

# The Jural Implementation of the Term Doping

## Zur Verrechtlichung des Dopingbegriffs

**The most common interpretation of “Doping” is usually an increase in the natural, optimal trained performance capacity by artificial means. In everyday use (but also e.g. in the military) such practices (called “enhancement”) are not only accepted but even promoted: think for example of coffee, drugs or Viagra as stimulants, tranquillizers or concentration aids. In this light, the doping ban in competitive sports demonstrates its peculiar quality**

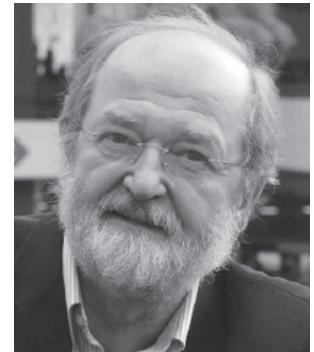
In this counter-world to the bourgeois society, only a non-doped, that is “naturally” achieved, “authentic” (ascribable only to the athlete) performance can be recognized as sports performance, which is why performance enhanced by doping must of necessity be annulled or a ban for the duration of the doped state imposed (and this regardless of whether the state was intentional or not). The character of a world apart lies in the prerequisite of voluntary participation in athletic competition and in the therein contained subjection to the fundamental principles of sportsman-like behavior, which are - as they must be - in the form of written basic regulations. This makes doping (also) to a violation of rules in the athletic world apart which may lead to sports disciplinary action in conscious (culpable) behavior (which usually is termed “restriction/banning”, but which must be differentiated from the non-admittance to athletic competition due to a doped state) and is intended to lead to deterrence and/or education for preventive reasons. By coupling with “fair play”, the doping ban achieves the additional quality of a sports-ethics demand: the persons breaking the rules are rated morally, judged to be a terrible dishonest swindlers, shamed, one even speaks of the “doping morass” and “laying it dry” in the doping war. Many theologians even see a serious sin in doping.

The consequence for this special world of competitive sports lies in a structural alignment with the juristic world of middle class society, especially with its prosecution practices. Like state Legal Regulations, sports regulations are termed “norms”, (the restrictions cited above) the sanctions imposed by “Sports Tribunals” as “sports penalties”; the result is the creation and broadening of a legal organization (that is the “Sports Tribunals” within an encompassing “league law”) and to the right of prosecution. The state legal system - which on the one hand recognizes and should recognize the autonomy of this sports league law (under Art. 9 Civil

Law) - demands on the other hand observation of the fundamental, constitutional principles (recognition of athletes as subjects under laws and processes, predictability of sanctions by linguistically precise formulation of the rules [including doping bans], punishment of culpability and ban on excess, prohibition of double punishment, assumption of innocence, recognition of work-law ordinances); the decisions in sports have effect in the sphere of civil rights, in income or work relationships, in the constitutional rights of those involved.

A separate legal codex arises, “sports law”, which is even managed these days by “specialist” attorneys. The special world of sports league organizations thus does not create an ungoverned space, even in the matter of doping bans, which is not justified by state jurisprudence under the general rights to freedom and personal right to live one’s own life under Art. 2, Par. 2 of the Constitution. According to this, every person has the right to enhance personal performance capacity by artificial means, even if thereby personal health is exposed to (even life-threatening) danger. This increases the demands on the sports-league doping laws, and also on the requisite of voluntary subjection of the athletes. Thus civil law, which applies for everyone without such subjection, has no active role in the “war against doping”, even under the aspect of protection of health (as long as the persons affected accept the risks of which they are aware [otherwise - that is, without effective acceptance - criminal law applies in its regulations against bodily harm]).

