Proportionality of Sanctions: A Threat to the Certainty of Law in Dispute Resolution and Perception of Justice in Sports

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Abstract

The Court of arbitration for sports emphasizes the proportionality of sanctions imposed by judicial or quasi-judicial panels. Nevertheless, this paper exposes the legal anomaly that the standard employed in the determination of proportionality lacks any form of precision or clarity leading to a discretionary determination of proportionality in the sports judicial hierarchy especially in the Court of arbitration for sports. The paper also investigated the non-admittance of the defence of personal circumstances in the principle of proportionality and the legal and allowable exception of no fault or negligence its validity or otherwise. The study further reinforced the need for the Court of Arbitration for sports to focus on its appellate jurisdiction in the review of facts and law as stated rather than review the prescribed sanctions enacted by sports authorities.

Keywords*:* Proportionality, Sanctions, precision, discretionary determination, no fault or negligence.

1. Introduction

Law is a body of regulations intended by the drafters to ensure order and forestall chaos in the society. In order to ensure peace in the society most laws prescribe some degree of punishment to ensure compliance with such laws. The punishment for the disobedience of such laws are tools internally attached to laws to ensure that laws have a likelihood of compliance without necessarily overburdening the enforcers of such laws due to the fear of sanctions.

The austinaian theory of law was deployed as the theoretical framework for this paper. This paper adopted the qualitative and the doctrinal research method with a focus of a litany of dictums of the Court of arbitration of sports to determine the ideology, standards,

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tests used to determine the elements of proportionality in each case and the validity of same. The paper further examined exemptions and other legal mitigating elements considered by the Court to mitigate sanctions previously decided by other sanctioning bodies and the validity of same. All data generated was content analysed.

2. Austinian Theory of Command

Sanctions as a concept and its direct affinity with most laws is an offshoot of the austininan theory of law was a direct promotion of the legal realities of mankind in the modern era referred to as a positive school of law with the obsession of projecting the law and its actual realities referred to as legal positivism.

The core of legal positivism posits that the law as a concept rests on a command theory concept in which a sovereign creates, mandates a command over a group of persons and there is a guarantee of compliance because of the threat of sanctions.[1]

John Austin proposes that law in reality is theoretical and only viable for compliance when there is an anticipated sanction or actual sanction coupled with the law prescribed or commanded which is usually to the notice of the public or persons to be governed by such laws.

The foregoing position is further justified because of the earlier position of Thomas Hobbes which was that it is improbable for a law to be unjust and that even before the status of law is just or unjust there must be a coercive power to compel men equally to the performance of its convenants .... and such there is no power there is none before the creation of the commonwealth''.

The foregoing also reiterates the possiton of the positivist school that mandates consequences for the breach of a law through coercive power which Thomas Hobbes emphasizes as a sustainable medium for compliance with such laws.

In compliance with the theoretical framework for sanctions as a sustainable way to ensure compliance with laws as espoused by John Austin and Thomas Hobbes. The paper will further examine other theories of sanctions or punishment that the sporting judicial or

[1] John Austin, Lectures on Jurispudence and the Philosophy of law (St. Clair Shores, MI Scholarly Press,1977)

quais-judicial panel can utilize in ensuring compliance with sports regulations which are retribution, deterrence and rehabilitation and their proportional indeologies to offenses committed.

3. Retributive Sanctioning Mechanism and the Proportional Ideology to the Offence Committed

Scholars such as Joel Meyer posits that retribution as a sanction model advocates for instinctive reaction to acts by the injured party to the assailant which is somewhat a vengeance instictiveness of human or corporate, institutional entity. The retaliative mechanism of this theory demands that a sanction for a breach of a law or crime be immediate and savage.[2]

Although this theory of punishment became unsustainable because of its chaotic consequences in society since it promoted individual retribution so in the event of creation of organs such as government, such right was monopolised by government as largely the sole owner of coercion as regards defiance to laws or criminal or civil injuries to victims.

