympic Games some officials responsible for the team were heard saying that they did not know that cathine was a prohibited substance. This is not withstanding the fact that the Prohibited List was at the time, as is of now, posted at the website of the World Anti-Doping Agency.\(^{305}\) Doping technology therefore constitutes a triad (laboratories, human resources, and ICT).

The degree of access to doping technology is a function of both economic and technological capabilities. Technology acquisition is not a one-off trade decision, but rather, an ongoing process. A simple dichotomous\(^{306}\) approach of "make it or buy it" choice does not accurately reflect the complexity of technology transfer. Secondly, if the war on doping is to be won, there is need to conduct random doping tests both during competition and out of competition. In fact, most sports organisations have already made provisions for such a continuous process of doping control.\(^{307}\) Thirdly, it is in the nature of doping itself that countries should endeavour to constantly renew their

---

\(^{304}\) Orłale says that Kenya is among 36 African countries who experience a shortage of health workers. Hundreds of Kenyan doctors are said to be working in Southern Africa, Europe and USA due to meagre salaries, poor working conditions and low morale in Kenya (Daily Nation, Thursday Sept. 7, 2006)

\(^{305}\) S Aletta, "How miraa cost Munyasa chance in the Olympic Games". The Standard, May 23, 2005, p. 28. None of the officials who took the Kenya team was aware of the banned substances.

\(^{306}\) Aletta ibid.

\(^{307}\) FIFA Regulations. Doping Control for FIFA Competitions and out of Competition; International Olympic Committee. Medical Code and Explanatory Document
technology in order to efficiently perform the task of doping controls. The 2009 World Anti-Doping Code Article 4.5 on monitoring provides that:

WADA, in consultation with other Signatories and governments, shall establish a monitoring program regarding substances which are not on the Prohibited List, but which WADA wishes to monitor in order to detect patterns of misuse in sport [...].

This emphasises the point that doping control is an ongoing activity that requires constant renewal of technology.

Furthermore some sports federations such as FINA require Member Federations to send in all results of doping controls in accordance with FINA Rules DC12.i:

Member Federations shall report at the end of every quarter (March 31, June 30, September 30, and December 31) all results of doping controls within their jurisdiction to FINA sorted by competitor and identifying each date on which the competitor was tested, the entity conducting the test, and whether the test was in or out of competition.\(^{308}\)

In Africa, it is only South Africa that has so far complied. Kenya suffers from the absence of requisite technology.\(^{309}\) This lack of technology implies that on average athletes in the South can hardly get access to doping control before they participate in competitions. Those doing athlete selection do not have the benefit of dope tests to inform their selection process.

Another related technological challenge refers to the ability of current methods of testing in combating doping in sport. Difficulties have been
experienced in this area. There is a high increase in new drugs, and this, together with chemical modifications of the old ones, makes it difficult to tell which substances to test for. Additionally, there is a scientific ambiguity that the inclusion criteria of compounds might be vague or inconclusive, since the side effects of compounds and their various interactions cannot be extrapolated with certainty. A major challenge lies in the detection of the administration of "endogenous-like" substances, such as some androgenic anabolic steroids or a full set of peptide hormones (EPO, high, IGF-1, insulin, etc.). In these cases, a presumption of doping will often be based on especially abnormal concentrations of the drugs themselves or some specific biomarkers. The extent to which the concentrations found differ from those occurring in the "normal population distributions" will be fundamental to the decisions taken. Even for some extreme values, some probability of "false negativeness" or "false positiveness" will be "statistically" present. This, therefore, makes room for some standard concepts of legal certainty, such as, "on a balance of probabilities", "prevalence of evidence" or "beyond reasonable doubt" to be applicable in legal cases related to doping using "endogenous-like" substances. A case in point is that of Claudia Poll, a Costa Rican swimmer, who tried to fasten onto such an ambiguity in her appeal to the CAS against a decision of FINA by arguing inter alia, that the quantities of nandrolone, an endogenous anabolic steroid, detected in her urine samples were too low,
considering that this substance can be produced naturally by athletes. In its ruling, the CAS Panel found that the quantity of nandrolone detected in Ms Poll's urine (7.5 ng/ml) was above the threshold of 5 ng/ml which is provided for by FINA Regulations.312

Another technology related issue is that certain drugs can be used to dilute or mask urine samples. This difficulty has been overcome by including "masking" agents on the list of prohibited substances.313 In certain cases, some drugs used in training may be untraceable by the time competition and testing takes place, yet still provide the desired effects on performance. The regulation requiring "out of competition" testing is meant to cure this mischief.

Many cheating athletes have always tried to be ahead of the existing technology.314 Also, the BALCO Laboratory scandal illustrates how much the drug cheats try to stay ahead of the current doping control technologies. For Kenya and other Third World countries therefore to effectively participate in doping controls, they will not only need "start-up" technology but also continuous upgrading of that technology.

Developed countries put their superior technology to use by testing their athletes ahead of any competition. Those who test positive during such screening are dropped from making the final team.315 Athletes in third world countries do not have access to such pre-competition screening. The absence

---

312 Claudia Poll v FINA, FINA Doping Panel 1/02
313 WADA 2009 Prohibited List www.wada-ama.org (24/10/08)
314 Witness: Dying to win: The History of doping in sport, 2004
315 CE Yesalis, formerly team doctor with the US Track & Field Team says the US athletics body was never keen on preventing drug use in sports. Instead it was involved in cover-ups
or near absence of one or several elements of this triad, and more especially the laboratories, in Kenya means that Kenya is unable to screen her athletes before sending them off to major competitions.\textsuperscript{316} Kenya’s attempt to meaningfully play ball in the fight against doping is thus greatly hampered. A major policy paradigm shift in prioritization and financing of projects is required to realise a doping control laboratory.

The second risk that Persley\textsuperscript{317} talks about is one of lack of confidence in the regulatory system. The author says lack of public confidence translates into stringent regulation. Those charged with regulation have to strive to work harder to be seen to be effective. Usually, such lack of public confidence is driven by exclusion of the public in the regulatory process. This risk has manifested itself in doping control. Until the formation of the World Anti-Doping Agency in 1999, doping control was in the hands of sports federations, including National Olympic Committees, whose primary function was to prepare teams for various competitions. They were thus charged with presenting the best athletes for a given competition. It soon emerged that the very federations were involved in both doping and doping control, a state of conflict of interest. Many federations engaged scientists to dope their athletes and cover up so they could not be caught during testing at competitions. The practice in the former East Germany is a classic example.\textsuperscript{318}

\textsuperscript{316} Most Kenyan athletes who have tested positive so far were tested whilst competing outside Kenya. Even where samples have been collected in Kenya, laboratory analysis has been done elsewhere.\textsuperscript{317} Persley supra note 296 p.34
In order to inspire public confidence in a system of regulation, Persley argues that regulation must be science based and involve public participation. Doping involves the science of chemistry, biochemistry, pharmacology, endocrinology, neurology, cardiology, radiology, genetic engineering among others. These sciences employ different approaches in their search for scientific facts. All this various approaches combine well to advice on drugs and methods of doping that should constitute the Prohibited List, methods of testing and the appropriate laboratory standards and procedures. Public participation has been restricted to those considered to be stake holders such as sports federations and their members. For a long time, there has been no concerted effort to reach the wider public. This changed a bit with the formation of WADA in 1999. WADA has a department concerned with education and through this, WADA attempts to reach school children besides the traditional stakeholders. This effort has received support from the 2005 UNESCO Convention Against Doping in Sport. Indeed, whereas stake holders are consulted from time to time in the process of policy formulation and setting of regulatory parameters, no serious attempt has been made to involve the public. The larger public remains an uninformed bystander in the debate on doping control. The scepticism that greets doping efforts by sports bodies may not go away any time soon unless the public is brought on board and made a major player in the whole discourse. Since sports bodies are only

---

118 Persley supra note 296 32
120 This Convention recognizes the importance of education and implores States Parties to put in place measures that can promote doping education (Article 19)
concerned with their members, an interface with public authorities in the fight against doping can be very useful.

3.7 Summary

Doping is high level science applied to sport. Regulation of doping must therefore take into account the nature of sport, law and science. Law Science and technology enjoy a mutual relationship in regulation. Both science and law are vital in the regulation of doping. Law relies on science to regulate science and technology. Sport has both economic and sport specific characteristics. Regulation of doping falls within the sport specific nature of sport and aims at preserving the spirit of sport. Doping is biotechnology, which produces adverse health effects in athletes apart from destroying the spirit of sport. Doping is in dire need of regulation. In regulating doping, both rules of regulating science and as well as those of sports federations come into play. Regulation of doping is based on the ethical aspects of protecting the spirit of sport. Human rights protections accorded to criminal prosecutions and principles of due process have been to a large extent incorporated in the sports rules. The use of expert testimony is accepted. Regulation of doping is largely an interface of approaches from law, science, technology and sport. Regulation can be effected through legislation, judiciary and administrative bodies. Many countries have not used legislation to regulate doping before 2005. This is now changing. Such legislative regulation is necessary to case the net of anti-doping much wider than sports bodies can do it. In domesticating the 2005 Convention, many countries are recognise the role of
administrative bodies. In terms of adjudication two parallel systems appear to be in use: one for athletes through sports bodies, and another for non-athletes through the regular judiciary. Sports bodies consider anti-doping rules to be an integral part of sports rules. To this end, sports bodies want to be left to regulate themselves. Indeed sports bodies have well developed anti-doping rules and disciplinary mechanisms that go all the way to CAS. It is recognised that due to the special nature of sport, the regular judiciary may not be ideal for resolving disputes that involve positive tests of athletes. It is also recognised that the approach of sports bodies is narrow and only limited to members of sports federations.

Law alone is inadequate to regulate science. Other mechanisms such as education, research and purely administrative measures need to be brought on board to complement the efforts of law. This probably supports the view that regulation of doping in sports should be anchored in doping law and that other policy mechanisms relating to doping be put in place.

Disciplinary panels of sports bodies rely on evidence provided by science together with general principles of law as practiced in many countries. Principles of law such as a right to a fair hearing and a right to be heard are adhered to. Proceedings take the nature of a quasi-criminal nature in which there is an accused, an accuser, the WADA Code that forms the basis for the charges, and evidence comes from science. Such evidence is considered first by disciplinary panels of sports bodies and then the CAS on appeal. Decisions from such disciplinary panels and from CAS contribute towards doping law.
Doping law can thus be considered to consist of decisions of sports disciplinary bodies and CAS, administrative law relating to anti-doping, judicial decisions involving doping matters, legislation on doping, the WADA Code, the 2005 UNESCO Convention, and any other rules or laws that support the cause of anti-doping. Doping law is therefore more comprehensive than state legislation or rules of sports bodies. It can be useful in overcoming the shortcomings of both state legislation and of rules of sports hereinabove alluded to. Subsequent discussion in this work uses doping law as the point of departure.

Kenya does not have doping law as yet. Doping matters have not been adjudicated upon in the Kenyan Judiciary and national sports bodies do not appear to have good structures for regulation of doping.\(^{321}\) Besides, the two major risks to regulation, that is, absence of requisite technology and lack of public participation in promulgating regulatory policies serve to further undermine efforts at regulating doping in sport in Kenya.
CHAPTER FOUR: FACTORS THAT CONTRIBUTE TO DOPING IN SPORTS

4.0 Introduction

A wide range of substances and methods for improving performance in diverse sports are available.\textsuperscript{322} For example, in 1998 during the Tour de France, a coach\textsuperscript{323} was arrested and charged with being in possession of blood doping substances, and a Chinese swimmer was caught with the human growth hormone.\textsuperscript{324} Katerina Bliamou, a swimmer from Greece tested positive for 19-norandrosterone, an anabolic steroid on 6\textsuperscript{th} September 2001.\textsuperscript{325} Yuliya Pidlisna from Ukraine tested positive for 3'-hydroxystanozolol in a swimming competition on 31\textsuperscript{st} July 2003.\textsuperscript{326} Joseph N'sima a basketballer of French nationality tested positive for ephedrine, a stimulant, on 19\textsuperscript{th} October 2004.\textsuperscript{327} On 21\textsuperscript{st} February 2005, David Morgan, a basketballer of Canadian nationality tested positive for ephedrine.\textsuperscript{328} On the same date, Guillermo Canas, an Argentinian Tennis player, tested positive for hydrochlorothiazide, a diuretic in a tennis tournament in Mexico.\textsuperscript{329} Coeur D Wright Stuff, a horse belonging to a rider from the Netherlands, tested positive for ibuprofen, ketoprofen and

\textsuperscript{322} The Prohibited List is published by the World Anti-Doping Agency (WADA) and it contains a wide range of substances which are classified as stimulants, narcotics, cannabinoids, anabolic agents, peptide hormones, beta-2 agonists, agents with anti-oestrogenic activity, masking agents, glucocorticosteroids, and methods such as enhancement of oxygen transfer, gene doping, and pharmacological, chemical and physical manipulation.

\textsuperscript{323} This was on the border of France and Belgium. French authorities found a car boot full of assorted doping materials including thousands of vials of EPO. He was arrested and the whole of the Festina cycling team left the competition.

\textsuperscript{324} The Economist, “Drugs and the Olympics”, 7-13 August, 2004

\textsuperscript{325} FINA v Katerina Bliamou, FINA Doping Panel 3/02

\textsuperscript{326} FINA v Yuliya Pidlisna, FINA Doping Panel 5/03

\textsuperscript{327} N’sima & WADA v FIBA, FIBA AC 2005-5

\textsuperscript{328} WADA v David Morgan, FIBA AC 2005-1

\textsuperscript{329} Canas v ATP, CAS 2005/A/951

Pharmaceutical substances for treating various diseases find use amongst military personnel/law enforcement officers, actors (show business), body builders and sportspersons. These four groups are obsessed with body image. However, some of these people are sportspersons. And these drugs find their way into sports. In the 1970s some Italo-American Mafia families set up illegal businesses with anabolic steroids and financed films with actors who had grotesque muscles. They promoted the image of a muscular person thereby promoting their own business. The development of erythropoietin

---

330 FEI2005/21 - Coeur D Wright Stuff
331 FEI2005/46 - Hermine D'Auzay
332 Ilanit Fridman v ITF, ITF Anti-Doping Tribunal
333 FEI 2006/08 - Arc Katusha
334 FEI 2006/29 - Chippolino
335 CAS 2007/A/1394 Floyd Landis v USADA
336 USADA v Justin Gatlin, AAA No. 30 190 00170 07
337 Daily Nation, Thursday, August 3, 2006
338 Donati supra note 37
(EPO) and human growth hormone (hGH) led to a black market where athletes mix with the sick.

Prof. Robert Kerr, an endocrinologist, stated in an interview after the 1984 Los Angeles Olympics that he had injected several athletes who won Gold, silver and bronze with human growth hormone (hGH). At that time hGH was being extracted directly from cadavers and Russian criminal gangs were on the forefront of this trade. For example, it was revealed much later after the 1984 Olympic Games that the US cycling team did blood doping via blood transfusions and won nine medals.

A major problem is in the rise in the use of steroids by youthful athletes. Centres for Disease Control (CDC) and Prevention stated that in 1993 2.2% of high school students used steroids and this figure rose to 3.7 in 2003 and to 6.1% in 2006. It is easy to procure drugs using anonymity of the Internet. Steroid dealers have become difficult to detect and prosecute.

Doping in sports has been fuelled in large measure by political interests of certain countries, drug trafficking, multinational pharmaceutical firms, the Internet, advanced doping technology, commercialization in sport and a wrong value and ethical system. This chapter examines each of these causative factors. It is concluded that concerted efforts involving legislative, judicial and administrative bodies can contribute immensely to doping control.

---

339 Donati supra note 37
4.1 Commercialization of sport

Sports is attracting a lot of money. This money has long invaded what used to be amateur sport – played for the love of the sport. Huge sums are being paid out to athletes in all disciplines. A positive result of this is that the living standards of top/professional athletes are some of the highest in the world, only surpassed by the Holywood actors. Athletes are not only earning good money but they are also able to afford residential properties in some of the exclusive parts of a city and own latest versions of automobiles. A few examples will suffice here.

The earnings by top tennis players can shed some light on commercialization of sport.\textsuperscript{341} It has been reported that Andrew Flintoff, an all- rounder Cricket player has contracts that earn him Kshs. 180 million (UK pounds 1.5 million) from playing and Kshs. 240 million (UK pounds 2 million) from sponsorships a year.\textsuperscript{342} By September 15, 2008, Roger Federer, a top tennis player and a Swiss national had made USD 43,268,419 (Kshs. 3.028 billion) since joining professional tennis in 1998. American tennis star Pete Sampras is reported to have earned USD 43,280,489 (Kshs. 3.09 billion) by the time he retired from professional tennis in 2002. Among the female tennis players, American Lindsey Davenport, who won three Grand Slam singles tournament and an Olympic Gold is considered the top earner at USD 22,144,753 (Kshs. 1,555 billion). Serena Williams, the current world number one in tennis has so far earned USD 21,750,782 (Kshs. 1,522 billion). In the

\textsuperscript{341} \url{http://www.atptennis.com} [last visited September 8, 2008]
\textsuperscript{342} O Okoth, ‘Cricket too has its own guns for hire’ The Standard (Nairobi 6th Oct 2009) at 43
season that ended in November 2008 alone she earned USD 4.12 million (Kshs. 288.2 million).\textsuperscript{343} In soccer,\textsuperscript{344} Brazillian Kaka who plays for AC Milan and who is also the FIFA World footballer of the year 2008 earned USD 25.7 million (KShs 1.8 billion) in 2008 alone. The most highly paid footballer is the LA Galaxy English midfielder David Beckham who earned about USD 59.03 million (KShs 4.123 billion) in 2008. Beckham also reportedly had a ten year endorsement contract with Pepsi which earned him USD 3.17 million (KShs 228 million).\textsuperscript{345}

The 2008 World Athletics Finals held in Stuttgart, Germany had the following prizes on offer: USD 100,000 (Kshs. 7 million) for breaking a world record, USD 30,000 (Kshs. 2.1 million) for first place, USD 20,000 (Kshs. 1.4 million) for second place, USD 12,000 (Kshs. 840,000) for 3\textsuperscript{rd} place and these were graduated to USD 2,000 (Kshs.140,000) for 8\textsuperscript{th} place.\textsuperscript{346}

After winning six successive 800 m Golden League races in Berlin, Oslo, Rome, Paris, Zurich and Brussels, Pamela Jelimo was paid USD one million (Kshs. 70 million).\textsuperscript{347} She also won USD 30,000 (Kshs. 2.1 million) for winning 800 m at the World Athletics Final held in Stuttgart, Germany in September\textsuperscript{348}, and received USD 35,700 (Kshs. 2.5 million) for having won Gold from the Government of Kenya. The government of Kenya gave out USD 35,700 (Kshs. 2.5 million) for each Gold medal won, USD 20,000 (Kshs. 1.4 million) for

\textsuperscript{343} M Mutwota ‘Sports and Finance – Sartr’s Earnings a Guarded Secret’ The Standard (Nairobi 2 December 2008), p.31
\textsuperscript{344} ibid
\textsuperscript{345} ‘Football: Becks ends Sh 228 million Pepsi Deal’ The Standard (Nairobi, Monday 29 December 2008) p.32
\textsuperscript{346} Saturday Standard, September 13, 2008, FeverPitch Extra, p.4
\textsuperscript{347} Gracious Talented, The Standard, Sunday September 7, 2008, p.45
\textsuperscript{348} Saturday Standard, September 13, 2008, FeverPitch Extra, p.4
Silver and USD 10,700 (Kshs. 750,000) for bronze. The athletes who participated in the Paralympic Games were rewarded with USD 28,500 (Kshs. 2.01 million) for Gold, USD 17,100 (KShs 1.2 million) for Silver and USD 9,300 (Kshs. 655,000) for Bronze.349

The downside of these enormous earnings in sports is that athletes attempt to win at all cost, including the use of prohibited substances. The huge earnings in sport mainly go to winners only. Hence, the pressure to win. Realising that a lot of money can be earned through sports, many support personnel (coaches, team doctors, managers etc) are equally eager to have a piece of the cake. Most of the money comes from the corporate world and governments. To this end, commercialization has made many different actors become “birds of the same feathers” in the doping game, even when the reasons for their involvement may vary.

Several researchers have attempted to link the continued use of banned substances in sport to commercialization. For example, Doriane Coleman,350 Senior Lecturer at Duke University School of Law and two-time Swiss National Champion in the 800 m says:

I think the answer is in the money and the fame and the fact that it's sometimes the only thing in their lives.

Previous attempts at doping control have not focused on this vital possible cause of doping in sport. In the USA, professional leagues have fought

350 http://more.abenews.go.com/sections/sports/DailyNews/oly_doping000927.html; Doping Dilemma: Why should top athletes risk using banned substances?
off attempts at being regulated. Ironically, the US negotiators at the 2005 UNESCO Convention Against Doping in Sport successfully fought for the Convention to exclude professional leagues. It is submitted that efforts at controlling the proliferation of prohibited substances in sport must of necessity address the issue of commercialization in sport.

The issue of commercialization in sport is rather delicate. Athletes, just like workers in other sectors desire to be paid highly. Over and above that, the successful running of various sports federations requires money. It takes money to organize sports events. It takes money to acquire state of the art technology required in the running of sports events, it takes money and especially good prizes to attract the best athletes to an event. In team sports it takes money to attract the best players. Organizers of events are therefore struggling to outdo each other. The corporate world uses the audiences at sports events to market their products. Hence, there is competition also for TV and broadcast rights. This competition ensures that more and more money is given to organisers of events. The situation is compounded by the fact that governments are either unwilling to directly finance sports enterprises or they view them as private business entities and a source of taxation. Currently, a

---

351 SM Burns, Deputy Director of the Office of National Drug Control Policy, in his submissions before the Congressional Senate Committee on Foreign Relations on “Hearings on the International Convention Against Doping in Sport” on May 22, 2008 had this to say: “The drafting process afforded the United States with an extremely fair opportunity to shape the contents and format of the instrument... Moreover, in April, 2004, a consultation letter, along with a copy of the draft Convention, was sent... to nearly 100 potentially impacted non-federal stakeholders. Not a single objection to a substantive provision of the Convention was received. The United States was pleased to support the Convention’s unanimous adoption by the UNESCO General Assembly in October, 2005.”
lot of money is reaching top athletes and this in part is fuelling the proliferation of doping substances in sport.

Commercialization in sport is like a two-edged sword. On the one hand, sports bodies need money to develop their programmes, including paying athletes and doping control. Subsidies from government are not enough. On the other hand, the private sector needs sports to promote their products. These activities take place against a backdrop of a free market economy. This means that there is competition amongst the firms and therefore pressure to increase their financial offers to sports bodies. This partly explains the huge payouts to athletes. Kenyan sport benefits from sponsorships, endorsements and from prize money.

No country has attempted to address the issue of commercialization with regard to doping. Neither the 2005 UNESCO Convention nor the WADA Code (2003 and 2009) mention this point. Any serious measures about regulation of doping in sports cannot afford to ignore the influence of commercialization. Where doping scandals have broken out corporate sponsors have withdrawn their financial support. They do this because they fear doping can harm their business reputation. Corporate firms can therefore be recruited in the fight against doping. It is submitted that the question of commercialization needs to be addressed at a Conference of Parties to the Convention.

4.2 Drug Trafficking

352 In Operation Puerto Doping case (at Wikipedia) sponsor Liberty Seguros withdrew support for cycling saying doping harmed their reputation and that of the sport
Trafficking in doping substances has flourished because successful athletes are fronted by the marketers as good examples of the effectiveness of drugs. Multinational pharmaceutical companies are first made aware of the demand for the substances amongst athletes, and these then produce for the black market where even non-athletes can access them. The activities of 1999 gives a good clue to the involvement of multinational companies. In that year, the anabolic steroid, nandrolone was found in urine samples of athletes from different countries and from different sports: British sprinter and European champion Linford Christie, Jamaican sprinter Marlene Ottey, the Barcelona Olympic 5000 m champion, Dieter Baumann, professional soccer players from France and Russia, several weightlifting record holders and female athletes from Sri Lanka, Columbia, the Dominican Republic and Morocco.

In January 1999, police in Milan seized bags containing 35 kg of testosterone (enough to dope 700,000 athletes in one day, or 70,000 athletes for 10 days). In May 1999, 4.5 million doses of EPO were stolen from a warehouse in Nicosia, Cyprus, to be sold on the black market to endurance athletes.

The Donati Report reveals that 22% of Gym goers in the Gulf states use anabolic agents. Gulf states are not only consumers but also conduit routes for other destinations. Countries of Western Europe are more of consumers than producers except Greece and Spain. A ten year study (1991-

---

354 S Donati supra note 353 p.17
355 ibid
356 A Donati supra note 37 and S Donati supra note 353
357 A Donati supra note 37
2001) using British centres providing assistance to drug addicts showed that consumers of anabolic steroids had increased six fold and that addiction from anabolic steroids was higher than from heroin. On 26 January 2002 Austrian customs officials seized three tons (60 million doses) of anabolic steroids in Vienna and Thule. These originated from Czech Republic and were destined for several European cities. On 1st June 2005 Spanish police did a thorough investigation that led to the closure of six clandestine plants in Catalonia with a production capacity of 20,000 doses an hour. It was found that the active ingredients for the production came from Greece, Turkey, Mexico, Brazil, and Portugal. Thirty million packaged doses and 10 tons of pills, all equivalent to 400 million doses were confiscated. It was established that most of these drugs were destined for Gyms. On 13th September 2006, it was revealed that 250,000 Britons regularly use doping substances and that there is a high diffusion of doping substances in 11 out of 20 large cities. It is estimated that between 50-60 million doses of anabolic steroids go through Belgium. On 23 July 2006, Belgium police seized 560 kg of anabolic hormones estimated at 136 million Euros destined for various Gyms in six European countries.

In South Africa,\textsuperscript{358} 11,007 kg of anabolic steroids (220 million doses, i.e. enough for a monthly dose for 2.5 million people or annual dose for 200,000-250,000 people) were intercepted on one day between 2004-2005. It has been estimated that there are at least 15 million people who use anabolic steroids.

\textsuperscript{358} A Donati supra note 37 p 93
per year, 1.5 million consume testosterone and 2 million use EPO and growth hormone. Roughly 15.5 million people are involved in doping.

In the USA, numerous tales of theft from hospitals and warehouses of a variety of doping substances worth billions of US dollars was reported between 1999-2006. It has been found that numerous fraudulent prescriptions are being issued by doctors to those who want to access doping substances. The Internet has also opened up another possibility for fictitious prescriptions. Between 1992-2003 the abuse of doping substances in the US was found to be double that of marijuana, five times that of cocaine and 60 times that of heroin. Most of these substances were trafficked through the Internet—which cannot be monitored, regulated or controlled. It was reported on 15 December 2005 that anabolic steroids illegally imported into USA constituted a 56 billion dollars a year. These came in from Mexico, China, Spain and other countries and were mainly marketed online.

Sports bodies that have been on the forefront of regulation of doping do not have the legislative mandate to search, seize, detain and prosecute. Drug trafficking is a problem that can be better addressed by state actors. Sports federations would become useful once the drugs are found within their membership.

Regulation of trafficking of prohibited substances together with distribution, sale, storage, and overproduction by the pharmaceutical industry falls squarely in the public domain. The public sector must devise a regulatory

\[ A \text{ Donati supra note 37 p 84 } \]
mechanism to address these issues. France is one of the countries that has
taken legislative measures to combat trafficking of doping substances. Article
L.232-20\textsuperscript{360} allows customs officials, criminal investigation officers and other
government officials to share information regarding the use and sale of doping
substances. This article is aimed at controlling trafficking, illegal distribution
and sale of doping materials. At article L.232-27\textsuperscript{361} penalties include
confiscation of the offending materials and closure of the business for a period
not exceeding one year, in addition to sanctions against the individuals
involved.

The WADA Code 2009 makes it an offence for one to be in possession\textsuperscript{362}
of or trafficking\textsuperscript{363} in any prohibited substances or prohibited methods.
However, such prohibition does not apply to doctors or to other athlete support
personnel where there is evidence of possession by a given athlete of a valid
therapeutic use exemption (TUE). The 2005 UNESCO also contains provisions
on trafficking of prohibited substances and methods. Through domestication,
Member states can enact in law measures that would criminalize trafficking in
doping substances and methods. Although Kenya has legislation on drug
trafficking,\textsuperscript{364} the Act does not anticipate substances and methods prohibited
in sports. In other words, trafficking in doping substances and methods is not
prohibited under Kenyan law, save for the few substances that are both in the

\textsuperscript{360} Protection of Health of Athletes and the Fight Against Doping. French Legislation in force 1\textsuperscript{st} October 2006
\textsuperscript{361} ibid
\textsuperscript{362} World Anti-Doping Code 2009 article 2.6
\textsuperscript{363} ibid article 2.7
\textsuperscript{364} The Narcotic Drugs and Psychotropic Substances (Control) Act, Act No. 4 of 1994 of the Laws of Kenya
said Act and on the Prohibited List. It is submitted that doping law may be useful in checking trafficking or substances and methods prohibited in sport.

### 4.3 The problem with Multinational Pharmaceutical Firms: the case of Serono\(^{365}\)

Serono, a Swiss pharmaceutical firm was fined USD 704 million on 17\(^{th}\) October 2005 in Boston, USA, for having illegally promoted and marketed the growth hormone based drug Serostim. Serono put on the market an analysis mechanism to deceive patients, showing inexistent treatment results attributed to Serostim, paid for trips for numerous doctors each of whom undertook to issue prescriptions worth USD 630,000. The state, through a public insurance system for AIDS patients reimbursed each patient for many years the daily cost of Serostim of USD 700. What Serono did was to promote a distorted use of a doping product disguised as treatment. The mass introduction of Serostim in USA stirred up an explosion of a huge black market in counterfeit Serostim, mainly meant for athletes and body builders. Such trading malpractices cannot be addressed by sports bodies. It is submitted that legislative and judicial law would be the entry points in the regulation of doping materials through irregular trading means. Kenya is a net importer of medicines. Multinational drug companies therefore do their business in Kenya. Kenya does not have manufacturing capacity for almost all prohibited substances and methods in sports. Kenya is therefore potentially exposed to unscrupulous and unethical marketing methods by these companies. Even then, there is need to

---

\(^{365}\) A Donati supra note 37 pp 89-92
control unethical trading practices involving substances and methods prohibited in sports.

4.4 The Internet as a Market Place

The internet is being used to peddle doping materials. Contracts, including payment, are concluded on the internet and the drugs delivered as parcels. In the process, they evade all forms of controls. This way, confiscation at border points is largely evaded. Many of the doping substances are being marketed online. Bogus prescriptions are scanned and used for these e-pharmacies. This mode of e-commerce is also contributing to the proliferation of prohibited substances in sports. A case study of MedXlife.com makes for interesting reading.

MedXlife.com is a prescription site website that was the second largest supplier of customers for steroids to Signature Pharmacy. The directors of MedXlife would speak with customers, issue a prescription which could be used to obtain performance enhancement substances. They passed on to the customers either prescriptions or drugs using prescriptions generated from the company. There was no contact between the “patient” and the “doctor”. MedXlife.com was a website that largely focused on anti-aging but had a section on the front page with the title “performance Enhancement” which included a picture of a muscular man. This website was slick with pictures of a sterile facility and all kinds of seals and assurances that all its activities were

\[\text{\textsuperscript{366} A Donati supra note 37 p.85-88; in IRB v Luke Troy & ARU, the athlete admitted having bought his drugs through the Internet (CAS 2008/A/1664)\textsuperscript{367} http://MedXlife.com (13 August 2008)\]
legal and of top quality. Browsing the site gives one an impression that everything they did was legal and legitimate. Nevertheless, this site was completely fraudulent. The company promoted itself on the website as being a US based company with a full team of certified US doctors, counsellors and support staff. And that they obtained their products from a certified US pharmacy. Upon investigation, it was found to be a fraud, and that after only three years it had a business turnover of USD5 million a year. Two of the owners pleaded guilty to felony third degree diversion of prescription medications and prescriptions. They admitted to getting steroids for customers.368

In *IOC v Fani Chalkia*369, Fani, an athlete of Greek nationality tested positive for Methyltrienolone in an out-of-competition test just before the Beijing Olympics in 2008. It was established that Methyltrienolone is an anabolic steroid that has adverse effects on human health and which is sold through the Internet.

