

A Study on Doping Punishment by the Criminal Law in China and Foreign Countries

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Abstract:

In this paper, the penal provisions on doping control in foreign countries are studied by literature review. In addition, the main causes for the accusation of crimes involving doping in Italy, Germany, the United States, Spain, France and other countries are discussed: (1) Fraud; (2) Perjury; (3) Producing, supplying, owning, importing and exporting illegal drugs without permission; Consumption of controlled goods; (4) Purchasing, managing and instigating the use of doping products; Blood doping; (5) Intentional injury; (6) Use of doping. According to these causes, the foreign punishment on doping is mainly used to punish the participants in the production and trading of doping. It is also found that athletes who take prohibited stimulants will be charged with crimes in Italy and other countries, but still with some difficulties. Based on the study of the attitudes of the WADA and the United Kingdom and other countries that disapprove of the criminal law legislation specifically for anti-doping, combined with the difficulties faced by the criminal conviction of anti-doping and the actual situation of limited law enforcement resources in China, it is considered that China can expand the content of "drugs" in the criminal law by amending the criminal law or issuing judicial interpretations, so as to better play the role of anti-doping. Finally, it is suggested that the definition of "drug" in criminal law should be explained to facilitate the practical operation of anti-doping, and the anti-doping publicity and education for athletes should be strengthened.

Keywords: *Anti-doping, the criminal law, Drugs, crime of doping, Judicial interpretation.*

I. INTRODUCTION

Both the *Sports Law* and the *Regulations on Anti-Doping* in China have stipulations on the investigation of criminal responsibility according to law for crimes committed by the use of doping. In recent years, the corresponding clauses have also been added in the *Criminal Law*. Italy, Germany and other countries applied criminal law to anti-doping earlier, while the United Kingdom called for the use of doping to be punished, and once conducted research and demonstration on anti-doping criminal law legislation, but had no doping punishment legislation except for the laws on the production and sale of illegal drugs. We searched the related literature through HeinOnline, Springer database and CNKI, and

conducted research on the situations in Italy, Germany, the United Kingdom, the United States and other countries, to explore their experiences and enlightenment for China.

II. GENERAL SITUATION OF DOPING PUNISHMENT IN CHINA AND OTHER COUNTRIES

The illegal acts involving doping mainly include the production, trading or supply of doping, the use of doping, instigation or deception or forcing others to take prohibited stimulants, etc. The imposition of penal sanctions for these acts begins with a criminal conviction. The attitudes of anti-doping agencies in various countries and the world towards doping conviction are mainly divided into: (1) comprehensively promoting criminal conviction. Italy and other countries have corresponding crimes against athletes using doping, inducing or assisting athletes to take prohibited stimulants, trafficking and distributing illegal drugs, and (2) partially promoting criminal conviction. The WADA and the United Kingdom are not in favor of criminalizing athletes' doping, but they are in favor of criminalizing those who traffic and distribute illegal drugs.

2.1 Italy, Spain, Germany and other Countries are Comprehensively Promoting the Criminalization of Doping

Italy, Spain, Germany and other countries are actively and comprehensively promoting the criminalization of doping. Since 1950, Italy has enacted or revised laws for anti-doping six times, and has convicted the crimes of sports fraud, doping, using drugs in a way that endangers public health, and dealing in doping products related to doping. Spain stipulated in the Criminal Code that illegal injection of drugs containing prohibited drugs for athletes would be sentenced to six months to two years' imprisonment [1] in 1995, promulgated the *Law on Health Protection and Anti-Doping in Sports* in 2006, and revised the criminal law in 2007 and 2015 to make it more convenient for the judicial application of anti-doping. In 2015, the German Parliament passed the *Anti-Doping Law*, which identified doping as a crime [2].

2.2 Trafficking and Supply of Prohibited Drugs are Criminalized in Britain and other Countries

In the early years, the British government had authorized the United Kingdom Anti-Doping Agency (UKAD) to conduct anti-doping legislation investigation. In 2017, the British Ministry of Sports and Civil Society conducted a survey to assess the necessity of criminalizing doping. The investigation team released the investigation report *Review of Criminalization of Sports Doping*, and concluded that there is no need to enact criminal law legislation specifically for anti-doping, but this does not mean that those who traffic and supply doping will be innocent, because the *Drug Abuse Law* stipulates that trafficking in prohibited drugs can be sentenced to a maximum of seven years' imprisonment, and supplying prohibited drugs can be sentenced to life imprisonment [3].

At present, many countries, such as France, Greece, Hungary, Luxembourg, Portugal, Spain and Sweden, have enacted legislation to criminalize the trafficking of WADC prohibited substances and methods [4].