Nevertheless, this theory still posited by the proponents of the retributive theory that the sanction to be implemented against persons in defiance of the law or a victim should be of the same kind as the breach of the law committed.[3]

The position of proportional retaliation is further reinforced by this retributive school of thought by advocating that the degree of personal vengeance or retribution is directed at achieving equilibrium between the injury caused by the assailant and the act of retaliation.Therefore, in modern use of the retributive theory of punishment, there is an expectation that sanctions should be quick in implementation and equivalent to the crime committed.

Although the retributive theory of punishment can be critiqued in the lines of proportionality in the sense that the modern society is oblivious of motivating factors for crime such as age, poverty,

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2 Joel Meyer, "Reflections on some theories of Punishment" The Journal of Criminal Law, Criminology, and Political Science vol 59 NO 4 (1968) pg 595 < https://www.jstor.org/stable/1141839?casa_token=hc6c_qnarU4AAAAA%3ABjyjyGd-HGQlxupPRxS6xnXYNjuD5lG6O_4W8r87EDcDWs_904THMNnKXF1fTuF7KYiWZel0jPLJMl0492QAwmVr7vSsA-SWcd9s1HgmXPvzANCfdZSB&seq=1#metadata_info_tab_contents last accessed on 24/10/2021

3 Ibid

provocation that spurs defiance to laws and the State acting from an viable economic, moral ground in its retribution for crimes committed against it.

3.1 Deterrence Sanctioning Mechanism and its Proportional Ideology with Offences Breached

The deterrence ideology to sanction was posited by Plato where he advocated that;

> *"No one punishes a wrongdoer on account of his wrongdoing unless one takes unreasoning vengeance like a wild beast. But he who undertakes to purnish with reason does not avenge himself for the past offense since he cannot make what was done as though it never came to pass; he looks to the future aims at preventing that particular person and others who see him punished from doing wrong again".*

Plato posits that it is more profitable for society to invest in the prevention of crime rather than the retribution for its breach since humans like the capacity to undo the crime commitied it is more profitable for humans to invest in the prevention of crime since it is what it can control by making laws to deter its commission.[4]

The objective of this theory is to ensure that sanctions are effective to such a degree that it prevents an offender from repeating his offense and to demonstrate to other potential offenders their fate if they venture into such criminal enterprise.

However, the effectiveness of this sanction ideology is debatable because studies show that virgin criminals usually doesn't subside and convicts usually go back to the life of crime usually because of the association of the criminal in the prison system and how such association reinforces the criminal tendencies of the convict rather than reduce it since the rehabilitation expected in prison systems are only theoretical.[5]

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[4] ibid
[5] ibid

Nevertheless, the proportionality of sanctions to defiance to law in this theory is very obvious in that the theory advocates extreme severity of punishment rather than commensurate or proportional sanctions for breaches to the law since the focus of the drafters of the sanction accompanying the law is to ensure that the convict never repeats the offense and to act as advertisement of extreme sanctions to the public to quell potential criminals.

Although some scholars advocate that the moral condemnation by the community may be commensurate to the offense committed since the convicts are used as scapegoats to the society for consequence of defiance to laws. However, this is debatable since some societies actually glorify prison time culturally but credence must be given to how societies refuse ex-convicts formal jobs or allowing social or corporate integration extremely difficult .[6]

Nevertheless, moral condemnation by societies is not a legally recognised sanctions for most legislations as a form of deterrent to crime but rather a consequence of it .Therefore, the proportionality of such condemnation may be out of the scope of this work.[7]

The proportionality of the sanctioning mechanism in the deterrent theory skewed towards the state and the sanctions like any form of equilibrium since convicts have face the risk of being purnished in excess of crime commitied not necessarily to purnish the convict but for a secondary objective of potential criminals in the society but this is rather discriminatory in nature because there should be a degree as to how a convict should be used or purnished as a scape goat for the benefit of society which in all cases should not be devoid of some level of proportionality to crimes committed.[8]

