The Legal Nature of Doping Law

by **Janwillem Soek***

In the disciplinary law concerning doping, use has to be made of the principles and doctrines which have reached maturity in the sanctioning systems of the states, i.e. criminal law, and which are universally recognized, in order to attain a just and fair balance between the interests of the prosecuting sport organization and the prosecuted athlete who is suspected of having used doping.

One could be critical of the omnipotence displayed by sports organisations with regard to the athletes at their whim. This omnipotence is especially apparent in the disciplinary law concerning doping. If an athlete wishes to participate in competitions he will have to put up with various compulsory measures, based on the articles of association of the organisation in question or his contract with that organisation, both of which bind him. If the analysis of his urine sample shows a positive result, he will be disqualified and disciplinary proceedings will subsequently be instituted against him. Such doping proceedings do not accord him the same rights that suspects in criminal proceedings before the state courts enjoy, but only such rights as are granted in accordance with the sport organisation's regulations. Nor is it considered self-evident in the sanctioning systems of the sports organisations that the principles which have been developed within the sanctioning systems of states - such as, for example, the principle of nulla poena sine culpa and the principles of in dubio pro reo - are applied. Due to the specific wording of the European Convention of Human Rights the athlete who is suspected of doping cannot invoke the rights of the defence, which are laid down in Article 6 of this Treaty, either.

In the following sections, it will first be argued that the objectives and organisation of the two sanctioning systems correspond to a surprising extent. Given these similarities, it is difficult to defend that the often ostentatiously relevant criminal law principles in disciplinary doping law must yield to the principles deriving from private law, with the only reason given being that the law of associations has private law roots, or, at least, that the legal relationship between the prosecuting association and the prosecuted athlete is of a private law character. However, there is the curious circumstance that the application of criminal law principles is not rejected in its entirety, which makes one wonder whether some kind of policy could be detected as regards their application or rejection. For reasons of transparency, coherence, predictability and, most of all, in order to protect the position in the doping trial of the athlete who is suspected of having used doping against the almighty sport organisation, it is advocated that the disciplinary law concerning doping be considered "organisational criminal law", in which the principles of the field of law with which it has the most in common, i.e. criminal law, must be applied. When one wishes to examine whether, and if so, in what way, the present principles have been enforced in disciplinary case law, one immediately encounters the problem that decisions from disciplinary tribunals are rarely published. In those cases, the judgments concerning doping from the Court of Arbitration for Sport should offer relief, although not all CAS decisions are published either.[1]

Doping as a social phenomenon

The simple provision in Article 8 of the Dutch Constitution, reading that: "The right of association shall be recognised" indicates the heart of the law of associations, viz. the power to establish internal regulations. This power entails that an association is able to give itself shape. The freedom to create norms for interaction is exalted in the possibility to punish the violation of such homemade rules. Therefore, the possibility to take disciplinary action against members of the association is also part of the freedom of association that is anchored in the Constitution. The origin of sanctions in sport lies in the autonomously established private norms for interaction, among which the rules of play, and in the association's authority over its members as laid down in the articles of association. Athletes and other members of the association must interact, both with each other and with the association, in accordance with the values of sportsmanship and fairness, or, at least, refrain from engaging in any act which would harm the association. Athletes who are guilty of foul play, or who have misbehaved during a competition, may be removed from the game and furthermore be excluded from participation in future competitions under the association's code of conduct applied in disciplinary proceedings. These measures have the objective of ensuring and enforcing sportsmanlike behaviour and of *disciplining* athletes where necessary. Sport-specifically speaking the protected interest contained in the rules of play is that of fair play. "The use of doping in principle has nothing to do with the contest as such. Using doping may give one player an advantage over another, but the advantage can also be gained because one player was better able to prepare for the contest, or uses better or other equipment or may simply have more money than another. The justification of the prohibition to use doping should therefore primarily be sought in the objective of promoting or retaining the social standing of the sport, rather than in the notion of fair play", claims Van Staveren.[2] The result of the momentum created by the Anti-Doping Convention has been that governments of countries which have acceded to the Convention are now bound to put pressure on the national sports organisations to include anti-doping rules in their regulations. Although some organisations had already proceeded to adopt anti-doping regulations under pressure from the international federations, many national organisations only succumbed in respond to threats that the financial support from the state would be withdrawn. The majority of national organisations conduct anti-doping campaigns because they are forced to do so from the outside. Organised sport was called on to be errand boy in the fight against an undesirable social phenomenon.[3] The services rendered were veiled in rationalisations based on equal opportunities, i.e. the notion of fair play. This had the advantage that the procedure following the doping offence could be guided through the same disciplinary channels which already existed for the prosecution of traditional activities which undermine the principle of fair play. The main difference between the punishment of, say, rough play and that of the doping offence is that the punishment of the first aims to discipline, whereas that of the second aims to exclude. Penalties lasting two years and, in some cases, even four years, for a first offence cannot be considered as aiming to restore discipline. The fight against a phenomenon which mainly occurs in sport, but is viewed as a threat to public health, should of course be fought within sport by means of disciplinary procedures, but the procedures in question should then also meet the requirements which the state prescribes should apply in corresponding criminal procedures outside sport.[4] "[...] there are areas which are traditionally self-regulatory (in the truest sense of the term) that have become sufficiently important to warrant great concern over the

