

A REVIEW ON DOPING IN SPORTS IN TERMS OF SPORTS LAW AND PENAL LAW IN THE LIGHT OF TURKISH LEGISLATION

«Lotus» Law Office, Izmir Bar Association
Mansuroglu Mah. 295/2 Sk. No:1 B Blok K:2 D:217 Bayrakli, İzmir, Turkey
E-mail: nisanyuce@gmail.com

Objective: the main objective of this paper is to study on the offense of doping and how it is regulated in Turkish law in terms of both sports law and penal law. **Methods of research:** general scientific, philosophical and specially-legal methods of scientific research have been used. A system analysis method has been used to determine doping, the activity of Turkish doping control agencies and specific of the judicial process, proof and evidence in trial in this issue. A dogmatic method was valuable to formulate conclusions and recommendations of practical character within the research issues concerning the prevention of doping use in sport by the Turkish legislation. **Results:** the movement against doping has only started in the 20th Century, and with the workings of the sports federations, the States and international organizations, a union is trying to be achieved in the fight against doping. Turkey has also established its own institutes and committees in accordance with the international conventions that Turkey is a party of and prepared regulations in accordance with the WADC and its prohibited lists. Nevertheless, to create a full unity, an effective control mechanism must be applied. The prevention of the application of doping or the imposing of the necessary sanctions is a matter of right implementation of the law. **Discussion:** it was based on whether the current regulations were effective enough to fight against the use of doping.

Keywords: sports law; penal law; doping; anti-doping; biological passport; disciplinary offenses; sporting disputes; procedure; arbitration; CAS.

Introduction. The fight against doping in the scope of international organizations and international legislation has been studied in the previous part of the research. In this part of the study, the institutions and organizations authorized in the fight against doping in Turkey and the regulations which form these or issued by them shall be reviewed.

Analysis of the Research and Publications.

Using of doping in sports became a subject of scientific interest for the leading Turkish scholars such as K. Erkiner, H. Gerceker, A. Simsek and Y. Unver. At the same time, the question of its concept, specific and prevention is still opened. That is why it needs its further investigation with the purpose to understand it and make a common policy to its effective prevention in Turkey.

Research Tasks. While the importance of the fight against doping is noticed and international attempts are being made in order to create a unity, success is only possible with the right implementation and initiative taken by the States and sports federations. Turkey is one of the pioneer countries in starting the fight against doping, however, in the implementation of the current global regulations, more steps must be taken.

The purpose of this paper is to make a review of doping in sports in terms of sports law and penal law in the light of Turkish legislation. To reach this aim, it is needed to perform the following tasks: 1) to determine a concept of doping in lights of sports law in Turkey, including the Constitution of Republic of Turkey and Turkish Anti-Doping Regulations; 2) to investigate the activity of Turkish Dop-

ing Control Center, Turkish National Olympic Committee Anti-Doping Commission, Turkish Football Federation Sanctions concerning anti-doping policy; 3) to analyze Proceedings the Judicial Process of Doping, Proof, and Evidence in Trial concerning illegal use of doping in sports under the legislation of Turkey.

Research Results. Following the suggestion of a definition in the meetings held by the Council of Europe (CoE) in 1963, doping has first entered Turkish law in 1971 with the “By-Law on Fighting Against Sportive Doping [1, p. 10].” Doping is regulated in our law as a disciplinary offense in accordance with Article 48 of the Amateur Sports Branches Penal Regulations of the General Directorate of Sports.

Turkish Doping Control Center (TDCC), as in all doping control centers in the world, was established in 1989 in order to protect the principle of “Clean Sports” by performing the analysis of the active pharmaceutical ingredients from the biological materials of the athletes, in accordance with the protocol signed between Hacettepe University and the General Directorate of Youth and Sports [2]. In 2001, TDCC has become accredited by deeming successful in the International Olympic Committee (IOC) compliance tests. Since 2004, it has been going through the World Anti-Doping Agency (WADA) accreditation audits and continues to serve as a WADA accredited Doping Control Specimen Analysis Laboratory. In addition to supervising athletes, TDCC continues experiments to help fight against doping.

Turkish National Olympic Committee Anti-Doping Commission (TADC), established with a protocol signed between the Turkish Olympic Committee and General Directorate of Sports on 24 May 2011, to form and implement a fully effective anti-doping program in compliance with the World Anti-Doping Code (WADC) [3]. Article 7 of the protocol indicates the aim to establish TADC as the sole competent authority at the international and national level in the fight against doping. In 29 June TADC held its first meeting and Turkish Anti-Doping Regulations were prepared. The Regulations were submitted for WADA’s approval, implemented by all federations in Turkey, and Turkey was recognized as “compatible with WADC.” Up-

dating the Regulations in 2015, TADC continues its fight against doping for the protection of health and fair competition in defense of the rights of clean athletes.

