Sports People's Right to Defence under the New Spanish Anti-Doping Law. A Perspective

by **Fernando del Cacho Millán***

1. Introduction

"Doping" cannot be considered as a typical sports phenomenon but as one that is found throughout our entire society. In our society, sport is only one of the mirrors in which doping is reflected. These circumstances have given rise to numerous discussions[1] in other European countries[2] on the opportunity of promulgating the so-called "anti-doping law"[3]. It is misleading to try and resolve such a complex phenomenon by law, regardless of one's intentions of enforcing it. However, it is also true that a law can always be an effective instrument, especially if the law in question is a precise and convincing one. One of the difficulties when legislating in this matter is that although health is a social (and individual) value, it is not an absolute value and it is not even possible to know, scientifically speaking, if some substances are harmful or not. Further difficulties are posed by the innumerable substances and ongoing research resulting in new discoveries all the time. The above points constitute such a complex panorama that some sportspeople have been sanctioned "fortuitously", without any intention of doping themselves[4]. It is also a fact that nowadays, individuals in general can easily become addicted to drugs, although they would not survive without them either. This is the paradox.

2. Historical and legislative backgrounds of doping in Spain

The different legislative landmarks and institutions that have gradually provided a framework in which to fight in favour of clean sports are summed up in the Exhibition of Motives of the Law 7/2006 of 21 November (International Olympic Committee -COI-, Law 10/1990 of 15 October, National Anti-Doping Commission, laboratory of the High Council of Sports -CSD-, World Anti-Doping Code, different Conventions within UNESCO, International Anti-Doping Agreement approved in 1989 by the European Council and its additional Protocol, laboratory of the Municipal Institute of Medical Investigation of Barcelona, World Anti-Doping Agency -AMA)[5]. Monitoring of substances and drugs (as well as methods) is carried out by listing substances considered to be prohibited; this is elaborated every year by the High Council of Sports. This list is published annually in the State Official Bulletin. This new law is intended to "harmonise" national and international regulations (in the middle of a ratification and adaptation process), while simultaneously "speeding up" mechanisms for greater effectiveness in the fight against doping in sports. This complies with the right to health protection laid down in Article 43 of the Spanish Constitution and the obligation of the authorities to protect and foster this right. In this regard, the Spanish Government approved the Plan to Fight against Doping in Sports with the aim of laying down a number of foundations and means to eradicate a phenomenon considered as the biggest threat to professional sport competition[6]. On 1 February last, the International Agreement against Doping in Sports - drawn up by UNESCO - took effect.

3. First steps towards the defence and principles of sportspeople's defence[7]

The organic law 7/2006 of 21 November concerning health protection and the fight against doping in sports has the following two objectives: it tries to establish mechanisms of prevention and control, and it sets up proceedings for the imposition of sanctions strengthened with the introduction of a new Article in the Criminal Code. Here, it is important to bear the principles of the proceedings in mind, since the imposition of a sanction must be carried out with the maximum guarantees[8], such as the right to be heard and the right to appeal. Article 82[9] of Law 10/1990 governing Sport refers to the "general and minimum conditions of disciplinary proceedings". Starting with the principles of defence that inform the proceeding, we should highlight the fact that, according to this Organic Law, sportspeople are legally obliged to undergo doping tests (Article 5.1). This limits the right to remain silent and not to declare against oneself. In principle, it affects sportspeople with a licence to participate in official state competitions, but the law itself extends the subjective environment to those sportspeople who have not renewed their licence and to those that have been suspended. Sportspeople can even be forced to undergo a "surprise" test. The law is clear in this respect and states that sportspeople are obliged to undergo this test, expressly recognised in the First Section of Chapter II of Title I. However, this is not the problem: the problem is to determine the legal consequences for those cases in which sportspeople refuse to be vetted. It is also important to define the responsibility of their trainers, physicians or executives when they refuse to indicate the medical treatments to which the sportspeople are subject, those responsible for such treatments and their extent. In this sense, the law recognises sportspeople's right to "refuse to authorise" such people to provide such information. This is

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1 An extensive and intensive debate on doping has been held in Germany. See Jahn, Matthias, *Doping zwischen Selbstefärdung, Sittenwidrigkeit und staatlicher Schutzpflicht*, Zeitschrift für Internationale Strafrechtsdogmatik 2/2006, page 57.