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1 See Karsten Hofmann: *Das Internationale Sportschiedsgericht (CAS) in Lausanne*, in: SpuRt 2002, p. 9. Cf. Stephan Netzle: *Das Internationale Sport-Schiedsgericht in Lausanne. Zusammensetzung, Zuständigkeit und Verfahren*, in: Sportgerichtsbarkeit (V. Röhricht Ed.), Stuttgart 1997, p. 15.

2 Lecture in the framework of Het Nationale Dopingdebat (The National Doping Debate), held on September 8th, 2000, in De Rode Hoed, Amsterdam.

3 Bernard Pfister and Udo Steiner, *Sportrecht von A-Z - Vereine und Verbände, Sportanlagen, Arbeitsrecht und Besteuerung, Unfallhaftung, Sponsoring, Gerichtsbarkeit,* Berlin 1995.

4 See, on the difference between disciplinary law and criminal law, and on the difference between ordinary disciplinary law and disciplinary law concerning doping, Eike Reschke, in: SpuRt 2001, p. 183.

extent to which their regulation is subject to scrutiny and required to adhere to constitutional standards. These sectors of activity, of which sport should be considered a foremost example, have, in effect, changed their nature to the extent that their activities can now be regarded as truly 'public' in practice and thus of constitutional significance", says Simon Boyes.[5]

The legal instruments

The CAS and the disciplinary bodies of the sports organisations often use a mixture of private and criminal law principles in order to decide a doping case. Decisions may, for example, contain references to the criminal law principle of legality "nulla poena sine lege scripta" or a principle such as ne bis in idem, right alongside arguments excluding the use of the in dubio pro reo principle.[6] The Swiss Tribunal Fédéral rejected the application of criminal law principles:

"As for the opinion of the CAS, whereby it is sufficient that the analyses performed reveal the presence of a banned product for there to be presumption of doping and, consequently, a reversal of the burden of proof, this relates not to public policy but to the burden of proof and the assessment of evidence, problems which cannot be resolved, in private law matters, in the light of notions proper to criminal law, such as the presumption of innocence and the principle 'in dubio pro reo', and corresponding guarantees which feature in the European Convention on Human Rights."[7]

From the following it will become clear that many arguments may be put forward which detract from such a rigid, dogmatic - (often) not legally founded - point of departure.

The cause of the confusing mix-up of principles can be found in the fact that the doping rules reside in the private law area of the law of association. Within the law of association, sports organisations are free to enact codes of conduct and rules for the enforcement of these codes.[8] From a certain point of view, the enactment by sports organisations of rules which concern the persons of whom the organisation is made up is a purely private law matter. In principle, the outlook remains the same when one involves the aspect of the hierarchy of the law of associations. Adding this detail to our considerations, i.e. the fact that the members of the organisations are subject to the organisation as a whole, has certain far-reaching consequences. The most important principle of private law, equality between the persons to whom the law applies, is put under great pressure in the disciplinary law of the organisation. "The federation in question has generally existed for decades if not generations, and has, without any outside influence, developed a more or less complex and entirely inbred procedure for resolving disputes. The accused participant, on the other hand, often faces the proceedings much as a tourist would experience a hurricane in Fiji: a frightening and isolated event in his life, and for which he is utterly unprepared", as Jan Paulsson[9] describes the situation.