Parallel to legal practice concerning consumption of narcotics, civil law can only attempt to make “public health” to an object of protection, in that the freedom of the market for doping substances, which are medicinal drugs, and therefore may be used therapeutically, can be limited under criminal law; which means at the same time that the doping athletes themselves cannot be held responsible under criminal law. The “war against doping” remains the task of sports league laws; which because a world sports league law due to globalization of the modern sports industry (Olympic Games [competence IOC], European and World Championships), which must be made uniform due to the various individual state legal principles in a difficult process and by means of international agreements among the individual states! The result valid today is the Codex of the World Anti-Doping Agency (WASA) founded in 1999, that is, the QADC, which is implemented in the individual national sports organizations >



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(in Germany as the NADC). The WADA or the German NADC was recognized nationally starting in 2008 in Germany in a supplementary protocol on the Agreement of the European Council against Doping (1989). In 2005 (in Germany in 2008), the International Agreement against Doping in Sports came into force. With its enactment, the UNESCO governments worldwide agreed to apply the international Law to doping, that is on the area of anti-doping in sports with the goal of “complete elimination of doping” (Art. 1). The Convention served primarily to guarantee the efficacy of the WADC, whose list of bans was attached to the agreement and published in the Bundesgesetzblatt (for the first time BGBl 2007 II Nr. 9 dated 26. March 2007) and is published annually in a new version. Since this Codex is a document of the WADA as a non-government organization, it applies in principle only for members of sports organizations. But this international agreement provides governments a legal framework in which to formalize global anti-doping regulations and guidelines in order to create fair conditions for all athletes.

This entry into jurisdiction of the sports-league doping ban leads to a change in the term doping which must be discussed briefly. As in a legal procedure, provability is at the heart of the matter. This leads to the first correction. In 1963, the European Council already defined doping not only as “administration or use of exogenic substances”, but also determined: “Moreover, various psychological measures for enhancing the performance of athletes must also be considered doping.” Such “psychical” (or “spiritual”) doping cannot be convincingly proven (and this means increasingly: by procedures of natural science), which is why it is no longer mentioned these days: Doping since then has been relevant only as physically-provable phenomena. The European Council’s criterion of “exogenesis” of doping substances fails in the practice of blood doping: it was not possible to apply the label of “artificial performance enhancement” to the method. Moreover, a second correction was found to be needed, since it cannot be proven in the individual case that a certain substance or certain method really led to such artificial performance enhancement: every training, every scientifically-planned diet and medical support is in this sense “artificial” enhancement of the “natural” capability of the person involved. The focus switches for this reason to determination of the substances and methods included under the doping ban in the Regulations themselves, that is at the level of the sports-league “Regulations” (comparable to state laws). Thus, Art. 4.2.1 WADC sees the criterion for inclusion in the “Prohibition List” even simply the “Potential for performance enhancement”, according to Art. 4.2.1.1 WADC the “medicinal or other scientific proof, the pharmacological effect of experience” that the substance or the method “has the potential to enhance athletic performance”. The overall suitability of the substance or the method to improve performance is already in itself sufficient. This means, however: if e.g. a substance included in this list is determined by a “doping test”, proof is given only that the particular athlete has a substance in his/her body which itself (in general) is suitable for performance enhancement, but not that the athletic performance of the athlete really was artificially enhanced, that is not that the athlete’s performance was doped, artificially enhanced, that the athlete really cheated the competition. But even this result isn’t quite right; the juristic implementation of the term doping leads to a third limitation. The general suitability for performance enhancement is, according to the WADC, only one criterion for inclusion in the prohibition list, in addition to two others which Art. 4.3. WADC circumscribes as “real or pos-

sible risk to health” and as judgement of the use as a violation “against the spirit of sports described in the Introduction of the Codex.” Decisive is now that, according to Art. 4.3.1 WADC, only two of these three criteria must be fulfilled. This means as a result for the example given above that it is not necessarily concluded from a positive doping sample of an athlete that he/she used a substance or method which is only suitable for artificial performance enhancement. It can only be concluded that he/she applied a substance or method which is included in the prohibition list, but actually more formally: that such a substance is in the body, even if he/she doesn’t know how that came to be. “It is the personal obligation of every athlete to take care that no forbidden substance enters his/her body.” (Art. 2.1.1 WADC, which treats of “strict liability”, which means that “the athletes bear the responsibility” for the state of their bodies.)