It is not known to what extent this form of transactions is used in Kenya. Nonetheless, the use of computers is increasing by the day. The growing concept of “wireless” connectivity will improve Internet access to thousands of Kenyans. There is a dire need to control the trafficking of prohibited substances through the Internet. The Internet, having an international nature

---


369 IOC Disciplinary Commission of 18 August 2008
will require collaboration amongst countries to regulate. In essence, it is trade on Internet that calls for regulation. The Kenya Communications (Amendment) Act \(^{370}\) provides for e-commerce and with that some form of regulation of e-commerce. However, the Act does not specifically target prohibited substances and methods.

### 4.5 Doping Technology ahead of Testing Technology

A major hurdle in efforts to control doping in sports through testing athletes has been and continues to be that the cheaters are several years ahead of the testers, i.e. drugs useful for enhancing performance in sports are first discovered and come into use and it takes much longer to find ways of testing for the presence of these substances in the body. It has been found that music in humans makes saturation of oxyhemoglobin significantly higher (compared to controls, \(p<0.01\)), and that resulting from music therapy, the level of oxygen saturation returns to the baseline faster (than in controls, \(p<0.01\)). \(^{371}\) This makes it hard to detect the transient oxygen saturation shortly after a competition. Many swimmers listen to music by the pool just before competition. Music therefore would appear to be a method of enhancing the uptake, transport or delivery of oxygen that is impliedly banned by the

\(^{370}\) Of 2008 www.kenvalaw.org (22 march 2009)

\(^{371}\) AR Koudinov (2004). Doping by the Pool? In: Doping Journal 1, 27 August 2004, p.1. Studies on music therapy and oxygen saturation were first published by L.L. Chou, R.H. Wang, S.J. Chen and L. Pai [J. Nurs Res 2003, 11(3):209-216] who investigated the effect of music therapy on oxygen saturation in premature infants receiving endotracheal suctioning. In this study, 30 premature infants were treated to endotracheal suctioning for four hours without music and thereafter exposed to music for four hours during a repeat procedure. Oxygen saturation was recorded 30 minutes following the suctioning in each phase. It was found that premature infants receiving music therapy with endotracheal suctioning had a significantly higher saturation of oxyhemoglobin (\(p<0.01\)) than during the control period, and that the level of oxygen saturation returned to baseline level faster than when they did not receive music.
World Anti-Doping Agency (WADA). However, due to difficulties of detection it has not been officially acknowledged as a doping method.

4.5.1 Human Growth Hormone

Human growth hormone (hGH) was recognized as a potent anabolic steroid around 1983. The first scientific publication on the potency of this hormone first appeared seven years later. Canadian sprinter Ben Johnson, who was disqualified for doping at the 1988 Seoul Olympics admitted to having used hGH. Several authors have demonstrated its widespread abuse by athletes. Detection of hGH is difficult as both exogenous and endogenous growth hormone have similar amino acid sequences and growth hormone is secreted under variable conditions such as stress, exercise, sleep and food intake. The concentration of growth hormone in urine is therefore very variable and, hence, insensitive as a marker of growth hormone administration. Detection of growth hormone appears to be possible using blood tests. Human growth hormone is therefore one of the examples in which the dopers have been ahead of the testers by about 20 years.

---

375 A. Giustina & JD Veldhuis (1998), Pathophysiology of the neuroregulation of growth hormone secretion in experimental animals and the human, *Endocrine Reviews* 19:717-797
The availability of a test for hGH was announced by WADA in April 2008 which test would be used during the 2008 Beijing Games.\(^{377}\) However, experts have warned that this test is only sensitive to uses of hGH within 48 hours.\(^{378}\)

Another twist in this test is the availability of hGH releasers.\(^{379}\) HGH produced by the human body presents in three different structures, also known as ‘isoforms’. Each has a specific weight. Synthetic hGH (used for doping purposes) presents in only one form. A person using synthetic hGH will have a higher proportion of a given isoform than can be normally expected. Such a finding is sufficient to declare a positive test result in a sample. HGH releasers stimulate the body to detect the presence of synthetic hGH but not the use of hGH releasers. It looks like the ‘cat-and-mouse’ game with respect to hGH is going to be on for a while.

### 4.5.2 Gene Doping

Gene therapy involves the delivery of a therapeutic gene to replace an absent or abnormal gene. Genes can be easily transferred into muscles using the adeno-associated virus (AAV) and thereby help to treat muscle dystrophy due to disease, disuse or aging. These methods are in danger of being used by healthy athletes to enhance their performance.\(^{380}\) Gene therapy is offering success in patients with x-linked severe combined immunodeficiency disease, haemophilia B and in heart disease. Gene therapy can be used in sports to


\(^{379}\) DM Rosen supra note 377 p.A-11

speed up healing of injuries to muscles, ligaments, tendons and bones. Genes for erythropoietin (EPO), insulin-like growth factor (IGF-1) or vascular endothelial growth factor (VEGF) may be applied in sports to boost red blood cells, muscle mass or blood supply respectively.\textsuperscript{381}

It has been established that the PPARdelta transgene is capable of increasing slow twitch muscles (responsible for endurance), resistance to weight gain and suppress inflammation. Mice with PPARdelta transgene in muscle were able to run twice the distance of non-transgenic littermates. Drugs that can trigger the PPARdelta “switch” are being developed. This is likely to be one of the avenues of gene doping.\textsuperscript{382}

Another likely avenue for gene doping is through the mitochondria. Energy for work in the body is produced by mitochondria. Mitochondria also produce reactive oxygen species (ROS). ROS mutates with maternally encoded DNA (mtDNA) resulting in new strains of DNA that are responsible for age related diseases. Metabolic and genetic interventions can therefore enhance individual performance. Metabolic interventions are directed at increasing energy output, reducing ROS production, and stabilizing the mitochondrial permeability transition (mtPTP). Genetic interventions include an introduction of engineered mtDNA into the nucleus. These approaches cannot only help improve performance but they are also difficult to detect.\textsuperscript{383} It is proposed that

\textsuperscript{381} Haisma supra note 124
\textsuperscript{382} Evans supra 120
\textsuperscript{383} Wallace supra note 121

140
a combination of detection methods and a clear education programme on associated risks be used as preventive methods.384

One possible way of detecting gene doping is through imaging techniques. It has been shown that gene doping may result in inflammation or other disturbances of receptor cells. Non-invasive imaging can be used to follow long term and stable gene expression resulting from gene transfer. Positron emission tomography (PET) and Single Photon emission computed tomography (SPECT) can detect localized but specific accumulation of radioactive tracers. This method can detect changes in receptor expression during disease processes or measure energy utilization. Magnetic resonance spectroscopy (MRS) can detect metabolites at rest or after recovery from exercise. This method may, however, not be suitable where genetic manipulation is done at embryonic stages.385 Other researchers say mass spectrometer methods are being developed to detect exogenous gene manipulations in muscles.386 Again, this method will not be suitable for embryonic gene manipulations.

Some scholars proffer the view that gene doping is likely to challenge the age old ethical understanding of sport, i.e. the concept of natural talents and the perfection of those talents.387 With regard to appropriate testing, it is thought that genetic testing is likely to infringe the requirement of privacy to

---

384 Haisma supra note 124
385 Zinn et al supra 128
386 Goldspink supra 127
personal genetic information. Other scholars hold the view that success in sports is determined largely by effort and talent. Each individual is interested in enjoying his/her privacy and at the same time in participating in community with others. This double interest means that gene tests are acceptable as part of the rules of fair play. It is said that gene doping should not be generally demonised as gene therapy could be useful in treating injuries in athletes. It is not clear whether genetic testing could be applied in cases of children born to parents who themselves were genetically enhanced. That the possibility of genetic enhancement over generations probably calls for a re-evaluation of methods of rewarding excellence in elite sports so as to promote a moral climate. It is gratifying to note that the World Anti-Doping Agency (WADA) has invested heavily in research on gene and cell doping with a view to getting specific and sensitive tests to use to detect gene doping. Nonetheless WADA admits there are certain challenges to be overcome. Firstly, it is still unclear which of the levels of genomic, transcriptomic, proteomic and metabonomic is likely to yield the desired results. Secondly, the limited level of invasiveness permissible with healthy athletes may limit the technical margin of test research. Gene doping is poised to remain a serious challenge to antidoping efforts. These challenges provide the dopers with a window of

---

opportunity to continue cheating undetected. Unfortunately, this “window” of opportunity could also mean that doping at embryonic stages where the germ cells are affected, and such effects are transmitted through inheritance, proliferates with no methods of detecting it. So far attempts at devising testing methods for “genomic” doping are at the initial stages.

Gene doping is already with us! It has been reported that a German coach Thomas Springstein used Repoxygen on young athletes.\(^{392}\) Repoxygen is meant to be used in gene therapy to treat patients with anemia. It helps to induce a controlled release of erythropoietin (EPO) which in turn stimulates the production of red blood cells, and, in the process, increases the amount of oxygen available to the working muscles. Repoxygen allows the body to switch the gene on when there is low oxygen and to switch it off when the level of oxygen normalises. Repoxygen therefore teaches the human body to produce EPO on its own. There is so far no test for Repoxygen. Repoxygen was first made by British pharmaceutical company Oxford Biomedica but the firm did not produce it on a large scale.

It is therefore accurate to say that many more athletes use drugs and methods of enhancing performance at international sports events without being caught through dope tests. Two case studies will serve to illustrate this dilemma. In Kenya, a total of 14 athletes have been found to have infringed anti-doping rules. Due to technological issues, this figure may not reflect the
true position. The numbers of those using prohibited substances could be much higher.

Whether it is about hGH or gene doping the matter of technology being ahead of testing procedures may be better fought through research, education, public awareness and inculcation of a value system geared towards respect for rules and fairplay in society. In particular, this needs to target young people. Both the WADA Code and the 2005 UNESCO Convention provide for research and education. WADA is currently involved in financing diverse research projects. UNESCO has also established a Fund that can be used for research and education purposes. Member States need to domesticate this Convention and apply the part on research and education with a view to deterring people from thinking of cheating in sports. Kenya has a Science and Technology Act which creates the Council for Science and Technology. This is a good avenue through which research on doping issues can be undertaken. However, certain amendments to the said Act will be necessary to accommodate research on doping issues.

---

393 Part V of the Convention is devoted to Research on anti-doping
394 Calls for proposals for the 2009 funding will close in July 2009 [http://www.wada-ama.org, 13 April 2009]
395 Article 17 of the 2005 UNESCO Convention creates a Voluntary Fund to which States parties and others can contribute. This is meant to be used to assist countries in carrying out anti-doping activities within their territories.
396 Cap 250 of the Laws of Kenya
4.6 Political Interests of Certain Countries

During the era of the cold war i.e. the period up to the collapse of the Berlin Wall in 1990, there was fierce competition between the Western and Eastern Blocs. Such competition played itself in the arena of sports. Countries on both sides of the divide were involved in doping. In the Western world, doping was organized around individuals such as the coach or team doctor. In the Eastern part, doping was a national enterprise. This competition contributed immensely to the proliferation of doping substances in sports. Scientists on both sides tried to dope their athletes without being caught, hence, the "cat-and-mouse" game that eventually developed.

Two cases will help to illustrate the situation: Italy representing the Western Bloc and the former German Democratic Republic (GDR) representing the Eastern Bloc.

4.6.1 Proliferation of doping substances and methods in the Western World- The Case of Italy397

Doping in Italy was propagated by sports federations with the support of the Italian Olympic Committee (CONI). CONI used Prof. Conconi to carry out blood doping on athletes and the use of other anti-doping substances. Coaches were required to cooperate and through them to get the athletes to accept to be doped. Prof. Conconi had perfected the system of blood transfusion first used by a Finnish athlete at the 1972 Olympics in Munich. The red blood cells were stored at minus 90°C, enriched with particular

---

397 S Donati Anti-Doping: The Fraud Behind the Stage at http://www.wada-ama.org (22 October 2008)
substances and then transferred back into the athlete two to three days to
competition. According to statistics, this method translated into an
improvement of 3 to 5 seconds for 1500m races, 15 to 20 seconds for 5000m
races and 30 to 40 seconds for 10,000m races. Blood would be drawn from
athletes during field tests. These doping manoeuvres took place with the full
knowledge of Primo Nebiolo, then President of the International Federation of
Athletics Associations (IAAF), then President of Italian Amateur Athletics
Federation and then a member of the Executive Board of the IOC.398

Dr. Daniele Faraggiana, a former decathlete was instructed by the
Athletics Federation and the Weightlifting Federation to administer anabolic
steroids and testosterone to the national teams. When his documents leaked
out, they showed the drugs that had been administered, the dosage, the
negative effects to health and targets set. Even the IOC accredited laboratory
in Rome was used to determine how long these substances would stay in the
body. The documents also showed that Dr. Faraggiana was paid by the two
associations to perform doping on athletes and to provide some of the
forbidden substances to Prof. Conconi. These documents leaked out in 1986.
In 1992, it emerged that both Prof. Conconi and the IOC laboratory in Rome
were involved in doping activities. In 1994, it became clear that dope tests on
cyclists were rarely positive because they used new substances like peptide
hormones, especially EPO for which there was no reliable testing method at the
time. Prof. Conconi had initiated the idea of using EPO on endurance athletes
and on cyclists. It also emerged at that time that the production of EPO was very limited. It was supplied only to hospitals treating nephrology (kidney disease), and that cyclists obtained it illegally. It was also revealed that the cost of EPO on the black market was US$150 per dose and that other hormones such as hGH and IGF-I were very expensive. This black market for the doping substances was as lucrative as the one for narcotic drugs.399

By 1996 it was evident that doping was not just an Italian problem but an international one. The pharmaceutical companies that produce these substances are multinationals. The Italian parliament became interested in the matter.400

In 1998, several soccer coaches in Italy gave press interviews at which they stated that doping was rampant in soccer. For a long time the IOC laboratory in Rome had reported very few positive tests. A search on the premises in 1998 revealed that the anti-doping tests performed on soccer players did not include tests for anabolic steroids or other hormones. The laboratory was eventually closed down. Criminal investigations were opened against the laboratory, several soccer clubs, pharmacies that provided the drugs, and Prof. Conconi.401

In the period 1998-2000, doping materials moved from the producer to the consumer. More and more people got involved with these drugs. The
market turnover of banned substances in Italy was estimated at US$40 billion, and that the dietary supplements reached US$400 billion.402

The escalation of nandrolone, an anabolic steroid, can be seen by the fact that in 1999 many champions tested positive for it. They include British sprinter Linford Christie, Jamaican sprinter Marlene Ottey, the Barcelona Olympic 5000m champion, Dieter Baumann, French and Russian professional soccer players, weightlifting record holders and various female athletes from Sri Lanka, Columbia, the Dominicas Republic and Morocco.403

This case study illustrates a breakdown in the regulation by administrative bodies. Major actors like sports federations and their doctors were co-conspirators in doping of athletes. It took the intervention of state actors to restore sanity and put anti-doping efforts even by sports federations back on track.

Kenyan sports bodies operate in an environment that is politically closer to the West. Indeed, most of the coaches hired in Kenyan sports come mainly from Western countries.404 In fact, most of the local coaches have been trained in Western countries.405 Directly or indirectly, the Kenyan athlete has been exposed or is potentially exposed to prohibited substances in sport. Yet, unlike Western countries, Kenya has not taken any decisive measures to counter such exposure of athletes to prohibited substances and methods.

402 S Donati supra note 353
403 S Donati ibid
404 Interview with Mr. Joe Kadenge, former international football player for Kenyan former football coach and former team manager with the National soccer team ‘Harambee Stars’
405 Interview with Bob Munroe [chairman of Xcelafrica which owns Mathare United and Mathare Youths Sports Club] who said that Denmark and other Western countries have taken a keen interest in capacity building in sports in Kenya.
4.6.2. Doping in the Eastern Bloc: The Case of the former German Democratic Republic (GDR)\textsuperscript{406}.

GDR broke away from “West” Germany at the end of World War II. By 1960, it was still seeking international recognition. The authorities in the GDR realized they could use sport to gain international legitimacy. Efforts were therefore made to improve athletic performances starting with the systematic selection of athletes to the systematic use of doping substances.\textsuperscript{407} From 1960’s to 1980’s, East German Olympic champions and world record holders in swimming like Kornelia Ender, Petra Schneider, Ute Geweniger, Barbara Krause and Ulrike Richter won almost every time they competed.\textsuperscript{408}

The state owned pharmaceutical company, VEB Jenapharma produced the androgenic-anabolic steroid, Oral-Turinabol, a chlor-substituted version of methandrostenolone. This steroid had been produced for clinical use in 1965 and by 1966 it had found its way into sports.\textsuperscript{409} GDR had an IOC accredited laboratory which was primarily used to enable athletes from GDR to evade detection.

An official of the sports medicine service (SMD) of the GDR reportedly said in 1977 that:

At present, anabolic steroids are applied in all Olympic sporting events, with the exception of sailing and gymnastics... and by all national teams. The application takes place according to approved

\textsuperscript{407} Franke & Berendonk ibid
\textsuperscript{408} M Janofky Olympics, Coaches concede that steroids fueled East Germany’s success in swimming, New York Times, Wednesday, February 13, 2008
\textsuperscript{409} G Doerner, 4-Chlor-1-Methyltestosteron (Oral-Turinabol), ein neues wirksames Anabolikum, \textit{Deutsch Gesundheitswes} (Berlin) 1965; 670-694.
basic plans, in which special situations of individual athletes are also considered. The positive value of anabolic steroids for the development of a top performance is undoubted.

It was feared that positive dope tests would damage the reputation of GDR. A general strategy was therefore devised to dope athletes and to evade detection. A bill enacted in 1974 provided, *inter alia* that the administration of doping substances should:

1. be an integral part of the training process and of preparations for major international competitions
2. be organized tightly and centrally, including regular evaluations of the results obtained and the experiences made by the sports physicians involved;

5. be taught to sports physicians and coaches in special documents and courses; and
6. take place in absolute secrecy and be classified as an Official State Secret.

This way a lot of government efforts were expended not only in doping manoeuvres but also in concealing the same activities. It is extremely clear that doping was a state secret in the GDR. All athletes doped together with the coaches and doctors involved were sworn to keep the state secret.

Dr. Hans-Henning Lathan, formerly chief physician and a member of the GDR Weightlifting Association, in describing how “it was done” at federation level says:

> In DGV\(^{10}\) a first agreement is obtained by the head coach, the special coaches, and the team physician as to which athlete should receive “UM”\(^{11}\). A detailed conception for

\(^{10}\) DGV denotes Deutscher Gewichtheberverband – German Weight Lifting Federation

\(^{11}\) UM denotes unterstuetzendes mittel – the term given to doping substances
drug administration is then worked out by the team physician in a written form and sent, via the classified document office... The sports doctors [Sektionsärzte] will swear the athletes and the coaches to secrecy and this will be recorded in special “secrecy books” for classified information. The sports doctors will then hand out the weekly doses to the specific coach who in turn will give the drugs to the athlete.

This state programme targeted only top athletes. Others who aspired to fame attempted to get the drugs in a clandestine manner. Thus, even under state controlled doping, a black market for doping substances emerged. This was due to the importance attributed to the success of GDR athletes.

4.6.2.1 Testosterone.

These were used in the GDR as anabolic-androgenic steroid preparations up to mid 1970s. Thereafter, they served as “bridging therapy” in which testosterone esters of varying fatty acid chain lengths were used. Up to mid 1980s these esters were undetectable through routine dope testing. Hence, athletes would be weaned off the synthetic steroid just before competition and started on a course of testosterone injections. Even after the introduction of tests for testosterone at the 1984 Olympics, athletes all over the world continued using them. In the GDR, injections of testosterone esters were used in combination with Oral-Turinabol and mestanolone. When the IOC introduced tests for testosterone the GDR changed to androstenedione, dihydrotestosterone, dihydroandrostenedione or dehydroepiandrosterone, and to administer testosterone by nasal spray. Meetings of top experts were held with only one objective: to improve athletic performance pharmaceutically and
without detection by international doping controls. To achieve this, it was agreed that only testosterone propionate would be injected in the last weeks to competition and that the last injection would be given 4 to 5 days before competition day. To prevent detection of testosterone, it was also determined to inject athletes with epitestosterone simultaneous with testosterone in order to maintain an acceptable testosterone: epitestosterone ratios. To facilitate the availability of testosterone, the national pharmaceutical company, VEB Jenapharma was detailed to produce epitestosterone for the government’s doping program only. As this approach proved successful, more and more athletes wanted to use epitestosterone. This led to the development of a black market for epitestosterone. It was later established that the same state firm, VEB Jenapharma was the source for the epitestosterone on the black market.

The GDR government also ensured that one of its officers was always among the testing crew. This way, any suspicious sample for an athlete of the GDR or any other socialist country would be cleared away, and falsely negative results arranged.\textsuperscript{412}

Numerous secret reports and protocols reveal that, save for one athlete, none of the athletes of the GDR pumped with anabolic steroids ever tested positive in any of the numerous international athletic competitions. In short, the government sponsored doping program of the GDR was so effective that doping controls were useless.

To make this program work, doctors involved with athletes violated patients confidentiality, and they were willing to subvert the Hippocratic Oath of doing no harm.413

This knowledge of “masking” banned drugs spread to other countries. For example, at the 1993 World Athletics Championship, a US athlete tested positive for GDR produced steroid mestanolone. In 1996, a Japanese athlete tested positive for methyltestosterone which was a rare occurrence in Japan. It has been reported that Californian doctor Robert Kerr also carried out an elaborate program of doping. He claimed to have prescribed steroids to over 20 medal winners of the 1984 Olympic Games in Los Angeles.414

This case study illustrates a conspiracy between the legislative and administrative forms of regulation to engage in massive doping and cover-ups. Nothing appears to have reached the judiciary at that time. The whole system was geared towards doping rather than anti-doping.

Both the Western and Eastern approaches to doping contributed immensely to proliferation of prohibited substances in sports. More worrying is that the “black market” for the same substances developed parallel to the “illegal” use of these substances. Due to this “black market” it is near impossible to estimate the extent of the problem of drug use in sports. Through the “black market” the doping substances have found ready clients in other users such as law enforcement officers, recreational athletes and other

413 J. Longman, Just Following Orders, Doctors’ Orders, New York Times, April 22, 2001
users, who are not subject to dope testing by sports federations. Through this “black market”, also, the same drugs end up in the hands of athletes. One thing is sure, that the pharmaceutical industry is producing not only for clinical use but also for the ever increasing “black market”. This black market is not located in a specific country, but rather where there are stringent controls. It is likely that these doping substances have found their way into Kenya. And that they may be being consumed clandestinely (such as without a prescription).

Political interests deprived the countries of an opportunity to intervene and regulate doping in sports. Sports federations stand accused for abetting doping instead of regulating the use of drugs in sports. The examples of Italy and former GDR make a case for excluding sports federations from regulating doping. It is also notable that it is the doctors who effected the doping. It is therefore submitted that the same doctors cannot be expected to remain objective in requesting for a therapeutic use exemption (TUE) certificate. The complicity of doctors and other sports officials in doping is suggestive of the fact that there is a case for investing in the area of values and ethics of fairplay in society. More critically, a need is made out for an integrated system of regulation so that the whole burden is not left to sports federations alone, who are, in any case, unwilling to perform a regulatory function. For example, in France, it is a crime for a person to prescribe, offer for sale, administer or apply to a sportsperson prohibited substances without following the laid down

---


154
procedures. Those who infringe this provision are subjected to disciplinary measures in the first instance and penal sanctions could also be proffered against them.

The cold war era is over. Nevertheless, the proliferation of prohibited substances and methods in sport still persist. It would appear as if the end of the cold was witnessed the death of 'state sponsored' doping programmes. Currently, it would appear that through the connivance of sports officials and of sports bodies, the Western model of doping still drives drug abuse in sports.

Globalisation means Kenyan athletes and officials can access prohibited substances and methods. Kenyan athletes and officials are likely to come into contact with these prohibited materials through visits to other countries, exchange programmes, the Internet not to mention that most of them are medicines necessary for given ailments and that they are imported into the country for that purpose. It is likely that many of these substances may already be in the country. All in all, it is proposed that cooperation amongst states using doping law may help reduce the effect of political will on doping in sports in many countries.

4.7 Summary

To date the substances and methods used for doping in sport have not only increased in keeping with technological developments in the pharmaceutical industry but their use has spread to virtually all sporting activities. This has been driven by lack of a strong commitment by state governments to fight doping, drug trafficking, unethical trading procedures by
multinational pharma firms, trade over the Internet, time lag between doping and testing technology, and commercialization in sport. It is submitted that sports bodies alone cannot adequately deal with the major drivers of doping in sport. Indeed, Kenya has not attempted to do so. There is therefore need for an anti-doping law in order to effectively address the identified causative factors to doping in sport.
5.0 Introduction

This chapter examines the existing legal and institutional framework for doping control in Kenya. On the legislative front it is noted that the present legal regime does not address the question of doping in sport. Kenya ratified the 2005 UNESCO Convention on 17 August 2009.\textsuperscript{416} There is no legal framework for regulating doping in Kenya. Regulation by sports bodies appears uncoordinated. It is submitted that Kenya needs an integrated system of regulation involving legislation, judicial and administrative law.

5.1 Sports Policy Framework

This Sports policy \textsuperscript{417} mentions something to do with the use of drugs in sports at paragraph 2.4 in the following words:

\textbf{2.4 Drugs and Substance Abuse in Sports}

Drugs and substance abuse adversely affects sports development for it damages the body organs, muscles, the skeleton and the general health of those involved. Youth and some adults engage in this harmful act due to peer pressure and the false belief of enhancing their performance in sports.

To stem these negative practices, the following measures will be put in place:

\begin{itemize}
\item 2.4.1 The general public will guard against selling of beer, cigarettes, \textit{miraa} and other harmful substances to the youth.
\item 2.4.2 All sports organizations will only seek sponsorship from firms whose products promote good health.
\end{itemize}

\textsuperscript{416} See Appendix I

\textsuperscript{417} Ministry of Heritage and Sports: Department of Sports Kenya National Sports Policy March 2002
2.4.3 Corporate sponsors and mass media will educate the public on the dangers of taking addictive substances, which would derail youth from sports.

The use of performance enhancing drugs is remotely mentioned in this policy document. The proposed measures for controlling the use of drugs in sports do not seem to be spot on. There is no mention of testing athletes for prohibited substances.

Although ‘miraa’ (scientific name: cathine) is specifically mentioned in the sports policy of 2002, a Kenyan boxer tested positive for it at the 2004 Olympic Games in Athens and the sports officials accompanying the athletes said that they did not know that ‘miraa; is a prohibited substance! 418

Although the sports policy does not use the word ‘doping’ the National Olympic Committee-Kenya had signed on the Copenhagen Declaration that helped form the current World Anti-Doping Agency (WADA) as early as 1999.419 There appears to be a disconnect between what is actually going on and the practice in sports associations.

All in all, this policy paper does not address itself sufficiently to the question regulation of doping in sports. Granted with the coming into force of the 2005 International Convention Against Doping in Sport and the ratification of the same by Kenya 420 this sports policy is due for an overhaul to reflect the seriousness with which Kenya should approach regulation of doping in sport.

418 S Aletta supra note 43
419 Personal communication from Ms Valerie Onyango, formerly administrator with the Regional Anti-Doping Agency (RADO) (18 June 2008)
420 See Appendix II
In another paper emanating from the same Ministry in 2004 ²²¹ there is a proposal on that all stake holders must educate athletes on the dangers of performance enhancing substances.

3.1 **Sports science**

Performance in sports is high scientific and technical. To sustain and improve our performance, all stakeholders in sports shall ensure that:

3.1.1 all athletes understand the dangers of performance enhancing drugs

3.1.2 there is credible and effective doping control program

3.1.3 all sports organizations utilize the services of professionally trained technical and medical personnel

3.1.4 ...

3.1.5 compliance with international bodies’ health requirements

3.1.6 the general public guards against selling of alcohol, tobacco and other harmful substances to youth

3.1.7 promotion of good health and hygiene is observed

This paper (though unofficial) appears to be an improvement on the sports policy. It dwells heavily on the health aspects of anti-doping measures. But most critically, it proposes a credible and effective doping control programme. The rationale (health based) provided in this document by far falls below that of international standards.

At paragraph 4.10.6 it is proposed that there shall be a Centre for Sport Science under the Kenya National Sports Institute. One of the functions of this

²²¹ Ministry of Gender, Sports, Culture and Social Services: Sessional Paper on Sports Development (Draft) 2004. This paper has not published as an official document to date.
proposed Centre is to set up a drug testing and anti-doping unit. To the extent that the draft Sessional Paper mentions doping and even proposes an institutional framework it can be said to reflect more progressive thinking. This draft (Sessional Paper) was prepared after the formation of the World Anti-Doping Agency (WADA) and after the first Code of WADA had been published. However, this paper has not been released by the Ministry. In the light of the 2005 International Convention Against Doping in Sport and examples from other jurisdictions this paper is also due for review.


5.2 International Legal Framework

Kenya, through the National Olympic Committee of Kenya, signed onto the WADA Code in 2006. This means that sports federations have accepted international standards of doping regulation within sports. It is to be remembered that the Code is binding on the International Olympic Committee and on all international sports federations affiliated to the IOC. By extension

---

422 http://www.sportunterricht.de/ksport/Declaration_e.html [last visited 4 July 2008]. WADA was born in 1999 at the Conclusion of the Lausanne Conference.
423 The first WADA Code was published in 2003, see www.wada-ama.org (last visited 16 October 2010)
therefore the Code is also binding on all National Governing bodies (NGBs) of the international federations that have bound themselves to the Code, together with the National Olympic Committee of Kenya. The 2005 UNESCO Convention Against Doping has been ratified by Kenya. This is meant to serve as a basis for local legislation on anti-doping. The 2005 UNESCO Convention is the premier international instrument that provides a legal framework for regulation of doping in sport. It is hoped that Kenya will domesticate it.

5.3 National Legislative Framework

Kenya has no anti-doping legislation. Nonetheless, Kenya has several pieces of legislation that touch on the regulation of drug use, research in science and technology and registration of sports federations. This section discusses the existing regulatory framework highlighting areas that need amendments to make it more relevant to the regulation of doping in sport in Kenya. The statutes reviewed include The Constitution, The Pharmacy and Poisons Act, The Medical Practitioners and Dentists Act, The Public Health Act, The Science and Technology Act, The Use of Poisonous Substances Act, The Narcotic Drugs and Psychotropic Substances (Control)
Act, the Children Act, the Penal Code, and the Kenya Communications (Amendment) Act.

5.3.1 The Constitution

Kenya's new constitution can be used as a basis for regulating doping in sport. Kenya has agreed to have as part of its laws any treaty or convention ratified by Kenya. The 2005 International Treaty Against Doping in Sport which incorporates the World Anti-Doping Code are now part of Kenya's law. What remains are the modalities of making the said Treaty operational locally.

5.3.2 The Pharmacy and Poisons Act

The Pharmacy and Poisons Act has as its objective "to make better provision for the control of the profession of pharmacy and the trade in drugs and poisons". The Act largely regulates the training, licensing and registration of pharmacists and it also regulates trade in various types of drugs. It makes no specific reference to doping control. Several amendments can be made to this Act to make it relevant to anti-doping efforts.

Firstly, according to the Act, there is no requirement for pharmacists to train in doping education. This puts both the pharmacist and the athlete at a disadvantage. Many athletes risk being given drugs that could lead to positive dope tests. Pharmacists are not likely to play their rightful role in educating the general consumer in doping matters. It is important that pharmacists
should inquire of patients whether they are athletes or not before dispensing or selling a given drug. In this connection, it is necessary to make doping education a requirement for registration of pharmacists and to prohibit the sale of drugs for doping purposes.

Secondly, the Act divides drugs into part I and part II poisons, whereby part II poisons include all those drugs that are likely to come into common use. Part I Poison refers to those drugs whose sale, distribution, prescription and retail is strictly controlled. A list is prepared by the Pharmacy and Poisons Board on which drugs are classified accordingly. The main effect of such classification is to regulate access and mode of supply.439 There is need for amendments to this Act to bring all drugs with performance enhancing capacity under Part I poisons. It is submitted that including doping materials under Part I poison under this Act is likely to reduce possible abuse of such drugs.

Thirdly, section 34 of the Act provides for labelling of containers. This needs to be amended to make provision for labelling of drugs whose use is prohibited in sports with a warning that their use could lead to a positive dope test. Pharmacists are involved in dispensing and selling drugs some of which are mixed and packaged in the chemist. Schedule III of the Act deals with substances exempt from labelling requirements. This needs to be reworked to ensure that all drugs on the Prohibited List are not exempt from labelling

---

439 Section 25(2) of the Act provides: “The list to be prepared under this section shall be divided into two parts as follows: (a) Part I of the list shall consist of those poisons which, subject to this Act, are not to be sold except by authorized dealers ....

