

# DOPING AND PENALTY CONFLICT

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## Abstract

The aim of this study is to examine the criminal dimension in doping from a legal perspective. As a result of this examination, answers were sought to questions such as whether doping athletes are subject to a criminal procedure in general law, if so, how effective or applied, what are the contradictions between legal disciplines. In this study, in terms of general law and sports law, the conflict of the penalties given by the two legal disciplines within their own dynamics in doping is, more clearly, the fact that each branch of law treats the issue with its own perspective and the resulting contradictions. According to Article 162b of the Norwegian General Penal Code, any person who sends, imports, exports, sells, transports, manufactures any substance that is considered doping illegally will be charged with a doping offense and will be prosecuted with a sentence of 2 to 6 years in prison. While there is such an example in the world, such a legal system has not yet been established in Turkey. As a result, in Turkey, it is urgently necessary to ensure that general law and sports law meet on a common ground with the doping law to be prepared by experts in doping, and the federations should prepare their own internal regulations regarding doping based on this law.

**Keywords:** Crime, Doping, Legal Contradiction.

## INTRODUCTION

Doping, which is one of the most basic problems of sports today, has been a situation that has emerged by people knowingly or unknowingly, starting from the existence of human civilizations on earth. The settlement of people on earth with agriculture has enabled people to gain more advantages from the neolithic age when they were hunter-gatherers. At the beginning of these advantages, people started to produce agricultural tools and societies gradually took steps towards cultivating the land, that is, sedentary life. With the beginning of the settled life of human generations, it has now become more than human need to produce. After this process, people have not only their daily food, but also their weekly food, and at the end of this situation, people's free time has begun to occur. In this spare time, in order to be successful in the struggle between nature, predatory animals and their own kind, they have made the actions they have done in nature harmless and have started to do them as sports by imitation. Now people have pushed the limits of their physical capacity and wanted more. For this reason, since the first civilizations, people have sought to increase their physical strength by constantly taking external supplements to increase their performance. The concept of doping started like this, and after the industrial revolution, the concept of doping in sports developed and progressed with the emergence of factory and modern sports.

## Method

In our study, it was created with the general scanning model pattern. The general scanning model is a scan to be made on the whole universe or the sample to be taken from it in order to have a general information about the universe in the universe consisting of many elements. This screening is done with a follow-up or section approach (Karasar, 2020, p.111).

In the survey model, science consists of observing, recording, determining the relationships between events and reaching generalizations on controlled invariant relationships. In other words, the descriptive function of science is in the foreground.

The recording of events as in the scanning model is the first feature of the classification. However, comments and evaluations are mandatory. (Lightning, 1966, p.67).

### Origin of the Word Doping

Although doping does not resemble today's definitions, in the 3rd century BC athletes were fed mushrooms to make them run faster. In the encounters organized by the Romans, it was seen that the horses in the chariots drank the so-called hydromel, consisting of honey and water, in order to create a faster run and continuity in strength (Akgün 1993). It has been observed that gladiators use stimulants to fight well. It is mentioned in many sources that they fed the coca sprouts to the local people in South America (Günay and Cicioğlu, 2001).

In another example, Central American Indians such as Peru and Bolivia chew "coco leaves" to increase their endurance during long and tiring mountain treks between 500 and 600 years (Yalnuz et al. 2002).

Besides all these examples, doping was used in some of the ancient civilizations to defeat the enemy in wars. As an example, Herodotus tells in his book that the Scythians gave magic herbs to their horses before the war and that the horses that ate these herbs ran like crazy during the war (Acarbay 1986).

If we look at more recent history, it was also seen in the Colonies of America in the 17th century. With the company established by Dutch immigrants in the North American continent, they buy the island of Manhattan and establish their new Capital. New Amsterdam (modern-day New York) called the soup "doop", which they gave to the workers they employed while building this city. It has been seen that this soup gives strength, power and comfort, and has a side that relieves fatigue. According to another source, it was said that the "paraguayan tea" used by the Guaranis Indians was in the soup used by the Dutch. It is certain that the word "doping" is of Anglo-Saxon origin (Erkiner 2006).