3.2 Rehabilitation Sanctioning Theory and Equilibrium with Offences Breached

Rehabilitation is a sanctioning mechanism that is based on the psychological and sociological effect on the convict. The

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6 Andenees``General Prevention-Illusion or Realty 43 J. Crim L.C & PS 176 (1952)
7 Ibid 5
8 Alexander Philosophy of Purnishment,13 J.Crim L.C & P.S 235 (1922)

rehabilitative proponents suggest that sanctions for the breach of a law is to ensure that the offender be reintegrated into society without being devalued as a person but rather armed with an arsenal of positive skills and values for the benefit of the convict and society at large .[9]

The rehabilitative theory is an investment by the state in a convict to ensure the reformation of the mind of the convict to ensure his or her productivity and prevent him or her from further harming the society.[10]

The rehabilitative sanctioning mechanism is largely individualistic in its approach to treatment of convicts so there is a possibility that convicts may be treated unequally for committing the same offense which then raises the question of proportionality of crime committed to the sanctions since the theory is individualistic in nature.

Further proportionality of sanctions in this theory can also be debated from the purview of the investment expended on convicts in the reformative adventure of the state. The item for debate is whether the cost of reformation is commensurate with the offense committed. The individualistic approach to the sanctioning system in this theory makes the sanctioning methodology unpredictable and consequently devoid of some measure of proportionality but the cost to society is definitely measurable since the exercise reduces the capacity of the state to invest in other socially beneficial to the society.

4. The Proportionate Sanctioning Ideology of the Court of Arbitration for Sports

The court of arbitration for sports has developed a consistent jurisprudence on its stance of pr sanctions or punishment for the evasion, defiance or the commission of a recognised sports offence and has only resolved to uphold and retain sanctions or penalties delivered by sports judicial or quasi-judicial panels for respective sports organisations only if such sanctions are proportional to the offence committed.

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[9] Ibid 5
[10] ibid

The prevailing definition or application of the proportionality of sanction in the court is that when a panel of the court is presiding over a matter the panel must be convinced or satisfy themselves that the sanction delivered by a sports judicial or quasi-judicial panel is evidently and grossly disproportionate to the offence before the before the court has the competence to overturn the sanction imposed by the lower sports judicial panels.[11]

The foregoing ideology of the proportionality of sanction was also re-emphasized in the arbitration case of *Union Cycliste Internationale V Alexander Kolobnev & Russian Cycling Federation*[12] where the Court also stated that the court of arbitration for sports in its appellate jurisdiction may in the review of facts and law review a sanction if it is evidently and grossly disproportionate to the offence.

The evidently and grossly disproportionate principle of sanctions may not be in tandem specifically or directly with the theories mentioned above. This is due to the fact that the objective of proportionality of sanction in the court suggests that the sanction should not be grossly, greatly disproportionate i.e. the principle ma not frown at a sanction minimally disproportionate to the offence but only of significant disproportion which then excludes the legal theory of retributive punishment which advocates equilibrium or almost quantum of exact punishment for offence committed.

The gross disproportionate sanction theory also eliminates the deterrent theory which emphasizes an almost extreme punishment measure to serve as deterrent to other potential violators in the sports sector. In fact, it seems based on the definition of both theories the gross disproportionate theory in the court of arbitration for sports is created to as a cure for the deterrent theory of punishment utilised by some sports judicial or quasi-judicial panels.

Also, the rehabiliatory sanction theory and the gross disproportionate sanction in the court of arbitration for sports are clearly mutually exclusive because the objective of the rehabilitative theory is to socially invest in the offender for reformation but the

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[11] Club Raja Casablanca V Federation Internationale de Football Association (FIFA) Award of 16 December 2019

[12] CAS 2011/A/2645 Award of 29 February,2012

gross disproportionate theory is tailored ensuring that every offender is justly sanctioned.