163
requirements. The Pharmacy and Poisons Rules \textsuperscript{440} (under section 44 of the Act) provide for importation of drugs. These rules can be amended to provide for labelling of performance enhancing substances. Rule 16 of the above Rules provides for manufacture of drugs. This also can be amended to provide for labelling. Clear labelling of drugs is likely to reduce incidences of inadvertent use of prohibited substances. The WADA Code requires an athlete who has tested positive to explain how the prohibited substance entered his/her body.\textsuperscript{441} Most of the athletes are not schooled in medicine or pharmacy. Most drugs are packaged with inserts whose detailed explanation on pharmacokinetics may not be understood by the athlete. Besides, the focus in such explanations is not on doping. Sports bodies have been struggling to impress upon athletes to make enquiries about the drugs they are given or the food supplements they purchase.\textsuperscript{442} In some cases, athletes have already said that they did not know how the prohibited substances entered their bodies. To cure this anomaly, nothing would be easier than to require manufacturers and retailers of drugs and food supplements to label their products in relation to the possibility of an athlete testing positive.

Fourthly, section 35 of the Act prohibits the sale of drugs through automatic machines. The Internet has been identified as an avenue for illegal sale of steroids and food supplements contaminated with prohibited

\textsuperscript{440} Legal Notice No. 51/1985
\textsuperscript{441} 2009 WADA Code at http://www.wada-ama.org (9 June 2009)
\textsuperscript{442} FINA v Vasilelois Demetis (FINA Doping Panel 2/02), FINA v Yuliya Pidlisna (FINA Doping Panel 5/03)
\textsuperscript{443} FINA v Marko Strahija (FINA Doping Panel 1/02)
\textsuperscript{444} ITF v M. Charles Irie (Anti-Doping Panel decided 13 Oct. 2008)
substances. This section of the Act can be amended to restrict trade in drugs through the Internet. It is appreciated that trade in drugs should also benefit from the availability of e-commerce.

The question of overproduction of medicines also requires regulation. Whereas it may not be feasible to control the actual quantities produced by manufacturing firms, it is possible to regulate at the point of dispensing. This Act can be amended to require manufacturers and Pharmacists to disclose the usage of the drugs. This can help establish the user patterns with a view to instituting other controls.

5.3.3 The Medical Practitioners and Dentists Act

This Act provides for training and registration of medical practitioners and dentists. It does not mention doping at all. Whether in Italy, America, Germany or any other country, doctors have been instrumental in almost all cases of doping. Doctors have the monopoly of diagnosis upon which a prescription is based. In prescribing, doctors can exercise a wide latitude in the choice of drugs. With proper doping education they can contribute to prevention of doping in sport. Another advantage of such education is that they can act as agents of change by educating those athletes who present themselves before them. In addition, such education is necessary so that doctors recruited to sit on therapeutic use exemption committees

---

445 Donati supra note 37; IOC v Chalkia (IOC Disciplinary Commission of 18 August 2008), MedXlife.com
446 Cap 253 of the Laws of Kenya
447 Donati supra note 37
448 ibid
449 Franke & Berendonk supra note 406
(TUEC) can contribute meaningfully. Not to be forgotten is that doctors are
harbingers of scientific knowledge that can be generally tapped into to help in
the regulation of doping. To this end doctors are a key cog in the wheel of
regulating doping in sports. Empowering them with doping education would
enhance their quality of participation. The Act can be amended to require
doping education for registration and to make it an offence for a medical
practitioner registered under the Act to engage in acts of doping athletes.

5.3.4 The Public Health Act 450

This Act has no provisions on doping. Evidence abounds of the abuse of
prohibited substances by the general 'healthy' public.451 The adverse effects of
prolonged use of such substances could affect the general public. Doping thus
constitutes a public health issue. This Act needs amendments to include some
provisions on doping.

5.3.5 The Science and Technology Act 452

Section three of this Act establishes the National Council for Science and
Technology whose membership includes Permanent Secretaries of Ministries
mentioned under the Act. The list of Ministries under this Act, however,
excludes the Ministry in charge of sports. This Council is tasked with advising
the government on priority areas for research. The 2005 UNESCO Convention
has provisions on research. It is important that Kenya be an active player in

450 Cap 242
451 A Donati noted that huge quantities of prohibited drugs had invaded the 'black market' where the users were not
sick people [see supra note 37]
452 Cap 250 of the Laws of Kenya
research programmes on doping in sport. There is need to amend the Schedule of Ministries to include the one in charge of sports.

5.3.6 The Use of Poisonous Substances Act 453

The Use of Poisonous Substances Act454 is intended to protect persons against the risks of poisoning by certain substances, and for matters incidental thereto and connected therewith.

Under the Act the Minister in charge of Health is empowered to declare certain substances ‘poisonous’. This Act can be amended to include a prohibition on the use of such ‘poisonous’ substances in sport.

5.3.7 The Narcotic Drugs and Psychotropic Substances (Control) Act455

This Act, in its preamble says:

An Act of Parliament to make provision with respect to the control of the possession of, and trafficking in, narcotic drugs and psychotropic substances and cultivation of certain plants; to provide for the forfeiture of property derived from, or used in, illicit traffic in narcotic drugs and psychotropic substances and for connected purposes.

This Act deals with some of the drugs that are prohibited in sports such as cannabis, cathine, heroin and opium. It is generally silent on doping in sports.

Part II of the Act prohibits the possession of, trafficking in, narcotic drugs and psychotropic substances and the cultivation of certain plants. The

---

453 Cap 247 of the Laws of Kenya
454 Cap. 247 of the Laws of Kenya
455 Act No. 4 of 1994
penalties for infringement are laid out under sections three to five and these include fines ranging from Kenya shillings two hundred and fifty thousand to over one million, with jail sentences ranging from five years to life imprisonment. In addition, a medical practitioner, dentist or veterinary surgeon could face deregistration if found in violation of the Act.\textsuperscript{456} To help stamp out illegal trade in doping materials, it is necessary to amend Part II of the Act to include doping substances and methods.

Section five prohibits smoking, inhaling, sniffing or otherwise using any narcotic drug or psychotropic substances. However, at the 2004 Athens Olympics, Kenya Boxer Munyasa tested positive for cathine, which is listed under Schedule Two of the Act as a psychotropic substance. Whereas the IOC expelled him from the Games and he was subsequently suspended from sports for two years, public authorities in Kenya did not take any action against the boxer.\textsuperscript{457} There is need to amend section five of the Act to include a prohibition on the use of narcotic drugs and psychotropic substances in sport.

Section 16 of the Act deals with importation and manufacture of narcotic drugs and psychotropic substances. It is necessary to amend this section to require importers to import, or manufacturers to produce, quantities that are in line with the demand and, further to label the products indicating their effects in sports.

\textsuperscript{456} This is provided for under section 15 of the Act
\textsuperscript{457} Contract this with the Greek government that prosecuted two of their athletes who skipped dope tests and were punished by sports bodies.
Section 59 allows the country to seek help from other countries in prosecuting crimes related to this Act. This section is also relevant to doping offences as such offences can be committed outside of the country. The 2005 UNESCO Convention provides for sharing of information related to doping matters. Amendment of this section to provide for sharing of doping related information could therefore bring Kenya in tune with practices in other jurisdictions.

Section 66 touches on corporate bodies and provides for their deregistration amongst other penalties in case of infringements against the provisions of this Act. This section can be very useful in regulating doping in sport.

In general this Act contains very serious penalties that are meant to be deterrent. It is submitted that amendment of the whole Act to incorporate prohibited substances in sports can be very useful.

5.3.8 The Children Act

Section 16 of this Act provides that:

Every child shall be entitled to protection from the use of hallucinogens, narcotics, alcohol and tobacco products or psychotropic drugs and any other drugs that may be declared harmful by the Minister responsible for health and for being involved in their production or distribution.

The same Act defines a child as a person below the age of eighteen years. This is the most crucial age for sport development. Many Kenyans start earning international accolades at this age. There is need to modify this
section to provide for an express prohibition of the use of substances and methods on the WADA List. There is also need to provide for doping education in this Act. This is the age group whose morals and values need to be properly handled as a way of preventing drug use in sports.

5.3.9 The Penal Code 459

This Code has no provisions on doping. This can be amended to criminalize infringements related to prohibited substances.

5.3.10 The Societies Act 460

All sports federations in Kenya are registered under this Act. However, the Act is not specific to sport as it caters for the registrations of associations, including religious ones. The Act does not make any provisions for the regulation of doping. It is submitted that an Act that provides for the registration of sports bodies ought to have provisions on doping.

5.3.11 The Kenya Communications (Amendment) Act 461

Part VII of the Act seeks to regulate electronic transactions. It is a welcome piece of legislation as it regulations e-commerce. Aspects of e-commerce are necessary in the importation, distribution, and sale of drugs. Through this legislation, benefits associated with e-commerce generally can also be enjoyed by those involved in the manufacture, distribution, importation, wholesale and retail trade of drugs. There is need even under e-commerce to give effect to the provisions of the Pharmacy
and Poisons Act relating to the classification of poisons into Part I and Part II. Section 84(1) specifies transactions that are excluded from the Act.\textsuperscript{462} To better regulate Internet Pharmacies, it is recommended that this section be amended to include prescription of drugs over the Internet on the list of prohibited transactions.

5.4 Judicial Approaches to Sports in Kenya

Kenyan courts have dealt with sports matters. In \textit{R v Kenya Cricket Association \& two others (Ex p Odumbe)} \textsuperscript{463}, Kenyan batsman Odumbe was suspended from Cricket for five years by the International Cricket Council (ICC) following allegations of the player's association with a book maker. After conducting hearings at which the player was invited to defend himself, the Executive Board of ICC issued the sanction mentioned above. Odumbe brought judicial review proceedings seeking orders of \textit{certiorari} to quash the decision of ICC and of prohibition to prevent ICC from suspending him. The court declined to grant the orders saying that ICC and the Kenya Cricket Association were not public entities and therefore their decisions could not be subjected to judicial review. The suspension of the player arose out of his alleged violation of ethical rules of cricket as enshrined in the Cricket Code of Conduct. Such rules are specific to the sport itself. ICC recognises the Court of Arbitration for Sport (CAS). It is submitted that the player ought to have appealed the decision of ICC to CAS instead of seeking judicial review.

\textsuperscript{462} "84 (!) This part shall not apply to any rule or law requiring writing or signatures in any of the following matters: (a) the creation or execution of a will; (b) negotiable instruments; (c) documents of title. The Minister may by order modify the provisions of sub-section (!) by adding or removing any class of transactions or matters."
This is not to say that one cannot approach the courts on matters of sports. In *Isaiah Kiplagat and two others v Eric Keter*, the appellants excluded the respondent from the National team to the 2000 Sydney Olympics although he had met the requirements for qualification as set by the appellants. The respondent approached the High Court complaining of unfairness in the manner in which he had been excluded from the team. He sought orders to quash the decision of the appellants and to have them compelled to include him in the team. These were granted. Hence, this appeal.

It was urged for the appellants that their decision was final and no appeal lies therefrom according to the constitution of the then Kenya Amateur Athletics Association (KAAA) to which the respondent was subject. The relevant section of the KAAA constitution provided:

---

*Civil Application No. NAI 239 of 2000*

KAAA changed its name to Athletics Kenya (AK) and the constitution was also amended.
KAAA constitution clause 21(ii) provides:
All disputes between the KAAA and any athlete shall be submitted to an arbitration panel appointed by the KAAA Executive Committee. The decision of the arbitration panel under this section shall be final and binding on all parties. No right of appeal

In dismissing the appeal, the Court of Appeal stated that the constitution of KAAA was not worth the paper on which it was printed. The learned judges of appeal were astonished that a constitution of a private body could so much stifle the rights of its members.

In Abdalla & Ors (Coast Stars) v Hatimy & Ors (Kenya Football Federation (KFF)) and Kenyan Premier League Limited (KPL), the plaintiffs sought a declaration that the decision of KFF and KPL to exclude Coast Stars from the Premier League was unlawful, null and void; and a mandatory injunction compelling the defendants to comply with the orders of the Independent Disciplinary Appeals Tribunal. Coast Stars had succeeded on an appeal using the appellate body of the first respondent. The second respondent refused to implement the orders of the appeal and instead sought an opinion from FIFA which contradicted the decision of the KFF appellate body. The plaintiffs argued that resort to FIFA was not provided for in the KFF constitution. The first respondent argued that resort to ordinary courts violated the KFF constitution. The court in finding for the plaintiffs stated that courts will always intervene where private bodies do not follow their own constitutions.

---

466 Abdallah & Ors (for Coast Stars) v Mohamed Hatimy & Ors (KFF) and Kenyan Premier League Ltd, Civil Suit No. 65 of 2008
467 FIFA – International Federation of Football Associations, the body that controls football worldwide.
In the case of *Nyamweya*, the plaintiffs sought to restrain the defendants from holding themselves out as officials of the Kenya Football Federation (KFF). The plaintiffs had a certificate from the registrar of societies indicating that they were the *bona fide* officials of KFF. But before they obtained the certificate they had been suspended from KFF and they never contested that suspension using internal mechanisms of dispute resolution as set out in the KFF constitution or even in the FIFA statutes. The defendants were in control of football and were recognised as KFF officials by FIFA. The issue before the court was partly who the *bona fide* officials of KFF were. The court in *Nyamweya* deferred to *Lex sportiva* when it ruled in favour of the defendants saying:

> FIFA, for the time being, recognizes the Defendants and not the Plaintiffs as the *bona fide* officials of KFF. FIFA will not do business at all with the Plaintiffs. FIFA has threatened to ban Kenya from international football if the Defendants are hindered, contrary to the statutes of FIFA, from managing the affairs of KFF. By its own constitution KFF is affiliated to FIFA and is bound by the FIFA statutes. Its members are similarly bound.

The court was saying in other words that the rules and regulations of FIFA take effect. The jurisprudence that emerges from the decisions cited above is that courts will always give sports federations a chance to resolve disputes. Although none of the matters in issue touched on doping, Kenyan courts are likely to decide in a similar manner should a matter of doping come before the courts.

---

68 *Sam Keengu Nyamweya & two others v Mohamed Hatimy and two others*, civil case No. 609 of 2007
There is one decision on doping involving a Kenyan athlete. This is the classic case of *Bernard Lagat v WADA, IAAF and Deutsche Sporthochschule.* Lagat lives in both Kenya and USA. He underwent an out-of-competition test in Tuebingen, Germany, and the samples were analysed at the WADA accredited laboratory in Cologne, the third defendant herein. Sample A turned out positive. This result was announced to the media by a Kenyan official, contrary to rules established by both the first and second defendant. Lagat brought a claim for compensation based, firstly, on restriction of trade practices under German law and, secondly, in tort. On the question of restriction of trade practices, the court observed that German Civil law applies if the effects of such restriction are felt on German soil. This was not the case as both the claimant and the first two defendants were not residents of Germany and the first two defendants carry out their activities globally. In tort, Lagat argued that the defendants were wrong in not handling his test carefully resulting in both a false positive test result and the announcement of the result of the A sample. The court found that the athlete had not been able to allocate responsibility of the breach of confidentiality to the defendants in two ways. Firstly, no experts were called to testify to the chain of custody of the samples and, secondly, the announcement of the A sample result was not done by any of the defendants but by a Kenyan official who was not made party to the proceedings. It is not apparent whether the absence of expert witnesses

---

469 (28 O[Kart] 38/05 determined on 13th September 2005 by the 28th Civil Chamber of Cologne Regional Court. The court ruled that it had no jurisdiction to determine an international dispute since German Civil Law confers jurisdiction if the effects of the acts complained of would be manifested in Germany.

470 He recently acquired US citizenship and represented the US in the 2008 Beijing Olympics.
was due to costs or merely an omission. Whereas Lagat was able to file his suit in far away Germany, not many athletes can afford the costs involved. The fact that the first two defendants carry on their activities globally means that a suit like Lagat’s can be filed in Kenya.

5.5 Regulation of Doping by Sports Federations in Kenya

There is no administrative law for regulating doping in sports in Kenya. This situation is likely to prevail until such a as Kenya domesticates the 2005 UNESCO Convention. This section looks at how sports bodies in Kenya have attempted to regulate doping in sport.

National governing bodies (NGBs) are expected to follow the anti-doping rules of international federations and to have in place mechanisms for resolving disputes on anti-doping matters. Two case studies will serve to illustrate the situation obtaining in ports bodies in Kenya;

The first case study is that of Athletics Kenya. Florence Muthoka, a 400 meter runner qualified to participate in the Olympic Games of 2008 in Beijing. Florence tested positive for an anabolic steroid in July 2008. Due to this positive test, she was excluded from the Kenya team to the Olympics. In September of the same year, Athletics Kenya (AK), the NGB for the International Amateur Athletics Federations (IAAF), set up an ad hoc committee that gave the athlete a hearing. After the hearing, AK suspended her for two

---

471 FIBA Internal Regulations 2008 at H7 makes provisions for anti-doping in Basketball. In CAS 2007/A/1446 WADA v Qatar Football Association & Hamad Rakea Humood Alanazi and in CAS 2007/A/1370 & 1376 “Dodo” CAS stated that the anti-doping rules of FIFA and by extension those of WADA were directly applicable to the Qatari Football Association and the Brazilian Football Association respectively.

472 Florence Muthoka, Personal communication (5 August 2008).
years and communicated the decision to IAAF in line with the rules. She was summoned in writing first to explain how the prohibited substance got into her body and thereafter to defend herself after the committee was satisfied that she had committed an anti-doping violation. This procedure is provided for both by the rules of AK as well as in the WADA Code and the International Standards that go hand in hand with the Code. It is only unfortunate that either the athlete did not consider it necessary to seek legal representation or that she could not afford the legal services. As such there was no serious challenge to the accuracy of the results and the procedure used by the laboratory. To this end, AK can be said to have a structure for regulating doping. Nonetheless, in 2007, Susan Chepkemei, an athlete, tested positive for salbutamol. The drug had been used in treating her for an infection at a hospital. She was banned for two years. This case reveals that AK has no anti-doping programme through which it can educate athletes on their rights. In this particular case, all Susan required to avoid suspension was to seek a therapeutic use exemption (TUE) through the federation.

The second case is about weightlifting. David Obiero, a weightlifter, tested positive in an out-of-competition test done in Nairobi in May 2007. The laboratory faxed the results to the International Weightlifting Federation (IWF) a day after they were ready. The following day the IWF wrote to the athlete through the local NGB asking the athlete to indicate whether he would

---

**Footnotes:**

177 **TUE enables an athlete to avoid sanctions under anti-doping rules when such athlete tests positive for using a prohibited drug for legitimate treatment**

177 **Personal communication from the International Weightlifting Federation (19 Sept 2008)**
want sample B (a confirmatory test) tested and also to indicate whether he
would like to have a hearing or not. This information was not communicated
to the athlete by the NGB. In July 2007, IWF, having received no
communication from the athlete, decided to suspend him for two years. The
athlete learnt of his suspension in the press in August of the same year.
David's case illustrates a national sports federation that does not understand
issues touching on doping. It is little wonder that the said federation, just like
several others have no structures for regulation of doping.

The overall picture that emerges is that sports federations in Kenya do
not have the structures for regulation of doping. This makes enforcement of
anti-doping rules very expensive for Kenyan athletes who may be required to
color travel overseas to adduce evidence and to defend themselves. Even if AK is
able to set up an ad hoc committee to deal with emerging issues, the need for a
structure to deal with doping matters has been demonstrated in part, by the
sad case of Susan Chepkemei. Instead of committees scattered in various
sports associations, there is need for one body that would take doping matters
out of the purview of sports federations. The Kenya Anti-Doping Agency
currently operates as a committee under the National Olympic Committee of
Kenya (NOCK). This limits both its finances and scope of operation to
members of NOCK only. The better view is to constitute KADA as a statutory

475 Normally an athlete would be required to pay for travel, accommodation and other costs for himself and for the
expert witnesses, and legal costs
476 This is the emerging trend globally especially in light of domestication of the 2005 UNESCO Convention. Australia has the Australian Sports Anti-Doping Agency (ASADA), USA has the United States Anti-Doping Agency (USADA) and France has the French Anti-Doping Agency (FAPA).
477 The Kenya Anti-Doping Agency (KADA) was accepted by WADA as the agent responsible for doping matters in Kenya on 26 February 2008. KADA is not a legal body but a committee of NOCK.
Therefore unless a proper anti-doping legislation is put in place, Kenyan athletes in many sports codes may have to continue incurring great expenses to defend themselves or may not be able to benefit from due process owing to the high costs associated with such a process overseas.

5.6 Institutional Framework

There is no institutional framework for the regulation of doping in Kenya. National sports bodies in collaboration with their international mother bodies carry out occasional testing of athletes and discipline those who test positive for prohibited substances. What is desirable is an independent body that would be in charge of doping regulation in Kenya and to which all national and international sports federations can refer. There is an attempt to set up the Kenya Anti-Doping Agency (KADA). However, KADA has not been institutionalized. It needs anchorage in a statute for it to function effectively.

5.7 Summary

The current legislative framework reveals lots of gaps in respect of regulation of doping in sports in Kenya. The 'primary' rules according to HLA Hart appear to be absent. This deficiency can be cured in part through amendments to existing statutes and partly through domestication of the 2005 UNESCO Convention. It is clear that most of the statutes reviewed are older than the 2005 UNESCO Anti-Doping Convention. Besides, they never set out to target doping in sport. The proposed amendments should therefore be seen in the light of an attempt to align them with the 2005 Convention. Most

---

The author is Founding Chairman of KADA which was set up in 2008 as a committee of the National Olympic Committee-Kenya.
critically, there is need for an anti-doping statute that would provide for administrative structures in addition to setting out the law. The Judiciary is already handling some sports related disputes. Through its rule making function, the Judiciary can be expected to make its contribution should any matter related to doping be brought before it. On the administrative front, a case is made for giving KADA teeth through legislative provisions to enable all Kenyan athletes who may test positive to have easy access to justice. In the absence of legislation, the onus of regulating doping in sports rests upon sports federations. This is a scenario of inadequate regulation.

There is no national body responsible for regulating doping in Kenya. There is no national institution charged with the role of regulating drug use in sports. So far, this role has been left to sports federations. Sports bodies are known to form *ad hoc* committees for purposes of adjudicating doping offences in line with the rules of international sports federations. But this function alone is insufficient for effective regulation of doping. In addition, the regulation by sports bodies can only be restricted to their members. The absence of national legislation on doping means that non-members of sports bodies who aid, abet or in any way are connected with doping cannot be brought to book. There is no framework for regulating doping in the general population. This kind of situation undermines the overall efforts in regulation of doping. Besides, it has been demonstrated that the primary goal of sports federations is to develop sports, read, athletes and present the best for competition. An additional anti-doping regulatory role tends to create a conflict
of interest as sports bodies may be required to exclude some of their best athletes from competition on account of doping. There is therefore need to set up a national legal framework for regulating doping supported by a national institution that should take over all matters relating to doping from sports federations. To complete the picture, the adoption of anti-doping rules together with case law from sports bodies will ensure the development of doping law in Kenya.
This chapter looks at efforts towards harmonization of regulation. Efforts by both sports federations and public authorities are considered. It is demonstrated that an attempt at public participation was made during efforts to involve public authorities. The role of scientists in regulation echoes through both sets of efforts. The 2005 UNESCO Convention Against Doping in Sport represents an interface between sports bodies and public authorities. Even then, the Convention does not address commercialization as a causative factor for increased drug use in sport. It is submitted that this Convention needs to be amended to be more effective.

6.1 Regulation by Sports Bodies

6.1.1 1999 Lausanne Declaration on Doping in Sport[^479] -

The birth of WADA

This Declaration was arrived at on 4th February 1999 following extensive consultations involving governments, inter-governmental and non-governmental organisations, the IOC, international sports federations, National Olympic Committees and athletes. This wide consultative process reflects what Ian Scoones[^480] calls "front-end" approach to regulation. This Declaration made some key changes in the approach to doping. Paragraph one provides that coaches and other officials are to be covered by the Olympic Oath. In case

[^479]: [http://www.sportunterricht.de/lksport/Declaration_e.html](http://www.sportunterricht.de/lksport/Declaration_e.html) [last visited 4 July 2008]
[^480]: Scoones says 'front end' approach is more consultative and scientific issues are opened up to the wider public to study, understand and give their input. This is opposed to 'back end' approach in which only specialists are consulted and the wider public left out of a scientific discourse (see supra note 183)
of doping, this means that these officials are now punishable under the anti-doping rules.\textsuperscript{481} Paragraph two states that the Olympic Movement Anti-Doping Code was to form the basis for the fight against doping in sport. In particular, the paragraph provides that:

The Olympic Movement Anti-Doping Code applies to all athletes, coaches, instructors, officials, and to all medical and paramedical staff working with athletes or treating athletes participating in or training for sport competitions organised within the framework of the Olympic Movement.

The court of arbitration for sport breathed life in this paragraph in the matter of \textit{WADA v National Shooting Association of Malaysia (NSAM) & Cheah, Ng, Masitah}.\textsuperscript{482} Cheah, Ng and Masitah are international level shooters – who tested positive for propranolol between 8\textsuperscript{th}-11\textsuperscript{th} March 2007. NSAM suspended them provisionally in line with ISSF rules. On 10\textsuperscript{th} and 17\textsuperscript{th} June 2007, a doping control panel from NSAM, National Sports Council and Medical Committee of Olympic Committee of Malaysia was constituted. Athletes claimed to have been offered chocolates by the coach, which was the source of propranolol. The panel found the athletes did not intentionally ingest propranolol and suspended them for six months. ISSF objected. WADA appealed arguing that the sanction was too lenient, and that the coach deserved to be sanctioned for four years. The appeal succeeded.

\textsuperscript{481} In the earlier dispensation only athletes would be punished for doping offences.
\textsuperscript{482} CAS 2007/A/1395; ISSF: International Federation for Shooting
In 2008, Trevor Graham, a US track and field coach was banned from sports activities for life for supplying drugs to athletes and faces a maximum sentence of five years in jail and a fine of USD 250,000 (KES 18 million) for lying to Federal officials in the BALCO investigation.

The third paragraph deals with the sanctions to be meted out against drug cheats and conditions for modifying the sanctions. It provides in part:

The sanctions which apply to doping violations will be imposed in the framework of controls both during and out of competition.

Noteworthy is that this part only refers to sports bodies. The sanctions are to be decided according to rules of the international sports federations.

Under paragraph four, participants agreed to set up an independent Anti-Doping Agency. This is the Conference that witnessed the birth of the “World Anti-Doping Agency – WADA”. Participants further agreed that the IOC, IFs, NOCs and CAS would maintain their previous competences and responsibilities to doping rules in line with WADA. This means that those sports bodies were given freedom to exhaust their internal dispute resolution mechanisms. It was agreed that all sports federations would recognise CAS as the final authority.

Such recognition is evident in the matter of Nuno Assis Lopez de Almeida. Lopez is a professional footballer playing for Club Sport Lisboa e Benfica within the Portuguese football federation. He tested positive after a

---

483 DM Rosen supra pp.A22-A24

match on 3rd December 2005. The Disciplinary Commission of the Portuguese Professional Football League (LPFP) found him guilty of an anti-doping infraction and suspended him for six months. He appealed to the judicial organ of the Portuguese Football Federation (FPF). The FPF lifted the verdict and sanction for lack of sufficient evidence on 14th July 2006. WADA appealed this decision to the CAS seeking a two year suspension. On 24th July 2007 CAS set aside the decision of FPF and suspended the player for 12 months. The appellant appealed to the Swiss Federal Court (1st Civil Chamber) seeking to have the decision of CAS set aside. He argued that WADA, in line with the WADA Code art. 13.2.2 and 13.2.3 should have appealed the first decision of the LPFP. By not doing so, he argued, WADA had acquiesced in that decision and that therefore WADA had no right to appeal to CAS. WADA argued that in the light of FIFA art. 61 par. 5 a sports federation should be given an opportunity to exhaust its internal remedies before an appeal to CAS can be made. WADA further submitted that art. 13.2.2 and 13.2.3 apply to a National Anti-Doping Organisation, not to a sports federation. The court found for WADA and dismissed the appeal.

---

485 WADA Code art. 13.2.2: Appeals involving National Level Athletes: In cases involving national-level Athletes, as defined by each National Anti-Doping Organisation, who do not have a right to appeal under Article 13.2.1 [International Level Athletes], the decision may be appealed to an independent and impartial body in accordance with rules established by the National Anti-Doping Organization. ....

486 WADA Code 13.2.3 Persons Rntitled to Appeal: In cases under Article 13.2.1, the following parties shall have the right to appeal to CAS:[a] the Athlete or other Person who is the subject of the decision being appealed; [b] the other party to the case in which the decision was rendered; [c] the relevant International Federation; [d] the National Anti-Doping Organization of the person's country of residence or countries of where the Person is a national or license holder; [e] the International Olympic Committee, as applicable ... and [f] WADA

487 FIFA art.61 par 5: FIFA is entitled to appeal to CAS against any internally final and binding doping-related decision passed by the Confederations, members or Leagues under the terms of par 1 and par 2 above [par 2: Recourse may only be made to CAS after all other internal channels have been exhausted]
WADA's recognition of the powers of regulation vested in sports federations can be seen in the matter of WADA v FILA & Mohamed Ibrahim Abdelfattah.488 Abdelfattah, a Wrestler of Egyptian nationality, declined to take an out-of-competition test while at the US Olympic Training Centre in Colorado Springs for rehabilitation following knee surgery on 24th July 2007. FILA sanctioned him with a warning. FILA informed WADA on 17th August 2007 of their decision. On 23rd August 2007, WADA filed an appeal against FILA's decision of 31 July 2007. On 31st July 2007 FILA wrote to the Egyptian Wrestling Federation informing them of the sanction of a warning. On receiving a statement of appeal, FILA re-examined the matter all over again and suspended the wrestler for six months. FILA asked for suspension of the appeal procedure at CAS on 25th September 2007 as they had submitted the matter to their [FILA's] appellate division. On 4th October, WADA objected to the stay of their appeal at CAS. On 23rd October 2007, WADA filed an appeal to FILA Federal Appeal Commission against FILA's decision and asked for a two-year period of ineligibility for the wrestler. In this matter, WADA recognised the need to exhaust internal remedies.

Sports bodies are so keen on their role that they detest interference by state actors. This came out in Giuseppe Gibilisco v CONI,489 in which the applicant, an Italian Pole Vaulter, was suspended by the Olympic Committee of Italy (CONI) for two years for “attempted use” of prohibited substances. CONI relied on information that the athlete was in constant touch with a doctor who

---

488 CAS 2007/A/1365
489 CAS 2008/A/1426

186
had been suspended for prescribing prohibited substances to cyclists, that he kept his visits to such a doctor private, that he discussed prohibited substances with the doctor (according to a tapped conversation) and that he had abbreviations in his diary that were similar to those found in the diaries of cyclists found to have used prohibited substances. However, he had tested negative in previous anti-doping tests. The preliminary panel of CONI suspended him. The athlete appealed to a criminal court which acquitted him. CONI appealed to an appeals tribunal which set aside the decision of the criminal court saying:

Sports law rules are specific and independent from the rules of other areas of law. The sports system shall be governed by those specific rules (not by rules of civil or criminal law) and particularly by the rules of the WADC accepted by CONI. ....

The appeals tribunal therefore upheld the initial sanction of a two-year suspension. It is against this decision that the athlete appealed to CAS. CAS held that the totality of the evidence provided did not point to attempted use of prohibited substances. The athlete's appeal thus succeeded.

Paragraph six of the Declaration sets out collaboration between the IOC and public authorities. In particular, cooperation was sought in areas of education, scientific research, social and health measures to protect athletes in the area of legislation related to doping.

This Declaration can be said to have been held against the background of reluctance on the part of the IOC to give away much authority to public

\footnote{Giuseppe supra note 489 pp 4-5 par 16}
authorities. By this time, it was already well known that doping materials were being consumed more by non-athletes than by athletes\textsuperscript{491} and that a more comprehensive approach involving tough measures by states was necessary.

This conference marked a major turning point in the history of doping in sports in several ways. Firstly, the IOC was compelled to cede the function of regulation of anti-doping activities to WADA, a body created by this conference. Secondly, athlete support personnel were to be punished for their roles in doping activities, and thirdly, governments were to participate in anti-doping activities in cooperation with sports bodies through an independent anti-doping agency – WADA. Most importantly, this meeting represents a global attempt towards harmonisation of anti-doping activities in sports. Its major drawback is that it could not be binding on governments because it was not a treaty. However, it formed the backbone of the treaty that came later in 2005.