Aside from the two establishments mentioned above, Anti-Doping and Support Services of Directorate of Health Affairs Department of the General Directorate of Sports, National Paralympic Committee, Turkish Football Federation, Independent Sports Federations, Federations affiliated with the GDoS have the authority to make regulations regarding the fight against doping and to issue regulations, instructions, internal instructions and directives in this regard. In addition, the Arbitration Board of GDoS, Arbitration Board of TFF, Penal and Disciplinary Boards of Federations are authorized to proceed in accordance with the Turkish legislation.

The Constitution of Republic of Turkey, Article 59 of the Constitution titled “Development of Sports and Arbitration” has been amended in 2011 and is now as follows: “*The State shall take measures to develop the physical and mental health of Turkish citizens of all ages, and encourage the spread of sports among the masses. The state shall protect successful athletes. The decisions of sport federations relating to administration and discipline of sportive activities may be challenged only through compulsory arbitration. The decisions of Board of Arbitration are final and shall not be appealed to any judicial authority.*” The legal regulations in Turkey regarding doping, and the institutions and organizations established in relation with doping are based on this article. In addition, due to Article 90 of the Constitution entitled “Ratification of International Treaties,” every anti-doping related convention that Turkey is a party of has been duly ratified and put into force, thus, become a part of the domestic law [4].

Turkish Anti-Doping Regulations (TADR), were prepared by TADC in accordance with international law and particularly WADC, approved by WADA, and entered into force in 23 September 2011 as an upper norm binding for all independent sports federations in Turkey. The regulations which lays out the procedure to follow in fighting against doping have later reentered into force in 1 January 2015 more comprehensively and regularly, due to

the necessity of renewal because of the developing technology and the current situation [5, p. 126]. TADR contains an introduction, detailed clauses and a list of concepts, examples of the application of sanctions on individuals who commit doping offenses.

In the introductory part of the Regulations, it is stated that “these anti-doping principles, which are intended to be applied worldwide and in harmony, are different in terms of quality from criminal and private law norms and cannot be limited to the conditions, procedures and other laws and/or rules to which criminal law or general law are subject to [6, int., prg. 2].” TADC is obliged to implement and to supervise the implementation of the TADR, and it is stated that the national federations must obey the rules of the Regulations and include TADR in their own legislation. The acts constituting the doping offense are regulated in Article 2, the violations were listed as multiple acts in ten separate sub-clauses under the article and some of these acts were to constitute a doping crime even if remained at the stage of attempt, complicity and prohibited cooperation acts which shall constitute a doping offense are regulated in the same article. The list of prohibitions published annually by WADA is stated in Article 4 as an inseparable part of the instruction and the exceptions for therapeutic use and the procedures to be applied are listed. Article 5 regulates doping controls and investigation principles and states that WADA and TADC are exclusively authorized to carry out controls.

In the process of controls, the concepts of “*gene doping*” and “*biological passport*” are two important topics. Gene doping is a method of doping in which the genetic structure of an athlete is changed by gene therapy medical intervention to increase the ability of the athlete [7, p. 55], also included in the prohibited lists. The controls are performed on variables, including DNA and genome profile in athletes' urine, blood or other body tissues. In case abnormal changes in the blood values of an athlete are detected as a result of one of the periodic analyzes and evaluations, it indicates outing of the biological passport profile and indisputably determines that prohibited substances or methods have been used [5, p. 129].

In Article 7, the process of evaluating the results of the analysis is explained and it is stated that the authority to manage the process is under the TADC. The detection of prohibited substances that can also be produced in the body and requiring further research is called as an “atypical finding”, and the disclosure of evaluations and reports of contradictory analytical findings has been explained, and the obligation to notify the athlete, national and international federation and WADA regardless of the result is regulated. While Article 3 regulates the rules about proof of doping and the burden of proof, the procedure for the doping offense is set out in Article 8, sanctions to be imposed if the offense is fixed in Article 9 and rest, objections to decisions in Article 13, and enforcement of decisions in Article 15. Furthermore, due to Article 16, if a notice or notice attempt has not made within ten years from the date of the violation, the crime shall be time-barred, and the prosecution related to the violation cannot be initiated. Lastly, Article 21 regulates that the TADC is authorized to make changes to the instruction if necessary, but the amendments against shall not be reversed due to the principle of protection of the acquired rights. As explained briefly, the Regulations have been prepared in accordance with WADC, as detailed as possible and comprehensively, and is an important and necessary step in regard of fighting against doping in Turkey.