In doping regulations a distinction can be made between the rules which concern the actual doping controls (the police law of doping) on the one hand and the substantive law and procedural law rules (which together constitute the normative law of doping) on the other. The rules containing provisions for the course of affairs during doping controls and doping analyses will only be dealt with below if they are needed in the argument concerning substantive and procedural doping law. The substantive law of doping indicates what type of behaviour is punishable in what type of circumstances. The procedural law of doping determines how and by whom it should be examined whether an offence has been committed and who should decide both this and the disciplinary measures to be imposed according to which standards. Normative doping law centres on the way in which athletes are supposed to behave and the action which is taken in the event that athletes fail to comply with the norms that apply to them. This phenomenon, i.e. conduct which violates the doping regulations, may be considered the main object of doping law. Doping law aims to negatively sanction objectionable behaviour with respect to doping. Doping law, unlike private law, has the fact that it is primarily a law of sanctions in common with criminal law.[10]

Just as criminal law regulates possible responses to the violation of - described - norms by those to whom they apply, doping law regulates the possible responses to the violation of the norms contained in that law by the persons to whom it applies. This is the object of both procedural and substantive law. The latter aspect of doping law determines under what circumstances certain behaviour may give rise to sanctions. The ius poenale of the sport organisation in the field of doping consists of the entirety of provisions which indicate under which conditions the organisation is entitled to punish and of the rules describing what such punishment may be.[11] Just like substantive criminal law, substantive doping law starts from the notion of the illegal act. It can be deduced from the description of the objectionable act what would be the proper way of behaving. Doping law is directed at enforcement in the event of non-compliance with the substantive doping rules (the norms), rather than at the rules of conduct deriving from other fields of law.

By way of an intermezzo, I would like to devote a few words to the relationship between the general disciplinary law of sports organisations and their disciplinary law concerning doping. In his Ph.D. thesis, Wassing[12] writes that fundamental to disciplinary law (in professional football) are "[...] the concept of 'fair play' and the flexibility formula, which means that such acts are punishable that 'harm the interests of the ... [organisation] or of the ... sport in general [...]'".[13] All behaviour that is relevant from a disciplinary law point of view can thus be included. The written and unwritten laws and attitudes of the (in the case of Wassing's Ph.D. thesis) football-playing nation are based on this.[14] What is, however, different from the general disciplinary (football) law which Wassing examined is that the disciplinary doping laws specifically target a certain type of act: the use of doping substances. General disciplinary law in sport serves two purposes. It is intended to enforce the general norms prevalent within the group which are essential for the continued existence of the organisation and it intends to enforce the norms of the sport: the rules of play.[15] After De Waard,[16] one could claim that penalising the behaviour indicated in the description of the doping offence serves to enforce the doping norm and to protect a legal interest corresponding with that norm. Doping law exclusively concerns the enforcement of one particular norm: the doping norm.[17] The violation of the substantive doping norm does not affect the organisation's structure. In other words, the norm is not part of the supporting structure of the organisation.[18] Its violation does, however, generally affect the essence of sport (the principle of equality). This is the legal interest which corresponds with the

5 Simon Boyes, in: *Sports Law*, 2nd ed. (Simon Gardiner, ed.), London/Sydney 2001, p. 198.

6 Christian Krähe: *Beweislastprobleme bei Doping im internationalen Sport - am Beispiel des Olympic Movement Anti-Doping-Codes*, in: *Doping, Sanktionen, Beweise, Ansprüche* (Jochen Fritzweiler, ed.), Vienna 2000, p. 42.

7 Extract of the judgment of March 15, 1993, delivered by the 1st Civil Division of the Swiss Tribunal Fédéral in the case G. v Fédération Equestre Internationale and Court of Arbitration for Sport (CAS). Cf. also Beloff, in: Sports Law (Beloff/Kerr/Demetriou Eds.), Oxford 1999, p.191, Rnr. 7.53.

8 Volker Röhricht: Chancen und Grenzen von Sportgerichtsverfahren nach deutschem Recht, in: Sportgerichtsbarkeit (Volker Röhricht ed.) Stuttgart, 1997, pp. 20-21.

9 Jan Paulsson, *Arbitration of International Sport Disputes*, in: Arbitration International, Vol. 9, No. 4 [1993], p. 361.

10 See G.J.M. Corstens: *Het Nederlandse strafprocesrecht*, Arnhem 1993, and M.J.C. Leijten: *Tuchtrecht getoetst*, Ph.D. thesis 1991, p. 31 and footnote 112.

11 Cf. for criminal law J. Remmelink, in: *D. Hazewinkel-Suringa's Inleiding tot de studie van het Nederlandse Strafrecht*, 1994, p. 1.