The World Anti-Doping Agency created at this Conference was to comprise of 50% sports federations and 50% government representatives.\textsuperscript{492} Its financing was to reflect that composition. Its first major task was to come up with a uniform set of anti-doping rules that would apply globally. These rules were compiled in what is known as the WADA Code (or simply “WADC” or the ‘Code’).

---

Donati Reports that around this time there was already overproduction of anabolic steroids, that most were being consumed by those in the “image” industry – fitness, films and law enforcement officers. That there was overproduction by the pharmaceutical industry and that there was a lot of trafficking in these substances (supra note 37)

\textsuperscript{491} http://www.wada-ama.org (last seen 17 Nov. 2009)

This document is also called the "Code" and the first version was produced in 2003 at the Copenhagen Conference.\(^{493}\) It resulted out of combined efforts of governments and non-governmental organisations, including sports bodies. In its introduction, it is stated that:

The Code is the fundamental and universal document upon which the World Anti-Doping Program in sport is based. The purpose of the Code is to advance the anti-doping elements. It is intended to be specific enough to achieve complete harmonization on issues where uniformity is required, yet general enough in other areas to permit flexibility on how agreed upon anti-doping principles are implemented.

The importance of the Code was restated in *WADA v IIHF & Busch*\(^{494}\) in which a CAS Panel said in relation to the International Ice Hockey Federation (IIHF) that:

Article 20.3 WADC 2003 required from IIHF as an International Federation to adopt and implement anti-doping policies and rules which conform with the WADC; to require as a condition of membership that the policies, rules and programs of National Federations are in compliance with the WADC; to require all athletes and athletes' support personnel within its jurisdiction to recognize and be bound by anti-doping rules in conformance with the WADC: to require athletes who are not regularly members of the IIHF or one of its member National Federations to be available for Sample collection and provide accurate and up-to-date whereabouts information if required by the conditions for eligibility established by the IIHF or, if applicable, the Major Event Organization; to monitor the anti-doping programs of National Federations; to take appropriate action to discourage non-compliance with the WADC; to authorize and facilitate the Internal Observer program at international events; and to withhold some or all funding of this member National Federations that are not in compliance with the WADC.

\(^{494}\) CAS 2008/A/1564
In a commentary to the Code, it is stated that both the IOC and UNESCO recognise the need for a harmonious fight against doping as well as its prevention.

The world anti-doping program includes three main elements – the Code, International standards and models of best practices, and guidelines. Compliance with the Code and international standards is mandatory, but not so for the models of best practices and guidelines.

This Code was first launched in 2003. A revised version came into effect on January 1, 2009. It’s a revision of the 2003 version. One major difference between the 2003 and 2009 versions is that the later recognises the 2005 UNESCO Convention Against Doping in Sport ('the Convention'). The further use of the word Code in this section refers to the 2009 version.

The Code is made up of three main parts. Part one deals with doping control. This part presents anti-doping rules that are to be followed by organisations responsible for adopting, implementing or enforcing anti-doping rules, such as the IOC, international federations and national anti-doping organisations. These anti-doping rules are sports rules which must be accepted by all those involved.

Part two is on education and research. This aims to prevent the intentional and unintentional use of prohibited substances and methods. Anti-doping research is meant to improve the quality of testing services offered as well as to detect new doping substances and methods. The availability of
Ph.D Thesis

research results is made subject to intellectual property rights. This condition is likely to slow down the diffusion of advanced technology or make it more expensive and therefore inaccessible. Part three deals with roles and responsibilities. Signatories are enjoined to enforce the Code within their areas of jurisdiction.

Article 22 deals with involvement of governments. The Copenhagen Declaration is recognised as having "mid-wifed" the Code. Under this article the Code states that governments will comply with the Convention. It is interesting that the operative word here is "will". This is probably informed by the fact that the Code does not have international legal binding force, the Code not being a product of States Parties. In any case, the Code lacks a mechanism of enforcement against States Parties.

Article 22.6 introduces sanctions. It also makes both the Code and the Convention time bound. The operative date here is January 1, 2010 for all states to have complied with Convention.\(^{495}\) Article 23.4 deals with monitoring compliance with the Code and Convention. Compliance with the Code is to be monitored by WADA through a self-reporting mechanism by the Signatories to the Code. Compliance to the Convention is to be monitored by the Conference of Parties. This article opens an avenue for continuous collaboration and cooperation between WADA and UNESCO. At international level the link between sports bodies and governments is firmly established. Article 23.5

\(^{495}\) By October 2010 146 Member States of UNESCO had ratified or shown acceptance of the Convention with Papua New Guinea being the last one to submit its instrument of ratification on 6\(^{th}\) September 2010 (see http://portal.unesco.org/la/convention.asp?KO=31037&language=E (17 October 2010))
provides for additional sanctions that may be imposed upon a Signatory for non-compliance with the Code. However, in such a case, the right of appeal lies to CAS.496

It is to be appreciated that the WADA Code served and continues to serve as the basic law upon which sports federations derive their rules and that much case law is based on this code. This case law in turn serves as a precedent for subsequent cases. In the process jurisdiction on doping has largely been based on this code.

It is therefore appreciated that the anti-doping effort was not unified until WADA came on the scene.497

6.1.3 Issues of Regulation of Doping by Sports Bodies

6.1.3.1 Conflict of Interest

Conflict of interest has previously undermined the ability of sports bodies to regulate doping. National sports federations have traditionally played a role in setting rules, promoting athletes as well as selling sports events to the media. National sports bodies have an interest to appear “successful” when their athletes win many medals. Considering that they are also involved in doping control a conflict of interest is sure to arise.498

This apparent state of conflict has not augured well for doping control. According to information attributed to Dr. Wade Exum, former USOC drug
control Director between 1988-2000, US athletes tested positive for banned substances more than 100 times but only a few were barred from competing.

The USA Track and Field Federation (USATF) and IAAF have been accused of a cover-up in the doping case of Jerome Young. It was not until after the 2000 Olympics that it became clear that Jerome had tested positive and that he should have been banned from participating in those games.

In the case of Ben Johnson, who tested positive for the banned steroid nandrolone at the Seoul Olympics in 1988, he continued to train despite the ban imposed on him then. In 1999, a Canadian arbitration ruled that Johnson had not received due process and would therefore be allowed to compete in Canada. The IAAF, however, upheld the life ban on him.

The US Olympic Committee cleared three athletes (Carl Lewis – a nine-time Olympic Champion, Joe DeLoach and Andre Phillips) to participate in the 1988 Olympics although they had tested positive. They all won Gold medals at the games. Whereas USOC thought it acted properly and within the rules, WADA said USOC acted improperly and the athletes should have been ruled ineligible for the Olympics. It can thus be concluded that an international federation is free to impose a sanction independent of the outcome of the


500 WADA/WADA/IOC Commission issues further report on Young Case, 30 September 2004

501 Witness – Dying to win 4: The Ben Johnson story, 2004

proceedings at a national level. In summary it is safe to say that sports bodies developed their own rules and structures for the regulation of doping.

An issue of conflict of interest also arose in WADA v USADA, Zachary Lund and FIBT. Lund was a member of the US Skeleton team to the World Cup in Calgary in November 2005 organised by the Federation Internationale de Bobsleigh et de Toboganning (FIBT). FIBT is the “supreme authority” in matters relating to International Bobsleigh and Skeleton. After the skeleton race on 10th November 2005, a doping test was conducted. Lund tested positive for Finasteride, an alphareductase inhibitor which is used for treating hairloss, on 19th November 2005. This was included on the Prohibited List since 1st January 2005. Lund did not then have a TUE for Finasteride. On 12th December 2005 FIBT informed USBSF of the positive dope test and asked USBSF to conduct results management. This was undertaken by USADA on behalf of USBSF. On 14th December 2005 Lund’s doctor signed a TUE application on Mr. Lund’s behalf. On the same day, Lund applied to USADA for a TUE. On 21st December 2005, USBSF purported to issue an Abbreviated TUE for the period 31st October 2005 to 31st October 2006. An abbreviated TUE was not even appropriate for Finasteride. On 16th January 2006 USBSF selected Lund to compete in the XX Olympic Winter Games in Turin. On 22nd January 2006 Lund acknowledged he had committed a doping violation and accepted the sanction of a public warning and disqualification of all

503 CAS 96/156 Foschi v FINA, Award of October 6, 1997, p. 38; CAS 2001/A/337 Bray v FINA, Award of March 22, 2002, p. 115
504 WADA v USADA, Zachary Lund and FIBT. CAS Arbitration No. CAS OG 06/01
505 USBSF - United States Bobsleigh and Skeleton Federation
competition results in the World Cup in Calgary. On 23rd January 2006 USADA informed the FIBT, USBSF, WADA and USOC of Mr. Lund’s acceptance of the sanction. WADA asked for the file. On 2nd February 2006 WADA appealed to CAS. The grounds for appeal were that having committed a doping infraction and in the absence of mitigating circumstances, firstly, Lund should never have been selected to join the US Olympic team and was therefore ineligible to represent the US at the Turin Winter Games, and, secondly, that USADA did not follow the rules in meting out the sanction. WADA asked that Lund be disqualified from participation at the Winter Olympic Games in Turin and that he be handed a one year suspension, considering that Lund did not bear significant fault or negligence. The appeal succeeded. This case illustrates an attempt at a “cover-up” by US national institutions (USADA, USBSF & USOC). The rules do not allow an athlete with a positive dope test to continue with competition. However, the purported issuance of an abbreviated TUE whose “effect” was deliberately backdated, together with inclusion in the US team, even before the athlete acknowledged and accepted the rather extremely “mild” sanction from USADA, are events that speak to an attempt to frustrate anti-doping efforts.

A similar situation arose in WADA v NSAM & Cheah & Ors. Cheah, Ng and Masitah were international level athletes who tested positive for propranolol while competing between 8th and 11th March 2007. The B samples were confirmed on 23rd April 2007. The athletes were temporarily suspended

---

506 CAS 2007/A/1395 WADA v National Shooting Association of Malaysia & Cheah & Ng & Masitah
on 24th April 2007 in line with the rules of the international shooting federation. On 10th and 17th June 2007, a doping control panel was constituted which comprised of members from NSAM, the National Sports Council and the Olympic Committee of Malaysia. The athletes claimed that they were offered chocolate by their coach and they did not know that it contained a prohibited substance. The panel considered that they did not intentionally seek to enhance performance and suspended them for six months. The international federation objected, saying the sanction was too low. WADA appealed against that action stating that the athletes should have been suspended for at least one year and also that the coach should also have been sanctioned. The appeal succeeded. Here is also a case of conflict of interest where the national institutions tasked with preparing athletes are also called upon to “punish” the same athletes.

In the matter of Lopez,507 the Portuguese Football Federation appeared too eager to let their player off the hook. Lopez is a professional footballer playing for Club Sport Lisboa e Benfica within the Portuguese football federation. He tested positive after a match on 3rd December 2005. The Disciplinary Commission of the Portuguese Professional Football League (LPFP) found him guilty and suspended him for six months. He appealed to the judicial organ of the Portuguese Football Federation (FPF). The FPF quashed the verdict and sanction of the LPFP for lack of sufficient evidence on 14th July 2006. WADA appealed against the decision of FPF to the CAS seeking a two

year suspension. On 24th July 2007 CAS set aside the decision of FPF and suspended the player for 12 months. The appellant subsequently appealed to the Swiss Federal Court (1st Civil Chamber) seeking to have the decision of CAS set aside. He argued that WADA, in line with the WADA Code 508 art. 13.2.2 and 13.2.3 should have appealed the first decision of the LPFP. By not doing so, WADA acquiesced in the decision and that therefore WADA had no right to appeal to CAS. WADA argued that in the light of FIFA art. 61 a sports federation should be given an opportunity to exhaust its internal remedies before an appeal to CAS can be made. WADA's appeal prevailed.

In the matter of Helena Javornik, 509 an athlete of Slovenia nationality who tested positive for rEPO, the athletics federation of Slovenia absolved her of any wrong doing based on what it considered to be technical errors. The IAAF appealed that decision to CAS arguing that the athlete had committed an anti-doping rule violation and that the athlete should be suspended for two years in line with the WADA Code. This appeal was upheld. This case further illustrates the apparent conflict of interest where a sports body charged with the function of developing sports and presenting the best athletes for

508 WADA Code art. 13.2.2: Appeals involving National-Level Athletes. In cases involving national-level Athletes, as defined by each National Anti-Doping Organization, ...; art. 13.2.3: Persons entitled to Appeal. ...the following parties shall have the right to appeal to CAS: (a) athletes, ... (c) the relevant International Federation and any other Anti-Doping Organization; FIFA art 65(2) – Recourse may only be made to CAS after all other internal channels have been exhausted, art. 65(5)-FIFA is entitled to appeal to CAS against any intentionally final and binding doping-related decision passed by the Confederations, Members or Leagues ....

509 CAS 2008/A/1608 International Association of Athletics Federations v Athletic Federation of Slovenia & Ms Helena Javornik; see also: CAS 2008/A/1632 Gusmao v FINA in which the Medical Director of the Brazilian Swimming Federation (CBDA) chaired the Provisional Panel for Doping Control and absolved the athlete, thereafter, she served as the athletes' expert representative during the analysis of the “B” sample, which also turned out positive. When FINA asked the CBDA to sanction the athlete, CBDA declined arguing that the analysis did not reveal an anti-doping rule violation. At the CAS hearing, the doctor gave expert evidence on behalf of the athlete. CAS observed that there was a serious conflict of interest.
competition is also required to enforce punitive anti-doping rules against the same athletes.

Similarly, Maria Stadnyik, a professional wrestler of Azerbaijan nationality tested positive for furosemide, an anti-diuretic. The international body for wrestling (FILA) just suspended her for one year (on 9 June 2006), then enhanced this sanction to two years (on 4 Sept 2006). On 20th June 2007 the FILA President had this reduced to 15 months. WADA raised the issue with FILA stating that the correct sanction was two years. The athlete and the Azerbaijan wrestling federation appealed against (re-) enhancement of the sanction. This appeal was thrown out by the Federal court in Switzerland.

In like manner, when Spanish hurdler Josephine Onyia tested positive for 4-Methyl-2-hexamine, a tuaminoheptane analogue as well as for clenbuterol in the last quarter of 2008, the Spanish athletics federation (REFA) did not find an anti-doping rule violation in both cases. The IAAF appealed both decisions to CAS arguing that the athlete had violated anti-doping rules and that she should be sanctioned with a two year ban as the rules provide. CAS found for IAAF. These cases serve to strengthen the view that sports federations should cede the doping function to independent bodies and concentrate on their core function of sport development.

A look at how professional leagues in USA have approached the question of doping also illustrates conflict that sports bodies experience. These leagues include Major League Baseball (MLB), National Basketball Association, National

---

310 Maria Stadnyik & Azerbaijan Wrestling Federation (AWF) v WADA & FILA, Urteil vom 17. March 2009 (Bundesgericht)
Football League and the National Hockey League. These leagues are owned by private firms and profit is their driving force. The state is also interested in promoting free enterprise. Hence, these leagues have been left to regulate their own affairs including drug testing. For a long time, Major League Baseball (MLB) denied the existence of a drug problem despite persistent speculation.511 A former Major League Baseball pitcher John Rocker reportedly said that high level Baseball officials as well as players knew he was on steroids and that doctors for both groups advised him and teammates on how to use performance enhancing drugs. According to Rocker about 50% of Baseball players are on steroids.512 From 2004, every baseball player was tested given a very mild penalties for positive tests. To avoid government imposition of the Clean Sports Act,513 MLB and the Players Association agreed to more stringent penalties which are still mild in comparison to those provided for in the WADA Code.

The drug policy of the National Basketball Association (NBA) does not appear to be tailored towards performance enhancing drugs.514 NBA players are not subjected to random tests, players are tested once annually during training in preparation of the season, and the drug policy does not cover drugs such as human growth hormone, erythropoietin (EPO) and designer steroids. The penalties are mild. The National Football League (NFL) has a fairly

---

512 AFP Feb. 12, 2008: Baseball star Rocker says officials knew of doping.
513 The Clean Sports Act provided for stringent drug testing policies similar to those of Olympic sports. Unfortunately, it never became law.
514 Latiner supra note 511
The professional leagues in USA have been reluctant to embrace stringent regulation of doping. They are seen as private business entities and therefore they do not fall under the arm bit of the stringent control of the United States Anti-Doping Agency (USADA). This situation presents an Achilles heel in the fight against doping in sport.

The examples hereinabove which are gleaned from a cross-section of sports federations serve to demonstrate that requiring sports bodies to perform an anti-doping function exposes them to unnecessary conflicts. All in all sports federations cannot be expected to penalise their best athletes. These examples strongly support the proposition that the function of anti-doping in sports is better performed by an independent body in the country which should have responsibility for all anti-doping activities across all sports.

In Kenya, the question of conflict of interest has not come to the fore probably because of poor to non-existent structures for regulating doping. However, the potential for conflict of interest is ever present.

---

515 Latiner supra note 511
516 SM Burns, Deputy Director of the Office of National Drug Control Policy, in his submissions before the Congressional Senate Committee on Foreign Relations on “Hearings on the International Convention Against Doping in Sport” on May 22, 2008 had this to say: “The drafting process afforded the United States with an extremely fair opportunity to shape the contents and format of the instrument... Moreover, in April, 2004, a consultation letter, along with a copy of the draft Convention, was sent... to nearly 100 potentially impacted non-federal stakeholders. Not a single objection to a substantive provision of the Convention was received. The United States was pleased to support the Convention’s unanimous adoption by the UNESCO General Assembly in October, 2005.
6.1.3.2 **Jurisdiction**

Issues of jurisdiction have also arisen. In particular, international federations (IFs) follow up decisions taken by national governing bodies (NGBs) and overrule them where necessary. For instance, Yuliya Pidlisna\textsuperscript{517} tested positive at a swimming competition organised by the *Ligue Europeenne de Natation* (LEN), who also conducted dope tests. LEN conducted doping controls according to FINA\textsuperscript{518} Rules. The above named swimmer tested positive for 3'-hydroxystanozolol. She belonged to the Ukrainian Swimming Federation. LEN suspended the swimmer provisionally and informed the Ukrainian Swimming Federation. The national federation suspended her and informed FINA. A FINA Doping Panel hearing this case stated that:

> Despite the doping offence having been committed at a LEN event the swimmer is under the jurisdiction of FINA.\textsuperscript{519}

In a related case, where a national federation has not followed the rules of the international federation within its jurisdiction, its decision has been overturned. In *Reza Ojagh v FINA*, the Islamic Republic of Iran Amateur Swimming Federation suspended the swimmer for 2 years instead of 4 years as recommended by FINA. This decision was overruled by FINA, which insists that its rules be enforced by its affiliates within an affiliate's jurisdiction.\textsuperscript{520}

\textsuperscript{517} Yuliya Pidlisna v FINA, FINA Doping Panel 5/03
\textsuperscript{518} FINA: International federation for notation and aquatics
\textsuperscript{519} Yuliya Pidlisna v FINA, FINA Doping Panel 5/03; Mette Jacobsen v FINA, FINA Doping Panel 2/04
\textsuperscript{520} Reza Ojagh v FINA, FINA Doping Panel 2/03
CAS confirmed the decision of FINA in the case of Claudia Poll, thereby throwing out her appeal.\footnote{Claudia Poll v FINA, FINA Doping Panel 1/02}

Similarly, in \textit{FIFA, WADA v CBF,STJD & Dodo},\footnote{CAS 2007/a/1370 & 1376} Ricardo Lucas Dodo, a footballer of Brazilian Nationality tested positive for Fenproporex, a stimulant. The Brazilian Football Tribunal (STJD) suspended him temporarily for 30 days. A Disciplinary Commission later suspended him for 120 days. The player appealed to STJD against the decision and he was acquitted. Hence, this appeal by FIFA and WADA. The appellants argued that the FIFA and WADA sanction of two years for a first offence must apply. The player sought to argue that only the rules of Brazilian soccer but not of FIFA and WADA were applicable to him. The player further argued that he had ingested caffeine capsules that must have been contaminated by Fenproporex. The Panel held that the player was subject to FIFA and WADA rules and that he did not offer a satisfactory explanation to warrant reducing his sanction. The appeal succeeded. The Football Association handed out a seven-month ban on Chelsea striker Andrian Mutu for testing positive for cocaine. WADA criticised this decision as being too lenient and not in line with the minimum recommended two-year ban.\footnote{S Ruscoe, "Mutu case alarms anti-doping police", Telegraph. Wed., 17 November 2004} However, an attempt by FIFA to overturn a decision of the Malta Football Association (MFA) in the matter of Nathaniel...
O'Neill based on the fact that the anti-doping rules of MFA were not in line with those of FIFA. 524

In WADA v CONI, FITET & Piacentini,525 Valentino Piacentini, an Italian Tennis player tested positive for marijuana during an in competition dope test. He admitted to having consumed the bhang, but stated that it was in a state of euphoria and two days to the competition. At first instance, the Disciplinary Panel suspended him for one year. WADA appealed. The Appeals Tribunal suspended him for 18 months. WADA was not satisfied with that result. Hence, this appeal to CAS. It was argued for WADA that there were no mitigating circumstances to warrant a reduction in the sentence as the player knowingly and intentionally ingested the prohibited substances. WADA argued for the mandatory two years suspension for a first offence. This appeal was upheld.

To help get out of this seeming confusion, WADA was created in 1999 with the mandate of streamlining doping regulation in sports. By November 2003, 98 sports organisations and 89 countries had signed the Copenhagen Declaration, signalling their acceptance of the WADA Code. In a Declaration of the Conference of Stakeholders hereinafter referred to as the Lausanne Declaration on Doping in Sport, the question of responsibilities of various stakeholders with respect to doping matters does not appear to have been well

524 CAS 2008/A/1575 FIFA v Malta Football Association & Gilbert Martin
525 CAS 2008/A/1516 WADA v CONI, FITET & Piacentini
settled. The Declaration says under paragraph 5: Responsibilities of the IOC, the IFs, the NOCs and the CAS that:\footnote{\Lausanne Declaration on Doping in Sport, adopted by the World Conference on Doping in Sport, 4 February 1999, Lausanne, Switzerland http://www.cannock.ac.uk/sports/sport_zip/Declaration_e.html}

The IOC, the IFs and NOCs will maintain their respective competence and responsibility to apply doping rules in accordance with their own procedures, and in cooperation with the International Anti-Doping Agency. Consequently, decisions handed down in the first instance will be under the exclusive responsibility of the IFs, the NOCs or, during the Olympic Games, the IOC. With regard to last instance appeals, the IOC, the IFs and the NOCs recognise the authority of the Court of Arbitration for Sport (CAS), after their own procedures have been exhausted.

Although the Lausanne Conference gave birth to the World Anti-Doping Agency (WADA), a major problem concerns the relationship of the federations to the Agency and the willingness of the former to transfer authority. Major federations such as FIFA, UCI and IAAF have shown reluctance to let go. For example, FIFA\footnote{\footnote{\textit{\textsuperscript{527}} FIFA eventually signed on the WADA Code in 2007.}} and UCI\footnote{\footnote{\textit{\textsuperscript{528}} UCI sued former WADA President Dick Pound in as Swiss Federal Court for the latter's suggestion that UCI was not serious about anti-doping measures.}} refused the IOC benchmark penalty for steroid use of two years. In like manner, the IAAF has threatened not to recognise CAS.\footnote{\footnote{\textit{\textsuperscript{529}} ibid p 84}}

This apparently muddled up situation of jurisdictional rivalry between the IOC, WADA and international federations (IFs) is directly related to their organisational structure. For example, whereas FIFA and UCI are members of the IOC, i.e. they are allowed to present athletes at the Olympic Games, each federation organises its own “world” games such as the soccer World Cup outside of the arm bit of the IOC. This may explain the “constitutional” power
accorded to them through the Olympic Charter \(^{530}\) to manage doping within themselves and within their affiliates. This means that during the Olympic Games, the IOC is totally in control of all doping processes. However, during the World Cup, say of soccer, FIFA is totally in control. This arrangement is not neat at all considering the conflict of interest already referred to earlier. It is therefore submitted that there is need for international sports federations such as FIFA and their affiliates at national level to surrender the doping control function to an independent body such as WADA and her affiliates. This would reduce the conflict of interest and free the sports federations to focus on their core mandate of sport development.

In Kenya regulation of doping within sports federations is largely done by international sports federations. This is due to the recognised lack of requisite structures in Kenya.\(^{531}\)

6.1.3.3 Therapeutic Use Exemption (TUE)

A therapeutic use exemption (TUE) is a certificate that allows an athlete to use prohibited substances and methods without incurring sanctions. The granting of a TUE is governed by the World Anti-Doping Code (WADC) as well as the International Standard on Therapeutic Use Exemption.\(^{532}\) The WADC on TUE provides as follows:

4.4 Therapeutic Use Exemptions

\(^{530}\) IOC The Olympic Charter Article 26
\(^{531}\) Personal Communication from the Legal Officer of International Weightlifting Federation: David Obiero's positive test results were handled in Budapest.
\(^{532}\) This is a document that outlines the conditions under which a TUE may be granted, the procedures for granting a TUE, who may grant it, and the process of appeals. This is intended to be used internationally.
WADA shall adopt an international Standard for the process of granting therapeutic use exemptions. Each International Federation shall ensure, for International-Level Athletes or any other Athlete who is entered in an International Event, that a process is in place whereby Athletes with documented medical conditions requiring Use of a Prohibited Substance or a Prohibited Method may request a therapeutic use exemption. Each National Anti-Doping Organisation shall ensure, for all Athletes within its jurisdiction that are not International-Level Athletes, that a process is in place whereby Athletes with documented medical conditions requiring Use of Prohibited Substance or Prohibited Method may request a therapeutic use exemption. [.]

Substances and methods used for doping are in large measure, used in normal clinical practice and for a variety of conditions. It is recognised that athletes, just like other people may have illnesses or diseases and therefore be compelled to use substances and methods on the Prohibited List. In order to distinguish such use from doping practices, athletes who require treatment using substances and or methods on the Prohibited List are required to apply for a TUE. A request for a TUE must be accompanied by detailed medical information on the nature of injury/illness, medication required, doses, and duration. Such a request is submitted to the therapeutic use exemption committee (TUEC) of the national federation with copies to the international federation and to WADA. If either the international federation or WADA is not satisfied with the grounds for grant or denial of a TUE they can overturn the

---

533 In CAS 2009/A/1782 Filippo Volandri v ITF, Volandi applied for a TUE for salbutamol to control his asthma in which it was stated that the athlete would require two puffs of 100 mcg by inhalation twice daily, and in addition, he was to take an additional two puffs if necessary. On the night before his tennis match he claimed to have been woken up by a severe attack of asthma. Under the circumstances he alleged that he took more puffs than prescribed. He tested positive and was indicted for a doping infraction.
decision of the national body. In terms of structures, TUECs are supposed to exist at each national federation, international federation and WADA.\textsuperscript{534}

An athlete is required to apply for TUE before commencing use of the prohibited substances or methods. In \textit{ITF v Mark Nielsen},\textsuperscript{535} the defendant tested positive for finasteride on 12\textsuperscript{th} January 2006 at the Australian Open in Melbourne. Finasteride is an anti-diuretic used for treating hair loss. He did not include this medication on the doping form he completed. He said he had been using it since 2003. Although he was familiar with the Prohibited List, he did not know that finasteride was on the Prohibited List since January 2005. He was informed of the positive test on 20\textsuperscript{th} February 2006. He thereafter sought a TUE for the period 23\textsuperscript{rd} March to 31\textsuperscript{st} December 2006. The anti-doping panel found him to have been negligent.

An athlete is required to apply for a TUE 21 days prior to competition.\textsuperscript{536} This requirement is not unproblematic especially in emergency situations. The appellant athlete\textsuperscript{537} performed an intravenous infusion (IV) of saline solution to himself. He claimed to have had an attack of diarrhoea. Attempts to get the team doctor before applying the IV were futile. He had a race the following day. He called his personal doctor who recommended the treatment. He was charged with a doping rule violation. Austrian Ski, had considered in their proceedings that he did not have significant fault and gave him a reduced

\textsuperscript{534} The World Anti-Doping Code: International Standard for Therapeutic Use Exemptions (in force since January 1\textsuperscript{st}, 2005)
\textsuperscript{535} \textit{ITF Independent Anti-Doping Tribunal 2005}
\textsuperscript{536} WADA The World Anti-Doping Program – Therapeutic Use Exemptions Guidelines version 1.0 January 2007
\textsuperscript{537} CAS 2006/A/1102 Johannes Eder v Ski Austria, & CAS 2006/A/1146 Agence Mondiale Antidopage (AMA/WADA) v Johannes Eder & Ski Austria
sentence. The athlete appealed arguing that the intravenous infusion was a legitimate medical treatment. WADA argued that the mere fact that the athlete performed the IV on himself excludes the existence of a legitimate acute medical treatment, and that the athlete was not in an emergency situation otherwise he would have gone to the Games medical facility. The CAS Panel restated the conditions under which a medical treatment can be considered legitimate and noted that:

1. The medical treatment must be necessary to cure an illness or injury of the particular athlete.
2. Under the given circumstances, there is no valid alternative treatment available, which would not fall under the definition of doping.
3. The medical treatment is not capable of enhancing the athlete’s performance.
4. The medical treatment is preceded by a medical diagnosis of the athlete.
5. The medical treatment is diligently applied by qualified medical personnel in an appropriate medical setting.
6. Adequate records of the medical treatment are kept, and are available for inspection.

The Panel found that the athlete treated himself and therefore the alleged treatment did not meet the criteria for a medical treatment.

In horses, the horse rider is required to indicate on the doping control form during registration for competition the drugs the horse has used in the recent past or is still using and provide medical evidence. Horse Orion tested positive for dexamethasone on 5th August 2005. Dexamethasone is an anti-inflammatory corticosteroid. The owner admitted that the horse had been treated for a tendon lesion on 10th June 2005 with dexamethasone. The

---

538 Johannes supra note 537 p 12 par 58
539 FEI 2005/45

208
veterinary doctor had advised that the dose would not show in the test at the time of competition. The owner was faulted for not informing the International Federation for Equestrian (FEI) Veterinary Department for appropriate authorization. Horse Orion was disqualified from competition and the owner suspended for two months.

In the matter of LF Follow Me Vallee, this horse was selected for testing on 26th March 2006 and tested positive for procaine. Procaine is a local anaesthetic. The owner stated that the horse was treated with an antibiotic five days before competition. The veterinarian for the horse said that the horse presented with signs of a cold having competed in rainy weather on 11th March 2006 and prescribed antibiotics for five days from 14th to 18th March 2006. The Head of the FEI Veterinary Department stated that all antibiotics are permissible except procaine-penicillin. The owner was also faulted for not having indicated the treatment the horse had been on upon arrival at the venue of competition for the issuance of the appropriate authorization to compete. The horse LF Follow Me Vallee was disqualified and the owner suspended for one month.

In the case of horse Hermine D’Auzay, the horse was tested on 3rd September 2005 and the test turned out positive for testosterone in a concentration higher than the accepted standard of 55 ng/ml. The owner explained that the high concentration was due to a cell tumour of an ovary of

---

540 FEI International Federation for Equestrian
541 FEI 2006/32
542 FEI 2005/46. It cannot be ruled out that cases such as this where the source of the prohibited substance cannot be definitely determined present a window of opportunity for doping.

209
the horse. A veterinary report dated 18th November 2005 showed that a granulosa cell tumor of the left ovary was diagnosed. On 19th December 2005, laparoscopic surgery was done and the left ovary completely removed. It was not possible to determine whether the high levels of testosterone were due only to the tumor or an exogenous source or a combination of the two. The horse was not disqualified and the owner was not suspended. It is submitted that the inability to distinguish between endogenous and exogenous sources of testosterone presents a serious loophole in the war against doping.

The rationale of allowing ill or sick persons or horses to compete under the cover of a TUE poses an opportunity for abuse. Besides, the TUE is supposed to be processed by national officials who have an interest to present the best athletes for an international competition. The TUE therefore presents an opportunity for a conflict of interest. This came to the fore in the matter of WADA v USADA, Zachary Lund and FIBT. On 21st December 2005, USBSF purported to issue an Abbreviated TUE for the period 31st October 2005 to 31st October 2006. Lund had tested positive in December. The TUE was intended to have a retrospective effect so as to cover up for the positive test. WADA successfully appealed against this decision. In USADA v Reed, the respondent tested positive for carboxy-THC and was notified on 19 April 2007. He then applied for a TUE for the same drug, which TUE was backdated to cover the period over which he tested positive. The panel observed that:
The use of an anti-doping appeals procedure to obtain a retroactive TUE in order to eliminate penalties for past use which also has prospective effect permitting future use would undermine the TUE process & disadvantage those competitors who abide by the rules.