### Definition of Doping Concept

With the effect of globalization, sports and sports-specific concepts have become one of the most mentioned phenomena all over the world (Çeviker et al., 2022). The fact that the sport has grown so much, that it has made a name for itself, has led to the conclusion that it causes the athletes to turn to undesirable situations in order to gain other benefits from the sport as well as gaining from the sport. One of these undesirable situations is the use of prohibited substances called doping.

In a scientific congress convened in France in January 1963, the first definition of doping was tried to be created. This is the first definition: "Doping is not an athlete's physiological preparation. This preparation is vital and should be done under medical supervision. Any substance or method that is against sports ethics and may harm the physical and mental health of the athlete is considered as DOPING for or during the competition" (www.halter.gov.tr).

In addition, the congress convened in France in 1963 was the first scientific congress in the world. Scientific definitions of doping from the countries participating in the congress were requested. Among these definitions, Turkey's definition is as follows: "Doping substance is a kind of pharmacological stimulant that improves performance" (www.halter.gov.tr).

Council of Europe definition: Doping is the administration or use of unfamiliar physiological drugs by any method, in high doses and abnormally, to a healthy person or on its own, with the aim of artificially and unfairly increasing performance. It is defined as the individual's doing these before participating in a competition (www.halter.gov.tr).

In the definition made by the World Anti-Doping Agency (WADA) on February 20, 2003, it was stated that doping is against the spirit of sports and it was stated that doping was defined as "using a prohibited substance or method". It is defined as the realization of one or more of a wide range of violations ranging from detecting a prohibited substance, avoiding taking the test, aiding or attempting doping (Tübitak 2008).

The most recent definition is the World Anti-Doping Agency (WADA) definition, which came into effect on January 1, 2004; "Doping is the presence, use or evidence of a substance or method that has the potential to increase an athlete's performance in sports, or threatens health unnecessarily or goes against the spirit of sports" (Yücesir 2004).

## Crime and Penalty in Doping

With the determination of the crime element, it is possible to divide them into three when it comes to the penalties to be given to the crime.

- **Disciplinary penalties:** These are the penalties applied by the IOC in the Olympics, by other international federations in their own organizations and by the national federations of its members in their own organizations. There can be huge differences between all these penalties for using the same doping substance or method.
- **Administrative penalties:** While the disciplinary punishments and administrative penalties given to the athletes are considered to be almost the same, the deprivation of rights given to persons other than the athletes who have somehow taken part in the use of doping is of an administrative nature.
- **Judicial penalties:** These penalties to be given to the athlete or other persons are fines or imprisonment. In general, such a penalty is given to the athlete only if he does not comply with an administrative penalty, while those who instigate, force, sell, supply these substances illegally, particularly if these substances are also included in the drug class, are punished. In addition, those who prevent or attempt to prevent the conduct of research stipulated by the law are subject to judicial penalties (Erkiner 2006).

The most obvious difference between doping in criminal law and doping in the disciplinary law of federations is intent, which is the moral element of the crime. In criminal law, it must be available for law enforcement. In order for the crime to be punishable, it is not enough to have only the material elements, there must also be intent, which is the spiritual element (Erkiner 2006).

Legal disciplinary penalties and administrative fines are applied for these three doping-related crimes in Turkey. Since there is no law on doping under general law, judicial penalties cannot be applied. Here, too, a legal contradiction arises, for example; According to article 162b of the Norwegian General Penal Code, any person who sends, imports, exports, sells, transports, manufactures any substance considered illegal doping will be charged with doping and sentenced to imprisonment from 2 to 6 years. While there is such an example in the world, such a legal system has not yet been established in Turkey.