The juristic implementation of the term doping thus leads to a strange obligation which is the foundation for responsibility no longer of an action, but for the physical state of the body! It can therefore not be an obligation with reference to an activity, that is a moral duty (in the form “Thou shalt” [namely: not dope])! Only a strict disciplinary commandment would be possible (whereby the sports-legal doping regulations would become a disciplinary law for athletes) in the sense: “You must take care to not have any substance/no method included in the prohibition list in your body”. Such a commandment would, however, be meaningless because compliance would not be possible. The sports league doping ban is thus not even based on a disciplinary regulation.

WADC drew the consequence for the sports league term doping in Art. 1: “Doping is defined as the presence of one or more of the violations cited below in Article 2.1 to Article 2.10 against the anti-doping rules”; the UNESCO Agreement of 2007 took up this definition in its Art. 2 (“Definition of terms”) No. 9 (“Doping in Sport means the presence of a violation against the anti doping rules, which are then listed in No. 3 corresponding to Art. 2 WADC). “Doping [in sports] is now only defined negatively, whereby this doping term has lost any content determination (in the sense of a “positive” term [e.g. artificial performance enhancement by means of exogenous substances]): but the reference/foundation in a sports-ethical interpretation (e.g. terms of fairness or equality) is eliminated as well. Definitive is the formal violation of the rules. Since such a violation can only be determined by a certain sports-legal procedure, this procedure for doping controls itself must be protected, whereby the erosion of the term doping is helpful. Just look at the regulations of Art. 2 QADC (or Art. 2 No. 3 of the UNESCO Agreement), which now cite everything that is defined and should be defined as “doping”: Handling of sampling, refusal or omission to submit samples (Art. 2.3), violations of reporting obligation (Art. 2.4), impermissible (attempted) influencing of a part of the control procedure (Art. 2.5), forbidden contact to a banned person (Art. 2.10). These behaviors are thus, by definition, “doping” in the same way as the (attempted) use of a forbidden substance or a forbidden method (Art.2.2). It is thus not surprising that – as mentioned – even the presence of a forbidden substance in an athlete’s sample or the possession of a forbidden substance or a forbidden method (Art. 2.6) or the (attempted) distribution of forbidden substances/methods (Art. 2.7) is considered doping. And everyone who assists, encourages, instigates, instigates, covers up or administers (Art. 2.7) thereby commits doping.

The sports league law has thus become a juridical text for

specialists and specialist lawyers in sports law, is discussed in text books and commentaries even though the content terms (like sport ethics) are irrelevant; just like the state legal laws have lost the reference to justice that was implied earlier: the rules/norms apply because they were set/passed/validated and published by the responsible authority (and can be enforced in practice [otherwise they would lose their relevant character]). The discussion moves to the level of lawmaking and thus to the conflict among responsible experts (doctors, chemists, pharmacists, specialists in “the spirit of sports”) about the contents of the prohibition list of the WADC. Which substances, which methods are generally suitable for possible performance enhancement and have at the same time the quality of being reliably (and therefore “revision-proof”) provable by empirical examination? or is the use a violation of the spirit of sports? or possibly a danger to health? As shown, any two of these criteria suffice for inclusion in the prohibition list.

The consequence of this juridical implementation means: what is not included in this list, is not per definitionem “doping”, but permissible, maybe in the sense of the Olympic principle of “Citius, Altius, Fortius” even imperative in the framework of competitive sports and training. If a healthy athlete wants to take a cardiac medication developed for cardiac patients, he/she doesn’t stop to ask about the fairness of doing so, but just takes a look at the prohibition list. If the substance is not yet or no longer included, he/she can take it with no problems, it’s not doping. And not only to his/her way of thinking, but in the eyes of the competition as well, who simply did not (or no longer) understand my point of view in a presentation, since of course no doping is to be assumed in such a case. But even if the person involved took a substance or used a method that is in the prohibition list: he was just unlucky; or he wasn’t bright enough; or simply missed the chance to get a “medical exception authorization” from a sports doctor responsible for this (“TUE”), which according to Art. 4.4 WADC (and also according to Art. 2 No. 24 of the UNESCO Agreement), has the consequence that there is no violation of the anti-doping regulations and thus (according to Art. 1 WADC) no “doping”.