2.3 The United State Criminalizes Possession of, Trafficking in Controlled Substances, and use of Prohibited Substances to Influence Major International Sporting Event

Some US political figures, such as President Bush, have focused on cracking down on doping. In 1990, the U.S. Congress passed the *Anabolic Steroids Control Act*, which classified anabolic steroids as a controlled substance and made it illegal to own or sell anabolic steroids without a valid prescription. In addition, American states have imposed fines and penalties on the illegal use of synthetic steroids [5]. In 2004, President Bush signed a new *Anabolic Steroids Control Act of 2004*, adding steroid precursors as controlled substances. In 2014, more than 20 additional controlled substances were added to the *Design Synthetic Steroids Control Act*. Possession of a controlled substance is a federal offense punishable by a maximum of one year's imprisonment (the first offense) and a fine of at least \$1,000, while the maximum penalty for the first offense of trafficking in a controlled substance is five years' imprisonment and a fine of \$250,000, doubling both the fine and the sentence for the second felony [6].

In April 2020, U.S. President Biden signed the *Rodchenkov Anti-Doping Act of 2019*, which stipulated that anyone who intentionally, or attempted, or conspired to influence a major international sports competition by using prohibited substances or methods would be subject to criminal penalties-fines, imprisonment for less than 10 years or both, and forced to return the illegal gains. In addition, property may be seized and confiscated to the United States Government if it is used or intended for use in a crime or if proceeds related to the crime can be traced [7]. It is a matter of concern that although the *Rodchenkov Anti-Doping Act of 2019* is the domestic law of the United States, it attempts to realize the extraterritorial jurisdiction of the United States and such an attempt is not impossible. For example, the United States and Japan have signed the *Japan-US Treaty on Mutual Assistance in Criminal Matters*, through which the United States can carry out criminal actions in its territory.

2.4 China has made it a Criminal Offence to Induce, Instigate, Deceive, Force Athletes to Use, and Provide Doping

China resolutely opposes doping, but in the early years, anti-doping relied mainly on self-discipline of sports industry. In Articles 37 to 40 of China's *Anti-Doping Regulations*, it is provided that criminal responsibility shall be investigated according to law for unauthorized production of contraband, provision of doping to athletes, personal injury to athletes, etc. that constitute a crime. However, there was no corresponding provision in China's *Criminal Law* in earlier years, resulting in the actual failure to punish the acts listed in the *Anti-Doping Regulations*. There is no criminal law punishment for athletes

using doping in our country, while the behavior of organizing, forcing and cheating athletes to take prohibited stimulants in sports can be charged with the crime of intentional injury in theory of law, but there are difficulties. According to the Criminal Law, the crime of intentional injury needs to be judged based on the result of causing mild injury. However, the side effects of stimulant use often cannot be revealed until many years later, which brings great difficulties to the evidence collection. Therefore, no criminal punishment case of intentional injury has been found.

In recent years, China has begun to actively promote doping punishment. On November 18, 2019, the Supreme People's Court officially promulgated the Interpretation of Several Issues Concerning the Application of Laws in the Trial of Criminal Cases of Smuggling, Illegal Operation and Illegal Use of Doping, which applies the criminal law to anti-doping, in which the crimes and penalties related to doping include: (1) the crime of smuggling goods and articles prohibited by the state from import and export; (2) the crime of illegal business operation; (3) the crime of maltreating the ward or guardian; (4) the crime of organizing cheating in examinations; (5) the crime of production and sale of toxic and harmful food; (6) the crime of abuse of power, dereliction of duty [8].

On December 26, 2020, the Standing Committee of China's National People's Congress passed *Amendment XI of the Criminal Law of the People's Republic of China*, which stipulated that one article should be added after Article 355 of the Criminal Law as one of terms under Article 355 [9]: "Whoever lures, abets or deceives athletes to take prohibited stimulants to participate in major domestic and international sports competitions, or provides doping to athletes knowing that they participate in the above competitions, if the circumstances are serious, shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention, and shall also be fined." "Whoever organizes or forces athletes to take prohibited stimulants to participate in major domestic and international sports competitions shall be severely punished according to the provisions of the preceding paragraph."