Table 1. Doping Penalties Provided by the WADA Code

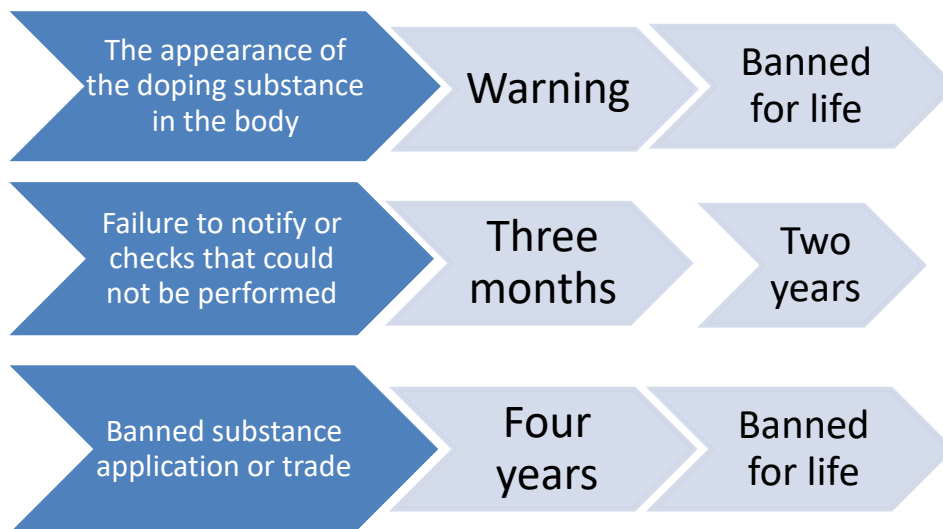
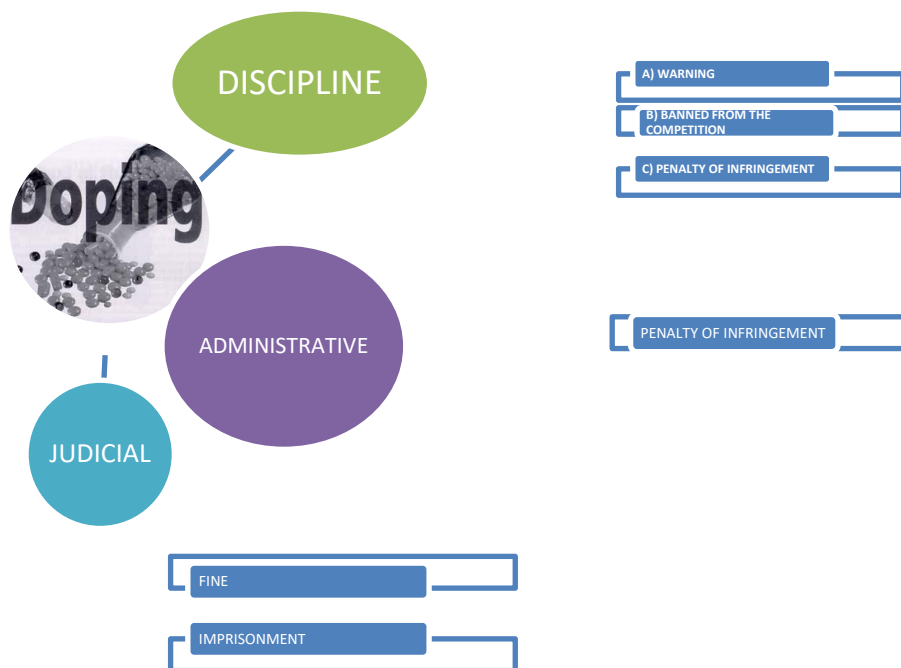


Table 2. The Separation Form of Doping Crimes in Our Country



Depending on the type and method of the substance used, different penalties are imposed on athletes and related persons and organizations who use doping. In general, when the athlete is found to have doping for the first time, the athlete is banned from sports for 2 years, and the athlete who is found to have doping for the second time is punished with a total ban from sports. If it is determined that some substances (Ephedrine, Pseudoephedrine, Phenylpropanolamine, Caffeine, etc.) used in the treatment of flu are used, they are banned from sports for six months in the first, two years in the second, and for life in others. If it is detected for the third time, it will be banned for life (Ertaş and Petek 2005).

#### Therapeutic Use Exemption

Athletes with a medically documented condition who need to use a prohibited drug for treatment must first obtain TUE approval. (TADC)

#### International Institutional Structure and Legal Regulations

The duty of the Health Committee, which was established within the IOC in 1967, is expressed as protecting the health of athletes, respecting medicine and sports ethics, and creating equality for all athletes participating in competitions. According to this statement, the health board, which was established to ensure that athletes can compete on equal terms, formed the first basis of the fight against doping (IOC).