2 For a general view, see Chaker, A.: *Study on National Sports Legislation in Europe*, Éditions du Conseil de l'Europe, Strasbourg, 1999, and Gulland, E. *The Reynolds and Barnes Cases and the Integrity of International Dispute Resolution*, in Sport and Law. Supplement to the Official Proceedings of the IAAF Symposium on Sport and Law, International Athletic Foundation Council, Monte Carlo, 1995.

3 See Vieweg, Klaus, *Eigenverantwortliches Doping und Strafrecht. Materiell-strafrechtliche, strafprozessuale und verfassungsrechtliche Aspekte eines "Anti-Doping-Gesetzes"*, in: Prisma des Sportrechts. Referate der sechsten und siebten interuniversitären Tagung Sportrecht, Berlin 2006, pages 33 to 63. See Koch en Röhricht/Vieweg, Doping-Forum, 2000, page 53.

4 In this regard, Jason Robert Klein from the Spanish ACB League was sanctioned because he was given Bisolvón compositum instead of Bisolvón tablets at the chemist's. The *Audiencia Nacional* eventually declared the sanction invalid.

5 To study the historical development of the fight against doping from Criminal Law, see Ahlers, *Doping und strafrechtliche Verantwortlichkeit*, 1994.

6 To see the content of this Plan of Fight against Doping, please consult the High Council of Sports' website.

7 For a definition of sportsperson, see Article 66 of Law 14/1998, of 11 June, on Sports of the Basque Country. For the Autonomous Region of Valencia, Law 4/1993, of 20 December of Generalitat Valenciana.

8 See Resolution from the Supreme Court dated 12 February 1986 (Aranzadi 2.156).

9 For further elucidation, we now reproduce Article 82.1 of the Sports Law: "The following are general and minimum conditions of disciplinary proceedings: a) The judges or arbitrators immediately exercise the disciplinary imperium during the course of the encounters whereby it is necessary to provide in this case, an appropriate system of later complaints. b) In sports competitions whose nature requires the immediate intervention of disciplinary bodies to guarantee the normal development of these competitions, procedural systems shall be provided making it possible to combine the peremptory action of such bodies with the interested parties' right to be heard and their right to lodge a complaint. c) The ordinary applicable proceeding for the imposition of sanctions for transgression of the rules of the game or the competition shall ensure the normal development of the competition, as well as guarantee the interested parties' right to be heard and the right to appeal. d) The extraordinary procedure, for the sanctions corresponding to other violations, shall be adjusted to the principles and rules of the general legislation, all the necessary extremes are defined in the regulation of development of the present Law".