III. ANALYSIS ON THE MAIN CAUSES OF ACCUSATION AS A CRIME

3.1 The Causes for being Accused of Doping Crimes in a Few Countries: Intentional Injury, Doping, Fraud, Perjury, etc.

3.1.1 Intentional injury

In the 1980s, doctors of the former Deutscher Fußball-Verband lied that muscle enhancers were vitamins and tricked underage female swimmers into using them. Since the use of muscle enhancers seriously damaged health and threatened to cause sequelae, the Federal Court of Justice of Germany convicted them of intentional injury [10]. Germany once successfully accused the team doctors who induced the athletes to take prohibited stimulants with the crime of "intentional injury", provided that the injury to the athletes caused by the use of doping was obvious. However, many doping do harm to

athletes' health slowly, and some even take decades to be revealed, which makes it difficult to obtain evidence. Another problem of applying the crime of injury to anti-doping is that it is impossible to regulate self-injury-athletes' own use of doping [11].

3.1.2 Doping

In 2015, the German Parliament passed the Anti-Doping Law, which identified doping as a crime [12].

3.1.3 Fraud

Italian prosecutors have repeatedly accused doping product suppliers of "sports fraud crime" in Article 1 of Law No. 401/1989, "Measures of the Competition and Illegal Gambling Department to Guarantee Fair Procedures in Competitive Sports", which was promulgated in 1989. However, the crime of sports fraud cannot be imposed on athletes who only take prohibited stimulants. Prosecutors accuse athletes of sports fraud, assuming that athletes who take prohibited stimulants are bound to manipulate the results of the competition, which ultimately fails, because it is difficult to prove the causal relationship between doping and manipulation (Letizia Paoli, 2013). Article 147 of the Austrian Criminal Code also criminalizes fraud for any individual who cheats by using prohibited substances or methods (Claire Sumner, 2017).

3.1.4 Perjury

The US Anti-Doping Agency discovered that Bay Area Laboratory Co Op (BALCO) provided special hormone drugs to athletes. Marion Jones, a former American Olympic gold medalist in track and field, admitted to using the performance-enhancing drugs provided by BALCO, and finally confessed in front of two grand juries that she made a false statement about the use of steroids and was sentenced to six months' imprisonment for perjury. Victor Conte, founder of BALCO, also admitted to providing athletes with performance-enhancing drugs (Ian Ritchie, 2018), but he was only sentenced to four months' imprisonment [13] for providing information about the 27 athletes involved.

3.2 Causes of Doping Crimes Accused in many Countries: Production, Supply, Import and Export of Prohibited Drugs without License

According to the *Misuse of Drugs Act* of the United Kingdom, it is a crime to traffic, supply, own and attempt to supply controlled drugs (such as methamphetamine, anabolic steroids, growth hormone, etc.) through import or export without permission (*Misuse of Drugs Act*, 1971).

In Article 9 of Italian Decree No. 376 of 2000, "Sports Health Protection Discipline and Anti-Doping Fight", the crime of dealing in doping products is classified as [14]: buying and selling drugs or

ingredients with pharmacological or biological activities that belong to the category mentioned in Article 2, paragraph 1, through different channels from the sales of public or hospital pharmacies, public pharmacies and other drugs directly used to treat patients (Letizia Paoli, 2013).

In 1990, the US Congress passed the *Anabolic Steroid Control Act of 1990*, which made it a crime to possess anabolic steroids without a valid prescription.

According to France's 1999 *Law on Protection of Athletes' Health and Anti-Doping* [15], anyone who prescribes contraband to athletes within the specified scope of the law, or transfers, provides or incites the use of prohibited substances and means will be sentenced to five years' imprisonment and fined 500,000 francs.

IV THOUGHTS ON PERFECTING THE PROVISIONS OF DOPING-RELATED CRIMINAL LAW IN CHINA

4.1 It is not the Focus of Doping Punishment to Regulate Athletes' Doping by Criminal Law

Since the main personnel who take prohibited stimulants are athletes, anti-doping will not be required if they do not take prohibited stimulants. Then, why does the anti-doping penalty not focus on regulating athletes? The Department of Sports and Civil Society of the United Kingdom believes through investigation that the evidence standard of criminal courts is "unquestionable", and it may be faster to use supervision or disciplinary procedures to deal with doping incidents [16]. The principle of presumption of innocence is used in criminal law, i.e. the accused should be presumed innocent until proved guilty according to law (Letizia Paoli, 2013). For a criminal offence to be charged in many countries, the accused must have committed some intentional or negligent act. However, the principle of strict liability is adopted in disciplinary punishment. Athletes are "responsible for any prohibited substances or their metabolites or marks found in their samples". The positive result of contraband found by the Anti-Doping Agency in the drug test constitutes a violation or prohibited act, which can be disciplined without proving the athlete's intention, negligence or negligent use [17]. Disciplinary punishment requires less evidence, while criminal punishment requires more. The inclusion of doping in the criminal punishment will complicate the current fault system [18], which is the main reason why the athletes who take prohibited stimulants are mainly subject to disciplinary punishment by the sports organizations and less punished.