The above theoretical analysis suggests that the court of arbitration for sports by its precedent a jurisprudence operates an independent theoretical framework in the determination of the proportional requirements for sanctions expected to be applied by the hireachy of the sports dispute resolution platforms.

4.1 Evident and Gross Disproportionate to Offence

The court of arbitration for sports (CAS) mandates that every CAS panels cannot review a sanction based on lack of consensus as to the degree of sanction imposed is proportionate or otherwise but rather the burden of proof to determine proportionality is whether the sanction imposed at the lower panel was evident and grossly disproportionate to the offence.

4.2 The Gross Element Definition

The jurisprudence of the court of arbitration for sports has made several attempts to define the requirement of gross as requirement for a review of a sanction imposed by a lower judicial panel. The court defined the gross element as typified sports federations were often very stringent and inhibit the interests of the athlete especially their personality rights (CAS 2001/A/317) vis-a-vis the sanctioning authority of the sports and international federations.[13]

The case of Federation Internationale de luttes Associes[14] also reiterates the foregoing position as to what constitutes a gross disproportionate sanction to an offence committed is when the interest or objective of the sanctioning authority outweighs that of the athlete in reaching the sanction.

The case above posits that a sanction will not be grossly disproportionate if the panel takes sufficient consideration of the interests e.g (Personality rights) in comparison with the rights of sporting authorities cures the gross proportionate element perpetuated by sporting authorities. It is posited that this position may be wrong since the rights of parties during court proceedings

[13] R V FINA CAS CAS 2005 /A/830

[14] ARbitration CAS 2001 /A/317 award of 9 July 2001 (FILA)

may not necessarily have a bearing on the culpability of an athlete and consequently the quantum or degree of sanctions imposed.

Therefore, despite the attempts by the court to demonstrate some level of precision on the definition of the element of gross in determining proportionality of sanctions to offences in sports and the lack of precision of the definition of the gross element has consequently led the court to perceive the consideration of the personality rights by the Court as compliance with proportionality of sanctions with offence committed.

4.3 Personality Rights

The term personality right is a very fluid concept in the court of arbitration for sports in its use and interpretation. It is believed based on its diversity of use to be a compendium of rights that are attributable to a person either human rights or in some cases patent rights[15] and also perhaps peculiar circumstances particular to a certain athlete, sports corporate personality that may be disadvantageous to such athlete if not properly considered in the determination of sanctions, liberties etc.

Therefore, despite the fact that it is conceded by this paper that the consideration of special circumstances or rights of an athlete should be considered as a mitigating factor to proportionality of sanctions to offence committed it should not be substituted for same since first, not all personal circumstances are considered by CAS as a mitigating factor and the personality rights may be considered by CAS and the consequent sanction may still be disproportionate.

4.4 The Evident Definition

The partner element in the determination of the proportional level of sanction to offence at CAS is that apart from a sanction being grossly disproportionate is that the gross disproportionate nature of the sanction must also be evident.

The literal interpretation of the word in the context used in the principle may be indicative of largely two meanings. The first being the proof of disproportionality either in breach of a documentary or

[15] Abitration CAS 2009/A/1968 FC Politechnica Timisoara V Romanian Football Federation & SC FC Timisoara

oral evidence[16] or the perception of disproportionality as perceived by the panellists of CAS based on their personal feelings, intelligence, beliefs .

The documentary evidence argument was commented upon by the CAS by stating in the case of R V FINA[17] where it was evident that the world anti-doping agency code had the doctrine of proportionality present in the code enforced by national and international organisation which was also applied by FINA in the present case. The court still held that the use of the WADA code by FINA was not evidence that there is no other possibility of a more proportional sanction than allowed by the WADA code.

The foregoing proves that the existent of a document which may be in form of a regulation, code, bye-laws that present specific proportion of sanction for a sports offence since other criteria or mitigating consideration outside the documentary may tilt a set of panellists to posit that a sanction is proportionate or otherwise.

Furthermore, the other definition that may be attributed to the word evident is the possible perception of the panellists as to whether the sanction for consideration is proportional relying on their personal sentiments.