a trace of their right to remain silent, not to incriminate themselves and not to state their guilt. However, if the law did not establish any legal consequences for the cases of non-subjection of sportspeople to a test that it describes as mandatory (Article 5), it would be ignored, at least with regard to this point. The truth is that the law expressly contemplates the possible "...refusal of a sportsperson to be subjected to anti-doping tests..." (Article 6.2), when practised outside a "time frame" (to be legally determined with regard to sleeping times). However, when being notified of the imminent test, sportspeople are entitled to be informed of their rights[10] and obligations. These rights include the right to refuse to take the test (Article 6.3 paragraph 2). However, such a refusal can be considered as "sufficient evidence"[11] to "punish his conduct". Here we understand that, in the event that the sanction is imposed, the conduct to be "repressed" will be the refusal to undergo the test and not the doping, although both types of conduct are considered very serious transgressions bearing the same sanctions (suspension or deprivation of licence for two to four years and fines, depending on the case, of between 3,001 and 12,000 euros). A refusal to undergo a test is justified when "a just cause" concurs: not any just cause, but only the one stipulated by the legislator, not without a certain ambiguity. In this way, sportspeople can prove that there was a "just cause" for refusing to take the test. The Law conceptually defines what may be considered as a just cause, so that the simple fact of being unable to attend is not valid but has to be the result of "accredited injury", or the test must "pose a serious risk to the sportsman's health". In the case of "accredited injury", it does not seem very logical if, for example, a sprinter could avoid the anti-doping test if he has broken the little finger of his right hand. With respect to the other cause, the definition of a "serious risk" to sportspeople's health has to be determined, since having a cold and having to go outside when it is raining to take the test could be considered as a just cause for avoiding the obligation, or having to drive on an icy road, for instance. In any case, the courts will determine what should be considered as "just cause" for not being subjected to the test for the purposes of the law, despite the fact that this still has to be determined. The principle of proportionality when obliging sportspeople to undergo the test has not been taken into consideration, at least expressly, what entails a better application of the measure to sportspeople's own personal circumstances, but leaves the decision to the monitoring bodies with regard to making some sportspeople undergo the test and not others[12]. Finally, the fact that the physician documents a refusal to undergo the test and that the document enjoys the presumption of truthfulness on the verified facts does not mean that there is no room for defence, but that this should be understood "without the prejudice of the tests that, for the defence of their respective rights or interests, sportspeople can indicate or put forward". Sportspeople can bring forward all the documents and testimonies that they consider favourable in spite of their refusal to undergo the test, although the same is reflected in a document to which the law grants probative value.

Having said that, one example of sportspeople's right to put forward a defence is their ability to forbid their trainers, physicians and executives to provide information to those responsible for the doping test. Here, the first issue is the one relative to the type of "information" that sportspeople's authorisation can veto. And the answer is that, pursuant to the law, not all the information with which a trainer or a physician counts is submitted to sportspeople's authorisation but only the one relative to "their medical treatment, those responsible for the same and the extent of the treatment" (Article 5.4). Article 13.4 refers to the "sportsman's illnesses". Therefore, it seems that the persons in the sportspeople's immediate environment provide other "data" such as their usual whereabouts in order to carry out the test, as long as the right and duty of professional secrecy and his right to privacy is respected. There is no doubt that these limits have been taken into consideration by the legislator in order to subject the information from the professionals to the sportspeople's authorisation. Those in the sportsman's immediate environment (doctors, trainers, etc.) are also responsible in the event of not making information available to the monitoring bodies when the sportsman has authorised the utilisation of such data. Article 14.1.e refers to the extent of such responsibility. This means that if a sportsman does not authorise the disclosure of the information, the people in his immediate environment will not be held responsible. The data relating to the sportsman's usual localisation are excluded (ex Article 13.3).

