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**“A COMPREHENSIVE DISSECTION OF THE NIKE VAPORFLY  
CONTROVERSY IN LIGHT OF SPORTS AND DOPING LAWS.”**

**AUTHORED BY: MS. SURABHI SRINIVASAN (BBA. LL.B),**

**CO-AUTHORED BY: MR. AYAN ROY (B.A.LL.B),**

**SYMBIOSIS LAW SCHOOL, HYDERABAD,**

**EMAIL IDS: SURABHI\_SRINIVASAN@STUDENT.SLSH.EDU.IN,**

**AYAN\_ROY@STUDENT.SLSH.EDU.IN.**

**I. INTRODUCTION:**

The legislature is a governing aspect of every nation and every person, the law has been widely formed to regulate almost all facets of a person life, right from a constitution governing a nation to specific laws be it for a corporate body or personal laws, there exists a law for nearly everything and the field of Sports is no exception. It has been observed that sports law consists of various interlinked laws consisting of but not restricting, Competition, Contract and taxation laws. The combination of these laws is what has given rise to the field of Sports Law.<sup>1</sup> Nonetheless, sports law has now evolved into more than just an amalgamation of laws<sup>2</sup> as now doping, sports ethics and gender discrimination, international sports all come under the purview of sports law<sup>3</sup>. This article focuses on a current day controversy that deals with Doping and sports law. Sports have been a part of human culture since over 3000 years, although the variety that existed then was far limited and the sport itself was of a primitive nature. However, since then sports have come a long way but the distinct competitive nature that it possesses has by far remained somewhat the same. Today sports are a global industry, being a sportsman or sportswoman is a legitimate profession that requires constant effort and dedication. Sports now has global platforms that cater to specific

<sup>1</sup> Robert C. R. Siekmann & Janwillem Soek, *Lex sportiva: what is sports law?* (2016).

<sup>2</sup> Robert C.R, *Supra* note 1.

<sup>3</sup> *Id.* at 1.

kinds of sports, these platforms are leagues or competitions that happen annually if not around the year and is the essential environment that forms the base of professional sports and the entire Sports and Athletics Industry. Competition is the primary essence of what makes professional sports an industry that is extremely labour intensive but the rewarding this Industry can provide is the factor that makes it a lucrative one.

Often these competitions have huge sums of money as a prize for those who perform the best, but often winning these competitions more of a matter of instilling the pride of being “the best” if not one of the best, within Individuals, Teams and even Nations, rather than the large sums of money that is attached to it. Today we have several large-scale competitions such as the Olympics, World Cups, Grand Prix etc., winning titles in these competitions is every participant’s final goal but it comes at a high price, years of practice, hours of intense training, blood sweat and tears are just a few investments every sportsman or sportswoman puts into becoming a champion. This high-risk factor is one of the leading reasons behind the extreme competition between sportspersons and at times it evolves into the need to use unsportsmanlike ways and other illegal methods to be deemed as the best.

## **II. THE CONTROVERSY:**

Doping in a general sense usually only refers to the usage of performance-enhancing drugs, but now sports itself has widened its ambit to include activities where man and machine work in coordination to perform with maximum efficiency, Cycling, Motorsports, Sailing are just a few of the several examples where technology and mechanics play a vital and an inseparable role. Mechanical doping is a rather recently coined term for the implementation of “Technological Fraud”, it simply means the unfair usage of technology to improve sports performance. The first confirmed case of mechanical doping was at the UCI Cyclo-Cross World Championship, 2016, where one of the cyclists had been found to have installed a hidden motor inside her cycle and thereby giving her an edge over her competitors. This brings us to the rather recent controversy in sports, the Nike Vaporfly Controversy. Nike is the world’s leading producer of sports apparel and accessories, it is one of the most premier brands within the sporting community and caters to almost all kinds of sports, and in addition

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to this is the largest supplier of athletic shoes specifically. Nike released its “Vaporfly” variant of running shoes all the way back in 2016, and has been well known among the runner’s community, in 2019 however, Eulid Kipchoge, a Professional Long-Distance runner, representing Kenya, broke the record time for a 42-Kilometer-long Marathon, at Vienna. He completed the marathon under the 2-hour mark and timed at 1 hour, 59 minutes and 40 seconds, although it was not officially recognized as a world record he had definitely broken his own personal record, keeping the fact that he is currently the world record holder for the Fastest Marathoner (Male), and has retained his crown since 2017. The very next day Brigid Kosgei, another fellow Kenyan runner broke the women’s record by 81 seconds, timing at a total of 2 hours 14 minutes and 4 sec<sup>4</sup>. Kipchoge and Kosgei claimed these feats wearing the Nike Vaporflys and this threw these shoes into Sporting Limelight. Research and studies showed that the new Vaporflys could typically improve running economy by 4-5% and it was estimated that it improved a “professional” running economy by almost 10%, it may seem less but a 1% minor improvement in running economy translates to around a 22-second advantage.