Turkish Football Federation has its own regulations regarding doping and continues to work on the subject as well. Article 45 of the TFF Main Statute, which was updated in 2009, stipulates an Anti-Doping Board as the sub-committee of the TFF Health Board. The TFF Anti-Doping Regulations are based on Article 60 of the TFF Football Disciplinary Instructions. Article 3 of the Regulations states that this it has been prepared based on TFF Status, CoE Convention, WADA Standards, FIFA and UEFA instructions. In this respect, it can be said that the TFF and its Directive are also obliged to implement the TADR as other independent federations, in addition to being subject to WADA supervision.

Aside from the regulations mentioned above, main status provisions of national sports federations, instructions, directives and regulations by the competent boards, and other legislation are exam-

ples of regulations related to doping offense. One point that should be emphasized is the necessity for federations and other sports organizations to prepare their legislation in accordance with the TADC Regulations. Unless it contains provisions in accordance with the Regulations, the act of the federations under their own legislation shall be considered unlawful. In this respect, the decisions of the Arbitration Board of GDoS, which is the highest appeal authority for independent federations in our country, have established a case-law in order to coalesce the fight against doping.

Sanctions and Proceedings. As mentioned before, the sanctions on the use of doping shall be in accordance with WADC in domestic law. The TADC Regulations explained above cover all sanctions regulated in the code, moreover, includes additional sanctions. The sanctions to be applied in TADR are not sanctions in terms of criminal law; and are criminal sanctions regarding sports law under private law. The sanctions applicable to individuals are regulated in Articles 9 and 10 of the TADR, while the ones for teams in Article 11 and to national federations and other sports organizations in Article 12.

In accordance with Article 9, all achievements gained by an athlete whose violation has been determined with a doping control in individual sports during the competition shall be automatically canceled, and the medals, points and prizes awarded shall be withdrawn. In Article 10, different sanctions are envisaged according to the moment of the violation, the moment it is detected and the way it is committed, and the issues related to the enforcement of the sanctions are explained in detail. Such as: cancellation of results in case of a doping rule violation happens during a tournament; the penalty of deprivation of rights; abolishing, reducing or suspending the deprivation penalty or imposing other sanctions, in the absence of fault or negligence and in other cases; multiple violations and recidivism; financial sanctions; the commencement time for the deprivation penalty; prohibition of participation in sports. On the other hand, Article 11 regulates that in cases where more than two players of a team violate anti-doping rules during a tournament, aside from the individual sanctions applied to the players, necessary sanctions for the team

(such as deletion of points, disqualification etc.) shall be applied to the team, and the organization organizing the tournament may impose heavier penalties.

The Amateur Sports Branches Penal Regulations of the General Directorate of Sports, which has entered into force in 1993, has regulated doping as a criminal offense in Article 48. However, related provision has become void with the TADR becoming effective. Nevertheless, the Article has taken a place in Turkish legislation before many countries as a regulation on doping and formed a base in this respect by regulating doping as a disciplinary offense, foreseeing sanctions and specifying the judicial bodies.

The Judicial Process of Doping. As well as the definition of doping, the prohibited substances and methods, and the sanctions, the investigation and trial process also vary between regulations in the legislation. Doping rules, which can be evaluated in the scope of disciplinary law, including sporting sanctions, the need to regulate a specific trial process has arisen for being a concept apart from the criminal law elements. The procedure begins in domestic law and is followed by the international process before WADC, thus, shall be reviewed in said order.

In Turkish Legislation, after the investigation is held according to the Regulations by TADC and TDCC, the first instance jurisdiction shall be held by the penal or disciplinary boards of the national federation the athlete is affiliated with. However, an arrangement that should be mentioned before the procedures is the Article 7 of TADR which regulates the situations that allow federations to take a decision without a trial, such as acceptance of the violation, waiver of the right to prosecute, acceptance of the legal consequences imposed in the TADR or proposed by the TADC, etc. Then, the decisions shall be taken by federations without any investigation, the decision shall be sent to the anti-doping organizations authorized to appeal and shall be announced to the public.