4.2 Criminal Law Regulation on the Production, Supply and Sale of Doping is a Useful Supplement to the Self-Discipline of Anti-Doping Industry

According to the general situation of foreign anti-doping penalties and the attitude of the WADA and other countries towards the criminalization of doping, the anti-doping penalties of countries around the

world are mostly used to crack down on the source of doping: producing, selling and organizing the use of doping.

In the practice of anti-doping, few cheating behaviors have been found in traditional anti-doping tests because the doping detection method lags behind the development of doping. According to the statistics made by some scholars on the data of the Anti-Doping Laboratory, among the 258,267 tests, only 2,790 bad test results were found, and the positive rate was only 1.08% (Verner Møller, 2016), which did not mean that athletes seldom used doping. Michael Rasmussen, a Danish rider, revealed in his autobiography in 2013 that he used a variety of illegal drugs, including EPO, but he never failed the doping test during his 12-year professional cycling career [19]. The detection means always lag behind the development of doping despite constant updating of the detection means, which is always a pending issue. To this end, the IOC has established a prosecution mechanism in the Anti-Doping Rules. For example, the doping test samples of athletes participating in the 2008 Beijing Olympics are required to be kept for 8 years, and the samples can be tested for prosecution at any time during these 8 years. However, there are still some athletes who take chances and take risks. In 2016, the Olympic ranking of many athletes was cancelled. Obviously, the anti-doping work in China still has a long way to go.

The targets of disciplinary punishment of anti-doping organizations are coaches, team doctors, athletes and other sports industry practitioners of sports industry associations, rather than producers and sellers of stimulants and medical institutions illegally participating in doping violations. Criminal penalties for doping can cover these gaps in disciplinary sanctions. Since it is difficult to find athletes' doping behaviors in a timely and comprehensive way in doping testing, so that some athletes are desperate, we can add a way to fight against doping by cracking down on the production and circulation of doping, which is also a vacuum zone for the self-discipline of sports industry. When athletes and related personnel take stimulants or trade, sports organizations have neither the legal right to enter the scene to search, eavesdrop or intercept athletes' communication information, nor access the related personnel's fund transfer records, and so on. If a criminal case is filed for doping, criminal investigation means can be used to obtain evidence. For example, according to China's Criminal Procedure Law, public security organs should investigate criminal cases that have been filed. In criminal investigation, they can use search, phone monitoring and other means, which is far easier to find and obtain evidence of doping-related behaviors than sports organizations. Therefore, it is an important means to make up for the lack of self-discipline in sports industry to regulate the source of athletes' doping-the production, supply and sale of doping by criminal law.

4.3 China's Anti-Doping Criminal Legislation Focuses on Revising the Criminal Law or Introducing Judicial Interpretations to Expand the Scope of "Drugs"

Considering the difficulties faced by foreign anti-doping criminal laws, the author thinks that at present, China's legislature can explore the revision of criminal laws, such as supplementing and

perfecting the content of criminal clauses related to the production and circulation of doping, so as to make it play the role of anti-doping more effectively.

Articles 347 to 357 of China's Criminal Law stipulate "crimes of smuggling, trafficking, transporting and manufacturing drugs", such as "smuggling, trafficking, transporting and manufacturing drugs, regardless of the quantity, shall be investigated for criminal responsibility and punished". However, according to Article 357 of the Criminal Law: "Drugs referred to in this law refer to opium, heroin, methamphetamine, morphine, marijuana, cocaine and other narcotic drugs and psychotropic drugs that can make people addicted to drugs". Other than cocaine, methamphetamine, morphine and marijuana, many stimulants prescribed by the WADA do not fall within the scope of "drugs" in Chinese criminal law.

One of the main reasons for Britain's decision not to legislate specifically on anti-doping in the near future is that the Misuse of Drugs Act of Britain has already included the possession and supply of drugs in the category of criminal punishment, and the "drugs" in this law include many stimulants recognized by the WADA, which plays an important role in anti-doping. After consulting the Misuse of Drugs Act, the author found that the law includes a very large list of prohibited drugs, such as Category A drugs from F1 to F32, each of which is subdivided, such as F5 including cocoa leaves, cocaine, morphine, dextromoramide, dihydromorphine, cyclophosphamide, diethylthiamine butene, and so on [20]. The Misuse of Drugs Act stipulates about 20 penalties for possessing and supplying ("supplying" includes sharing or providing drugs to others, not limited to selling) the above-mentioned prohibited drugs [21], which can be summarized as follows: Category A drugs, possessing: imprisonment for up to 7 years and/or unlimited fines; supplying: life imprisonment and/or fine; Category B drugs, possessing: up to 5 years' imprisonment and/or unlimited fine; supplying: imprisonment for up to 14 years and/or fines; Category C drugs, possessing: imprisonment for up to 2 years and/or fine; supplying: imprisonment for up to 14 years and/or fine [22]. Thus, the Misuse of Drugs Act of Britain is of great reference significance to relevant legislation in China. Numerous stimulant products have emerged over the past decades, with anabolic steroids accounting for approximately half of the positive doping test results by WADA. In fact, the inclusion of anabolic steroids as Category C controlled products in the Misuse of Drugs Act has already brought nearly half of the drugs with high incidence of positive stimulant testing under its control. In addition, cocaine, methamphetamine, marijuana, etc. are also under control.