These shoes have been specially engineered to be extremely light as it is mainly comprised of a light fiber-based upper, and a single lightweight PVAX foam (Nike Zoom X) based sole with a full-length Carbon Fiber Plate providing additional rigidity. Combining the use of such modern and high-grade materials to make a running shoe, had never been done before and Nike had certainly set new standards for the best in running technology and shoe design. With the Tokyo Olympics around the corner, several critics have slammed the usage of this shoe and contested against its new variant the Nike Alphafly NEXT% which is supposed to be an improved version of the Vaporfly variant<sup>5</sup>. The primary issues that stand debated are, whether these shoes provide an unfair advantage because of its inherent construction and whether they fall under the ambit of Mechanical Doping.

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<sup>4</sup> Adam Kilgore, Nike’s Vaporfly shoes changed running, and the track and field world is still sifting through the fallout, The Washington Post (Feb. 9, 2020, 7:14 P.M.)

<https://www.washingtonpost.com/sports/2020/02/09/nikes-vaporfly-shoes-changed-running-track-field-world-is-still-sifting-through-fallout/>.

<sup>5</sup> Rachel Bachman, Khadeeja Safdar, The Wall Street Journal (Jan. 31, 2020, 3:59 P.M)

<https://www.wsj.com/articles/nikes-controversial-vaporfly-shoe-cleared-for-use-at-tokyo-olympics-11580484025>.

### **III. DOPING AND ITS EFFECTS:**

Doping is the prime term that is associated with cheating in Professional Sports; it officially means the usage of forbidden drugs or means to improve performance in training or to improve sporting results. It is an issue that has been plaguing the world at a level of international sporting events. The history dates all the way back to 776 BC during the era of Greek Olympics where Mushroom and plant mixtures were used to enhance the performance of the athletes, however, these caused great medical effects including premature death and hence the International Olympic Committee banned these substances and even introduced the idea of anti-doping tests in the year 1967. There are known to be a variety of almost hundreds of doping substances, and a few hundred more which are yet to be identified as doping techniques. The ambit of Doping does not only cover specific performance-enhancing drugs such as Steroids but it also includes the usage of illegal drugs, and by means, it includes the process of bodily fluid transfusions and the application of genetic engineering for bodily enhancements. Substances that are generally used in doping are broadly categorized into 3 types, namely, Steroids, Stimulants and Diuretics.

Most of this introduced into the body through simple oral intake or direct injection into the bloodstream of the user. Steroids essentially play the role of synthetically produced hormones that are usually naturally induced within the body; these steroids when introduced may stimulate additional growth of the body, increased blood cell production among several other effects. Stimulants, on the other hand, fool the body into thinking that the body needs to adapt to a sudden change in its surroundings, for example stimulating low oxygen in high altitudes will lead to the body to increase hemoglobin within the body thereby enhancing the efficiency of energy produced per unit of oxygen consumed, these substances are often used in sports that are played in high altitude or frigid conditions. Lastly, Diuretics are chemicals which disguise other doping agents and behave as masking potions which prevent detection in case the user is subjected to a doping test<sup>6</sup>. These drugs are very efficient too when it comes to performance-enhancing, Steroids can induce rapid muscle growth and eventually provide a significant 20% increase in overall strength, this is vital to field sports and combat

<sup>6</sup> What is Prohibited, World Anti-Doping Agency, <http://www.wada-ama.org/en/content/what-is-prohibited>.

sports where muscle capacity is the key factor. Stimulants are used by those who deal with endurance sports and athletics, stimulants have shown to improve endurance by a minimum of 8%, while diuretics are substances which help with an easy getaway from a failed doping test, irrespective of which performance-enhancing drug has been priorly introduced within the body of an athlete.

Blood doping is also another method to stimulate increased performance by introducing more blood in the body by simple transfusion, this is a more complex method of enhancing one's performance but is now widely used due to the easy process of blood transfusion, another highly complex way of doping is gene doping wherein the genes of an individual is genetically modified to induce the formation natural characteristics that will condition the body to be good at specific sports, for example, genetic editing has been used to make individuals grow taller and have larger limbs so that they inadvertently have an edge in sports where height is a crucial criteria, such as basketball.

The efficiency of these drugs and methods is the primary reason as to why they are banned in the first place, not only are they effective but they almost always have the desired results<sup>7</sup>. If a sportsman was allowed to take such drugs or go through bodily modifications, there would be no levelled playing field for the others, giving the user an unfair advantage over his competition, apart from the immoral perspective, another very concerning issue, is the lasting health effects these drugs may have on its consumers over time and after repetitive usage.

The usage of synthetic steroids may cause excessive excretion of hormones that may lead to cardiovascular disorders, hormonal imbalances, gigantism, impotence, acromegaly; diabetes among several other hormone-related illnesses, Stimulants can cause severe hypertension insomnia, osteoporosis, psychosis, excessive euphoria and erratic cardiac cycles. Diuretics, on the other hand, being purely inorganic chemical-based substances lead to kidney damage and blood poisoning. Blood Doping can cause recurring strokes and internal clotting, while gene doping is far too risky to be conventionally approved due to its infancy.

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<sup>7</sup> Harmful Effects of Doping, National Anti Doping Agency, <https://www.nadaindia.org/en/harmful-effects-of-doping>.