The IOC's fight against doping has also received support from the United Nations Organization (UN) and the Council of Europe, and with the international conventions on the fight against doping, not only sports circles, but also countries are included in the fight against doping (Turkish Grand National Assembly Doping Commission report).

The Council of Europe opened the Anti-Doping Convention for signature by the States Parties on 16.11.1989 in Strasbourg. This document is the first document in the fight against doping. Until 1999, when the World Anti-Doping Agency (WADA) was established, the IOC was the top anti-doping agency. Established in 1999 in accordance with Swiss law, WADA has become the highest authority in the fight against doping by establishing a structure that includes both governments and the Olympic movement (<https://www.wada-ama.org/>).

The Doping Convention is an international convention adopted on 19 October 2005 at the 33rd session of the UNESCO General Assembly for the purpose of combating doping in sport and entered into force on 1 February 2007. There are some features that

make this contract different from other contracts. This convention is the first international global agreement on the fight against doping at the state level. This issue is very important because only governments can provide support in certain areas in the fight against doping. The Convention also helps improve the effectiveness of the World Anti-Doping Code developed by WADA. Considering that the World Anti-Doping Code is not an interstate document that only addresses sports organizations, it is understood that the UNESCO convention draws a comprehensive legal framework to fill this gap (Report of the Parliamentary Doping Commission).

#### Anti-Doping in Turkey

The “European Convention Against Doping in Sports” signed by Turkey on 16.11.1989 was accepted with the Law No. 3885 dated 11.03.1993 and entered into force after being published in the Official Gazette dated 21.03.1993 and numbered 21531. Law No. 3289 on the Organization and Duties of the General Directorate of Youth and Sports, Law No. 3703 Amending this Law and Law No. 3885 on Approval of the Council of Europe Anti-Doping Convention, Official Gazette of Anti-Doping Regulation published in the Official Gazette dated 26.08.1993 and numbered 21680 ( Anti-Doping Regulation).

Has a law been prepared or has there been such a process in order to eliminate many incomplete and contradictory situations regarding doping in Turkey?

The “Anti-Doping Law Draft” submitted to the Turkish Grand National Assembly in the 22nd Term on 27/2/2007 became invalid due to the general election. Later on, on 09.04.2008, it was renewed in accordance with Article 77 of the Internal Regulation of the Grand National Assembly of Turkey in the 23rd Legislative Period. The aforementioned draft law was discussed in the TGNA Committees and was put on the agenda of the TGNA with 250 numbers on 11.06.2008, but could not be discussed due to the general elections (Turkish Grand National Assembly Doping Commission Report).

Due to the inability to establish an independent institution, a protocol was signed between the General Directorate of Sports and the Turkish National Olympic Committee on the establishment of an "Anti-Doping Commission" on 24.05.2011. Before this date, all doping-related transactions carried out by the General Directorate of Youth and Sports have been carried out by the Anti-Doping Commission (ADC) of the Turkish National Olympic Committee (TOC) since 24.05.2011, and its budget is covered by the Ministry of Youth and Sports. This Commission includes "Scientists" who have international experience in the fight against doping and are experts in their fields (TOC).

#### Legal Structure

The tools used in the fight against doping in Turkey are the authorized and authorized institutions and organizations and the legal texts on which they are based. Legal texts consist of international conventions and domestic legislation to which our country is a party. The international conventions to which our country is a party in the fight against doping are mainly composed of three basic conventions, which were transposed into domestic law pursuant to Article 90 of the Constitution. Although our domestic legislation does not appear uniform, it is rather regulated by regulations and instructions (Parliamentary Doping Commission Report).

The fundamental basis of the fight against doping in the Turkish legal system is the “International Convention on Anti-Doping in Sports” adopted by UNESCO on October 19, 2005 in accordance with the Law on Our Participation in the International Convention on Anti-Doping in Sports, No. 5721. It is dated 10.12.2007. With this agreement, the function of the World Anti-Doping Agency (WADA) was accepted and the “Anti-Doping Commission” was established within the Turkish National Olympic Committee (TMOK). The “Turkish Anti-Doping Regulation” dated September 23, 2011 prepared by this Commission has entered into force (Grand National Assembly Doping Commission Report).