12 A. Wassing, *Het tuchtrecht van het publiekvoetbal*, Ph.D. thesis, 1978, p. 16.

13 See also Volker Röhricht: *Chancen und Grenzen von Sportgerichtsverfahren nach deutschem Recht*, in: Sportgerichtsbarkeit (Volker Röhricht ed.) Stuttgart, 1997, p. 28.

14 Röhricht *op.cit.* p. 28.

15 See W.L. Haardt: *Samenvattend Verslag*, in: *Tuchtrecht en Fair Play*, Nederlandse Vereniging voor Procesrecht, 1984, p. 8.

16 R. De Waard: *Schuld en wederrechtelijkheid als elementen van het delict*, in: Liber Amicorum Th.W. van Veen - Opstellen aangeboden aan Th.W. van Veen ter gelegenheid van zijn vijfenzestigste verjaardag (1985), p. 382.

17 Verheugt, J.W.P.: *Inleiding in het Nederlandse recht*, 1999, p. 12.

doping norm. Given that the doping norm does not go to the essence of the sport in question, it should be described carefully. In case of its violation, it would seem obvious that the prosecuting body cannot rely on the concept of "fair play" or make use of unwritten laws and a flexible formula such as "unsportsmanlike behaviour".[19] The sports organisation is free to determine which acts or what type of behaviour go against the interests of the organisation or of the sport in general which the organisation in question represents. As opposed to criminal law and doping law, general disciplinary law is an open system.[20]

As does criminal law, the law of doping has a special sanction at its disposal: the penalty.[21] A particular characteristic of the penalty is that it does not aim to redress injustice, but rather has the objective of taking away the illegally obtained advantages. Analogous to what Corstens[22] has written on the position and purpose of criminal procedural law, it may be claimed with respect to doping law that "with the imposition of a penalty [...] the citizen [in this case: the athlete] is being corrected and subjected to suffering which is in fact intended. The penalty does not redress the injustice which was done in practice. The penalty is *non-reparatory* by nature."[23] It entails a reprimand by means of imposing suffering which is mainly intended to result in prevention: to ensure that the perpetrator and third parties will, in future, refrain from engaging in such or similar acts. According to Corstens, this is where sanctions in private and administrative law differ from those in criminal law. Private law damages intend to bring about reparation; the primary objective of the private law of damages is to indemnify the victim for injury. Although the penalty, which is imposed at the end of doping proceedings, is in abstracto directed at the reparation of harm incurred by the legal order, it is absolutely not directed at the reparation of harm suffered by an individual. The injured party in disciplinary doping law is society, just as it is in criminal law. What both types of law have in common is their objective to enforce the law and protect the society in which this law applies. A point in case for showing that doping law should be positioned in the sphere of criminal law rather than that of private law may be found in the nature of the penalty.[24] The penalty's counterpart "which is exclusive to the domain of criminal law: the deprivation of liberty"[25] may be found to be present in the practice of imposing temporary bans from competition and, at times, even bans for an indefinite period of time, which is how the "*life long ban*" may be regarded.[26] "Even though disciplinary law penalties are to every purpose the equivalent of criminal law penalties, their legal basis is different."[27] This contention only serves to indicate that disciplinary law is not criminal law; but this does not mean to say that other principles apply with respect to disciplinary law than those applying in criminal law. What makes the basis of the two means of imposing penalties so essentially different? Corstens discovers this essence in the fact that disciplinary law serves to reprove the party involved for breaching the norms in force for and within a particular group, "whereas in criminal law one is reproved for having failed to act in accordance with a generally applicable norm". Within the confines of the sports club, of the national federation and of the international federation there are generally applicable norms for behaviour as well. This is a case of scaling down which is not coupled with a structural disruption of the essence. Structurally speaking, the size of the group makes no difference. The enlargement or reduction of a photograph does not change the photograph itself.

It has been shown that the imposition of a penalty for the violation of doping rules is a correctional response involving the infliction of suffering. It is precisely the correctional aspect which renders the execution of a custodial sentence in the law of associations "in more need of justification than the actual reparation of the injustice perpetrated, either through the payment of damages or otherwise".[28] Corstens' further contentions intrinsically apply to doping law: "A person who commits an unlawful act against another, must offer redress or compensate for the damage. This may be considered a fundamental rule of law. The infliction of suffering goes beyond that. The more solid foundation for this lies, inter alia, in the compulsory intervention of the courts and in the requirement that there must be an element of guilt present before any punishment can be imposed." In doping law, the disciplinary tribunal can only impose a penalty after a carefully described procedure has been followed. The doping procedure is the indispensable link between the offence and the penalty to be imposed by the disciplinary tribunal.