Article 8 states the authorized boards for the first instance trial as mentioned above, as well as the principles for fair trial and the rights of the person on trial which shall be respected in every step of the trial, such as the fairness and impartiality of

the board; the certainty of the trial process; timely written reasoned decision; the right to be represented by an attorney; the right to be timely notified about the alleged anti-doping rule violation, the right to respond to the alleged violation and its consequences; the right to submit evidence including the right to call and question witness. The process may be accelerated if needed in each case. Each stage of the investigation and trial shall be reported to WADA by TADC, and TADC has the right to participate in the proceedings through its inspectors and to obtain records. In addition, it should be noted that the disciplinary/penal boards of the international federations (FIBA, FIFA, etc.) may also take part in the proceedings since there is no obstacle for the case to be taken to the international federations upon the decisions of the national federation boards. In such a case, the proceedings carried out by the international federation boards shall also have the status of first-instance trial.

All decisions made pursuant to the TADR are subject to appeal under the regulations and the provisions of the WADC. While the right to appeal against board decisions has been regulated in Article 13, it is stated as compulsory for the federation to notify other organizations with the right to appeal when notifying the reasoned decision to the parties. The Arbitration Board and CAS are the only authorized institutions to examine the final decisions of the disciplinary/penal boards due to their legal effects, and due to the faults, deficiencies or deviations occurred in the procedure. The appeal does not stop the execution of the decision, and the appeal against the decision shall be valid and enforceable during the appeal process. In addition, in order to make an objection, it is obligatory to use the post-decision review means provided in the rules of the anti-doping organization. In the appeal, the scope of the examination includes all relevant aspects and is not clearly limited to the issues before the first trial authority or the scope of the examination. Moreover, the decisions of the Arbitration Board may be appealed only to CAS. CAS is not obliged to respect the judicial discretion exercised by the trial authority in its decision. CAS proceedings are newly initiated proceedings; thus, the previous proceedings do not limit the evidence in

the CAS case and do not have an importance in the trial.

Lastly, although primarily being an appeal authority which can be appealed after exhausting the domestic remedies, there are two exceptions when appealing to CAS. First is, the cases where WADA has the right to appeal and none of the parties have objected to the final decision of the trial court, WADA can directly take the decision without exhausting the domestic remedies. For example, if a decision made by the board in the first trial becomes final without taking it to the higher board, WADA is not obliged to exhaust the remaining domestic remedies and has the authority to transfer the decision directly to the CAS. The second exception is, if the national federation board of the athlete cannot decide whether an anti-doping rule violation has occurred within the reasonable time set by WADA, WADA has the right to take the matter to the CAS as if the relevant judicial authority to which the national federation of the athlete is subject has decided that there has been no violation of the anti-doping rule. Doping control procedures, trial results or other definitive judicial decisions which are in conformity with the WADC and signed by any signatory party who has the right to appeal, shall prevail throughout the World and shall be recognized and implemented by TDMK and national federations.

Proof and Evidence in Trial. As it is an international standard adopted by WADA that the burden of proof is at the institution that claims a violation and is responsible for conducting investigations; in the investigation stage, the person being investigated has a defect liability and the obligation to prove the defect is on the prosecution. As much as this part reminds of the investigation process in criminal law, if evidence of doping has been obtained as a result of the investigation enough to create an opinion that the violation has occurred, the investigation phase shall be terminated and the proceedings will be initiated in accordance with a report prepared in this direction, hence, the person on trial will be obliged to prove their faultlessness by presenting their own evidence against the current ones against them. As this part resembles of private law, it would be correct to say that from the moment the investigation is over and the proceedings initiate,

the strict liability of the person on trial begins [8, p. 364].

It is inevitable to apply sanction to a person who was found to have violated a rule, because, as explained before, the tests and analyzes are made in the light of the latest technological developments and it has become almost impossible to hide or misuse the use of doping. Thus, in trials, although there are many cases with no sanctions, generally the faultiness of the person is being determined while they are considered proven guilty of the offense.

In the doctrine, the cases where the cause cannot be determined even scientifically, and it is not possible to be proven otherwise by the person on trial are named as "grey zone." In such cases, the practice adopted in CAS decisions and local council decisions is to split the burden of proof equally between the parties [8, p. 376]. Unlike criminal law, the main reason for presumption of innocence not being applicable in disciplinary proceedings in relation to doping is the athletes' responsibility of due diligence and due attention. However, if the evidence obtained as a result of the investigation is not sufficient and in cases of scientific uncertainty, in order to ensure fair trial and fair judgment, the presumption of innocence is partially applied and without fully applying the strict liability, the burden of proof is equally shared between the parties.