4. Sports People's right to defence before the proceedings for the imposition of sanctions regarding doping.

To sum up, we can affirm that the path followed by the legislator to sanction doping conducts branches into two: firstly, the fact that we can denominate administrative disciplinary proceeding and secondly, that of the jurisdictional criminal tribunals with the introduction of a new precept in the Criminal Code, Article 361bis, to which we refer in the last section. With respect to the administrative disciplinary proceeding, it is set up *ex officio* (with the exception that claims can be filed before the Commission of Control and Follow-up of Health and Doping). After a doping test, the laboratory that has carried it out usually communicates a positive result to the sports federation affiliated with the sportsman; in other words, to the sports federation's disciplinary body. However, not only the inception of the proceedings takes place *ex officio*, but all other steps are also impelled by the disciplinary body in charge of the proceedings (28.2). This is important, since the legislator has elected to incept proceedings *ex officio* so that the proceedings are able to progress. This means that when the system of terms which the Spanish legislator has established is not complied with in practice, the opportunities for progressing with the defence are very limited. We should stop at this point, since it is logical that a sportsman against whom disciplinary proceedings have been filed is eager to have these resolved, and in spite of the extent to which the law establishes a term for resolution or tries to ensure that the necessary measures of anonymity are adopted to conceal the sportsman's identity, reality shows us that it is not so easy. The law establishes a maximum term of two months (Article 27.3), so that the disciplinary body of the relevant sports federation can complete the file and impose a sanction. However, in the event that this term elapses without having completed the file, the legal provision is that the Commission of Control and Follow-up of Health and Doping (CCSSD) is placed in charge of it, and the terms no longer apply. Therefore, the proceedings can remain open *sine die*, but a more serious aspect is that the sportsman is not able to make a plea in this sense with a legal basis, since there is not a term for the resolution by this Commission. We say a plea because the law excludes all type of appeals in these proceedings (Article 28.4). This Article makes express reference to a "sole instance"; therefore, there is no distinction between the instruction phase and the sanctioning phase (Article 27.4) that corresponds to the same disciplinary body of the relevant sports federation[13]. The terms of Article 28 may contradict the doctrine of our highest courts with respect to the imposition of administrative sanctions, such as the ruling of the Constitutional Court 18/1981 of 8 June, according to which "the guarantee of the constitutional order demands that the decision is adopted through proceedings where the prospective inculpated party has the opportunity to propound and bring forward the evidence that he deems relevant and to state his rights". Article 28 confirms that there are no facilities for the above, since the proceedings are, as already stated, "set up and instructed *ex officio* in all its stages" (Article 28.2). This is important, given that the imposition of a sanction on a sportsman can be declared invalid if the guarantees of defence, such as not allowing him to make allegations, are omitted. Actually, to enable him to make a statement, sportspeople have the right to information and to obtain a hearing. Continuing with the proceedings, the court ruling issued by the relevant disciplinary body is communicated to CCSSD, and it will be finalised within fifteen days after notification unless it is

10 *Inter alia* the right to access, rectification, cancellation and opposition of the Law of Personal Data Protection.

11 Article 137.3 of Law 30/1992, 26 November of the Legal Regime of the Public Administrations and Common Administrative Procedure refers to the principle of presumption of innocence.

12 See in this regard the Resolution from the German Constitutional Court, 1990, 145 (185).

13 See Article 134.2 of the Law of the Legal Regime of the Public Administrations and Common Administrative Procedure.

impugned within this period by means of an appeal (*recurso de revision*), as stated in Article 29, which will be heard by a specific section of the Spanish Committee of Sport Discipline. Here the sportsman's right to defend himself comprises the option of appointing one of the three members of the arbitration body that will come to a decision on the appeal. Therefore, a system of special administrative revision has been adopted with an arbitration formula that replaces the administrative remedy. If the sportsman is the one who seeks to use this special appeal, he will bear the costs of the arbitration, except when dealing with common current expenditures that will be borne by all parties. One aspect that is unclear is the sportsman's option of submitting proof at this stage of the appeal, since Article 29.2.a) only contemplates the possibility of formulating "pleas". A contentious-administrative appeal against the ruling in this special appeal could be filed in accordance with the accelerated proceedings pursuant to Article 78 of the Law 29/1998 of July 13.