This makes the discussion of the sports league doping ban contradictory. The regulations shift every term contained, every sports-ethical argumentation in favor of the legal regulation dimension, clearly circumscribed, reliably provable, impeccable in authorized procedures. On the other hand, there is still talk of sport-ethical reprehensible swindlers, increasingly stringent sanctioning is demanded (up to enforced cessation of athletic activity), a “swamp” is claimed, that can only be laid dry by war. Even the UNESCO Convention against Doping in Sports uses war-like terms – that (in the German translation) it is all about “elimination” of doping; and the countries signing this convention, including Germany, enroll as participants in this war, which according to Art. 19, should lead to education and schooling principles, which cover the “damage, that doping inflicts on the ethical values of sports”. According to Art. 18 WADC, too, programs are to be developed to bring the “damage by doping to the spirit of sports” to the consciousness of especially young athletes.

In 2015, Germany got its own state Anti-Doping Law (AntiDopB). Under constitutional law, there should not be such a law, since Art. 2 Par. 2 of the fundamental law grants every person the right to improve his everyday performance capacity artificially by means of all substances and methods, even if this may appear unreasonable due to sometimes life-threatening dangers. The state may not issue a ban to protect the individual health of the person involved. The information in

§1 of the new anti-doping law – “to protect the health of the athletes” – is (with regard to adults who dope voluntarily and in full knowledge of the risks to health) thus unconstitutional. Many interpreters of the law think that this means “public health” in the tradition of state measures against doping in sports, that is in reference to the marketed drugs which are used contrary to intention, are now sold as dangerous doping substances, traded and administered to others.

The state drug law (AMG) starting in 1998 attempted to combat “Doping in Sports” in a new §95 Par.1 No. 2a, later No. 2b as well, which imposed the threat of punishment on the general ban of §6a (“Ban on drugs for doping purposes in sports”), whereby the underlying term doping was not defined and “Sport” included any physical activity, since the area of fitness and leisure activity and (especially) bodybuilding were to be controlled. This connection with medications brought sport physicians, as well as practicing doctors who attend leisure athletes and intend to help them to improved performance (which Art. 2 Par. 2 of fundamental law permitted) to the focus of the doping discussion: the limitation to so-called “therapeutic doping” (also in connection with physical overexertion in training) arose. In the practice of blood doping this equating of medicinal and doping substances got into difficulties, which of course could be overcome by expanding the term medication to include blood (products). But §1 AntiDopG dispensed with the reference to protection of public health (cites only “health of athletes”).

For this reason, the terms of §2 AntiDopG hang at legal loose ends “Impermissible contact with doping substances, impermissible use of doping methods”, which correspond in content to the earlier regulations of the AMG (but now, instead of “medications” with reference to “substances and methods” from the WADC prohibition list). For the acts “with the intention of doping of humans in sports”, the protective purpose “to guarantee fairness and equality of chances in sports competitions and thus contribute to the integrity of sports” goes into free fall, if within the framework of this §2 these “sports” (like in the AMG tradition since 1998), mean leisure and fitness sports and bodybuilding. For this reason, it is not understandable why for this area - which usually is not subject to WADC - the prohibition list (in the new version published every year in the Bundesgesetzblatt Part II as an appendix to the UNESCO Agreement by the Federal Ministry of the Interior) should apply, unnecessarily – as shown – according to possible danger to health. Apparently the lawmakers anticipated the problem, since they apply in §2 Par. 3 purchase and possession of only doping substances which are cited expressly by the state lawmakers in the appendix to the AntiDopG. In any case, this ban under §2 should apply to all persons, even if they are not subject to the WADC, even if they are not even active in sports. In §3 AntiDopG (“self-doping”) the new legal ban to dope oneself for a competition in organized sports or to participate in such a competition using a doping substance: the purchase and possession of a doping substance is forbidden, if this occurs in relation to the participation in such a competition.