#### Legal Issues in the Fight Against Doping

In establishing the legal foundations of the fight against doping, sports law and general law principles should be considered as two separate phenomena. The current problems of these two principles also differ from each other. The biggest problem in terms of sports law is the lack of uniformity in the anti-doping legislation in force and the incompatibility of the disciplinary penalties applied in line with these different legislations, taking into account different legislation in the current judicial processes. This is a major obstacle to a fair trial and to international standards. For instance, if a federation's disciplinary committee sees a situation as a reason for penalty reduction, the penalties that arise if the disciplinary committee of another federation is not evaluated in the same way, both cause non-compliance with international anti-doping rules and cause serious

harm. As a result, the confidence of the athletes in the anti-doping system is shaken. The Turkish Anti-Doping Commission objected to almost all of the doping-related decisions of the criminal/disciplinary committees of sports federations in order to eliminate this legal deficiency, and almost all of them were overturned and brought into compliance with the current instruction. However, although this uniformity has been postponed due to the unlawful behavior of sports federations, there are still sports federations that do not show the necessary care and harmony in this regard. (Parliamentary Doping Commission Report).

In the light of this information, another legal deficiency is the introduction of doping products into the country, and the lack of legislation for any punishment for those who mediate them, that is, those who help the athletes reach them, are the main sources of distress for all organizations fighting against doping. However, the free circulation of doping products on the internet and the fact that they are not subject to any control is another source of distress.

## Discussion and Conclusion

In this study, it was emphasized that doping should be determined primarily. The main reason why such a definition is needed is to give a full definition of this situation in order to impose a criminal action. After the full and complete definition of the act committed, the punishment to be given to it should be determined. The concept of doping has many different definitions. The reason for this is that each country or federation defines doping based on their own value systems and the societies in which they live. But three more or less definitions have also met on a common denominator. The Council of the European Union played a leading role in coordinating these definitions. In the following processes, countries created their own definitions.

To make an important point, in order for an act to be considered a crime, it must be stated beforehand in which situations or which acts we will be considered guilty. In this direction, the code published by WADA has determined all these. After this ambiguity has disappeared, it is now up to how the criminal procedure should be applied. There are many discussions on this subject because there are many different applications on the subject. For example, when a drug is considered doping in one country but not in another, or a substance considered doping is used for therapeutic purposes in the normal pharmaceutical industry and the athlete takes it without knowing it. All this uncertainty will disappear once the athlete proves his goodwill to the institution. As a result, if the athlete does not make any progress, he will be able to apply to CAS. Here is another contradictory situation. In other words, despite the list published by WADA, Nations continued to decrease or increase the drugs in their lists. In the face of this situation, it has been revealed that WADA has no criminal situation other than complaining to the IOC. The IOC, on the other hand, is content with not accepting the states that fall into this situation or imposing sanctions, which brings to mind the question of whether these methods are deterrent.

Another issue is that federations independent of states are in the form of a spiral that cannot be resolved by the state legal system. The reflection of this on doping is the situation in which an athlete who does doping is penalized. In other words, when an athlete uses doping, he or she is punished by the sports federation, but the State does not take any penal action in this regard. The reason for this is that, as we mentioned in our study above, there is an intentional situation in criminal law for an event or an elephant to be considered a crime. In the case of doping, only the sports federation has a penal action in response to the action of the athlete. The reason is that the sports federation takes action by looking at the situation of the event without looking at the caste. At this point, the state can only take action to harm human health, and in this process, people other than the athlete, that is, those who buy, sell, supply or trade this drug, are subject to penal action because they commit an act that is harmful to health.

## Recommendations

- It is among the events seen in history that an athlete who has won the third place is the first or the second. In order to prevent this, the samples must be taken and analyzed before the competition and if there is doping, the athlete must be disqualified from the competition.
- It is essential that a doping law be enacted urgently in Turkey and that federations prepare their own internal regulations regarding doping based on this law.

- It is essential to ensure that general law and sports law meet on a common ground with a law to be prepared by lawyers who are experts in doping.
- Athletes who use doping should be punished separately in terms of general law, apart from the penalties stipulated by the TOC's anti-doping instruction.

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