Doctors, scientists and sports administrators have for a long time been party to a doping conspiracy. They should not be handed an open cheque in the form of the power to either process or grant a TUE. It is submitted that if the war on doping is to be won, then the TUE must be done away with.

6.1.3.4 Restriction of sanctions to members

A major limitation lies in the fact that sports bodies can only punish their members, i.e. athletes, coaches, referees, and other officials directly connected with sport. This matter became evident in FINA v Linda van Herk. Linda was 14 years when she took part in a national swimming competition on 30th March 2002. She had been selected to undergo a doping test. While waiting in the doping control room and before the test could begin, her father came and pulled her away, claiming they were late for an appointment. She was sanctioned for “missing” the test with a two year suspension. Noteworthy is that the father, who caused the unfortunate event was not sanctioned at all. He could not be sanctioned.

545 For example, Toni Schumacher explains in his book “Anpfife” how the doctors and officials of the German National Soccer team to the World Cup in 1986 was systematically doped. Doctors Dorit Roesler and Ulrich Suender both of former East Germany were handed heavy fines for systematically doping 17 female swimmers with anabolic steroids without their knowledge. [East German officials fined for doping]. Manfred Ewald, a long-serving sports official together with Medical Director Manfred Hoeppner were charged in court for organizing the state-sponsored doping programme in East Germany, often without the consent of the athletes [Doping scandal reaches court, E. Germany Dopers guilty]

546 FINA Doping Panel 6/02
6.1.3.5 Commercialization in sport

The prize money in sports has continued to increase. Sports that used to be “amateur” and done for the love of the sport is no longer so. It is now a profession in which athletes earn a living. Since only the best can earn well from sport, all efforts are directed at being the “best”. The world of sports appears to have either been overtaken by this aspect of “commercialization” or become an accomplice in it. Efforts at doping control have not specifically targeted this aspect. Instead, they have augmented it by attempting to ensure that only the “clean” athletes benefit from commercialization.

6.1.3.6 Doping Technology

Another area in which efforts by sports bodies at regulation of doping could be effective is in the field of doping technology. Unfortunately, this has been turned into a “cat-and-mouse” game, i.e. manufacturers come up with new drugs, thereafter sports bodies struggle to find appropriate ways of detecting them. To this end, it is instructive that WADA not only encourages but it also commissions research on various aspects of doping.547

6.1.3.7 Lack of Labelling of Doping substances

Many sports federations appear to be issuing blind and blanket warnings to their athletes regarding drugs or supplements of unknown origin. In FIFA, WADA v CBF, STJD & Dodo548 the Panel noted that CBF had issued clear and public warnings to Brazilian footballers and their doctors to be wary of medications and nutritional supplements of unknown origin, and not to trust

547 www.wada-ama.org [2 May 2009]
548 CAS 2007/A/1370 & 1376
the labels put on these products. Such warnings show the helplessness of sports federations in this regard. Instead a strict responsibility is placed upon athletes. Such a burden requires athletes to "investigate to their fullest extent that the medication does not contain prohibited substances" 549

A famous US Baseball player told a Grand Jury investigating the BALCO scandal that he had not knowingly used performance enhancing drugs.550 Cheah, Ng and Masitah, international level athletes of Malaysian nationality tested positive for propranolol. They claimed to have ingested chocolate which they did not know was contaminated with a prohibited substance.551 Charles Irie, 552 a tennis player tested positive for the stimulant nikethamide and said that he did not know how it entered his body. Similarly, tennis player Courtney Nagle 553 said that she did not know that her prescribed medicine contained a prohibited substance. In Depres v CCES,554 Despres, a Canadian Bobsleigh athlete tested positive for nandrolone presumably from food supplements. He sought to argue for a reduced sentence stating that he was not significantly at fault. It was urged for him that he had made enquiries with the shop attendant where he bought the supplements and he had been guaranteed that the supplements he bought were not contaminated. He said he had bought the supplements from a reputable retailer and not on the Internet, and that he took the supplements not to enhance performance but to

549 CAS 2008/A/1488 Pous Tio v ITF
551 CAS 2007/A/1395 WADA v National Shooting Association of Malaysia & Cheah & Ng & Masitah
552 ITF v Charles Irie (Anti-Doping Tribunal, 3 Oct 2008)
553 ITF v Courtney Nagle (Anti-Doping Tribunal, 29 March 2009)
554 CAS 2008/A/1489 and CAS 2008/A/1510 WADA v Despres, CCES & Bobsleigh Canada Skeleton
hasten recovery from surgery, and that he had done online research and had not found anything suggesting that the manufacturers of the supplement he used dealt in prohibited substances. The panel faulted the athlete for using supplements against the advice of sports bodies, for not seeking a guarantee from the manufacturer as recommended by sports bodies, and for ignoring information on the Internet indicating the manufacturers supplied supplements to body builders, and for not checking with his doctor. He lost the appeal. In early April 2008, eleven Greek weight lifters tested positive for banned substances. The coach blamed the results on possible contamination of food/dietary supplements given to the athletes. The athletes said that they did not know that the food supplements contained banned supplements.\textsuperscript{555} Various anti-doping panels, in line with the anti-doping rules, require that athletes must show how the prohibited substance entered their bodies.\textsuperscript{556} In \textit{ITF v Laura Pous Tio},\textsuperscript{557} the athlete was sanctioned:

\begin{quote}
[Because] she did not take any responsibility for checking whether her prescribed medication contained substances that were prohibited under the programme.
\end{quote}

Many patients never check for the ingredients in the prescribed medication. Such a requirement for checking can be compounded by the high levels of illiteracy in a country like Kenya.

\textsuperscript{555} DM Rosen, p.A-13
\textsuperscript{556} CAS 2006/A/1130 \textit{WADA v Stanic & Swiss Olympic Association} (par. 39, 51-55), CAS 2006/A/1032 \textit{Karatancheva v ITF} (par. 117), CAS 2006/A/1330 \textit{International Rugby Board v Keyler} (par. 6.10-6.12), ITF \textit{v Abel} (Anti-Doping Tribunal, 29 April 2008), \textit{ITF v Karol Beck} (ITF Anti-Doping Tribunal),
\textsuperscript{557} ITF Anti-Doping Panel (23 Dec 2008)
Nothing could be easier than to compel the manufacturers through appropriate machinery to label all their products. The state has powers of legislation, policing, seizure and prosecution. This problem underlines the need for an integrated approach to doping control.

6.1.3.8 Overproduction of Prohibited Substances

Efforts by sports bodies are grossly inadequate to address issues such as overproduction of drugs by manufacturers, control of trafficking of doping substances, use of doping substances by non-members of sports federations, use of doping substances by law enforcement officers, purchase of doping substances over the Internet, and the media blitz that goes with celebrity status. Inadequate as regulation by sports bodies may appear, Kenya has not set up structures for regulation by sports federations. Sports bodies in Kenya rely on the rules and structures set up by international federations. Cases involving Kenyan athletes have so far been largely adjudicated upon outside of the country.558

It is clear that sports bodies alone are unable to control the proliferation of doping substances in sports. This seeming inability of sports bodies to control doping has angered many people. The inadequacy of regulation by sports bodies has been expressed by some critics thus:

558 Bernard Lagat v WADA, IAAF and Deutsche Sporthochschule, 28 O (Kart) 38/05, 28th Civil Chamber of Cologne Regional Court. Here the court opined that Lagat should have filed his suit either in Kenya or USA where the effects of the harm he suffered were likely to felt. In the matter of WADA v FILA & Mohamed Ibahim Abdelfatah [CAS 2007/A/1365] in which the respondent wrestler missed an anti-doping control test, FILA requested and was granted a stay of the CAS proceedings pending exhaustion of “internal remedies” under FILA. This means that if sports federations in Kenya had structures for doping control, this would be much easier and convenient for the athletes.
They say they are testing, but they are running some random tests that are not nearly enough to make a difference. They need to research and develop good tests that are targeted at the substances that the athletes today are misusing. You have to invest in research and development. You have got to have effective and fair drug testing. Effective in that you catch them, and fair, in that the system assures that you are not catching innocent people.\textsuperscript{559}

Many see such inability in the absence of cooperation between sports bodies and other actors. Sandra Donati sums up the feelings of many when he says:\textsuperscript{560}

\[\text{The IOC has gradually become an organisation that is part corrupt and part inadequate, occupying the demanding but bulky role of the World's foremost sporting institution, but in this capacity it has been unable to dialogue with the World's leading non-sporting institutions - Governments, the World Health Organisation, international pharmaceutical companies or international scientific organisations - to seek joint solutions to problems.}\]

Clearly, many people seem to see a solution to doping in cooperation between various players both governmental and non-governmental.

Sports bodies have numerous structural weaknesses that do not auger well for their "policing" role in the anti-doping fight. It is therefore clear that regulation by sports bodies alone is necessary but not sufficient to control doping in sports. However, it can be appreciated that sports bodies have developed useful parameters (international standards) for dope testing which can be extended beyond the sports arena. Besides, they have also developed

\textsuperscript{559} \url{http://more.abcnews.go.com/sections/sports/DailyNews/oly_doping000927.html}: Doping Dilemma: Why should top athletes risk using banned substances?
\textsuperscript{560} S Donati supra note 353 pp 18-19
specialized adjudication structures that are ideal for sporting purposes. Sports bodies have also developed useful case law on doping, which can be considered part of doping law. There is need to set sports bodies free from the role of doping regulation through the creation of an independent structure to take care of doping matters. Kenya needs to put such administrative structures in place.

6.2 Efforts by Public Bodies

6.2.0 Introduction

For many years, governments the world over turned a deaf ear to calls to effectively ban doping in sport. There was no political will to stamp out this vice. The cold war era made things worse as sport was used as an avenue for national superiority and pride. The state sponsored systematic doping in the former East Germany and the Soviet Union as well as the private manoeuvres by sports federations in the West to dope athletes weakened commitment of states to anti-doping measures. To compound this problem the International Olympic Committee together with her affiliates abhor government interference in sport. This may have also partly contributed to the disinterest of national governments in doping matters.

It should be noted that the State is endowed with powers otherwise not possessed by sports federations. These include powers of investigation, search,

---

7 B Houlihan, “Anti-doping political measures: the new approaches after the Lausanne meeting on doping”, IEC Scientific Conference; 1999: this was also the era of the cold war. No doubt the countries of the then Eastern block successfully used sport (doping) as an extension of the war of supremacy.
seizure, and arrest. The state has powers to control what is produced within its boundaries - through licensing, and to control what enters or leaves a country. All these powers put the state in a position where it can contribute to the control of the proliferation of doping substances. In particular, the state is better placed to control trafficking in prohibited substances, their manufacture, importation, distribution, sale, and mode of access. The state, unlike sports bodies, has the wherewithal to avail state-of-the-art testing technology. Most importantly, the state has the capacity to net everyone involved in doping, including legal persons.

However, a few factors have hitherto hindered state involvement in doping control. Firstly, many states saw sport as a political tool necessary for the propagation of patriotism and international recognition. To achieve this, some states put in place an elaborate doping programme in which athletes had no choice but to use doping substances. Other states engaged in covering up cases of doping. Other states looked the other way as sports federations went about doping their athletes. There was no political will to stamp out

---

562 During the 2004 Olympic Games in Greece, two athletes skipped doping tests. While the IAAF charged the two (Costas Kenteris and Katerina Thanou) for missing the mandatory tests in the Olympic Village, Greek Prosecutors charged the two sprinters with repeatedly obstructing doping officials by failing to attend requested drug tests under Greek law.

563 Reports abound of several athletes who tested positive in the US but the authorities tried to cover up. In particular the US was criticized for manner in which they handled the matter of Marion Jones - who tested positive, was not eligible for the Sydney Olympics in 2000, yet was included in the UD Team.

564 The Government of the then West Germany never took action against sports officials who administered dope substances to athletes even where this came to light. Toni Schumacher (1997) clearly outlines in his book “Anpfiff - Enthuellungen ueber den deutschen Fussball” how the German National Football Team was systematically doped during its participation at the 1986 World Cup.
his vice. The cold war era made things worse as sport was used as an avenue for superiority.\textsuperscript{566}

The second factor that made many states appear “toothless” in the control of doping substances is the strong opposition by sports bodies, including the International Olympic Committee (IOC), to government interference. Sports bodies want to be left alone to manage their affairs. Sports bodies have threatened and continue to threaten to ban “countries” from international sports participation, whose governments attempt to have a say in the management of national sports bodies.\textsuperscript{567} With respect to doping control, sports bodies adopted rules that avoided any mention of governments and which focused only on their members. To this end, many governments felt “locked” out of the doping debate. Governments never made an effort to have legislation on doping save for isolated cases such as Belgium\textsuperscript{568} and Denmark.\textsuperscript{569} This situation changed drastically with the conclusion of the 2005 UNESCO Treaty Against Doping in Sport.\textsuperscript{570}

\textsuperscript{566} B Houlihan, “Anti-doping political measures: the new approaches after the Lausanne meeting on doping”, IEC Scientific Conference; 1999: this was also the era of the cold war. No doubt the countries of the then Eastern block successfully used sport (doping) as an extension of the war of supremacy.

\textsuperscript{567} In May 2008, the International Olympic Committee (IOC) threatened to ban Iraq and therefore bar Iraq from presenting athletes at the 2008 Beijing Olympic Games because of government interference in the management of the Iraq Olympic Committee; In the same month FIFA confirmed the continued ban of Albania from international football activities because the Minister in charge of sports continued to interfere with the National football officials [http://www.fifa.com/aboutfifa/federation/releases/newid=685487.html]


\textsuperscript{569} Anti-Doping Danmark – Analysis and Statistics, 2000; Anti-Doping Danmark – Danish Law and Regulations, 2002

\textsuperscript{570} It is mandatory for states to ratify this treaty as failure so to do by November 2008 could lead to exclusion of athletes from such a country from participation in IOC organized and other international competitions.
The third but related factor was lack of an appropriate “entry point” by state authorities. Prior to 2005, it was not clear how efforts of a state could fit into those of sports federations. As a result, very few countries attempted to put in place anti-doping legislation. Even then, such legislation that tended to put the state on top of the anti-doping agenda was viewed suspiciously by sports federations. This conflict manifested itself in the arena of adjudication. In the case of the swimmer Katerina Bliamou who tested positive for norandrosterone the FINA Doping panel, relying on case law, said that the judgement made by a national civil court may be binding on the national swimming federation in the domestic jurisdiction, but certainly not on FINA, especially, where FINA was not a party to the proceedings.571

Considering the sum total of the above factors, it is not surprising therefore, that many states the world over turned a deaf ear to calls to effectively regulate doping in sport. Nonetheless, there were efforts aimed at bringing public authorities on board.572 These efforts culminated in the 2005

---

571 Bray v FINA, FINA Doping Panel 01/01 at p.115; “... a judgement by a national civil court may be and probably is binding on the national swimming federation in the domestic jurisdiction... However, in no case, the national judgement can be binding on FINA ... especially in a case FINA not having been part of the national proceedings”; See also: Katerina Bliamou v FINA, FINA Doping Panel 3/02; Vaseleios Demetis v FINA, FINA Doping Panel 2/02


6.2.1 2003 General Conference of UNESCO, 32nd Session, Paris

This meeting was attended by 103 member States and 20 intergovernmental and non-governmental organizations. The meeting noted that doping was the greatest threat facing sport. It was also noted that the International Olympic Charter Against Doping although ratified by 40 States at that time, was adopted by a non-governmental body and that its provisions applied only to Olympic sport. That WADA had adopted the World Anti-Doping Code. But given WADA's composition (half inter-government and half voluntary athletic organisations the WADA Code could not be legally binding under public international law. The meeting therefore insisted on the need for an international legal instrument.

This meeting also noted that national legislation had not had a good effect on the war against doping in sport because courts were reluctant to penalise with prison sentences and yet fines were not deemed to be deterrent enough. It was stated that States can play a role in prevention, education, training, information and harmonization of regulations and disciplinary sanctions.

---

http://unesco.org (21 June 2008)
The meeting noted that anti-doping efforts that far had only taken the form of controls and crackdowns. Very few countries as at that time had provisions to educate and inform athletes about doping in sport. Even so, the information was only confined to sports organisations and the medical profession. The approach taken that far (controls and crackdowns) had proved ineffective and that there was need for education and information as ways of preventing the further spread of the problem. The meeting therefore resolved that the question of doping control should be regulated by means of an international convention.

6.2.2 2005 International Convention Against Doping in Sport

The drafting of this Convention started in January 2004. This was concluded in Paris under the auspices of UNESCO General Assembly in October 2005. UNESCO protocol requires that the instrument come into effect upon receiving ratification from 30 Member States. This number was achieved in December 2006 and it came into effect on 1st February 2007. As at May 2008, 83 nations had become parties to the Convention.

The purpose of the Convention is stated as:

Article 1 Purpose
The purpose of this Convention, within the framework of the strategy and programme of activities of UNESCO in the area of Physical Education and Sport, is to promote the prevention of and the fight against doping in sport, with a view to its elimination.

The Convention thus sets out to harmonize the international anti-doping legal framework. The language of the Convention is such that regulation of sport shall be within the province of national law and policy. The Convention aims to secure international commitments and collaboration in areas of anti-doping such as research, education, and testing. The WADA Code was included as an appendix to the Convention. The Convention provides for what can be considered minimum standards for nations to control doping within their borders.

It would appear from the purpose of the Convention that there is no intention to look for "doping practices" outside of sport. The revelations contained in the Donati Report, however, would require States Parties to combat doping practices not only in sport but also beyond.

At this point in time it can be noted that the Convention does not make a distinction between amateur and professional sport. On the surface, it is ALL sport. However, the understanding is that the Convention only deals with sport of an international nature, which excludes mainly the professional

---

576 A Donati supra note 37
577 SM Burns Deputy Director of the Office of National Drug Control Policy, in his submissions before the Congressional Senate Committee on Foreign Relations on "Hearings on the International Convention Against Doping in Sport" on May 22, 2008 had this to say: "For purposes of doping control, "athlete" is defined as a person who participates in sport at the international or national level as defined by the relevant national anti-doping organization. Therefore, only athletes under USADA's testing program would be impacted by the Convention's doping control provisions. USADA has no authority to include athletes competing in non-Olympic professional sports without the consent and authorization of the professional player."
leagues of USA such as the National Football League (NFL), Major League Soccer (MLS), National Basketball Association (NBA) and National Hockey League (NHL). Such exceptions are loopholes that can be used to defeat the fight against doping in sport.

It has been observed that prior to 2000, anti-doping rules and regulations, wherever they existed, varied a great deal, and, sometimes, contradicted each other. They were also inconsistently applied and enforced. WADA was created to cure this mischief. Through the WADA Code, it is possible to harmonize anti-doping rules and regulations within the Olympic sport organizations and among governments. The Code addresses previous problems in areas such as testing, adjudications, sanctions, anti-doping prevention and education. This Code was developed through collaboration between governments and non-governmental institutions as well as the Olympic movement. More than 570 sport organisations have signed the Code. Governments cannot sign the Code because it is a non-governmental private legal instrument.578

Unlike other UN Conventions that do not usually have an enforcement mechanism, and, pursuant to the terms of the WADA Code, only representatives of sport organisations that are Code compliant and whose national governments would have ratified the Convention by 2009 may serve or continue to serve in the WADA leadership positions. Also, in order to host the

578 SM Burns, see supra 577
Olympic Games, a nation must have ratified the Convention \(^{579}\) and the country's National Olympic Committee and National Anti-Doping Agency must be Code compliant.\(^{580}\)

Article four of the Convention introduces the [WADA] Code as the basis of all anti-doping measures by States Parties. The article provides:

**Article 4 Relationship of the Convention to the Code**

1. In order to coordinate the implementation, at the national and international levels, of the fight against doping in sport, States Parties commit themselves to the principles of the Code as the basis for the measures provided for in Article 5 of this Convention. Nothing in this Convention prevents States Parties from adopting additional measures complementary to the Code

[...]

This article not only introduces the Code but also the four international standards developed and to be amended from time to time by WADA. In case of an amendment to any of the documents expressly referred to in this Convention, such amendments shall be communicated to the Director-General of UNESCO who shall in turn, inform all States Parties of the amendments. Although States Parties have 30 days within which to indicate their acceptance or rejection of the amendments, it is a very unlikely scenario that a States Party will reject changes made by a body in which governments are

\(^{579}\) At the time of writing, Kenya had not yet ratified the Convention

\(^{580}\) The Kenya Anti-Doping Agency (KADA) was founded in February 2008 and it became Code compliant on 25 June 2008 and the National Olympic Committee of Kenya became Code compliant on 14 July 2008. However, these 'institutions are not anchored in law. Currently, KADA operates as a committee of the National Olympic Committee-Kenya (NOC-K). This structural set up does not allow Government to play a meaningful role in regulation of doping in sports in Kenya as NOC-K is a private organization registered under the Societies Act. There is need for legislation to anchor KADA in substantive law, expand its mandate and allow for Government participation.
represented. This article (art. 4) is the major link between private (sports) and public bodies.

Article five of the Convention suggests ways of achieving the goals of the Convention as follows:

Article 5 Measures to achieve the objectives of the Convention
In abiding by the obligations contained in this Convention, each State Party undertakes to adopt appropriate measures. Such measures may include legislation, regulation, policies or administrative practices.

This is a very broad provision. Countries that have domesticated this Convention have used varying approaches such as a stand alone legislation (France), amendments to existing legislations (Germany) and creation of an anti-doping institutions coupled with legislation that targets the most abused prohibited substances such as steroids (USA). Germany has gone a step further to require manufacturers of drugs to clearly label whether the product has capacity to enhance performance in sports.

Part II of the Convention addresses the measures expected at national level. Article seven implores States Parties to implement the present Convention through domestic coordination by relying on anti-doping organizations as well as on sports authorities. Here a clear cooperation between State and sports bodies is envisaged.

---

581 Protection of Health of Athletes and the Fight against Doping, French Legislation in force 1st October 2006
Article eight of the Convention deals with proliferation of prohibited substances. It provides:

Article 8  Restricting the availability and use in sport of prohibited substances and methods
1. States Parties shall, where appropriate, adopt measures to restrict the availability of prohibited substances and methods in order to restrict their use in sport by athletes, unless the use is based upon therapeutic use exemption. These include measures against trafficking to athletes and, to this end, measures to control production, movement, importation, distribution and sale.

The significance of article eight is that it provides for measures to control production of and trafficking in prohibited substances. This way it seeks to tackle some of the issues that sports bodies have no means of tackling.

Article nine recognises the need to reign in support personnel who aid doping practices. It provides that:

Article 9  Measures against athlete support personnel
States Parties shall themselves take measures or encourage sports organisations and anti-doping organizations to adopt measures, including sanctions or penalties, aimed at athlete support personnel who commit an anti-doping rule violation or other offence connected with doping in sport.

Although athlete support personnel have previously escaped sanctions are now likely to be napped once this provisions is implemented at National level. USADA is reported to have imposed a lifetime ban against former Track and Field coach Trevor Graham following his conviction for lying to Federal authorities about his involvement in the Bay Area Laboratory Cooperative (BALCO) scandal of June 2003. The coach opted not to have arbitration
proceedings, hence, the sanction by USADA as announced on July 15, 2008, took effect. The coach is banned from coaching or participating in any capacity in any competition or sporting activity organised by the United States Olympic Committee (USOC), USA Track and Field (USATF), the International Association of Athletics Federations (IAAF) and or any other signatory to the World Anti-Doping Code or any signatory’s member organisation. In other words, that coach is banned worldwide in so far as sports organized under the IOC is concerned. Commenting on the lifetime ban, USADA’s CEO said:

While drug use by athletes is a serious wrong to be addressed with stiff penalties, involvement in doping by a coach is even more reprehensible and must be dealt with through the most severe of all sanctions. It is truly disgraceful when a coach uses his position to assist athletes under his care in doping.

There is no doubt that the action taken by USADA is in line with the provisions of article nine of the Convention. A similar action was taken by Spanish authorities in what is known as Operation Puerto Doping Case. In this case, Dr. Eufemiano Fuentes was accused of administering prohibited doping products to 200 professional athletes to improve their performance. His clients included tennis, football and cycling athletes. The investigation into the activities of Dr. Fuentes were triggered by an interview given by one of the athletes who alleged massive doping practices in his team whose doctor was Dr. Fuentes. Spanish police arrested the doctor together with several accomplices in May 2006. Several blood bags, name tags and other materials

supra

USADA NEWS RELEASE, USADA imposes lifetime ban against former Track and Field Coach, Trevor Graham, at www.usantidoping.org [last visited July 16, 2008]
for doping were found in his clinic. An analysis revealed that the doctor carried out both blood doping as well erythropoietin (EPO). The records implicated over 200 athletes, including FC Barcelona and Real Madrid football clubs although no specific names of players were found. The doctor repeatedly denied having carried out illegal activities. The whole case was, however, dropped on March 3, 2007 for lack of enabling legislation. Such support personnel have been the contact persons between athletes and prohibited substances in many instances.586

Part IV of the Convention addresses the need for education of athletes to provide information on the harm of doping to the sport and health of athletes, doping control measures, rights of athletes, nutritional supplements, prohibited substances, and consequences of committing an anti-doping rule violation. Part IV therefore captures partly what is contained in article 7.4 of the 1978 International Charter of Physical Education and Sport.587 The original [2003] Code made education optional and this role was vested in an Anti-Doping Organisation. The revised [2009] Code provides for education at article 18 as follows:

Article 18 Education

... All signatories shall within their means and scope of responsibility and in cooperation with each other, plan, implement, evaluate and monitor information and education programs for doping-free sport.

586 Toni Schumacher (1987), Anpfiff: says it is the team doctors who gave them drugs. The revelations from former East Germany attest to the participation of doctors and sports officials in doping.
587 www.unesco.org [seen 12 may 2008]
Education is no longer optional but a requirement. It is foreseen that education shall target educators, parents, peers, doctors, sports administrators, lawyers/agents, spouses coaches/trainers. However, such education should be extended to cover pharmaceutical veterinary products, counterfeit and underground manufacturers, traffickers and organized crime.

It is submitted that the Convention as read together with the Code make education on doping mandatory. However, the preoccupation of these two documents with sport only would appear to limit the extent of education to sports circles only. The better approach would have been to open up doping education to the general public under what is now popularly known as ‘public participation’. This way, the sought after prevention through education would work in two ways: firstly, the individual athletes and their officials would be sufficiently informed to keep off prohibited substances and methods; and secondly, the sensitization of the general public on doping would ‘convert’ the public into watchdogs, which in effect would have a deterrent effect on both athletes and officials. This second reason makes it the more compelling to pursue the question of public participation.

To the extent that part IV of the Convention provides for education to athletes only, it is inadequate. The whole of society needs education on doping so that the public may support regulatory measures put in place and that individuals may make informed decisions. It is common knowledge that doping materials are being consumed in larger quantities by those outside of sports.
circles than those within sports. To this end, the drafters of the 1978 International Charter of Physical Education and Sport at article 7.2 had the foresight to advocate for inclusion of a broader segment of society under the rubric of education.

Part Five deals with research. States Parties are enjoined to carry out research on anti-doping procedures using the highest ethical standards and without exposing athletes to the prohibited substances. This article is actually meant to enable the technology of detecting doping practises be at par with that of doping. One of the biggest challenges in doping control has been that the dopers have always been ahead of the technology. States Parties are also required to share results of such research studies.

All in all, the Convention represents a vital step in the direction of an integrated approach towards regulation of prohibited substances and methods in sports. In commending States Parties for their quick action in accepting the Convention, Richard Pound, the former President of WADA stated:

Governments’ authority, when applied to the fight against doping, greatly advances efforts. For example, governments can take action against the illegal manufacture and supply of doping substances, facilitate doping controls, support education, fund research, and take other equally important measures.

The above sentiments are supported by the action taken in USA in the wake of the BALCO scandal. On indictment, BALCO’s licence (to manufacture food supplements which were contaminated with steroids specifically designed

---

588 A Donati supra note 37
589 Richard Pound in his opening address at the World Conference on Doping in Sport, Spain, 15-17 Nov. 2007
to evade detection) was cancelled for over a year, the chief managers were sent to jail, and the sports authorities disciplined the athletes involved.\textsuperscript{590}

Increasingly, many states seem to have found a foothold for intervention in doping matters.\textsuperscript{591}

It is acknowledged that the Convention has provisions aimed at tackling some of the causative factors such as overproduction of prohibited substances by industries, importation, trafficking, advanced doping technology and the Internet (although this is indirectly mentioned). WADA\textsuperscript{592} has a scientific and research department which identifies areas that require research and funds some research studies. It is hoped that such research efforts will eliminate the gap between dope technology and testing technology, especially, in areas of genetic and genomic doping.

The Convention allows for regulation at two levels: the sports level by sports bodies and the public level by public authorities. The need to use science in regulation is well recognised by references to therapeutic use exemption, testing, education and research. The publishing by WADA of international standards on testing procedure, laboratories, therapeutic use exemption and the Prohibited List clearly illustrates the interface of law, science, technology and sport.\textsuperscript{593}

6.3 Is the Harmonized Framework Optimal?

\textsuperscript{590} Tim Montgomery, S Donati supra note 353, A Donati supra 37
\textsuperscript{592} WADA <wada-ama.org> (28 October 2008)
\textsuperscript{593} www.wada-ama.org [seen 28 October 2008]
But are these efforts bearing fruit? Whereas it may be too “early” to answer this question, one thing is clear – many athletes appear busy out there still using prohibited substances. At the Commonwealth Games of 2010 held in New Delhi, Indian Race walker Rani Yadav tested positive for nandrolone, an anabolic steroid; Nigerian runner Folashade Abungan tested positive for testosterone; and Nigerian athletes Osayomi Oludamola and Samuel Okon tested positive for the stimulant Methylhexaneamine. Press Releases attributed to the Court of Arbitration for Sport indicate that Australian male swimmer Ryan Napoleon and Italian male cyclist Gianni da Ros infringed anti-doping rules. Yuliya Chepalova, a female Russian skier tested positive for rEPO on 2 January 2009 while participating in a cross-country event in Val di Fiamme, Italy and was suspended for two years. Nick Zuijkerbuijk, a male Dutch billiard player tested positive for Benzoylcegonine, a metabolite of cocaine on 5 April 2009 and was also suspended for two years. In swimming, it has been reported that Indian swimmer Naskau Uma Pada tested positive for Mephentermine and its metabolite Phentermine on 3 September 2009 and was suspended for 2 years by the Indian Anti-Doping Agency; French Waterpolo player Kevin Barrois

---

594 Peter Riis Andersen, a Danish cyclist tested positive for erythropoietin on June 25, 2008 and was thrown out of the Danish Olympic Delegation. More disappointing is that Denmark is one of the few countries that first enacted national anti-doping legislation over twenty years ago, Daily Nation, Tuesday July 29, 2008, p. 42; Between 2005-2009 six Kenyans tested positive for various prohibited substances [see Appendix I].

595 AP Dope Abuser Denied Medal The Standard on Sunday October 17 2010, 37

596 Ryan tested positive for Formoterole (Beta-2-agonist) on 16 November 2009 and was suspended by a FINA Doping Panel for three months.

597 Gianni was caught trafficking banned substances and suspended for four years

598 CAS 2010/A/2041 Yuliya Chapalova v Federation Internationale de Ski (FIS)

599 CAS 2009/A/2012 Doping Authority Netherlands v Nick Zuijkerbuijk

600 At http://www.fina.org/project/index.php (17 October 2010)
tested positive for Cannabis and Predinison and Predinisolone on 16 January 2010; and Brazilian swimmer Lorena Araujo Rezende tested positive for stanozolol, an anabolic agent in September 2009 and was suspended for two years. Jessica Hardy,601 a female swimmer from USA tested positive for Clenbuterol, an anabolic agent on 4 July 2008. It has also been reported that Madalina Veroica Muresan tested positive for Sibutramine on the occasion of the National Fitness and Bodybuilding championship on 6 June 2009 in Bucharest and was suspended for one year. These examples serve to illustrate that the use of prohibited substances appears to be ongoing several years after the conclusion of the 2005 International Convention Against Doping in Sport. Athletes from both developed and developing countries continue to cheat in sport. Even legislation by way of domestication of the 2005 Convention has not eliminated doping in sport in those countries. This implies that Kenya should do more besides legislating against doping in sport.

In spite of the harmonization of anti-doping efforts, there is no indication that these efforts have been successful. This is a serious indictment of the international efforts. It points to the shortcomings of the efforts put in place so far. Indeed, several areas vital to the success of the Convention have not been adequately addressed.