The procedural rules of doping law - the disciplinary law of doping - must contain careful descriptions of the norms according to which the doping trial must be conducted. This requirement should as far as possible allay the ever-present suspicion that persons who are subjected to the powers of punishment of monopolistic sports organisations will fall victim to arbitrariness. The application of the criminal law and criminal procedural law principles in the doping trial may reduce such suspicions to a minimum.[29] The main thing is that the athlete who has been accused of a doping offence must be protected against any excessive action on the part of the prosecuting body. Only specially designated officials of the organisation have been granted certain - circumscribed - powers during the trial.[30] [31] In the doping trial, which is by nature both inquisitorial and accusatorial, the prosecutor and the accused face each other as unequal parties. The initial stage of the trial is inquisitorial: the accused athlete is the object of examination, while the prosecutor is vested with several powers which infringe on the athlete's rights which in other circumstances are guaranteed by statutes and regulations. Although the athlete who stands accused of a doping offence is the object of scrutiny he does have some powers - sparingly granted by the doping regulations - to defend himself against the accusations made against him. In the audi alteram partem stage, the doping trial is accusatorial in nature. The possibility to defend himself that is offered to the athlete does not make him an equal in the doping trial; for example, the athlete is unable to submit a counterclaim. This inequality causes the doping trial to be best approachable from a criminal law angle, rather than from a private law angle.[32] Given that a very real inequality exists between the parties to the doping trial - as is the case in criminal proceedings - "special care must be taken in the granting and exercise of powers to or by the prosecuting body".[33]

The purpose of the penalisation of the use of doping substances and methods is to create the same general preventive effect as is intended with the penalisation of certain acts as laid down in the Criminal Code. The penalisation as such "has a certain positive effect on the compliance with the norm".[34] The rules in the doping regulations make it clear to potential offenders that the violation of these rules will result in punishment. "This will possibly deter them from committing offences. Also because of this intended effect - insofar as the objective is attained, of course - the reach of criminal procedure

18 Although this is not to say that doping regulations are lower in the hierarchy of the organisation's regulation. See, on the importance of the position of doping rules, Vieweg, *Doping und Verbandsrecht*, in: NJW 1991, p. 1514.

19 Urs Scherrer, *Strafrechtliche und strafprozessuale Grundsätze bei Verbandssanktionen*, in: *Doping, Sanktionen, Beweise, Ansprüche* (Jochen Fritzweiler, ed.), Vienna 2000, p. 125. See, however, Südwest Presse Vermischtes 22.3.2000: "Lanzaat acht Wochen gesperrt - Fürther Einspruch abgelehnt", Frankfurt/Main (dpa) and the Krabbe II case of 20-11-1993 in re Deutscher Leichtathletik Verband (DLV) v. IAAF.

20 Cf. A. Wassing: *Het tuchtrecht van het publiekvoetbal*, Ph.D. thesis, 1978, p. 137.

21 See, on the penalty in criminal law, Verheugt, J.W.P.: *Inleiding in het Nederlandse recht*, 1999, p. 9.

22 *Het Nederlandse strafprocesrecht*, Arnhem 1993, p. 2.

23 See also Apeldoorn, L.J. van, Reijntjes, J.M. Boon, P.J. Bergamin, R.J.B. : *Van Apeldoorn's Inleiding tot de studie van het Nederlands recht*, 2000, p. 289.

24 See ECHR cases Welch of 9-2-1995 (NJ 1995, 606) and Jamil of 8-6-1995 (NJ 1996, 1) on the criteria for criminal law penalties, which may be applied to doping law penalties as well.

25 Corstens [1993], *Idem*.

26 *Op.cit.* p. 120.

27 Corstens [1993], *Idem*. Cf. Reschke (SpuRt 2001, p. 183).

28 Corstens [1993], *Idem*.

29 Urs Scherrer, *op.cit.*, p. 121.

30 The German Bundesverfassungsgericht held that "Grundrechtsschutz durch Verfahren" must also be complied with in the law of association (BVerfGE 53, 30 (65).

31 On the absence of separate and independent prosecuting bodies in doping law, see Th. Summerer, *op.cit.,* p. 165, Rz. 276, and Heikki Halila, in: *Dopingrecht in Finnland*, IV, 1.

32 Urs Scherrer, *op.cit.* p. 124.

33 Corstens [1993], *Idem*.

34 Corstens [1993], *Idem*.

[in the present case: disciplinary doping law] extends further than the cases which are actually prosecuted." The course set in the doping regulations for conducting the prosecution of doping offences is virtually the same as that encountered in criminal law where the prosecution of regular offences is concerned.