5. New Article 361 bis of the Criminal Code. A perspective from the right to defence.

Although this matter cannot be approached with the depth it deserves, we cannot omit it in view of its importance in connection with the defence of what we have called the sportsman's "environment", since it is not relevant in this case, at least not as an active collaborator in the offence. This does not mean that sportspeople are unable to "prescribe, provide, dispense, supply... substances..." It is about protecting health and fair play and applies to everyone[14]. Some people are opposed to creating punishable offences such as the above, arguing in favour of minimal legislation and the possibility of violating the principle *non bis in idem* when combining criminal and disciplinary legislation[15]. However, in forensic practice, the criminal proceedings are not a model example of efficiency and diligence: even less so at a time when new amendments are about to be made. The Article referred to mentions "therapeutic justification"[16] in order to exonerate those who exhibit the typified conduct from liability. Another problem is that the term "therapeutic justification" is not defined, since this term is not mentioned in all the criminal types contemplated in Chapter III of Title XVII of Book I regarding offences against public health. Organic Law 7/2006 of November 21 may clarify the matter. However, according to Article 7.1 paragraph 7 of this law, "the medical, therapeutical or sanitary procedure to be prescribed or applied ... administered for medical purposes and with due therapeutical authorisation [...] shall follow a procedure of informed consent that will be established by means of regulations". We do not know what should be understood by "due therapeutical authorisation", or who should grant it and, in any case, the definition of "procedure of informed consent" must be laid down in a regulation. However complex it is, this must include what the Penal Code defines as "therapeutical justification" that can be put forward by the defence. By definition, the conduct defined in Article 361 bis of the Penal Code cannot be the performing of a therapeutically-justified action, such as prescribing or supplying "prohibited substances". If we understand the "therapeutic justification" in relation to a generic qualification established by a regulation that does not yet exist, we are facing a standard that may not be constitutionally sound according to the doctrine of the Constitutional Court relative to the admissibility of the criminal framework acts[17]. The reference to "prohibited substances or pharmacological groups" - published every year in the State Official Bulletin (BOE) - is a different matter. The same applies to the "no-regulation methods". The prohibited substances must "put the lives or health" of sportspeople at risk, and such substances must be "destined" to increase sportspeople's physical performance or to "modify the results of competitions". Therefore, it is not any "prohibited" substance or pharmacological group (or non-regulation method): however, other circumstances must concur that could be very complex. Therefore, for example, there might be a danger that an innocuous product turns into a prohibited substance under certain circumstances. These definitions do not include the treatment of animals in the world of sport with regard to the lives or health "of sportspeople" being endangered. However, the first Additional Disposition of Organic Law 7/2006 does contain the provision of drafting a bill to amend all the obligations and the appropriate supervision to include the animals participating in state competitions.

14 "UniversalRechtsgüter". See comment from Roxin at Kreuzer, Handbuch des Betäubungsmittelstrafrechts, 1998, pages 20 et seq.

15 Among the detractors of the creation of criminal types to repress doping, see Millán Garrido, A., *La lucha contra el dopaje en el Derecho español: síntesis normativa*, Régimen jurídico del dopaje en el deporte, Ed. Bosch, Madrid, 2005, pages 126 et seq.

16 The bill made a reference to the "medical justification".

17 In this sense, see Sentence from the Spanish Constitutional Court 127/1990 of 5 July.

On the Front Foot Against Corruption

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Introduction

In 2001 cricket was in crisis with corruption threatening to tear the fabric of the game apart. Research into the problem revealed that corruption involving match fixing linked to betting on international matches had been in existence for over 20 years. This corruption was permeating all aspects of the game and the international governing body, the International Cricket Council (ICC) was ill-equipped to deal with the magnitude of the problem. Although gambling is legally prohibited in countries such as Malaysia, India, Pakistan and Sri Lanka[1] an estimated $150 Million is bet on the unlawful market on an average One Day International (ODI) match anywhere in the world.[2] The sheer scale of the problem had been suppressed for years with each country's domestic cricket board dealing with it in their own way and often concealing events. There was no international structure in place to handle the corruption, no formal penalties to be applied and certainly no culture of integrity. The game was wide open to the corrupters.

The truth is that all sports are vulnerable to corruption. Around the world, horse racing, tennis and football have all recently made the headlines because of corruption scandals. In football, 26 year old German football referee, Robert Hoyzer was sentenced in 2005 to two years and five months in prison for his role in match fixing and banned for life by the German Football Association.[3] In 2006, the Italian football authorities punished a number of Serie A clubs for col-

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1 See Raja, N, Sports Gambling in Malaysia", For the Record - the Official Newsletter of the National Sports Law Institute (1997) 8(2) pp.3-5.

2 Lord Condon, Bounce Corruption out of Cricket leaflet (2002). Also see ICC Anti Corruption Unit Interim Report April 2001 (the condon report) - www.icc-cricket.com

3 See news.bbc.co.uk/sport1/hi/football/europe/4445896.stm.