Firstly, commercialization in sport is driven by the private sector. Member States were careful not to interfere with the private sector’s role in sport. The huge prize money at stake is a major driving force of doping in

---

sport. There was no attempt to try and interfere with this aspect. It was not even mentioned. The private sector is doling out lots of money by way of wages, endorsements, and purchase of broadcast and other rights inherent in sports. As if celebrating such an omission, one US official who participated in the framing of the Convention proudly presented at the Senate Hearings in the US saying:

[The] Convention only governs the anti-doping frameworks of “sport organizations” which are specifically defined as the “ruling body” for a particular event or sport. According to that term of art, leagues such as the National Football League, National Basketball League, National Hockey League and Major League Baseball would not be within the Convention’s scope. This limitation was intentionally included in the Convention.

This so called “intentional” limitation is likely to remain a major loophole for continued use of prohibited substances in sports. For example, the use of doping materials by law enforcement officers or in gymnasia which gymnasia are not sports organisations as noted in the Donati Report is likely to continue and overflow in regular sport. So long as the world ignores this aspect, the “cat-and-mouse” game that has undermined previous anti-doping efforts is likely to continue.

Secondly, another major loophole in the Convention and the Code is its recognition of “therapeutic use exemption (TUE)”. It is submitted that the continued application of TUE may be exploited by the pharmaceutical industry and coaches and doctors to see to the continued use of prohibited substances

---

602 Scott M. Burns, Deputy Director of the Office of National Drug Control Policy, in his submissions before the Congressional Senate Committee on Foreign Relations on “Hearings on the International Convention Against Doping in Sport” on May 22, 2008

603 A Donati supra note 37

235
and methods in sport. An application for a TUE must be supported by a doctor’s recommendation. A TUE committee is made up largely of doctors. It has been amply demonstrated in this work that doctors in Australia, Canada, (West) Germany, (East) Germany and Italy to name but some, were on the forefront of doping athletes. Furthermore, many officials and sports federations have attempted to abuse the privilege of TUE by offering an abbreviated TUE (ATUE) where it was not necessary or ‘backdating’ TUE to cover up for positive tests. The other reason is that competitive sport is a strain on a healthy body and only those ‘healthy’ on the day of competition should be allowed to compete. It is submitted that it is an unnecessary risk in the war against doping to provide for an exemption based on TUE.

A third weakness of this instrument relates to education. Meetings that preceded the Treaty as well as the treaty itself seem(ed) to suggest that education should be given to athletes. Since the ills in sport (such as doping) mirror the values held by society, a better view would be to expand the scope of "education" to target a larger segment of society rather than athletes alone. Unlike instruments on environment and biotechnology that lay emphasis on public participation, there is no provision in the Convention on this aspect. This is likely to slow down acceptance by the public of any regulatory measures

---

605 ibid
606 Toni Schumacher supra note
607 WW Franke & B Berendonk (supra)
608 S Donati supra note 353
609 ITF v Mark Nielsen, ITF Anti-Doping Tribunal 2005, CAS OG 06/01; WADA v USADA, Zachary Lund and FIBT
that may be put in place. In fact, the term education should be replaced with the term 'public participation'. Lack of structures for disseminating doping education in Kenya could be partially responsible for the continued use of prohibited substances in sport in Kenya.

A fourth issue is the limitation of doping efforts to international sport. It is apparent that many more people seem to be using substances and methods prohibited in sport than sportspersons. Through these “other” avenues the prohibited substances and methods are likely to permeate into sport. It is further submitted that efforts at international level ought to go all out to curtail access to substances and methods prohibited in sport from the broader society.

The international community recognised the problem of the increasing use of prohibited substances in sport in the 1970's. The various meetings held by different groups to address this issue illustrate not only the concern but also the efforts at coming to grips with the problem. Clearly, what had been left to sports bodies alone has now been taken up by the community of nations. Public authorities have far wider powers to fight this problem than sports bodies. Both the Convention and the Code show a clear intention by the international community to eliminate prohibited substances from sport. These efforts have succeeded in increasing the number of players in the war against doping. Also there is more awareness about the problem of doping than ever before.

Questions of commercialisation of sport, TUE and public participation require attention at international levels. The scope of “education” measures as
well as the question whether to limit anti-doping efforts only to sport can be
addressed at National level, although their recognition at international level
would no doubt boost the international efforts.

It is clear that the international community has shown a commitment
towards an integrated system of regulation of prohibited substances in sport.
Nevertheless, there is need to address the weaknesses in the Convention in
order to turn rhetoric into meaningful action.

6.3 Summary

Both the Code and the Convention provide platforms for harmonizing
efforts aimed at regulation of doping in sports. This is at the level of sports
federations (international and national), between sports federations and
government and between governments. It is submitted that this approach
represents a more comprehensive approach to regulation in which legislative,
judicial and administrative law will come to play. Domestication of the
UNESCO Convention therefore opens doors to an all inclusive approach to
regulation. Sports bodies alone are ineffective in regulating doping. Although
the Convention lays a broad framework for regulating doping in sport, certain
issues require further negotiation at the level of the Conference of the Parties.
These include commercialization in sport, public participation and therapeutic
use exemptions (TUE). Kenya needs to revise her sports policy and then
domesticate the 2005 Convention Against Doping in Sport. Kenya has ratified
this Convention. It is clear that Kenya stands to participate more effectively in
regulation of doping in sport by domesticating the Convention.
CHAPTER SEVEN: COMPARATIVE ANALYSIS OF REGULATION OF DOPING IN OTHER JURISDICTIONS

1.0 Introduction

The international community has realized that the involvement of public authorities in regulating drug use in sports is necessary. A good example of co-operation between the state and sports bodies is illustrated by the scandal of the Bay Area Laboratory Cooperative (BALCO) in San Francisco. BALCO had been selling tetrahydrogestrinone (THG), a steroid manipulated to avoid detection in the laboratory, to athletes for many years. A whistle blower, former US athletics coach, Trevor Graham, sent a syringe containing THG to an anti-doping laboratory. Using the 1990 Anabolic Steroids Control Act, state officials arrested the managers of BALCO, seized some of the materials at BALCO and the arrested officials were eventually indicted for manufacturing, distributing and selling THG. Further, those athletes who admitted to using THG were disciplined by their sports body. This way all actors in the BALCO scandal were brought to “justice”.

As many nations endeavour to put in place national anti-doping legislation, new challenges are in the offing. For instance, national legislations alone could be inadequate to serve the interests of sports. On the one hand, in many countries, the criminal justice system applies the doctrine of due process...
under which punishment is meted out at the conclusion of a hearing and upon conviction of an accused person. On the other hand, anti-doping rules allow for immediate suspension of an athlete who tests positive pending a hearing. Whereas the position taken by sports bodies would appear to amount to a violation of the rights of an accused person, several reasons can be advanced in their favour. Firstly, it would negate the principle of equality in competition to allow an athlete who has tested positive to continue with participation pending conclusion of a criminal case. Secondly, allowing such an athlete to continue with participation would send a wrong message to those athletes who are trying to compete in an honest manner. Thirdly, the world of commerce that enjoys a symbiotic relationship with sports may be reluctant to be seen to be associating and promoting “cheats”. Lastly, the “modelling” role of athletes would be severely distorted if athletes with positive dope tests were allowed to continue with competition.613

It is therefore clear that sports bodies want to be left to discipline errant members. National legislation is extremely necessary in netting in other parties involved in doping who are not members of sports federations. There is therefore need to gauge national anti-doping legislation in such a way as to avoid conflict.

State regulation is necessary for controlling unethical trade practices of the pharmaceutical industry, addressing issues of appropriate testing

---

613 In the case of Marion Jones and her relay teammates at the 2000 Sydney Games it took up to seven years to indict her in connection with the BALCO scandal after which the team was asked to return medals. Such a duration cannot be seen to be in favour of sports as no one would be certain of the winners until pending court cases are concluded [DM Rosen, ibid, pp.A8-A9]
control of trade in pharmaceutical products over the Internet, control over the prize money and other financial inducements offered to athletes, and for dealing with issues of athletes and of morality. With respect to criminal matters, the state can play a complimentary role. Some of these factors require intervention at an international level.

This chapter examines the models adopted by some countries in the attempt to domesticate the 2005 UNESCO Convention and to combat the proliferation of prohibited substances. Historical impediments to state intervention are discussed. Parallel to international efforts and arising out of the same, three major trends of national regulation can be perceived. The first one is a model in which states have merely amended various existing pieces of legislation to make such legislation accommodate the Convention. An example here is the German anti-doping law. The second category involves setting up an anti-doping agency combined with amendments to existing legislation. This route was taken by countries like Australia and USA. The last category is the enactment of a "stand-alone" anti-doping legislation. An example here is France. Case studies of each of these models are discussed in greater detail herebelow. Common to all models is that law has been given space to play a role in regulation through legislative, judiciary and administrative law.
1.1 Model I: Amending Various Statutes to Accommodate the Convention: The Case of the German Anti-Doping Law

The German Anti-Doping Law is an omnibus that contains amendments to the Penal Code and the Medicinal Products Act. It also includes the Prohibited List as an appendix.

Article one amends the Penal Code to include the word medications besides narcotics. Any reference therefore to narcotics also refers to substances prohibited in sport. This amendment to the Penal Code to elevate doping substances to the level of prohibited substances implies that the same serious penalties hitherto applied to offences related to narcotics will now apply to infractions involving prohibited substances and methods in sport. In addition, the criminal procedure is applicable to offences connected with doping. This amendment is mainly meant to punish support personnel, traffickers, traders and others outside of the fold of sports organisations. It is not clear whether under this amendment athletes will be liable to both the disciplinary procedures of sports federations as well as to criminal proceedings under the Penal Code.

Article two makes several amendments to the German Medicinal Products Act. The first amendment is that the packaging of drugs must where applicable carry a warning that the use of that medication can lead to a positive dope test. Where the use of a given drug for doping can lead to a health risk, this information must also be indicated. This amendment is likely

\footnote{Gesetz zur Verbesserung der Bekämpfung des Dopings im Sport (vom 24. Okt. 2007, Bundesgesetzblatt Jahrgang 2007 Teil 1 Nr. 54, ausgegeben zu Bonn am 31. Okt. 2007)}
make it easier for athletes seeking treatment as well as for doctors and pharmacists to be able to quickly guide an athlete to an alternative medication where necessary. This amendment is therefore extremely useful. In *ITF v Courtney Nagle*, Nagle tested positive for canverone, a diuretic, that was contained in a medication spironolactone that was given by her doctor to treat her medical condition. She stated that she was not aware the medication contained any prohibited substances. The panel held that ignorance was no excuse. Similarly, in *ITF v Laura Pous Tio*, Tio tested positive for Hydrochlorothiazide and Amiloride. She admitted that she had not checked on the ingredients of the medication prescribed to her and that she had not asked her doctor, national federation, national anti-doping agency or ITF. The Panel found her negligent. Other importers of drugs made in or originating from Germany may have to comply with this requirement. That the amendments are useful to both the public and sports authorities illustrates the necessary complementary role the two can play in the war against doping.

The amendment also criminalises possession of substances prohibited in sports. This is an amendment that in a way targets support personnel some of whom would have conspired with athletes to defeat the war on doping. It is hoped that since this amendment is housed under a general statute, the amendment affects other persons not actively involved in competitive sport such as recreational athletes, body builders and others. It has been observed, however, that law enforcement officers also use doping materials. How this

---

615 Decided on 29 March 2009
616 Decided on 23 Dec 2008
Amendment can be used to nap those law enforcement officers who abuse doping substances must await the practical application.

The Prohibited List is included as an appendix. This is meant to give clarity in the said Act regarding substances the Act seeks to regulate. Since such a List is revised annually, the drafters of the amendments were minded to give authority to the Minister in charge to add or remove some drugs to or from the appendix. This is important to avoid the lengthy process of legislation making.

Violation of any of the amendments provided for in this Act attracts a prison term of between one year and ten years. More serious sanctions are foreseen for those who may give such drugs to persons aged below 18 years or where the drugs are contaminated with prohibited substances. Also the sale or manufacture of falsified or contaminated drugs will be countered using very severe sanctions. However, the German laws on doping in sports appear silent on issues of education, public participation and commercialization in sport. There is no mention of research to improve doping technology. Also the issue of value and ethics are not addressed. It is submitted that heavy punishment of doping related offences may not be as effective as making people conscious of the ills of doping so that they can police themselves.

There is no mention in this amendment of sports organisations. Since sports bodies already have elaborate anti-doping rules, this amendment should be understood as a supplement to such rules, thereby paving way for an integrated system of regulation.
As opposed to Germany, Kenya has not domesticated the 2005 UNESCO Convention. Besides, anti-doping structures within sports federations in Kenya do not appear to be functioning except, perhaps in track and field. Under the circumstances, the German model may not be suitable for Kenya. However, the idea of labelling doping substances is one that is worth pursuing.

2 Model II: Establishment of an Anti-Doping Agency Together with the Implementation of Drug Specific Legislation: The Case of the United States of America

USA has the Ted Stevens Olympic and Amateur Sports Act which sets up the United States Olympic Committee (USOC) as a chartered corporation similar to a company limited by guarantee. USOC is charged with the task of coordinating all amateur sport in the US. Membership to USOC is open to amateur sports organisations, amateur athletes who are either active or have been active in the preceding ten years. Some of the powers of USOC read:

S.220505 POWERS
(c) POWERS RELATED TO AMATEUR ATHLETICS AND OLYMPIC GAMES
The corporation may-
(5) facilitate, through orderly and effective administrative procedures, the resolution of conflicts or disputes that involve any of its members and any amateur athlete, coach, trainer, manager, administrator, official, national governing body, or amateur sports organisation and that arise in connection with their eligibility for and participation in the Olympic Games, the Paralympics Games, the Pan-American Games, World championship competition, or other protected competition as defined in the constitution and bylaws of the corporation; and
(6) Provide financial assistance to any organisation or association, except a corporation organised for profit, in furtherance of its purposes of the corporation".

245
Under S 220521 USOC may recognise one national governing body for each Olympic sport upon application. One of the conditions of recognition is the readiness of the national governing body to agree to submit to binding arbitration in any controversy. S 220529 provides for appeal of the decision of USOC to the American Association of Arbitrators (AAA). The Act therefore establishes a mechanism for registration of sports federations, dispute resolution and financing.

2.1 United States Anti-Doping Agency (USADA)

USADA is an independent legal entity not subject to the control of USOC. It was set up after the Sydney Games of 2000. Before, during and after those Sydney Olympics] USOC was heavily criticised for doing very little to discourage drug use in amateur sport. The pre-cursor to USADA is the National Anti-Doping Programme (NADP) which was more like a committee of USOC and directly under the control of USOC. NADP was criticized for conflict of interest.618

USOC has contracted with USADA through the USADA Protocol:

To conduct drug testing, manage test results and adjudicate disputes for participants in the Olympic Movement within the United States and to provide educational information to those participants.
USOC is therefore USADA’s client. The legal relationship between USOC and USADA is contract. USADA follows the rules of WADA. USADA has the mandate to conduct doping tests in all Olympic type sports. USADA may also carry out doping tests in non-Olympic type sports only upon invitation. As part of its mandate, USADA can test any athlete selected by USOC or a national governing body for international participation, or any foreign athlete who is present in USA, or an athlete who is a member of national governing body, or an athlete who has given his/her consent to testing by USADA. USADA uses the rules of the international sports federations in results management and prosecution. National governing bodies need not prosecute their own athletes. USADA has been hailed as a breakthrough in the war against drug use in sports in USA.\textsuperscript{620} However, the conduct of USADA in the case of Zachary Lund\textsuperscript{621} leaves some doubts on the seriousness of USADA to combat doping in sports.

Professional Leagues in the USA are not international in nature but more of business entities. They are therefore outside the purview of USADA. USADA has no powers over non-members of USOC or professional sports bodies. The unwillingness of Professional League athletes to be controlled by statute and concomitant support of it by the US government\textsuperscript{622} is a worrying concern and this leaves room for continued drug use in sports.

\textsuperscript{620} Tygart, supra p.138.
\textsuperscript{621} CAS OG 06/01 \textit{WADA v USADA, USOC, USBSF and Zachary Lund}, Here, USADA gave a sanction WADA considered too lenient and contrary to the anti-doping rules. WADA appealed to CAS and USADA’s decision was overruled.

247
Other statutes such as the Anabolic Steroids Control Act 1999 empower federal authorities to net in other users of steroids. Admittedly, anabolic steroids are the substances most abused by athletes. However, there is no room for coordination and collaboration and exchange of information between sports authorities and federal authorities. The example of BALCO is, however, a good sign.

It is worth noting that USADA was established following the recommendations of the USOC Select Task Force on Drug Externalization established on 15th June 1999. This task force was asked to bring together experts and professionals within and outside of sports to explore the possibilities of “externalization” of drug testing. This was by and large a “self-regulatory” mechanism. The consultative process was not “wide” enough. Little wonder that the product of the process, USADA, conforms to self-regulation of sports bodies, and USADA has no powers to extend its mandate to non-athletes. USADA has the mandate for anti-doping in all Olympic type sports in USA. This way, the structural weaknesses noted of sports bodies is addressed. Nevertheless, USADA applies the WADA Code and has generated useful case law that beefs up the jurisprudence on doping.

The US does not have comprehensive laws that deal with all doping substances on the Prohibited List. With respect to anabolic steroids and other

---

623 WADA 2007 Report on substance use in sports states that in 2007, about 48% of the athletes tested positive for anabolic steroids alone.
624 Following revelations that athletes may have been using doping materials from the Bay Area Laboratory Cooperative (BALCO), Federal authorities were alerted. As they went about dealing with the owners of BALCO criminally, sports federations went about disciplining those athletes suspected to have been clients of BALCO.
substances for which legislation exists in the USA, it is unclear how law enforcers can link up with sports federations and vice versa. Little wonder then, the black market in doping substances is most prolific in the USA. The case of Serono Pharmaceuticals 625 is a real concern. This may only be a tip of the iceberg. More worrying is that whereas the USA has the technological muscle to carry out gene and genomic doping, there is no legislation to regulate its use in sports.

This model is not comprehensive enough to net in persons abusing a variety of drugs. It also appears cumbersome to attempt to legislate for each prohibited substance. USADA has a good programme but its limitation to amateur sport should be a source of concern to public authorities in the USA and to the international community. Issues of public participation, inculcation of values and ethics, and commercialization of sport, have not been dealt with. This omission, together with the reluctance of the state to compel stringent testing measures in professional sport leaves a wide window of opportunity for continued drug use in sports. It is submitted that this model is not strong enough to regulate doping in sport.

The US model is one of setting up an anti-doping institution coupled with legislation targeting the most abused anti-doping drugs. In this model, sports federations have ceded their powers to regulate doping to USADA. To this end, the regulation of doping within sports is likely to be uniform and quite strong. Legislation targeting only what is considered to be the most abused drugs
leaves a lot of room for the non-sporting public to abuse drugs not strictly regulated. Besides, this approach of targeting only certain drugs can be very unwieldy as the number of ‘most abused’ substances increases. Kenya is a country with diverse sports. It is well known that drugs that may enhance performance in the marathon may not be ideal for rugby or even Kayak (canoeing). Hence, in terms of the most abused drugs – these are likely to vary from sport to sport. It is submitted that the approach of legislation against individual drugs may not serve the needs of Kenya suitably. Nevertheless, the formation of one strong anti-doping institution is worth emulating.

7.3 Model III: A Stand-Alone Anti-Doping Legislation:

The Case of France

France has put in place an anti-doping legislation, the “Protection of Health of Athletes and the Fight Against Doping”. This has been in force since 1st October 2006. The preliminary chapter provides:

“Art. L. 230-1 Preliminary Chapter
The Minister for sport in conjunction with other ministers and bodies concerned, initiates and co-ordinates activities for preventive, medical supervision and education, with the help of recognised sports federations to protect the health of athletes and combat doping”

This preamble vests coordination of anti-doping activities in the Minister for sports. It is not lost to keen readers of the document that the Minister in charge of sport is required to cooperate with other Ministers as well as with
This preamble sets the tone for comprehensive measures of cooperation between public and sports bodies.

Article L. 231-1 enjoins all school doctors, company doctors, military doctors and general practitioners to contribute to preventive measures regarding physical education and sports activities. All athletes in France are required to have a sports licence. A prerequisite to the issuance of such a licence is a medical certificate following a comprehensive medical examination (article L. 231-2). A doctor who detects signs of doping may refuse to issue a medical certificate and inform both the athlete and the doctor at the athlete’s Doping unit (art. L. 232-3). Failure by a doctor to comply with article L. 232-3 could lead to sanctions from his/her professional body (art. L. 232-4). Article L. 232-2 recognises a therapeutic use exemption (TUE) and any athlete who tests positive of a prohibited substance but who is in possession of a TUE will not be sanctioned.

Article L. 232-5 establishes the French Anti-Doping Agency (FADA) as an independent legal public authority to determine and implement anti-doping measures in collaboration with WADA and sports federations. FADA is charged with control, analyses and exercise of discipline, although these three functions may not be done by the same persons. The establishment of FADA through legislation shows very strong commitment by the government of France to the war against doping. One can say that the state has literally taken over the fight against doping as the budgetary aspects of the anti-doping control are taken care of. It is also instructive that FADA, a public body seeks to
collaborate with WADA and sports federations. This eliminates any possibilities of conflict with WADA and with sports federations. Indeed, this kind of collaboration opens an avenue for a more comprehensive fight against doping in sport.

The Board of FADA has nine members: three from the administration and justice system, three who must have expertise in pharmacology, toxicology and sports medicine, and three with sports qualifications. The chair is nominated by the Chief Justice and is one of the nine. The Board serves for a term of six years renewable once (art. L. 232-6).

The prohibited materials are those prohibited by WADA (art. L. 232-9). This is very instructive and unique in a way. Normally, Parliament has the authority to amend a statute. However, WADA amends the List of Prohibited Substances and Methods annually. This article therefore allows for an automatic amendment of the statute without recourse to Parliament.

According to article L. 232-10, it is forbidden to prescribe, to grant, offer, administer or apply to athletes taking part in competitions and events one or more substances or practices or to facilitate or encourage their use. This article implies that all those granted powers of prescribing drugs must be careful about their activities. It is mainly doctors who are targeted. This is quite commendable because doctors are a key cog in the game of doping. There could probably be no meaningful doping without the conspiracy of doctors.627

627 The admission by doctors in former East Germany is very telling.
Under the same article (L.232-10) it is forbidden to avoid or oppose the control measures. This is in tandem with WADA Code article 2.3 which considers avoidance of a doping test as a violation that is punishable.

That other state agencies are called upon to join in the war against doping is contained in article L.232-11 which provides:

"Article L. 232-11
Besides criminal investigation officers acting under the provisions of the code of criminal procedure, officials coming under the Ministry of Sport and persons approved by the agency and sworn in as laid down by decree in the State Council are authorised to carry out controls undertaken by the French anti-doping agency or for which the agency is called upon by the [sports] federations for training sessions, events and competitions ... with a view to determining offences against the provisions set out in Articles L.232-9 and L. 232-20."

This article gives the FADA unlimited authority to cooperate with other state agencies in determining offences. This way, FADA is empowered to fight doping not only amongst athletes but against any person found violating the law. Articles L.232-19 and L. 232-20 provide for the involvement of criminal investigation officers and customs officials with powers of seizure after obtaining a court order. The involvement of criminal and customs officials is particularly important in controlling possession, "trafficking", distribution, importation, and sale of doping substances. Law enforcement officers are allowed to communicate amongst each other and share information. What of law enforcement officers themselves abusing dope materials? One hopes the law would not look the other way round in such cases.

WADC (2003) “2.3 Refusing, or failing without compelling justification, to submit to Sample collection after notification as authorized in applicable anti-doping rules or otherwise evading sample collection”.

253
Adjudication of doping offences is also provided for under this law. Under article L.232-21 Licensed players who violate the code are subject to disciplinary proceedings under the sports federation at which the affected person must be given a fair hearing. An appeal to a disciplinary Panel within the sports federation is also provided for. Sanctions to be meted out are those prescribed in the rules of the various sports, in other words, those approved by the World Anti-Doping Agency. FADA has powers to prosecute non-licensed persons, persons who fall under the authority of sports federations or even to overrule the decision of a sports federation. Decisions of FADA may be appealed to court. This "two-tier" approach: one for athletes and another for non-athletes serve to avoid conflicts between international sports federations and municipal arbitral bodies. CAS is not expressly mentioned in this legislation but it can be understood that sports federations (which have a big leeway to discipline athletes) will no doubt have CAS in their constitutions. Article L.232-21 therefore provides for the checking of the power wielded by FADA. Judicial review process is provided for. This therefore leaves little room for the rights of citizens to be violated by FADA.

In terms of sanctions, the law foresees two approaches: disciplinary sanctions by sports federations and other sanctions for non-athletes, both natural and legal persons. Severe penalties including prison terms of up to five years together with closure of a business (for corporations) are foreseen in this law. This law also allows sports federations to institute civil proceedings against persons not directly under their control. This law can be considered a
model law in the fight against doping in sport. This model is by far the most comprehensive of all the three. It provides for the formation of an institution (FAPA) to take care of athletes and non-athletes. Provisions are made for communication at various levels touching on anti-doping starting from the doctor in a clinic to the athlete to customs and other law enforcement officers.

In creating two institutions (FADA and FAPA), the French legislation provides for both administrative law and gives sports bodies the necessary autonomy to administer sports rules. This legislation can be said to be favourable to the development of doping law in its entirety.

However, this law does not give serious consideration to issues of commercialization in sport, public participation and ethics and values. Nevertheless, it is gauged in terms that leave very little room for violations to escape detection and punishment. Nevertheless, this is the most admirable model, and probably one that is poised to be very effective. Kenya could do well to borrow a leaf from the French model.

7.4 Policy Options for Regulating Doping in Sports in Kenya

There are three possible models of policies that are commonly used in regulation. These are self-regulation, co-regulation and direct (government) regulation.

7.4.1. Self-regulation

This is done voluntarily but not as an alternative to government. Its advantages are that it is done by a specialist group and it can be easily...
amended. The major disadvantage is that rules may be made to give an advantage to one group over the other. Sports federations have used this model to regulate doping without much success.

7.4.2. Co-Regulation

Here an industry makes regulations and government comes in to give legal backing. The involvement of government implies negotiation for the codes. Advantages include enhanced credibility. Enforcement is cheaper. This form of regulation reduces the burden of the state without taking away its responsibility. An example is regulations for professional bodies such as the Law Society of Kenya.

7.4.3. Direct government regulation

This is also called subordinate legislation. It relies on government inspections for enforcement. It imposes punitive sanctions in case of non-compliance. This is necessary because of the link between law and public policy. A major advantage of this model is that it creates certainty. Disadvantages include inflexibility, more regulations are required to adapt to

---

630 Sports federations and other private bodies are modelled along these lines. They make rules outside of government regulation and these are imposed upon the membership. Sometimes, these rules can be very oppressive as it was found in Eric Keter v Isaiah Kiplagat and two others Civil Case No. 1223 of 2000 and Isaiah Kiplagat and ors v Eric Keter Civil Application No. NAI 239 of 2000 in which the then Kenya Amateuer Athletics Federation (KAAA) was found to be overbearing vis-a-vis the rights of athletes. In this case, KAAA had argued that its constitution gave it discretion in the selection of athletes and therefore that merely meeting the qualifying standards did not guarantee one a place in the national team. The athlete/respondent had argued that there was no other known standard for qualifying for inclusion in the Kenya team to the Olympic Games. The court found for the athlete. KAAA has since changed its name to Athletics Kenya (AK).


632 The Advocates Act (Cap 16) regulates the qualifications of advocates, conduct, licensing, and disciplinary issues. Most of these activities are done by organs manned by advocates.
new changes. An example is the Communications Commission of Kenya, a body corporate established to regulate on behalf of government, the telecommunications sector.

7.4.4. Which is the ideal Policy Model for Kenya?

It is proposed that a mix of co-regulation and direct government regulation may be better suited for regulation of doping in Kenya. Co-regulation would create space for sports bodies to prepare the regulations for athletes and their other members. The co-regulation would be through a specialized agency that enforces sports rules (away from direct regulation of doping by sports bodies) on members of sports federations. Direct regulation would apply to non-athletes and this would involve various arms of government such customs officials, police, public health officials amongst others.

Kenya needs an all-encompassing policy. The policy framework should provide for wide consultations involving state agencies and private sector actors. It is known that government institutions such as schools, colleges, disciplined forces and local authorities have robust sports organizations. Besides, there are national sports federations whose reach goes to the county and district levels. Involvement of these actors in a policy framework would lead to wide consultations. Also to be included in this scenario are law enforcement officers (police, customs officials and immigration officials), the

---

S.3 of the Kenya Information and Communications Act (Cap 411A) establishes the CCK. Under S.6 of this Act the Board of Directors of CCK is appointed by both the President and the Minister in charge of information and communication. This therefore represents direct government control. S.5 (1) provides that “The object and purpose for which the Commission is established shall be to licence and regulate postal, information and communication services in accordance with the provisions of this Act.” This has since been amended to accommodate mainly e-transactions [Kenya Information and Communications (Amendment) Act 2008]
media, scientists/ researchers and the medical fraternity. Educational measures on anti-doping should not only reach all the above mentioned persons but that they should also be disseminated by and from all these places and persons.

Research policy geared towards improving the health of Kenyans should build in anti-doping measures in order to include athletes. Such research should be cross-cutting in mature.

In terms of legislation, Kenya should set up an anti-doping law as a stand-alone statute. However, through such a statute relevant amendments of all previous statutes as discussed under chapter five should be considered. In particular such a law should seek to incorporate as much of the provisions of the 2005 International Convention against Doping in Sports as possible. In so doing, the French Model should be adopted with relevant adaptations from other models as herein discussed.

The anti-doping law should provide for regulation at three possible levels. Firstly, the law should seek to combat trafficking of prohibited materials, regulate the manufacture/importation of the said materials (through labeling and re-classification to provide for stringent handling by pharmacists), control athlete licensing after a medical check up, redesigning the hiring and licensing of medical personnel, promotion of research activities on doping and promoting awareness campaigns for the general public.

Secondly, anti-doping law should provide for regular testing and awareness campaigns for athletes at the level of sports bodies. For this to be
effective, registration of sports bodies should be done at one central registry such as that of the Registrar of sports. This would give power to the government to register those association that do not comply and or deny them state funding. In addition sports bodies should have an element of ‘self-regulation’. However, self-regulation in matters of doping control are fraught with a conflict of interest. Such a conflict can be eliminated through an appropriate independent institutional.

The third level is institutional. There is need to set up an institution with a broader mandate to cater for both sports bodies and government functions as proposed above. This can also be achieved by anchoring the Kenya Anti-Doping Agency into law. Such a body should have powers of investigation, seizure and of suing (not to mention being sued). This institution can in its work through several departments such as education, research, training, prosecution and adjudication take control of both sportspersons and non-sportspersons. There should be an independent dispute resolution organ attached to such an institution. To ensure a linkage with international sports organizations, the adjudicating mechanisms should be provided for at two levels - an ordinary and appellate division, with a further appeal to the Court of Arbitration for Sport. For non-athletes (sportspersons) or non-members of

---

634 See discussion under 6.1.3.1 supra
635 This is provided for in the Rules of the Kenya Anti-Doping Agency which rules have in turn been approved by the World Anti-Doping Agency (WADA).
sports organizations, the normal criminal law should take its course. The criminal law would thus play a role in anti-doping measures.\textsuperscript{636}

There is a sense in which other professional bodies need to be roped in to make this whole regulation meaningful. Such bodies include the Medical Practitioners and Dentists Board, the Clinical officers Council, the Nursing Council of Kenya, the Pharmacy and Poisons Board to mention but a few. These bodies should also be required through anti-doping legislation to sanction their members who violate anti-doping laws.\textsuperscript{637}

In sum, the proposed anti-doping legislation should go a long way in overcoming most of the weaknesses so far experienced in anti-doping efforts, especially by sports bodies.

\textbf{7.5 Summary}

Of the three models, the French Model stands out as the most comprehensive. However, other models have some provisions that are worth duplicating. For example the provision for mandatory labelling to show whether a given medication is a banned substance in the German legislation, or the idea of legislating on specific substances such as the US Anabolic Steroids Control Act. All said and done, the French Model represents a better form of domestication of the Convention. Nevertheless, none of these models addresses the question of commercialisation in sport, public participation and ethics, which are drivers in the game of doping.

\textsuperscript{636} The French Model is rich on the use of criminal sanctions and this is the only way through which non-athletes can be punished.