The difference between the criminal law and the disciplinary law system of law enforcement often lies in the fact that "disciplinary law sanctions are of a lesser calibre"[35] than their criminal law counterparts. That is not to say that if the calibre of the penalties were the same, disciplinary law should be considered equal to criminal law. There are penalties in disciplinary law which have as much of an impact on those involved as any criminal law penalty would have. This, however, does not in itself turn disciplinary law into criminal law.[36] It does, on the other hand, provide an argument in favour of applying criminal law principles rather than private law principles in doping law.[37]

In a decision dated 8 June 1976 the European Court of Human Rights at Strasbourg (NJ 1978, 223; the Engel Case) held that when sanctions are, by reason of their severity, in principle of a criminal law nature the disciplinary trial must be considered a criminal prosecution in the sense of Article 6 ECHR. However, this qualification cannot be transposed, just like that, to doping law as the case in question concerned - statutory - military disciplinary law. Moreover, the case cited involved a disciplinary law custodial sentence. Deprivations of liberty, except for those which by their nature, duration or manner of execution are unable to result in significant prejudice, belong in the sphere of criminal law, according to the Court. Still, the Court's decision provides food for thought where doping law is concerned. It can indeed be said of a professional ban for a definite or indefinite period of time that it results in significant prejudice by its nature, duration and execution.[38] It is argued that, contrary to criminal proceedings which could be directed at anyone, disciplinary law is only exercised within certain groups. This claim which is, of course, in itself correct does not, however, offer any substantive argument for having other than criminal law principles apply in disciplinary law. It only puts the two systems of law enforcement in perspective. Persons who are members of a sport organisation are subject to doping laws in the same manner that citizens in society are subject to criminal law.[39]

De Doelder is of the opinion that disciplinary law is positioned precisely where administrative law, private law and criminal law intersect.[40] The extent to which the members joined the group of their own free will is decisive for the type of law that is predominant in the disciplinary law in question. Van Staveren[41] views disciplinary law in sport from the same angle. In his opinion, the law of obligations (both of contracts and of legal persons) has a major impact on the disciplinary law of "regular associations, among which sports clubs, and several non-major sport federations". He contrasts this with statutory disciplinary law, which is greatly impacted by criminal law. "The disciplinary law governing professional groups which have more or less voluntarily united in associations lies somewhere between the two extremes. An example would be the disciplinary law that is applicable for top athletes and professional athletes". These days, due to the increased professionalism in and the commercialisation of sport, the standards of "the extent to which" membership is voluntary (De Doelder) or "more or less" voluntary membership (Van Staveren) have become unwieldy instruments.[42] It is true that everyone is free to decide whether they wish to take up a sport or not. Once the choice in favour of a particular sport has been made, the only norms the budding athlete must take into account until he has reached a certain level are those which apply to his particular branch of sport, including the norms of the disciplinary law in question. If the athlete decides on the basis of his talent and dedication to turn his sport into his profession he will also become subject to the general disciplinary law, including that concerning doping, of the international sport federation. A professional athlete exercises his profession voluntarily, but, as he starts to earn respect and popularity both within and outside the sport as a result of wins and scores and possibly makes a fair amount of money because of this, the voluntariness of his choices will become comparable to that of any other professional to whom statutory disciplinary law applies. If he does not like the rules, the "ordinary" professional can always emigrate, but even that freedom is not available to the professional athlete because the disciplinary law of his international federation will apply no matter where in the world he practises his sport. Professional sport has put the embedment of sport within the law of association under pressure. If one can still speak of the voluntary subjection by professional athletes to the regulations of sports organisations, there is at any rate by now a complete absence of voluntary subjection to doping regulations. The voluntariness in question is a legal (dogmatic) presumption which does not correspond to reality. In reality, one could sooner speak of being forced. "Da im kommerzialisierten Sport die Sportler existentiell auf die Monopol-Organisation angewiesen sind, können sie der Bindung nicht entgehen; ihnen ist faktisch eine autonome Wahrnehmung ihrer eigenen Interessen nicht möglich; sie sind [...] auf Schutz angewiesen", says Fritzweiler.[43] ["As the athletes in commercialised sport are essentially committed to the monopolistic organization, they cannot escape this tie; it is factually impossible for them to serve their own interests; they are dependent on protection", says Fritzweiler. Transl. JS] And yet another quote claims that: "Der Profisportler muss sich regelmäßig der Sanktionsgewalt des Verbandes unterwerfen, um seinen Beruf überhaupt ausüben zu können. Von der sonst für das Privatrecht typischen Freiwilligkeit kann daher im Bereich der Sportgerichtsbarkeit kaum die Rede sein".[44] ["The professional athlete must regularly submit to the federation's power to penalize in order to at least be able to practice his profession. The element of voluntariness, which is typical for private law, is hardly present at all in the prosecution procedures in the realm of sports law". Transl. JS] Given how relative the professional athlete's voluntary subjection to the sports organisation is it could be argued that the impact of principles of criminal law should not only be substantial but should in fact be predominant. There must be no misunderstanding over the fact that disciplinary doping law is not criminal law and will never be criminal law, but in the framework of the law of associations it is a *kind* of criminal law,[45] at least, a system of imposing sanctions that should have criminal law principles and concepts applied to it.[46] As public criminal law also finds itself in an environment that is of a private law character, no arguments for proving that private law principles must have an impact on doping law can be deduced from the fact that doping law is embedded in the law of associations. "Although the punishment of doping is not a criminal punishment, it is a criminal-like punishment and will be estimated mainly according to the same principles", according to Tarasti.[47] Tarasti probably intended to say "procedure"