Conclusion. As a result of the anti-doping movement under the leadership of IOC, WADA was established and the Anti-Doping Code was prepared by it as the base document for doping legislation of all countries. With the List of Prohibited Substances and Methods as an annex, which is annually updated and republished, it has become applicable as a general list and been implemented by all national legislation including Turkey.

Turkish Anti-Doping Commission was established within the Turkish Olympic Committee and has prepared an Instruction according to WADC, which is updated regularly and binding for all federations and sports clubs in Turkey. Moreover, another institution that must be established in accordance with the WADC is the Turkish Anti-Doping Agency. In order to attain an effective fight against doping, the laboratories within the body of the TDCC does not provide sufficient facilities, and it

is a compulsory issue to establish TADA in our country for subjects such as educating experts, examining the results, instilling the awareness necessary for the fight against doping and providing trainings in that matter. Because in Turkey, although there are sufficient institutions and organizations in terms of both the judiciary and the legislation and analyzes, in order for these institutions and organizations to function effectively and to rightly implement the legislation prepared detailly and versatily, it is necessary to raise the awareness of primarily the athletes, and other people related to the sports and the whole public, hence studies must be carried out within this scope.

It should be noted that doping is a matter of law, as well as health and sports. Even if the researches on doping and the determination of doping substances fall within the scope of the work of health professionals, the prevention of the application of these substances or the implementation of the necessary sanctions when applied, are entirely jurisprudential. Investigations concerning the doping offense within the scope of sports law are carried out by TADC in Turkey, the trial proceedings are firstly seen by the disciplinary/penal boards of the national/international federations, the first appeals authority is the GDoS Arbitration Board, and then CAS.

There are still federations which have not yet regulated their internal legislation in accordance with the TADR, and decisions are taken in accordance with due legislation, which causes for most decisions to be corrected by the Arbitration Board. Therefore, the importance of informing the athletes and the whole sports and the legal community on the subject of doping, giving trainings and carrying out the controls should be emphasized once again, and the importance of the establishment of TADA should be once more reminded.

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Nisan Юсе

ОГЛЯД ДОПІНГУ В СПОРТІ З ТОЧКИ ЗОРУ ЗАКОНОДАВСТВА ПРО СПОРТ ТА КРИМІНАЛЬНОГО ПРАВА У СВІТЛІ ЗАКОНОДАВСТВА ТУРЕЧЧИНИ

Асоціація адвокатів Ізміру, Адвокатське бюро «Lotus»
Мансуроглу Мах. 295/2 Sk. №: 1 Б Блок К: 2 Д: 217 Байраклі, Ізмір, Туреччина
E-mail: nisanyuce@gmail.com

Мета: вивчити правопорушення допінгу та те, як це регулюється турецьким законодавством з точки зору спортивного та кримінального законодавства. **Методи дослідження:** використовуються загальнонаукові, філософські та спеціально-правові методи наукових досліджень. Метод системного аналізу був використаний для визначення допінгу, діяльності турецьких організацій з контролю над допінгом та специфіки судового процесу, доказів та доказів у судовому процесі у цьому питанні. Догматичний метод був цінним для формулювання висновків та рекомендацій практичного характеру в рамках дослідницьких питань щодо запобігання вживання допінгу у спорті за турецьким законодавством. **Результати:** рух проти допінгу розпочався лише у 20 столітті, і завдяки роботі спортивних федерацій, держав та міжнародних організацій робиться спроба досягти союзу у боротьбі з допінгом. Туреччина також створила власні інститути та комітети відповідно до міжнародних конвенцій, стороною яких вона є, а також підготувала правила відповідно до WADC та її заборонених списків. Тим не менш, для створення повної єдності необхідно застосувати ефективний механізм управління. Запобігання застосуванню допінгу або введенню необхідних санкцій є питанням правильного виконання закону. **Обговорення:** ґрунтувалося на тому, чи чинні норми є достатньо ефективними для боротьби з використанням допінгу.

Допінг вперше з'явився у праві Туреччини в 1971 році і регулюється в нашому законодавстві як дисциплінарне правопорушення відповідно до статті 48 Кримінальних регламентів аматорських видів спорту Головного управління спорту. Основними організаціями, які керують боротьбою з допінгом, є Турецький центр допінгового контролю (TDCC) та Антидопінгова комісія Турецького національного олімпійського комітету (TADC), а також інші спортивні федерації та Арбітражні ради, у той час як основне законодавство складає Турецькі антидопінгові правила.

Ключові слова: спортивне право; кримінальне право; допінг; антидопінг; біологічний паспорт; дисциплінарні правопорушення; спортивні спори; процедура; арбітраж; КАС.