\textsuperscript{637} For example under the French Model, a doctor who contravenes anti-doping rules can be de-registered.
Kenya needs to start by domesticating the 2005 UNESCO Convention. In terms of national legislation, Kenya can liberally borrow from best practices elsewhere, while at the same time attempt to avoid the weaknesses in the models printed out. In particular, Kenya needs to put a lot of emphasis on education/public awareness as a means to inculcating good moral and ethical behaviour in the population. Besides, factors that fuel doping in sport such as the huge sums of monies ought to be addressed either at national or international levels. The policy model that allows for both government regulation (through a specialized agency) as well as allowing sports federations to have control over their members is considered ideal for Kenya.
CHAPTER EIGHT: SUMMARY AND CONCLUSIONS

8.1 Summary

Regulation of doping in sports is a tripartite affair involving sports, science and law. Sports bodies have developed their own rules which have assumed an international dimension. Rules of an international sports federation find effect in all the countries where that sport is represented. On account of such rules and based upon the inherent components of sports (economic and non-economic) sports bodies have sought to regulate themselves. However, they have not succeeded in regulating doping. Doping—the prohibited substances as well as the laboratories for analyzing and detecting such substances represent very sophisticated science and technology. The rules of science are applied in the chemical analysis of samples and even in accreditation of doping control laboratories. Even adjudicatory processes regarding the use or abuse of prohibited substances rely on science or scientific experts. In regulating doping, law can play a facilitative role, help in dispute resolution and it can be an avenue for ventilating questions of rights. Mechanisms of law that are used in Commonwealth countries to achieve the stated roles include legislation, judge made law and administrative law. For many decades, regulation of doping was done by sports bodies alone and there were no harmonized rules. The UNESCO Convention can be seen as bridging this gap in two ways – it seeks the involvement of governments/public bodies to complement sports bodies and it seeks to harmonize processes for regulating
doping globally. The Convention is therefore a thought out international skeleton upon which States parties thereto like Kenya can add flesh.

For over 30 years (1968-2003), regulation of doping was the preserve of sports/administrative bodies. This proved ineffective as sports bodies have a mandate limited to their members only. Besides, sports federations lack police powers of search, seizure, investigation, arrest and prosecution. Until 2003 with the publication of the WADA Code, there was no harmonization in anti-doping rules. Sports federations even chose which prohibited substances to include in their rules. The Code therefore brought sanity in this area. The 2009 Code (a revision of the original one of 2003) together with the WADA International standards are geared towards harmonisation of the regulation of doping in sport. The 2005 UNESCO Convention not only provides an international legal framework for anti-doping efforts but it also adopts the Code and the International Standards. The Convention therefore sets the stage for global harmonisation of anti-doping efforts, apart from bringing public authorities on board in the war against doping in sport.

In domesticating the Convention, many countries have taken three main approaches (herein called ‘models’). Typical of all these models is that they recognise the need for legislation, judicial and administrative law.

From the broad discussion in the preceding chapters and in the preceding sections of this chapter it is clear that Kenya can benefit from the experiences of others.
Model one adopted by Germany and other countries involves amending various legislations to bring them in tune with the 2005 UNESCO Convention. Such amendments do not create a new institution in charge of doping. Instead, responsibilities for doping control are spread out across many actors. It should be noted that countries using this model already have strong institutions within sports federations in which matters of athletes are left to the sports bodies. This is not the case in Kenya. Hence, this model, if adopted in Kenya could operate in an institutional vacuum.

The second model under which an anti-doping agency is set up coupled with pieces of legislation targeting certain drugs works in states like Australia and USA which also have specific legislation on sports. In such countries, such an institution is based on broad legislation. Kenya does not have legislation on sports. But also the major weakness of this model is that it targets amateur sport alone. This would make it unattractive for Kenya that has a total of 52 sport codes and less than 20 amongst them considered as amateur sport.

The third model, a stand alone piece of legislation – appears to be most attractive. This model brings together private and public actors under one legislation while at the same time amending several other statutes. This is the model that could be most applicable to Kenya. Even then, Kenya should attempt to improve upon what other countries have done by including aspects on public participation, education and commercialization in sports.
While not having both legislative and judicial law on doping, Kenya has a weak and discarded system of administrative law based on the *ad hoc* practices of various sports federations.

Kenya can take several steps to regulate doping in sport. Firstly, the policy on sports needs review to lay a broad base upon which legislative and other measures can be based. Such a policy should aim at involving many professional bodies especially medical and sports bodies, besides research and academic institutions and various government agencies. Secondly, an attempt should be made to separate state actions from those of private sports bodies. To this end, the French model can be quite useful, combined with provisions for labelling of drugs and food supplements the German way, and probably, supplemented by isolated legislation targeting the most abused drugs such as anabolic steroids.

Thirdly, it is useful to attempt to address other causes of doping such as commercialization of sport and the value system in society. This could be singularly done by Kenya or through proposals for amendments to the Convention. In particular, Kenya could take a lead in initiating discussions with a view to reaching certain agreements on these issues. The value system in society may require a different approach other than legislation. It is proposed that educational measures through the school system as well as regular media briefs and shows should be adopted as a way of 'civic' and other forms of education on anti-doping. These measures should target the general public as well as the private sector who are the major sponsors. Fourthly, the
issue of genetic and genomic doping needs closer monitoring. This should constitute one of the priorities for research under the Council for Science and Technology. Fourthly, whereas children are protected under section 16 of the Children Act, 2001, there is no corresponding protection for those over eighteen years. This omission needs attention. Fifthly, Medical personnel (pharmacists, doctors, dentists, veterinary surgeons) need to have doping education as a requirement for registration and licensing. Sixthly, the issue of sale of medicines over the Internet needs to be addressed. In particular, Internet pharmacies should be prohibited.

The major challenges to regulation of doping in sport are numerous. They include technology, lack of public participation, commercialization in sport, overproduction of prohibited substances, trafficking in prohibited substances, lack of labeling requirements, e-commerce, therapeutic use exemption (TUE), and institutional weaknesses. These challenges have eluded efforts by sports federations in combating doping. They require an integration of private (sports bodies, corporate world) and public efforts. Technology is an ever changing phenomenon. The challenge is to have state-of-the-art technology. This requires investment in human resources development and funding for appropriate laboratories. One such challenge is the disparity in technology between the dopers and the testers. The dopers have always been ahead of the testers. An example is genetic doping. While the science of genetic doping is known, regulators are still cracking at ways of testing for it. It is also acknowledged that genetic modification of the germplasm is self-
propagating. There may not be a way of testing for such since a recipient of
genetic manipulation would be born with the desired sporting traits. It is
submitted that a challenge of this magnitude requires investment in Research
and Development (R & D) as well as public education to inculcate right values
and ethics in society. Public education could result in self-restraint and self-
policing. Two recommendations flow from this challenge. Firstly, Kenya needs
to invest in R & D with appropriate representation at the Council of Science
and Technology. In relation to laboratories several academic and research
institutions have analytical laboratories that can be upgraded to requisite
standards for dope analysis. Secondly, there is need to invest in public
awareness to, firstly, inculcate a good value system and ethics, and, secondly,
to make the regulatory policies put in place more acceptable. Investing in anti-
doping education in the school system would most likely fulfill a longer term
goal of attitudinal change.

The second challenge is lack of public participation in the Convention as
well as amongst the models already adopted by certain countries. Lack of
involvement of the public undermines the acceptance of policies and rules
meant for society. It is recommended that Kenya should agitate for
amendments to the 2005 UNESCO Convention to include public participation.

The third challenge is one of commercialization in sport. There is a lot of
money in sports which is partly fuelling doping. The Convention does not
address this factor at all. Sports being global, there is need for a global
consensus on how to regulate commercialization in sport. The corporate sector
is willing to cooperate. To this end, it is recommended that Kenya should spearhead changes to the Convention to create provisions on commercialization in sport.

The fourth factor is overproduction of prohibited substances. It has been shown in preceding chapters that the pharmaceutical industry overproduces prohibited substances. The amount of drugs produced has no bearing on either the actual or the projected number of patients for a given drug or on the projected sales. One way to control this problem is to regulate at the point of source of dispensing. In particular there is need to impose disclosure requirements on pharmacists in order to establish user patterns.

The fifth challenge is trafficking in prohibited substances. Several hundreds of tones of prohibited substances have been seized at various border points. It is recommended that the laws on trafficking of narcotic drugs and psychotropic substances of Kenya be amended to include substances prohibited in sport. And this could be accommodated in the proposed laws.

The sixth challenge relates to lack of labeling of prohibited substances. In the past, some athletes have argued that they did not know that the drugs they were using were prohibited in sports. Obviously, it is not expected that athletes will be very conversant with the science of pharmacology. To get round this challenge there is need to label those medicines that are prohibited in sport. Some jurisdictions such as Germany have made labeling mandatory. Both manufacturers and importers are under an obligation to label clearly those drugs that are prohibited in sports and put a health warning on the
labels against prolonged use. Kenya’s Pharmacy and Poisons Act can also be amended to provide for labeling of those medicines whose use is prohibited in sport. This Act can also be amended to provide for a third category of classification of medicines and poisons to consist of substances and methods prohibited in sport.

The Seventh challenge is one of e-Commerce as it affects the sale of prohibited drugs through the Internet. In medicine, there is as yet no good substitute for the interaction of a doctor and a patient in order to establish a diagnosis. It is therefore near impossible to issue a prescription in cyberspace. Besides, it is difficult to vet the quality of drugs sold over the Internet. It must be appreciated that manufacturers, importers, and wholesalers of medicines should benefit from the advantages offered by e-commerce. However, it is submitted that the transactions between the retailers and end-users (patients) over the Internet require tighter controls to prevent abuse of prohibited substances in sport. Maybe imposing disclosure requirements on pharmacists may cure the mischief. It is therefore recommended that Kenya amends her laws to regulate the sale of medicines over the Internet.

The eighth challenge relates to the therapeutic use exemption (TUE). This is a power to allow an athlete to use prohibited substances for legitimate treatment whilst competing in sports. It is within the reach of a national sports federation to grant or deny TUE. TUE has been abused by sports federations in the past, where, in certain cases, TUE has been issued retrospectively against the rules after an athlete has tested positive. It has been argued
elsewhere in this work that the continued use of TUE opens a door of opportunity for cheating to continue. It is necessary that either the whole concept of TUE be done away with or that its management is shifted from sports federations to an independent body within each country, such as the equivalent of WADA. It is recommended that Kenya can promotes modifications to the rules relating to TUE at an appropriate international forum such as the Conference of Parties to the 2005 UNESCO Convention.

The ninth challenge is institutional. Countries using the various models have national institutions for doping control. Sports federations in Kenya use ad hoc committees to deliberate on issues of doping in sport. There is need for an institutional set up in Kenya to take charge of testing, education and other functions connected with and incidental to doping. In order to create the relevant institutions and at the same time consider the previous recommendations above, it is recommended that Kenya establishes a stand alone anti-doping legislation.

Hypothesis one was to the effect that anti-doping law is necessary to combat doing in sport. It has been observed that countries that have such a law and strong anti-doping institutions still have some of their athletes posting positive dope results. The missing link has been identified as commercialization in sport and poor social values. When all is said and done, law alone would not be a panacea for doping in sports. Other mechanisms that can complement the work of law include education, research and administrative measures. These call in the need for an anti-doping law which
encompasses traditional aspects of law in addition to accommodating the rules of sport and case law developed by such bodies. Such anti-doping law should have provision for education, research and public participation.

All in all, Kenya is such a key sporting nation that it should also be on the forefront of regulation of doping in sport. Kenya should formulate an anti-doping policy and set up a legislative and institutional framework for an integrated approach to regulating doping in sport.

8.2 Conclusions

Several conclusions flow from this work. Firstly, it has been shown that cooperation between the state and sports federations is essential in a meaningful fight against doping in sport. For over three decades, sports bodies tried it on their own without success. Sports bodies are ill-equipped to address all the causes of doping in sport. On the one hand the state has vital powers not possessed by sports bodies. On the other hand sports bodies have developed (anti-doping) rules that are suited for use in sports and by sports bodies. It is concluded that legislative judicial and administrative law is necessary for doping control in sport. That this triad can be used to address the issues that fuel doping in sport.

Secondly, Kenya has ratified the 2005 Convention Against Doping in Sport. According to article 2(6) of the new Constitution, this Convention became part of Kenya’s laws upon such ratification. The existing laws do not deal with the question of doping. Her sports federations do not have a coordinated institutional framework for doping control. It is therefore
concluded that Kenya does not have the requisite regulatory policy and legislative framework in place to fight doping in sport.

Thirdly, another conclusion is that allowing sports bodies to perform the function of anti-doping is to unnecessarily subject them to a conflict of interest. The core mandate of sports bodies is to develop sport by way of training and competition. They therefore attempt to “showcase” their efforts during competition. This requires that they present their best athletes. Under the circumstances, many sports federations have previously attempted to cover up positive dope cases. Many countries have gone around this problem by setting up independent institutions to take care of anti-doping matters. It is concluded that Kenya does not have an independent legal entity to take charge of doping matters and therefore the threat of conflict of interest in Kenyan sport is both a possibility and a reality.

Fourthly, Kenya is a known sporting country with talent that is quite deep especially in sports such as athletics, rugby, volleyball and cricket. In spite of this standing no doping control sample has been analysed in Kenya. Samples are collected and send abroad. This makes the process of doping control very expensive and relatively inaccessible. This leads to the conclusion that Kenya does not have state of the art technology to enable her effectively participate in sample analysis for doping control.

Fifthly, both the Convention and the Code seem to agree that other mechanisms other than law are needed to help combat doping in sports. These can be subsumed under anti-doping law.
Sixthly, neither the Code nor the UNESCO Convention in their current formulations adequately addresses the issues of commercialization and public participation in doping in sport. It is concluded that both these documents need to be amended to accommodate these two issues.
SELECTED BIBLIOGRAPHY

AFP Feb. 12, 2008: Baseball star Rocker says officials knew of doping.


Anon 'Football: Becks ends Sh 228 million Pepsi Deal’ The Standard (Nairobi, Monday 29 December 2008) p.32

M Akech Privatization and Democracy in East Africa – The Promise of Administrative Law (East African Educational Publishers Ltd Nairobi 2009)


WA Anderson et al 'A National Survey of Alcohol and drug Use by College Athletes’ (1991) 19 The Physician and Sportsmedicine 91,104

J Andreu Medical and Regulatory aspects. EU action in the fight against doping. The First EU Conference on Sport held at Olympia, 23 May 1999

PM Anthony ‘Should drug testing be banned?’ August 2007 Doping Journal 4, 8


Anti-Doping Danmark (2002). Danish Law and Regulations

Anti-Doping Danmark (2002). International Anti-Doping Arrangement – IADA


C Ayotte and A Charlebois T/E values: Measurements and observations’ In W Schenzer et al (eds.). Recent advances in doping analysis (4) Sport & Buch Koeln (1997) 91,98.


WE Buckley et al 'A study of anabolic steroid use at the secondary school level: Recommendations' In CE Yesalis (ed) Anabolic steroids in sport and exercise (Human Kinetics Publishers Champaign. IL 1993) 71,86.


C Cardis et al 'Ketoconazole Test: Blood versus Urine values’ In W Schaezner et al (eds) Recent advances in doping analysis (4) (Sport & Buch Koeln 1997) 305-318.

DH Catlin and CK Hatton 'Use and abuse of anabolic and other drugs for athletic enhancement’ (1991) 36 Advances in Internal Medicine 399,424.


N Chantramoneklasri 'The Development of Technological and Managerial Capability in the Developing Countries’ In M Chatterji (ed.) Technology Transfer in the Developing Countries (St Martin’s Press New York 1990).


WW Clark _Publicly-funded Research and Publicly-owned technologies in the Transfer and Diffusion of Environmentally Sound Technologies (ESTs): The case of the US._ Paper prepared for the Division for Sustainable Development, Department of Economic and Social Affairs, July 1999.


KE Crummy ‘Urine or You are out: Student Athletes’ Right to Privacy stripped in Hill v NCAA (1994) 29 U.S.F.L. Rev 197, 198

P Culliton ‘Harvard and Monsanto The $23 Million Alliance’ Science (25th February 1997) 211.

Anon ‘Danish Biker tests positive for EPO’ Daily Nation Tuesday July 29 2008) 42.

Daily Nation, ‘Star’s two-year ban for doping’ (7 September 2006) p.64

D De Boer M Van Beek CHJ Bekkers and RAA Maes ‘The detection of the administration of salmeterol in urine after inhalation’ In W Schaezner, H Geyer A Gotzmann and U Mareck-Engelke (eds) Recent advances in doping analysis (4) {Sport & Buch Koeln 1997) 357,370.


X De la Torre J Segura Z Yang Y Li M Wu ‘Testosterone detection in different ethnic groups’. In: W Schaezner, H Geyer A Gotzmann and U Mareck-Engelke (eds) Recent advances in doping analysis (4) {Sport & Buch Koeln 1997) 71,90.
A de Merode 'IOC List of Prohibited Classes of Substances and Prohibited Methods' IOC Medical Code, Chapter II. An IOC information update to all her affiliates (1997).

Death of Birgit Dressel. Athletics February/March (1988) 6,10


G. Doerner '4-Chlor-1-Methyltestosteron (Oral-Turinabol), ein neues wirksames Anabolikum' (1965) Deutsch Gesundheitswes (Berlin), 670-694.


M. Donike and Ch M. Kaiser Dopingkontrollen. (Bundesinstitut fuer Sportwissenschaft Koeln 1984)

M. Donike H. Geyer A. Gotzmann U Mareck-Engelke S. Rauth (eds) Recent advances in doping analysis: Proceedings of the 10th Cologne Workshop on Dope Analysis, 7th to 12th June 1992 (Sport und Buch Strauss Koeln 1993)


'Doping: IAAF Praesident foerdert staatliche Hilfe' *Financial Times Deutschland* (dpa, 8 Sept. 2006)


Economist. Drugs and the Olympics (7th-13th Aug 2004)

RM Evans ‘The Marathon Mouse and genetically engineered Endurance’ Presented at the Gene Doping Symposium held in Stockholm, Sweden, 3-5 Dec. 2005


J Fairbanks *Indigenous technical knowledge and natural resource management a critical overview*. (NRI Chatham, UK 1992)


FIFA FIFA *Regulations Doping Control for FIFA Competitions and out of Competition* FIFA Zurich


WW Franke and B Berendonk 'Hormonal doping and androgenization of athletes: a secret program of the German Democratic Republic government' (1997) 43 Clinical Chemistry 1262,1279


KE Friedl 'Effects of anabolic steroids on physical health' In CE Yesalis (ed) Anabolic steroids in sport and exercise (Human Kinetics Publishers Champaign. IL 1993) 107,150.

EE Floyd 'The Modern Athlete: Natural Athletic Ability or Technology at its Best?' (2002) IX Villanova Sports & Entertainment Law J 155,180

DP Fox 'Structural Barriers in Antidoping Measures' (2001) 8 Sports Law J 271, 277


M Gakii 'Champ Kirwa gets Kshs. 6 million gift' Sunday Nation (Nairobi 21 September 2008) p.44


EF Gilbert AQ DaSilva and DM Queen 'Intrahepatic Cholestasis with Fatal Termination Following Norethandrolone Therapy' (1963) 185 Journal of the American Medical Association 538,539.


280


G Goldspink C Velleso S Beech S Janmohamed and SY You ‘Molecular Regulation of Muscle Hypertrophy and Gene Doping’ Presented at the Gene Doping Symposium held in Stockholm, Sweden, 3-5 Dec. 2005


MG Hanson ‘Effort, Talent and Far Play – How to protect the values of sport and the privacy of athletes in the area of Gene Doping’ Presented at the Gene Doping Symposium held in Stockholm, Sweden, 3-5 Dec. 2005


J Hersh. 'French-fired Conundrum Landis Doping Case Not At All Clear-Cut' Chicago Tribune (Chicago 31 July 2006)

K Hoffman and N Garvin Managing International Technology transfer; A Strategic Approach for Developing Countries. IDRC-MR259e (International Developing Research Center Ottawa 1990)

K Hollmann and Th Hettinger, Sportmedizin: Arbeits- und Trainingsgrundlagen (Schattauer Stuttgart 1990) 442,512


K Horning et al.'Detection of Exogenous Testosterone by 13C/12C Analysis' In: W Schaeenzer, H Geyer A Gotzmann and U Mareck-Engelke (eds) Recent advances in doping analysis (4) (Sport & Buch Koeln 1997) 275,280.

K Houlihan 'Anti-doping political measures: the new approaches after the Lausanne meeting on doping' IEC Scientific Conference (1999).


http://www.atptennis.com [ 8 September 2008]

http://www.atptennis.com [ 8 September 2008]


http://www.law.villanova.edu/students/orgs/index, 2004 (13 Mar 2007)
http://more.abcnews.go.com/sections/world/DailyNews/olympicsdrugs_0009
Mat 2007)

http://more.abcnews.go.com/sections/sports/DailyNews/oly_doping000927.h
ml: Doping Dilemma: Why should top athletes risk using banned
substances, 2004 (20 July 2007)

http://more.abcnews.go.com/sections/sports/DailyNews/oly_raducanruling00
0927.html: Raducan loses Doping case Appeal: No Gold for Raducan,
2004 (20 July 2007)


http://www.ncaa.com/library/sports_science/drug-testing-program/2002-
03/drugtesting.pdf, 2004 (20 July 2007)

http://www.nflpa.org/members/main.asp?subpage=drug+policy#type
nflpa.org/, 2004 (10 May 2006)

release=385: IOC Executive Board (EB) concludes two days of productive
meetings, 2004 (12 April 2006)

April 2007)


http://sports.espn.go.com/oly/winter02/xcountry/news?id=1324203 (6 Feb
2007)

(24 July 2006)

America told to come clean on dope tests. (24 July 2006)


N Hubbell The use of steroids by Michigan high school students and athletes: An
opinion research study of 10th and 12th grade high school students and
varsity athletes, November 1989 through January 1990. Lansing: 
Michigan Department of Public Health, Chronic Disease Advisory
Committee (1990).

R Hughes. 'Drugs in Sports: what do we tell the kids?' The East African (Nairobi
13-19 December 2004) VIII

International Olympic Committee Medical Code and Explanatory Document IOC
Lausanne

Italy Evaluation Team Compliance with Commitments Project - Respect by Italy
of Anti-Doping Convention (2002).

S Jasanoff Science at the Bar – Law, Science and Technology in America (Harvard University Press Cambridge, MA 1995)

S Jasanoff The fifth- Science Advisors as Policymakers Harvard College London 1990.


P Kameri-Mbote D Wafula and N Clark Public/Private Partnerships for Biotechnology in Africa - the Future Agenda, (ACTS Nairobi 2001)


B Keisser ‘We need to pass Alzado’s painful lesson on to the kids’. Knight-Ridder News Service, (16 July 1991)


Laroche 'Steroid Anabolic Drugs and Arterial Complications in an Athlete - a case history (1990) 41 Angiology 964, 969.


Ljungqvist The use of anabolic steroids in top Swedish athletes' (1975) 9 Brit J of Sports Med 82


Longman 'Just Following Orders, Doctors' Orders' New York Times (New York 22 April 2001)


D Mackay ‘Samaranch to lead drug agency’ Guardian Unlimited (Tuesday 2 February 1999).

C Manas (ed.) Technology Transfer in Developing Countries (St. Martin Press New York NY 1990)


P Mansbridge ‘Tonight The Pressure mounts’ CBC-TV interview on Biotechnology (2001)


C M McHugh RT Park PH Sorksen and RI Holt ‘Challenges in detecting the abuse of growth hormone in sport’ (2005) 51 Clin Chem: 1587,1507


A Miah ‘Ethically Modified Athletes’ Presented at the Gene Doping Symposium held in Stockholm, Sweden, 3-5 Dec. 2005


A P Millar ‘Should drug testing be banned?’ (2007) 4 Doping Journal 4 1,12

J Mugabe Technology and Sustainable Development in Africa – Building policy and institutional capacities for needs assessment Background paper prepared for the UN Division for Policy Co-ordination and Sustainable Development (New York, NY 1996)


K Murugu ‘Games Review The 2008 Beijing Olympic Games – the last words’ Saturday Standard (Nairobi 6 September 2008) 33

C Musumba ‘Lel captures Sh. 38 million Majors Prize’, Sunday Nation, (Nairobi October 19 2008).


O Okoth, ‘Cricket too has its own guns for hire’. The Standard (Nairobi 6th Oct 2009) at 43


OECD Climate Technology Initiative – Inventory of Activities (Paris 1996).


287


R Pound (2007). Opening address at the World Conference on Doping in Sport, Spain (15-17 Nov 2007)


O Rabin ‘Gene Doping’ Presented at the Gene Doping Symposium held in Stockholm Sweden (3-5 Dec 2005)

AKN Reddy The Trojan Horse. (1976) 50 9(2) Ceres 40-43.

Register-Guard Doping Athletes USA (2004) 3


Reuters ‘Jones is cleared of doping as “B” sample negative’ Daily Nation, [Nairobi Kenya 8 Friday September 2006].


NA Robinson ( ed ) Agenda 21 Earth’s Action Plan IUCN Environmental Policy and Law paper No. 27 (Oceanica Publications Inc. New York)


M Schillig Schiedsgerichtsbarkeit von Sportverbaenden in der Schweiz (Zurich 1999).


AJ Schneider ‘Ethics and the Challenges of the Potential Use of Genetic Technology in Sport’ Presented at the Gene Doping Symposium held in Stockholm Sweden (3-5 Dec 2005)


Scott M. Burns, Deputy Director of the Office of National Drug Control Policy, in his submissions before the Congressional Senate Committee on Foreign Relations on “Hearings on the International Convention Against Doping in Sport” on May 22, 2008


V Shiva and J Bandyopadhyay Environmental Conflicts and Public Interest Science. (1986) 21(2) Economic and Political Weekly 84,90.

L Silverstein ‘Anabolic steroids at the 1972 Olympics’ (1973) 43 *Scholastic Coach* 90,92.


PH Sorksen Insulin, growth hormone and sport, (2001) 170 *J Endocrinol* 13,25


*Standard* (Nairobi 6 Sept 2008) 33

*Standard* (Nairobi 13 September 2008) FeverPitch Extra, p.4

*Standard on Sunday* (Nairobi 21 September 2008) FeverPitch


HL Sweeney Will the Age of Gene Therapy usher in the Age of Genetic Enhancement?’. Presented at the Gene Doping Symposium held in Stockholm, Sweden, 3-5 Dec. 2005


D Thieme J Grosse and RK Mueller ‘Observations on new metabolites of Clostebol by High-Resolution-MS’ In W Schauenzer H Geyer A Gotzmann


E Umpierre and D Lorenzo Three cases of misleading results in drug analysis re-analyzed by GC/MS’ In W Schaenzer H Geyer A Gotzmann and U Mareck-Engelke (eds) *Recent advances in doping analysis (4)* Sport & Buch Koeln (1997) 335,342.


H Virkunen "There’s cause for concern if there's stuff you can't talk about" *Motion-Sport in Finland* 1/2002

WADA/IOC Commission issues further report on Young Case, 30 Sept 2004 (28 Nov 2008)
WADA Interpol and WADA team up to fight cheats’ http://www.wada-ama.org/en/printme.ch2 (10/02/2008)

WADA The Prohibited List 2009 is published by WADA and revised annually after consulting experts and stake holders’ (http://www.wada-ama.org)


GI Wadler and B Hainline Drugs and the athlete (Davis Philadelphia 1989)...


DC Wallace The Mitochondrial Genome in Human Adaptive Radiation and Disease: On the Road to Therapeutics and Performance Enhancement’ Presented at the Gene Doping Symposium held in Stockholm, Sweden, 3-5 Dec. 2005


S Wilson IOC asks for more information on US doping cases, including Lewis at http://ca.sports.yahoo.com/030517/6/t5zh.html (20 Sept 2007)


Witness - Dying to Win 6: Sports and Drugs - a lethal team: At the BALCO Laboratory, athletes could purchase food supplements fortified with the tweaked anabolic steroid Tetrahydrogestrinone

Witness: Dying to win: The History of doping in sport, 2004

Witness – Dying to win 2: Possible solutions to the doping problem, 2004

Witness – Dying to win 4: The Ben Johnson story, 2004


R Wyler La convention d’arbitrage en droit du sport in: RDS 116/1997, I, pp. 45 et seq

xcskiworld.com: Brief History of DopingNews, 2001

293

CE Yesalis et al. ‘History of anabolic steroid use in sport and exercise’ In CE Yesalis (ed) Anabolic Steroids in Sport and Exercise (Human Kinetics Publishers Champaign IL 1993) 35

C Yesalis R Herrick W Buckley K Friedl D Brannon and J Wright ‘Self-reported use of anabolic-androgenic steroids by elite power lifters’ (1988) 16 The Physician and Sportsmedicine 91,100.