35 Corstens [1993], *Idem*, and J. Remmelink, in: *D. Hazewinkel-Suringa's Inleiding tot de studie van het Nederlandse Strafrecht*, 1994, p. 30.

36 Th. Summerer: *Internationales Sportrecht vor dem staatlichen Richter,* Ph.D. thesis 1989, p. 149.

37 G.W. Kernkamp: *Verslag van de discussies bij de overige onderwerpen*, in: *Tuchtrecht en Fair Play*, Nederlandse Vereniging voor Procesrecht, 1984, p. 328.

38 "A four year ban can be a 'functional death penalty' for an athlete", says Ken Foster, in: *The discourses of doping: law and regulation in the war against drugs*. See also A.B.Diouf's comments on the Braunskill Case (25.5.1996 - IAAF v. USA Track & Field (USATF)).

39 Th. Summerer, in: Fritzweiler/Pfister/Summerer: *Praxishandbuch Sportrecht*, München 1998, p. 162, Rz. 265.

40 H. de Doelder: *Terrein en beginselen van tuchtrecht*, diss. 1981, pp. 25-27 resp. p. 34.

41 H.T. van Staveren, Syllabus Part II, 1998-1999, Ch. V.

42 See also Margareta Baddeley: *Dopingsperren als Verbandssanktion aus nationaler und internationaler Sicht - Insbesondere am Beispiel des schweizerischen, australischen und amerikanischen Rechts*, in: *Doping - Sanktionen, Beweise, Ansprüche*, Herausgegeben von Dr. Jochen Fritzweiler, Wien 2000, p. 13.

43 Jochen Fritzweiler in: Fritzweiler/Pfister/Summerer: *Praxishandbuch Sportrecht*, München 1998, p. 12.

44 Michael Reinbart, *Sportverbandsgerichtsbarkeit und Doppelbestrafungsverbot*, in: SpuRt 2001, p. 48.

45 J. Remmelink: *Mr. D. Hazewinkel-Suringa's Inleiding tot de studie van het Nederlandse Strafrecht,* 1994, p. 30.

46 Summerer, *op.cit.* p. 163, Rz. 267.

47 L. Tarasti: *When can an athlete be punished for a doping offence*, World doping conference 1999.

instead of "punishment". It is a pity that he failed to provide any foundation for this claim. Going beyond criminal law, in which the Public Prosecutor has some discretion to decide whether to prosecute or not,[48] the doping law regime of the sports organisations contains the obligation on the part of the prosecuting bodies to institute disciplinary proceedings.