Here, too, it is not required that the person involved has subjected him/herself to the WADC. It becomes clear that the state will not protect athletic competitions per se with this – the responsibility remains with the legally organized sports leagues, which are to carry out their doping procedures independent of state liability law – but (in the words of §1) the “integrity of sports” is a cultural asset worthy of protection. Thus each person is obligated to not damage >

this cultural asset, even if the person has absolutely no interest in sports. It is questionable whether this reasoning will hold water. In any case, the lawmakers in §4 Par. 7 AntiDopG made violation against §3 a punishable offence, aimed only at persons who are top athletes or “commercial athletes” (who directly or indirectly draw considerable income [whatever that means] from athletic activities). It almost appears that that at least one protective purpose of the AntiDopG could be the income situation in well-paid sports. No-one can know given the poor quality of this law: it even dispenses (as a necessary consequence of throwing together various areas of sports) with a definition, not only of “doping” but also of “sport”.

The result of this process of judicial implementation thus leaves a feeling of concern. But how else should a legally adequate control procedure be laid down? For sports medicine, the task remains to perform reliable tests for establishing the prohibition list, at any rate in the same way as have existed from the start. ■

## References

- (1) **ASMUTH, CHRISTOPH (HG.)** Was ist Doping? Fakten und Probleme der aktuellen Diskussion. Bielefeld, 2010.
- (2) **CHROBOK D.** Zur Strafbarkeit nach dem Anti-Doping-Gesetz. München, 2017.
- (3) **KOTZENBERG J.** Die Bindung des Sportlers an private Dopingregeln und private Schiedsgerichte. Baden-Baden, 2007.
- (4) **STELLUNGNAHME DER HOCHSCHULEHRER DER DEUTSCHEN SPORTMEDIZIN UND DES WISSENSCHAFTSRATES DER DEUTSCHEN GESELLSCHAFT FÜR SPORTMEDIZIN UND PRÄVENTION (DGSP).** Doping im Leistungssport in Westdeutschland. Dtsch Z Sportmed. 2011; 62: 343-344.
- (5) **SCHILD W.** Gerichtliche Strafbarkeit des Dopings, in: Rico Kauerhof/u.a. (Hg.), Doping und Gewaltprävention. Leipzig, 2008: 35-128.
- (6) **SCHILD W.** Doping, Sportethos und rechtliche Sanktionierung, in: Peter-Alexis Albrecht/ u.a. (Hg.), Festschrift für Walter Kargl zum 70. Geburtstag. Berlin, 2005: 507-522.
- (7) **STEINACKER JM, SCHILD W, STRIEGEL H.** Stellungnahme der Deutschen Gesellschaft für Sportmedizin und Prävention e.V. zum Referentenentwurf eines Gesetzes zur Bekämpfung von Doping im Sport. Dtsch Z Sportmed. 2015; 66: 156-160. doi:10.5960/dzsm.2015.181
- (8) **STELLUNGNAHME DER HOCHSCHULEHRER DER DEUTSCHEN SPORTMEDIZIN UND DES WISSENSCHAFTSRATES DER DEUTSCHEN GESELLSCHAFT FÜR SPORTMEDIZIN UND PRÄVENTION (DGSP).** Doping im Leistungssport in Westdeutschland. Dtsch Z Sportmed. 2011; 62: 343-344.
- (9) **TAUSCHWITZ M.** Die Dopingverfolgung in Deutschland und Spanien. Eine strafrechtliche und kriminologische Untersuchung. Berlin, 2015.
- (10) **WILKMANN J.** Die Überführung des Sportlers im Dopingverfahren. Direkter und indirekter Nachweis im Lichte der Unschuldsvermutung. Berlin, 2014.