CE Yesalis (ed) Anabolic Steroids in Sport and Exercise (Human Kinetics Publishers Champaign IL 1993)


# TABLE OF CASES

<table>
<thead>
<tr>
<th>Case Description</th>
<th>Year/Location</th>
</tr>
</thead>
<tbody>
<tr>
<td>judgement of 27 May 2003, Swiss Federal Tribunal, 1st Civil Chamber</td>
<td></td>
</tr>
<tr>
<td>Abdallah &amp; Ors (for Coast Stars) v Mohamed Hatimy &amp; Ors (KFF) and Kenyan</td>
<td>2008</td>
</tr>
<tr>
<td>Premier League Ltd, Civil Suit No. 65 of 2008</td>
<td></td>
</tr>
<tr>
<td>Andrey Sheutsou v FINA, FINA Doping Panel 2/03</td>
<td>1993</td>
</tr>
<tr>
<td>ATF 119 II 271 rec. 36 (1993)</td>
<td></td>
</tr>
<tr>
<td>Baltimore Orioles, inc. v Major Leagues Baseball Players Assin. (805 F. 2d 663</td>
<td>1989</td>
</tr>
<tr>
<td>(7th Cir. 1989))</td>
<td></td>
</tr>
<tr>
<td>Basketball New Zealand v Mark Dickel, Sports Disputes Tribunal of New</td>
<td>2008</td>
</tr>
<tr>
<td>Zealand, SDT 18/06</td>
<td></td>
</tr>
<tr>
<td>Bernard Lagat v WADA, IAAF and Deutsche Sporthochschule, 28 0 (Kart) 38/05,</td>
<td>2005</td>
</tr>
<tr>
<td>28th Civil Chamber of Cologne Regional Court</td>
<td></td>
</tr>
<tr>
<td>Bray v FINA, FINA Doping Panel 01/01</td>
<td></td>
</tr>
<tr>
<td>Canadian Centre for Ethics in Sport, Football Canada and Government of Canada</td>
<td>2008</td>
</tr>
<tr>
<td>v Scot Lelievre, SDRCC DT-04-0014</td>
<td></td>
</tr>
<tr>
<td>Canadian Centre for Ethics in Sport, Football Canada and Government of Canada</td>
<td>2008</td>
</tr>
<tr>
<td>v Steve Stanislaus, SDRCC DT-04-0009</td>
<td></td>
</tr>
<tr>
<td>Canas v ATP Tour 4P.172/2006 (1st Civil Ct., 22 March 2007) ATF 133 III 235</td>
<td></td>
</tr>
<tr>
<td>CAS 2009/A/1931 Ekaterina Iourieva &amp; Albina Akhatova v International Biathlon</td>
<td></td>
</tr>
<tr>
<td>Union</td>
<td></td>
</tr>
<tr>
<td>CAS 2009/A/1782 Filippo Volandri v ITF</td>
<td></td>
</tr>
<tr>
<td>CAS 2008/A/1644 Adrian Mutu v Chelsea Football Club Ltd</td>
<td></td>
</tr>
<tr>
<td>CAS 2008/A/1591 ASADA v Nathaniel O’Neill</td>
<td></td>
</tr>
<tr>
<td>CAS 2008/A/1710 Christian Ahlmann v FEI</td>
<td></td>
</tr>
<tr>
<td>CAS 2008/A/1489 Despres v CCES</td>
<td></td>
</tr>
<tr>
<td>CAS 2008/A/1700 Deutsche Reiterliche Vereinigung e.V. v FEI &amp; Christian Ahlmann</td>
<td></td>
</tr>
<tr>
<td>CAS 2008/A/1624 FC Barcelona v FIFA</td>
<td></td>
</tr>
<tr>
<td>CAS 2008/A/1622 FC Schalke 04 v FIFA</td>
<td></td>
</tr>
<tr>
<td>CAS 2008/A/1576 FIFA v Malta Football Association &amp; Ryan Grech</td>
<td></td>
</tr>
<tr>
<td>CAS 2008/A/1575 FIFA v Malta Football Association &amp; Gilbert Martin</td>
<td></td>
</tr>
<tr>
<td>CAS 2008/A/1588 FIFA v Malta Football Association &amp; Claude Mattocks</td>
<td></td>
</tr>
<tr>
<td>CAS 2008/A/1471 FINA v Tagliaferri &amp; Federazione Italino Nuota</td>
<td></td>
</tr>
<tr>
<td>CAS 2008/A/1426 Giuseppe Gibilisco v CONI</td>
<td></td>
</tr>
</tbody>
</table>

295
CAS 2008/A/1572 Gusmao v FINA
CAS 2008/A/1632 Gusmao v FINA
CAS 2008/A/1659 Gusmao v FINA
CAS 2008/A/1608 International Association of Athletics Federations v Athletic Federation of Slovenia & Ms Helena Jawornik
CAS 2008/A/1664 IRB v Luke Troy & ARU
CAS 2008/A/1452 Kazuki Ganaha v Japan Professional League,
CAS 2008/A/1623 SV Werder Bremen v FIFA
CAS 2008/A/1480 Pistorius v IAAF
CAS 2008/A/1616 UCI v Nathanial O'Neill
CAS 2008/A/1577 USADA v Reed
CAS 2008/A/1516 WADA v CONI, FITET & Piacentini
CAS 2008/A/1486 WADA v CONI & Tagliaferri
CAS 2008/A/1738 WADA v DEB & Busch
CAS 2008/A/1510 WADA v Despres, CCES & Bobsleigh Canada Skeleton
CAS 2008/A/1564 WADA v IIHF
CAS 2008/A/1628 WADA v Malta Football Association & Ryan Grech
CAS 2008/A/1629 WADA v Malta Football Association & Claude Mattocks
CAS 2008/A/1627 WADA v Malta Football Association & Gilbert Martin
CAS 2008/A/1592 WADA v Nathaniel O'Neill, Cycling Australia and ASADA
CAS 2007/A/1370 & 1376 FIFA, WADA v CBF, STJD & Dodo
CAS 2007/A/1394 Floyd Landis v USADA
CAS 2007/A/1365 WADA v FILA & Mohamed Ibahim Abdelfattah
CAS No. 30 190 00782 07 USADA v Joe Warren [AAA/North American]
CAS 2007/A/1395 WADA v National Shooting Association of Malaysia & Cheah & Ng & Masitah
CAS 2007/A/1446 WADA v Qatar Football Association & Hamad Rakea Humood Alanezi
CAS 2006/A/1146 Agence Mondiale Antidopage (AMA/WADA) v Johannes Eder & Ski Austria
CAS 06/002 Andrea Schuler v Swiss Olympic Association and Swiss Ski
CAS 06/010 Australian Olympic Committee v Federation Internationale de Bobsleigh et de Tobogganing (FIBT) and Brazilian Bobsleigh Association, Ad hoc Division – XX Olympic Winter Games in Turin, CAS arbitration

296
CAS 0G 06/ Dal Balcon v Comitato Olimpico Nazionale Italiano (CONI) and Federazione Italiana Sport Invernali (FISI)
CAS 2006/A/1330 International Rugby Board v Keyter
CAS 2006/A/1102 Johannes Eder v Ski Austria
CAS 2006/A/1032 Karatancheva v ITF
CAS 2006/A/1025 Mariano Puerta v International Tennis Federation
CAS 2006/A/1032 Sesil Karatancheva v/ International Tennis Federation
CAS 2006/A/1130 WADA v Stanic & Swiss Olympic Association
CAS 0G 06/01 WADA v USADA, Zachary Lund and FIBT
CAS 2005/A/726 Calle Williams v IOC
CAS 2005/A/951 Canas V/ ATP
CAS 2005/A/922,923,926 Hondo v UCI, Swiss Olympic and WADA,
CAS 2005/A/847 Knauss v FIS
CAS 2005/A/830 Squizzato v FINA
CAS 2005/A/884 Tyler Hamilton v USADA & UCI
CAS 2004/A/748 Roc Viatcheslav Ekimov v IOC, USOC & Tyler Hamilton
CAS 2004/O/649 USADA v Christe Gaines
CAS 2004/O/645 USADA v Tim Montgomery
CAS 2003/A/517 IAAF v Al-Dosari
CAS 2003/A/484 Kicker Vencil v USADA
CAS 2002/A/371 Danilova v IOC
CAS 2002/A/370 Lazutina v IOC
CAS 2002/A/374 Muehlegg v IOC
CAS 2001/A/317 A v/ FILA;
CAS 2001/A/337 Bray v/ FINA
CAS 2001/A/317 Claudia Poll v FINA
CAS 2000/A/310 L v/ FILA;
CAS 2000/A/312 L v/FILA
CAS 96/156 Foschi v/ FINA
Cases 98-711 and 98-034 at Chalons en Champagne Administrative Court, France (28 January 1999)
Cezar Badita v FINA, FINA Doping Panel 2/01
Claudia Poll v FINA, FINA Doping Panel 1/02

297
Collin Mathieson v Athletics Canada, Sport Dispute Resolution Centre of Canada, SDRCC/CRDSC 04-0021

Dimeo v Griffin, 924 F. 2d 664 (7th Cir. 1991), 266

Donoghue v Stevenson [1932] ER Rep 1 (HL)

Eric Keter v Isaiah Kiplagat & ors Civil Case No. 1223 of 2000

FEI 2006/08 - Arc Katusha

FEI 2006/29 - Chippolino

FEI 2006/32 - LF Follow Me Vallee

FEI 2005/56 - Bury Boy Du Guy

FEI 2005/21 - Coeur D Wright Stuff

FEI 2005/46 - Hermine D'Auzay

FEI 2005/32 - LF Follow ME Vallee

FEI 2005/45 - Orion 135

FEI 2005/43 - Orkara

FEI 2005/62 - Penn 1

FINA v Alexander Morgunov (FINA Doping Panel 1/09)

FINA v Yuliya Pidlisna FINA Doping Panel 5/03

FINA v Vasilelois Demetis (FINA Doping Panel 2/02)

FINA v Marko Strahija (FINA Doping Panel 1/02)

Fox v NZ Sports Drugs Agency (1999) DCR 1165

Gundel v Federation Equestre Internationale, Swiss Federal Supreme Court Decision of 15 March 1993

Hawker v New Zealand Rugby Football union (1999) Nzar 549

Hill v NCAA, 273 Cal Rptr 402 (Cal. App. 6 Dist. 1990)

Ilanit Fridman v ITF, ITF Anti-Doping Tribunal

Ina v USADA, AAA No. 30 190 00814 02

Indianapolis Colts v Metropolitan Baltimore Football Club (34 F. 3d 410 (7th Cir 1994))

International Rugby Board v Irakli Chvihivadze (decided 2 June 2009)

IOC v Fani Chalkia, IOC Disciplinary Commission of 18 August 2008

IOC Decision in Re Mr. Alain Baxter, Great Britain, Men's Alpine Skiing, Slalom (2002)

Isaiah Kiplagat and two others v Eric Keter Civil Application No. NAI 239 of 2000

298
Ph.D Thesis

ITF v Courtney Nagle (Anti-Doping Tribunal decided 29 March 2009)
ITF v Laura Pous Tio (Anti-Doping Tribunal decided 23 Dec 2008)
ITF v M. Charles Irie (Anti-Doping Tribunal decided 13 Oct 2008)
ITF v Abel (Anti-Doping Tribunal 29 April 2008)
ITF v Martina Hingis (Anti-Doping Tribunal 3 January 2008)
ITF v Karol Beck (Anti-Doping Tribunal 13 Feb 2006)
ITF v Mark Nielsen, ITF Independent Anti-Doping Tribunal 2005

Jeffry Michels v United States Olympic Committee ([1984] US 741 F. 2d 155), Seventh Circuit Court of Appeals

John Maller & Co v New York Arrows Soccer Team (802 F.2d 989 (8th cir. 1986)
Johnson v Athletic Canada and IAAF, [1997] O.J. No. 3201
Juan Jose Veloz v FINA, FINA Doping Panel 1/03

Katerina Bliamou v FINA, FINA Doping Panel 3/02

Kicker Vencil v Ultimate Nutrition Inc. (Seattle Times August 4, 2008)

Krabbe v IAAF and others, SpuRt 1996, pp. 133-135

Linda van Herk v FINA, FINA Doping Panel 6/02

Mahmoud Jadaan v FINA, FINA Doping Panel 5/02

Maria Stadnyik & Azerbaijan Wrestling Federation (AWF) v WADA & FILA, Urteil vom 17. March 2009 (Bundesgericht)

Marko Strahija v FINA, FINA Doping Panel 1/02

Martin v International Olympic Committee 740 F.2d 670 (9th Circ. 1984)


Mette Jacobsen v FINA, FINA Doping Panel 2/04

Miller v Cave City School (US Ct of Appeals 8th circuit 31 March 1991)

Modahl v British Athletic Federation Ltd [2002] 1 WLR 1192, 1232 CA

Monsanto v Schmeizer, F. Ct of Canada 2001

Moore v Regents of the University of California [51 Cal 3d 120, 793 P2d 479, 249 Cal R Ptr 494, 271 Cal RPtr 146 (1990), 499 US 936 (1991)]

Natalya Khudyakova v FINA, FINA Doping Panel 4/03

New Zealand Federation of Body Builders Inc. v Naera Johnson, SDT/01/06

New Zealand Power Lifting Federation Inc. v Mark Mete, SDT 04/06

Nike, Inc. v Wolverine World Wide, Inc. 43 F. 3d 644 (Fed. Cir. 1994).

N'sima & WADA v FIBA, FIBA AC 2005-5

299


Pittsburgh Athletic Co. v KQV Broadcasting Co. (24F. Supp. 490 (W.D.Pa, 1938))

Raguz v Sullivan, 2000 NSW Lexis 265 (Superior Ct of Appeal 2000)

Re Baby K 16 F.3d 590, 513 U.S. 825, 115 S. Ct. 91, 130 L. Ed. 2d 42 (1994)

Re Katerina Bliamou FINA Doping Panel 3/02

Re Mahmoud Jadaan FINA Doping Panel 5/02

Re Marko Strahija FINA Doping Panel 1/02

Re Marko Strahija, FINA Doping Panel 1/02

Reynolds v International Amateur Athletics Federation 23 F. 3d 1110 (6th Circ 1994)

Re Yuliya Pidlisna FINA Doping Panel 5/03

Reza Ojagh v FINA, FINA Doping Panel 2/03

Sam Keengu Nyamweya & two others v Mohamed Hatimy and two others, civil case No. 609 of 2007

Sam Keengu Nyamweya & two others v Mohamed Hatimy and two others, Civil App No. 154 of 2008

Schaffluetzel and Zoellig v Federation Suisse de courses de chevaux (FSC), 5C. 248/2006 (Decision of 23 August 2007) ATF 134 III 193, 200

Shaill v Tippecanoe County School Corporation, 679 F. Supp. 833 aff'd 864 F. 2d 1309 (7th circ. 1988) 212, 274


Swiss Federal Supreme Court Gundel v Federation Equestre Internationale, Decision of 15 March 1993

S.F. Arts & Athletics, Inc. v USOC, 483 U.S. 522, 542-547

Softball NZ v A Neemia, Sports Disputes Tribunal of New Zealand, SDT 08/06

Softball NZ v Curtis Ames, Sports Disputes Tribunal of New Zealand, SDT 10/06

Swiss Federal Tribunal: Judgement of 27 May 2003, 1st Civil Chamber

Touch NZ v Nui Bartlett, Sports Disputes Tribunal of New Zealand, SDT 15/05

Touch NZ v William Morunga, Sports Disputes Tribunal of New Zealand, SDT 13/06
Union Royale Belge des Societes de Football Association ASBL v Jean-Marc Bosman, Royal Club Liegeois SA v Jean-Marc Bosman and Others and Union des Associations Europeennes de Football (UEFA) v Jean-Marc Bosman [1995] C-415/93

Universal Athletic Sales Co v American Gym, Recreational & Athletic Equipment Corp (397 F. Sup 1063 (HD Pa. 1975))

USADA v Jonathan Page (AAA No. 77 190 16 09 JENF).

USADA v Kayle Leogrande AAA No. 77 190 0011 08

USADA v LaTasha Jenkins, AAA NO. 30 190 00199 07

USADA v Justin Gatlin, AAA No. 30 190 00170 07

USADA v Josh Moreau, AAA/NCAS AAA No. 30 190 00825 07

USADA v Joe Warren, AAA 30 190 00782 07

USADA v George Hartman, AAA NO. 30190 00900 05

USADA v Rickey Harris, AAA NO. 309 90 01114 05

Vaseleios Demetis v FINA, FINA Doping Panel 2/02

WADA v David Morgan, FIBA AC 2005-1

WADA & Ermal Kurtoglu v FIBA, FIBA AC 2005-6


Yuliya Pidlisna v FINA, FINA Doping Panel 5/03

================================
## TABLE OF STATUTES AND POLICY DOCUMENTS

<table>
<thead>
<tr>
<th>Document</th>
<th>Reference/Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Advocates Act (Cap 16)</td>
<td></td>
</tr>
<tr>
<td>African (Banjul) Charter on Human and Peoples’ Rights</td>
<td></td>
</tr>
<tr>
<td>Anabolic Steroids Control Act 1990 (USA)</td>
<td></td>
</tr>
<tr>
<td>Anabolic Steroid Control Act of 2004 (USA)</td>
<td></td>
</tr>
<tr>
<td>Anti-Doping Convention, European Treaty Series No. 135, Strasbourg, 16.XI.1989</td>
<td></td>
</tr>
<tr>
<td>Anti-Doping Danmark – Analysis and Statistics, 2000</td>
<td></td>
</tr>
<tr>
<td>Anti-Doping Danmark – Danish Law and Regulations, 2002</td>
<td></td>
</tr>
<tr>
<td>Arbitration Act, 1995 (Kenya)</td>
<td></td>
</tr>
<tr>
<td>Australian Sports Drug Agency Act 1990</td>
<td></td>
</tr>
<tr>
<td>Cape Town Declaration 2001</td>
<td></td>
</tr>
<tr>
<td>Cartagena Protocol on Biosafety</td>
<td></td>
</tr>
<tr>
<td>Children Act, 2001</td>
<td></td>
</tr>
<tr>
<td>Constitution of Kenya</td>
<td></td>
</tr>
<tr>
<td>Constitution of the International Cycling Union</td>
<td></td>
</tr>
<tr>
<td>Copenhagen Declaration 2003</td>
<td></td>
</tr>
<tr>
<td>Criminal Procedure Code, Cap 75 (Kenya)</td>
<td></td>
</tr>
<tr>
<td>Decree of the Flemish Executive N87 - 386 of 14 January 1987 (B.S. 21.02.1987)</td>
<td></td>
</tr>
<tr>
<td>Declaration on the Establishment of a New Economic Order, GA Res 3201 (S-VI) (1974)</td>
<td></td>
</tr>
<tr>
<td>Defamation Act, Cap 36 (Kenya)</td>
<td></td>
</tr>
<tr>
<td>Draft International Code of Conduct on Transfer of Technology 1974</td>
<td></td>
</tr>
<tr>
<td>European Anti-Doping Convention, Council of Europe, European Treaty Series – No. 135, Strasbourg, 16.XI.1989</td>
<td></td>
</tr>
</tbody>
</table>
Evidence Act, Cap 80 (Kenya)
FIBA Internal Regulations 2008
FIBA Regulations 2006-2010
Food, Drugs and Chemical Substances Act (Cap 254 of the Laws of Kenya.)
General Conference of UNESCO 2003, 32nd Session, Paris
Guidelines on Therapeutic Use Exemption (TUE) at http://www.wada-ama.org
International Charter of Physical Education and Sport, Adopted by the General Conference of UNESCO at its twentieth session, Paris, 21 November 1978
Kenya Information and Communications Act (Cap 411A)
Kenya Information and Communications (Amendment) Act 2008
Kuala Lumpur Declaration 2002
Lausanne Declaration on Doping in Sport 1999 http://www.sportunterricht.de/lksport/Declaration_e.html [last visited 4 July 2008]
Medical Practitioners and Dentists Act, Cap 253 of the Laws of Kenya
Moscow Memorandum of Understanding on Anti-Doping in Sport 6 November 2002.
Narcotic Drugs and Psychotropic Substances (Control) Act, Act No. 4 of 1994 of the Laws of Kenya
New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards
International Convention Against Doping in Sport 2005
Olympic Charter
Oslo Declaration 2000
Penal Code, Cap 63 of the Laws of Kenya
Permanent World Conference on Anti-Doping in Sport 1988
Pharmacy and Poisons Act, Cap 244 of the Laws of Kenya
Protection of Health of Athletes and the Fight Against Doping, French Legislation in Force, 1st October 2006

Public Health Act, Cap 242 of the Laws of Kenya

Recommendation No. R (92) 13 REV, Recommendation of the Committee of Ministers to Member States of the European Union on the Revised European Sports Charter (adopted by the Committee of Ministers on 24 September 1992 at the 480th meeting of the Ministers' Deputies and revised at their 752nd meeting on 16 May 2001).

Recommendation No. R (92) 14 REV adopted by the Committee of Ministers on 24 September 1992 at the 480th meeting of the Ministers' Deputies and revised at their 752nd meeting on 16 May 2001)

Science and Technology Act, Cap 250 of the Laws of Kenya

Societies Act, Cap 108 of the Laws of Kenya

Sydney Communiqué – International Drugs in Sport Summit 1999

Ted Stevens Olympic and Amateur Sports Act (USA)

The Kenya Communications (Amendment) Act, 2008


United Nations Convention to Combat Desertification in those Countries experiencing Drought and/or Desertification 1994


Mori Wekesa

Ph.D Thesis

United Nations Framework Convention on Climate Change


United Nations Protocol to the Convention on Long-Range Transboundary Air Pollution concerning the Control of Volatile Organic Compounds and their Transboundary Fluxes 1992

United States Anti-Doping Agency (USADA) Protocol for Olympic Movement Testing

Use of Poisonous Substances Act, Cap 247 of the Laws of Kenya

World Anti-Doping Code 2009

World Anti-Doping Code 2003
APPENDIX I: KENYAN ATHLETES WHO HAD TESTED POSITIVE BY END OF 2009

<table>
<thead>
<tr>
<th>S/No</th>
<th>YEAR</th>
<th>NAME</th>
<th>SPORT</th>
<th>DRUG</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>2009</td>
<td>Raymond Tanui</td>
<td>Athletics</td>
<td>EPO</td>
</tr>
<tr>
<td>2</td>
<td>2008</td>
<td>Susan Chepkemei</td>
<td>Athletics</td>
<td>Salbutamol</td>
</tr>
<tr>
<td>3</td>
<td>2008</td>
<td>Elizabeth Muthoka</td>
<td>Athletics</td>
<td>Nandrolone</td>
</tr>
<tr>
<td>4</td>
<td>2006</td>
<td>Lydia Cheromei</td>
<td>Athletics</td>
<td>Clomiphene</td>
</tr>
<tr>
<td>5</td>
<td>2005</td>
<td>Philip Wire Opiyo</td>
<td>Soccer</td>
<td></td>
</tr>
<tr>
<td>6</td>
<td>2005</td>
<td>Edwin Shimenga</td>
<td>Rugby</td>
<td>Hydrochlorothiazide</td>
</tr>
<tr>
<td>7</td>
<td>2004</td>
<td>David Munyasa</td>
<td>Boxing</td>
<td>Cathine/Miraa</td>
</tr>
<tr>
<td>8</td>
<td>2003</td>
<td>Pamela Chepchumba</td>
<td>Athletics</td>
<td>EPO</td>
</tr>
<tr>
<td>9</td>
<td>2003</td>
<td>Ambrose Bitok</td>
<td>Athletics</td>
<td>Norandosterone</td>
</tr>
<tr>
<td>10</td>
<td>2000</td>
<td>Simon Kemboi</td>
<td>Athletics</td>
<td>Nandrolone</td>
</tr>
<tr>
<td>11</td>
<td>1999</td>
<td>Delilah Asiago</td>
<td>Athletics</td>
<td></td>
</tr>
<tr>
<td>12</td>
<td>1997</td>
<td>David Obiero</td>
<td>Weightlifting</td>
<td>Nandrolone</td>
</tr>
<tr>
<td>13</td>
<td>1993</td>
<td>John Ngugi</td>
<td>Athletics</td>
<td>No Test taken</td>
</tr>
<tr>
<td>14</td>
<td></td>
<td>Charles Nyakundi</td>
<td>Athletics</td>
<td>Boldenone</td>
</tr>
</tbody>
</table>
APPENDIX II: INSTRUMENT OF RATIFICATION BY KENYA OF THE 2005 INTERNATIONAL CONVENTION AGAINST DOPING

INSTRUMENT OF RATIFICATION

INTERNATIONAL CONVENTION AGAINST DOPING IN SPORT
WHEREAS the International Convention Against Doping in Sport was adopted in Paris on 19th October, 2005;

WHEREAS the Convention, under Article 36 is subject to ratification, acceptance, approval or accession by Member States of United Nations Educational, Scientific and Cultural Organization (UNESCO) in accordance with their respective constitutional procedures;

AND WHEREAS the Republic of Kenya is desirous of ratifying the Convention:
NOW THEREFORE, I, Hon. Moses Wetang’ula, EGH, MP, Minister for Foreign Affairs hereby declares that the Government of the Republic of Kenya, having considered the above mentioned Convention ratifies the same and undertakes to faithfully perform and carry out the stipulations contained therein.

IN WITNESS THEREOF, this instrument of Ratification is given under my hand and the Official Seal of the Ministry of Foreign Affairs of the Republic of Kenya.

DONE at NAIROBI, this 17th day of August, Two Thousand and Nine.

HON. MOSES WETANG’ULA, EGH, MP
MINISTER FOR FOREIGN AFFAIRS OF THE REPUBLIC OF KENYA
# APPENDIX III: RATIFICATIONS/ACCEPTANCES OF THE INTERNATIONAL CONVENTION AGAINST DOPING IN SPORT.

**PARIS, 19 OCTOBER 2005**


<table>
<thead>
<tr>
<th>States</th>
<th>Date of deposit of instrument</th>
<th>Type of instrument</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Sweden</td>
<td>09/11/2005</td>
<td>Ratification</td>
</tr>
<tr>
<td>2. Canada</td>
<td>29/11/2005</td>
<td>Acceptance</td>
</tr>
<tr>
<td>3. Denmark</td>
<td>15/12/2005</td>
<td>Ratification</td>
</tr>
<tr>
<td>4. New Zealand</td>
<td>23/12/2005</td>
<td>Acceptance</td>
</tr>
<tr>
<td>5. Norway</td>
<td>13/01/2006</td>
<td>Ratification</td>
</tr>
<tr>
<td>6. Australia</td>
<td>17/01/2006</td>
<td>Ratification</td>
</tr>
<tr>
<td>7. Monaco</td>
<td>30/01/2006</td>
<td>Acceptance</td>
</tr>
<tr>
<td>8. Iceland</td>
<td>10/02/2006</td>
<td>Acceptance</td>
</tr>
<tr>
<td>9. Cook Islands</td>
<td>15/02/2006</td>
<td>Accession</td>
</tr>
<tr>
<td>10. Nigeria</td>
<td>24/02/2006</td>
<td>Accession</td>
</tr>
<tr>
<td>11. Latvia</td>
<td>10/04/2006</td>
<td>Accession</td>
</tr>
<tr>
<td>12. United Kingdom of Great Britain and Northern Ireland</td>
<td>25/04/2006</td>
<td>Ratification</td>
</tr>
<tr>
<td>13. Nauru</td>
<td>04/05/2006</td>
<td>Ratification</td>
</tr>
<tr>
<td>14. Seychelles</td>
<td>05/07/2006</td>
<td>Ratification</td>
</tr>
<tr>
<td>15. Mauritius</td>
<td>06/07/2006</td>
<td>Ratification</td>
</tr>
<tr>
<td>16. Lithuania</td>
<td>02/08/2006</td>
<td>Ratification</td>
</tr>
<tr>
<td>17. Jamaica</td>
<td>02/08/2006</td>
<td>Ratification</td>
</tr>
<tr>
<td>18. China</td>
<td>09/10/2006</td>
<td>Accession</td>
</tr>
<tr>
<td>20. Peru</td>
<td>16/10/2006</td>
<td>Ratification</td>
</tr>
<tr>
<td>21. Romania</td>
<td>23/10/2006</td>
<td>Acceptance</td>
</tr>
<tr>
<td>22. Mozambique</td>
<td>23/10/2006</td>
<td>Ratification</td>
</tr>
<tr>
<td>23. Spain</td>
<td>25/10/2006</td>
<td>Ratification</td>
</tr>
<tr>
<td>25. Ukraine</td>
<td>08/11/2006</td>
<td>Ratification</td>
</tr>
<tr>
<td>27. Netherlands</td>
<td>17/11/2006</td>
<td>Ratification</td>
</tr>
<tr>
<td>29. South Africa</td>
<td>30/11/2006</td>
<td>Ratification</td>
</tr>
<tr>
<td>30. Luxembourg</td>
<td>11/12/2006</td>
<td>Ratification</td>
</tr>
<tr>
<td>31. Malaysia</td>
<td>20/12/2006</td>
<td>Ratification</td>
</tr>
<tr>
<td>32. Barbados</td>
<td>21/12/2006</td>
<td>Acceptance</td>
</tr>
<tr>
<td>33. Finland</td>
<td>22/12/2006</td>
<td>Acceptance</td>
</tr>
<tr>
<td>34. Japan</td>
<td>26/12/2006</td>
<td>Ratification</td>
</tr>
<tr>
<td>35. Tunisia</td>
<td>26/12/2006</td>
<td>Ratification</td>
</tr>
<tr>
<td>36. Argentina</td>
<td>29/12/2006</td>
<td>Ratification</td>
</tr>
<tr>
<td>37. Algeria</td>
<td>29/12/2006</td>
<td>Ratification</td>
</tr>
<tr>
<td>38. Russian Federation</td>
<td>29/12/2006</td>
<td>Ratification</td>
</tr>
<tr>
<td>39. Greece</td>
<td>31/12/2006</td>
<td>Ratification</td>
</tr>
<tr>
<td>40. Ghana</td>
<td>31/12/2006</td>
<td>Ratification</td>
</tr>
<tr>
<td>41. Albania</td>
<td>31/12/2006</td>
<td>Accession</td>
</tr>
<tr>
<td>42. Bulgaria</td>
<td>12/01/2007</td>
<td>Ratification</td>
</tr>
<tr>
<td>43. Thailand</td>
<td>15/01/2007</td>
<td>Ratification</td>
</tr>
<tr>
<td>44. Poland</td>
<td>17/01/2007</td>
<td>Accession</td>
</tr>
<tr>
<td></td>
<td>Country</td>
<td>Date</td>
</tr>
<tr>
<td>---</td>
<td>----------------------------------</td>
<td>------------</td>
</tr>
<tr>
<td>45</td>
<td>Slovakia</td>
<td>26/01/2007</td>
</tr>
<tr>
<td>46</td>
<td>Republic of Korea</td>
<td>05/02/2007</td>
</tr>
<tr>
<td>47</td>
<td>France</td>
<td>05/02/2007</td>
</tr>
<tr>
<td>48</td>
<td>Trinidad and Tobago</td>
<td>09/03/2007</td>
</tr>
<tr>
<td>49</td>
<td>Ecuador</td>
<td>22/03/2007</td>
</tr>
<tr>
<td>50</td>
<td>Mexico</td>
<td>11/04/2007</td>
</tr>
<tr>
<td>51</td>
<td>Czech Republic</td>
<td>30/04/2007</td>
</tr>
<tr>
<td>52</td>
<td>Portugal</td>
<td>30/04/2007</td>
</tr>
<tr>
<td>53</td>
<td>Egypt</td>
<td>23/05/2007</td>
</tr>
<tr>
<td>54</td>
<td>Mali</td>
<td>30/05/2007</td>
</tr>
<tr>
<td>55</td>
<td>Libyan Arab Jamahiriya</td>
<td>30/05/2007</td>
</tr>
<tr>
<td>56</td>
<td>Germany</td>
<td>31/05/2007</td>
</tr>
<tr>
<td>57</td>
<td>Oman</td>
<td>09/07/2007</td>
</tr>
<tr>
<td>58</td>
<td>Kuwait</td>
<td>13/07/2007</td>
</tr>
<tr>
<td>59</td>
<td>Austria</td>
<td>19/07/2007</td>
</tr>
<tr>
<td>60</td>
<td>Azerbaijan</td>
<td>23/07/2007</td>
</tr>
<tr>
<td>61</td>
<td>Samoa</td>
<td>08/08/2007</td>
</tr>
<tr>
<td>62</td>
<td>Estonia</td>
<td>17/08/2007</td>
</tr>
<tr>
<td>63</td>
<td>Qatar</td>
<td>24/08/2007</td>
</tr>
<tr>
<td>64</td>
<td>Hungary</td>
<td>29/08/2007</td>
</tr>
<tr>
<td>65</td>
<td>Burundi</td>
<td>05/09/2007</td>
</tr>
<tr>
<td>66</td>
<td>Croatia</td>
<td>03/10/2007</td>
</tr>
<tr>
<td>67</td>
<td>Cameroon</td>
<td>15/10/2007</td>
</tr>
<tr>
<td>68</td>
<td>Mongolia</td>
<td>15/10/2007</td>
</tr>
<tr>
<td>69</td>
<td>Bangladesh</td>
<td>22/10/2007</td>
</tr>
<tr>
<td>70</td>
<td>Singapore</td>
<td>05/11/2007</td>
</tr>
<tr>
<td>71</td>
<td>India</td>
<td>07/11/2007</td>
</tr>
<tr>
<td>72</td>
<td>Gabon</td>
<td>27/11/2007</td>
</tr>
<tr>
<td>73</td>
<td>Panama</td>
<td>27/11/2007</td>
</tr>
<tr>
<td>74</td>
<td>Saint Lucia</td>
<td>07/12/2007</td>
</tr>
<tr>
<td>75</td>
<td>Brazil</td>
<td>18/12/2007</td>
</tr>
<tr>
<td>76</td>
<td>Indonesia</td>
<td>30/01/2008</td>
</tr>
<tr>
<td>77</td>
<td>Pakistan</td>
<td>04/02/2008</td>
</tr>
<tr>
<td>78</td>
<td>Republic of Moldova</td>
<td>19/02/2008</td>
</tr>
<tr>
<td>79</td>
<td>Italy</td>
<td>27/02/2008</td>
</tr>
<tr>
<td>80</td>
<td>Guatemala</td>
<td>17/03/2008</td>
</tr>
<tr>
<td>81</td>
<td>Brunei Darussalam</td>
<td>31/03/2008</td>
</tr>
<tr>
<td>82</td>
<td>Cambodia</td>
<td>09/04/2008</td>
</tr>
<tr>
<td>83</td>
<td>Saint Kitts and Nevis</td>
<td>14/04/2008</td>
</tr>
<tr>
<td>84</td>
<td>Uruguay</td>
<td>28/04/2008</td>
</tr>
<tr>
<td>85</td>
<td>Senegal</td>
<td>29/04/2008</td>
</tr>
<tr>
<td>86</td>
<td>Saudi Arabia</td>
<td>22/05/2008</td>
</tr>
<tr>
<td>87</td>
<td>Cape Verde</td>
<td>05/06/2008</td>
</tr>
<tr>
<td>88</td>
<td>Belgium</td>
<td>19/06/2008</td>
</tr>
<tr>
<td>89</td>
<td>Ireland</td>
<td>18/07/2008</td>
</tr>
<tr>
<td>90</td>
<td>Cuba</td>
<td>28/07/2008</td>
</tr>
<tr>
<td>91</td>
<td>Côte d'Ivoire</td>
<td>29/07/2008</td>
</tr>
<tr>
<td>92</td>
<td>Ethiopia</td>
<td>30/07/2008</td>
</tr>
<tr>
<td>93</td>
<td>Eritrea</td>
<td>19/08/2008</td>
</tr>
<tr>
<td>94</td>
<td>United States of America</td>
<td>25/08/2008</td>
</tr>
<tr>
<td>95</td>
<td>El Salvador</td>
<td>05/09/2008</td>
</tr>
<tr>
<td>96</td>
<td>Slovenia</td>
<td>18/09/2008</td>
</tr>
<tr>
<td>97</td>
<td>Palau</td>
<td>23/09/2008</td>
</tr>
</tbody>
</table>
In accordance with its Article 37, this Convention entered into force on 1 February 2007 for those States that have deposited their respective instruments of ratification, acceptance, approval or accession on or before 31 December 2006. It shall enter into force with respect to any other State on the first day of the month following the expiration of a period of one month after the date of deposit of its instrument of ratification, acceptance, approval or accession.