There is another argument for taking a criminal law approach to doping law, deriving from Article 4 in conjunction with Article 7(2)(d) of the Council of Europe's Anti-Doping Convention.[49] Article 4 provides that: "The Parties shall adopt where appropriate legislation ... to restrict the availability ... as well as the use in sport of banned doping agents and doping methods and in particular anabolic steroids". In other words, the parties to the Convention are, where appropriate, bound to include rules in their legislation concerning, inter alia, the use of doping in sport. The provision does not say what type of legislation should be involved in the view of the Convention's authors. However, clues are provided when Article 4 is combined with Article 7. Under this provision the contracting parties are, among other things, expected to urge their sports organisations to harmonise their disciplinary proceedings... "applying agreed international principles of natural justice and ensuring respect for the fundamental rights of suspected sportsmen and sportswomen; these principles will include: ... ii. the right of such person to a fair hearing and to be assisted or represented ..." This rule undeniably aims to endow doping law with criminal law characteristics. As it is apparently expected of sports organisations that they adopt disciplinary provisions with a criminal law orientation in their disciplinary regulations,[50] the conclusion is justified that the legislation referred to in Article 4 is also of this orientation. The Convention has by now entered into force for 36 countries (consisting of both members and non-members of the Council of Europe) of which 23 have adopted anti-doping rules in their criminal codes. Another 10 countries not party to the Convention have made the use of doping in sport an offence under their legislation. Regarding doping law as organisational criminal law[51] in which the principles of criminal law are especially present offers several advantages over the starting point that doping law is geared towards private law or governed by several fields of law.[52] That doping law is part of the autonomous law enacted by associations is not to say that it should fall back on the law of associations or general private law. Criminal law is also part of the private law world. All inter-human acts are in essence private law acts. This has not been an impediment for the substantiation of numerous concepts, nor for the development of principles within criminal law, which deviate from those applicable in private law.

Conclusion

The main advantage of the criminal law approach of doping law consists of the clarity and transparency it creates. Syncretisms, the intermingling of private law and criminal law concepts, which often occurs in doping judgments, are prevented by it. Concepts such as fault/guilt and intention/malice, for example, in doping proceedings must not derive from private law where they have a different function from the one they have in criminal law. The adoption of criminal law principles in doping law adds to the standing of this body of law rather more than does the arbitrary application of criminal law principles one day and private law principles the next. Why not adopt the principles of Articles 6 and 7 of the ECHR, such as in dubio pro reo, outright in doping law?[53] Why would one use the private law rules on evidence instead of the criminal law rules in a field of law dealing with punishment, as doping law does? The reversal of the burden of proof fits in beautifully with organisational criminal law, but this is completely untrue where the concept of strict liability as it has developed over the past few decades in the practice of doping law is concerned.[54] Why should concepts such as "absence of all guilt" and "lack of substantive illegality" which have been elaborated in the criminal law doctrine of legal defences not be used in doping law? Using the criminal law toolbox in doping law may render the attempts at harmonisation of this field of law more successful than the mixture of concepts from various fields of law has done so far. An additional argument in favour of the criminal law approach to doping law lies in the fact that several countries have proceeded to include the issue of doping in their (criminal law) legislation.[55] "Das nichtbeachten der [...] strafrechtlichen oder strafprozessualen Grundsätze bedeutet grundsätzlich einen Eingriff in die Persönlichkeit des Betroffenen", claims Scherrer.[56] ["Disregarding the principles of material and formal criminal law boils down to a fundamental infringement of the personality rights of the athlete involved", claims Scherrer. Transl. JS] The application of generally and internationally recognised criminal law and criminal procedural law principles and concepts to doping law does not only contribute to the careful and respectful treatment of the athlete but also renders the law more transparent and definitely more predictable for those directly concerned than does the application of a mixture of principles and concepts from other fields of law. It is not only in the nature of things that in a sanctioning system use should be made of principles and concepts which have for centuries developed and evolved in the public sanctioning system, but the application to doping law of such principles and concepts moreover contributes to the harmonisation of this body of law.

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48 In private law, a similar discretion is left to the interested parties. See Apeldoorn, L.J. van, Reijntjes, J.M. Boon, P.J. Bergamin, R.J.B. : *Van Apeldoorn's Inleiding tot de studie van het Nederlands recht*, 2000, p. 65.

49 Anti-Doping Convention, Strasbourg 16-11-1989, ETS no. 135.

50 See also the Gasser case (Gasser v. SLV, in: SJZ 84 (1988), p. 87).

51 Cf. Michael Reinhart, *Sportverbandsgerichtsbarkeit und Doppelbestrafungsverbot*, SpuRt 2001, p. 48.

52 See also Ken Foster, in: *The discourses of doping: law and regulation in the war against drugs*.

53 See Th. Summerer, *op.cit.,* p. 163, Rz. 268, and p. 162, Rz. 264.

54 Cf. OLG Frankfurt of 18-5-2000 (13 W 29/00, 1 O 198/00).

55 E.g. Belgium, Denmark, France, Greece, Italy, Austria, Portugal and Spain.

56 Urs Scherrer, *op.cit.,* p. 128.