The United States also has legislation similar to that of Britain. The U.S. Congress enacted the Anabolic Steroids Control Act in 1990, making it an offence to illegally possess any quantity of anabolic steroids even without intent to sell or distribute them (Rick Collins, 2006). In 2004, President Bush signed the 2004 Anabolic Steroids Control Act, under which the Attorney General only needs to prove that the compound in question is chemically and pharmacologically related to testosterone without proving its "anabolism" [23].

In view of the difficulty of enacting new laws and the relative ease of amending laws, it is suggested to draw lessons from the legislative experience of Britain, the United States and other countries to amend our country's criminal law, or to introduce a judicial interpretation to expand the scope of "drugs" in the criminal law, so that it can better play its role in anti-stimulant.

4.4 China's Judicial Interpretation should Explain the Definition of "Drug" to Facilitate Anti-Doping Practice

In addition to the revision of the criminal law, the judicial interpretation issued by the Supreme People's Court is a faster way to revise the criminal law.

At present, both Article 357 of China's Criminal Law and Article 2 of the Anti-Drug Law stipulate that "Drugs as mentioned in this Law refer to opium, heroin, methamphetamine, morphine, marijuana, cocaine and other narcotic drugs and psychotropic drugs that can make people addicted to drugs and drugs controlled by the state". The author thinks that the words "addiction", "narcotic drugs and psychotropic drugs" in this article are inconvenient for doping punishment: (1) According to the condition of "addiction", it can be considered that narcotic drugs and psychotropic drugs that "do not make people addicted" are not drugs, and doping punishment is not based on athletes' addiction to used stimulants, even if athletes only use stimulants once, they should be punished as long as the test is positive; (2) stimulants in sports include diuretics and inhibitory beta blockers, and so on, not only those drugs that play an exciting role. Every year, the World Anti-Doping Agency will publish the International Standard of Prohibited List, which covers more and more prohibited drugs. As early as 2017, there were more than 240 prohibited substances listed in the International Standard of Prohibited List, and most of the prohibited substances were marked with "including but not limited to" or "other substances with similar chemical structure or similar biological effects", so in fact there were more than 2,000 prohibited substances. Stimulants can be divided into 9 categories according to the different pharmacological effects, including some drugs that have not been approved for human treatment and are still in clinical trials [24]. Because drugs in China's Criminal Law refer to "narcotic drugs and psychotropic drugs" controlled by the state, many kinds of stimulants do not belong to the category of "narcotic drugs and psychotropic drugs" and therefore do not belong to the category of "drugs" in the Criminal Law. How to deal with these problems when the Supreme People's Court issues a judicial interpretation has yet to be jointly studied by medical, biochemical and legal experts who jointly carry out anti-doping tests.

V. CONCLUSION

The author suggests that the short-term goal of promoting doping punishment in China is to issue relevant judicial interpretations, and the long-term goal is to amend the criminal law to include doping

contraband published by the World Anti-Doping Agency into the scope of "drugs". In addition, it is also very important to strengthen anti-doping education, because the development of doping technology will soon make it more difficult and expensive to detect illegal behaviors solely by doping testing. The importance education of keeping clean sports is very important, which is a priority for China's anti-doping organization.

The China Anti-Doping Center has announced the changes in the rules of the World Anti-Doping Agency on its official website in a timely manner. However, according to the author's knowledge of many provincial athletes who have participated in international competitions, they actually don't know which therapeutic drugs contain stimulants, and they often consult the team doctors repeatedly when they are ill and need to take medicine or be hospitalized because they are afraid of violation. Although there is an exemption mechanism for therapeutic drugs in doping control, it is often a matter of confusion and anxiety for athletes whether they need to apply for exemption or not, so not only should China Anti-Doping Center strengthen the training of team doctors, but the national team and provincial teams should also pay attention to the popularization of popular science for athletes to prevent them from taking banned drugs by mistake.

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