#### **IV. WORLD ANTI DOPING AGENCY:**

The world anti-doping agency or popularly known as WADA<sup>8</sup> is the leading body that currently deals with the anti-doping policies of sports, the agency has been established nearly two decades ago, as it came into force under the aegis of the *International Olympic Committee (IOC)* in the year 1999, although it comes under IOC is functions like any other independent body that works in the capacity of a private law organization<sup>9</sup>, the main task undertaken by WADA is to promulgate anti-doping codes in order to bring into effect the regulations at a global level. In 2015, WADA issued an updated Code<sup>10</sup> that was to be followed on a global level, it provides a certain framework for various regulations which regulate the anti-doping policies, rules which are required to be adhered to by and among sports authorities as well as sports organizations. The code is widely accepted and has been adopted as the primary source of legislation by many authorities including the Court of arbitration of sports (CAS); which happens to be a legal institution that deals with legal disputes, and consists of over 150 arbitrators from all over the Globe. The code included an analysis known as the ‘Technical Document for sport-specific analysis (TDSSA), this helps in identifying substances and methods of doping which are being used by sportspersons. However, at present, there has been a review set up for a 2021 code and in the month of January, there have been rule modifications made by WADA to their constitution and Book of rules which consist of the legal backing of the code and are used as a tenet.

#### **V. LEGAL ACTIONS:**

The burden of proof in terms of doping is on the athlete, and the principle of strict liability applies, however, the 2015 code paves way for the question of Intent to be included, though Article 2.1.1 of the Code<sup>11</sup> that it is construed as the Athlete’s fault and has been referred to the principle of strict liability in awards by the CAS. However, the consequences of doping are severe in nature, as they include the ban of an athlete from a particular sport. In the

<sup>8</sup> O’Grady, T. J., & Gracey, D. (2020). An Evaluation of the Decision by World Athletics on Whether or Not to Ban the Nike Vapor Fly Racing Shoe in 2020. *The Entertainment and Sports Law Journal*, 18(1), 3.

<sup>9</sup> *Supra* note 7.

<sup>10</sup> <https://www.wada-ama.org/en/questions-answers/2015-world-anti-doping-code>.

<sup>11</sup> 2015 WADC Art.2.1.1

current situation of the Nike Vaporfly it is essential to note that in terms of Mechanical or technological doping, there has been no specific precedent or rule laid down with respect to the shoes, until the year 2020.

WADA also works Hand in Hand with the world athletics as it is sporting federation, and athletes are bound by anti-doping laws too. The world athletics lays down regulations which are specific and in tandem with recognized athletic competitions, these regulations are known as its '*Constitution and Book of rules*', in this, every detail is mentioned including the guidelines for the required footwear to be worn by the athlete. Post, the study of the Nike Vaporfly where it was observed that the footwear provided an undue advantage in terms of speed and increased economy, there were amendments made to the constitution and rules, in specific Rule 5 of book C which comes under the heading of 'Technical Rules' where it was mentioned that the footwear being used must not in any provide an undue advantage over other athletes, and if any footwear were to be found having such advantages it would be studied and further banned.

Post, the findings of the advantage of the Nike Vaporfly the study was conducted and on 31<sup>st</sup> January 2020<sup>12</sup> the World athletic forum amended their technical rules to specify that the sole of the shoe must not be thicker than 40mm and that it should not contain more than a single rigid embedded plate, in lieu of these changes the use of Nike Vaporfly in the future was banned, however, the already existing Nike Vaporfly was not banned as the improvement in mechanical terms was a result of the metatarsal-phyangeal joint with the shoe and not just the shoe alone<sup>13</sup> as it did not conform to those specifications and as mentioned earlier Doping can also be Mechanical or Technical and this comes under those categories as it gives an unfair advantage as well as boosts performance. The backlash of this would be that it would be considered doping and which is an offence and the athlete would be liable under the WADA code and could be banned under the provision of Article 10.<sup>14</sup>

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<sup>12</sup> Id. At 7.

<sup>13</sup> Hoogkamer, W, et al. 2019. The Biomechanics of Competitive Male Runners in Three Marathon Racing Shoes: A Randomized Crossover Study. *Sports Med*, 49(1): 133–143.

<sup>14</sup> 2015 WADC Art.10

## **VI. CONCLUSION:**

Taking into consideration the controversy, the legislature and the basic morals and ethos of sports, it can be observed that the Nike VaporFly indeed boosts the performance of an athlete, which comes under the terms of undue advantage over other participants, further drawing comparison to a past experience of where technology was made use in order to boost performance, two decades ago, in the sport of speed skating, a new device was developed known as clap skates, these had the quality of relieving muscle sores and tension especially the quadriceps<sup>15</sup> and they increased the economy of the skater as well, however they were banned as they provided an undue advantage.

This is only one of the many technological advances made that have been banned for undue advantage. Further, noting that Doping is an offence worldwide and that any form of having an upper hand by means of external factors is strictly frowned upon and the Nike Vaporfly does provide an upper hand, it is for the betterment and the fairness that the amendment has paved a way for the Ban of the same.

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<sup>15</sup> Id. at note 7.