Although the courts have held that the determination of the proportionality of sanctions should not be based on personal conviction of uncomfortable feeling. The court of arbitration of sports held that a mere uncomfortable feeling alone that a sentence or sanction is not justified or proportionate to justify a possible reduction of sanction.[18]

This may be the position of the law but may not be feasible since evidence shows that in the dispensation of justice or the interpretation of law by justices in the municipal terrain have always shown with their judgements that their personal sentiments, religious or political ideologies and their understanding and interpretation of laws are not necessarily mutually exclusive.

4.5 Official Bystander or Objectivity

16 R V FINA CAS CAS 2005 /A/830
17 Ibid
18 ibid

The competence of the court of arbitration for sports in the review of sanctions by other sports quasi-judicial panels is not unlimited but subject to a test of a reasonable man. The court held in the conclusively believes that for a sanction to be proportional to an offence then the sanction should be reasonable commensurate to the offence.[19]

The court also emphasizes that for a sanction to be proportional to an offence committed then the sanction must not exceed that is which is reasonably required to achieve the justifiable aim.[20]

Furthermore,it can be deduced that the court expects that when a court complies with the underlisted standards then such sanction will be proportionate with sanction imposed. The condtions are that;

(i) the individual sanction must be capable of attaining the desired goal
(ii) the individual sanction is necessary to reach to envisaged goal
(iii) the constraints which the offender will suffer as a consequence of the sanction is justified by the overall interest of achieving the envisaged goal.[21]

The frequent reference to the term reasonableness indicates that the court intends for the determination of proportionality to be objective to achieve an envisaged goal. However, it is necessary to note that the court is silent on the actual goal being reference in the test or standard mentioned above.

Scholars may posit that the goal being referenced in the reasonable test mentioned above is the goal of proportionality of sanction to offence but that may be an unsafe assumption being that the term proportionality is relative to different personalities which informs different reasonableness of proportionality depending on the personalities on the quasi-judicial panel.

The foregoing argument is canvassed because the term reasonableness is devoid of mathematical precision. This is because the reasonable test as indicated by the court as to whether the

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19 Fifa v World Anti Doping Agency CAS 2005/C/976 & 986
20 Ibid
21 Fifa v World Anti Doping Agency CAS 2005/C/976 & 986

reasonable man are persons in the class of experts who are usually competent to be appointed as arbitrators to the court of arbitration of sports to preside over such matters or persons that usually preside over sports matters in quasi-judicial panels in municipal or international organisations or the average person (official bystander) who may not be knowledgeable about sports offences and their corresponding sanctions but has requisite perception of equilibrium between offence and punishment.

Furthermore, there seems to be an unintended reference to an individual sanction as a symbol of reasonableness of proportionality. The reference to individual sanction would mean a single sanction from the range of sanction at the discretion of a sanctioning authority devoid of whether the single sanction is milder than the offence. The test concludes that there is impossibility for the imposition of more than a sanction to be reasonably proportionate to an offence committed.

Furthermore, the second test of reasonability states that the sanction necessary to reach an envisaged goal perceived to be proportionality. There appears to be a contradiction in the dictum of the court in the sense that what is considered necessary may not be reasonable.In fact it may be argued that it may be necessary for a seemingly disproportionate sanctions can be perceived as proportionate to act as a deterrent to an increased rate of commission of a particular offence.

5. Personal Circumstances Argument

The gross element as practised by the court of arbitration for sports has demonstrated over time that it is oblivious of the personal circumstances that by municipal law usually affects the gravity of sanctions imposed on defaulters of laws which are discussed below';

5.1 Juvenile

Municipal criminal law largely reduces or exempts criminal responsibility and sanctions and some jurisdictions also reduces the proportionality of sanction to crime committed by a juvenile in recognition and consideration of the age of the offender.

Jurisdictions such as the Netherlands create alternative sanctioning system such as custodial sentences, carrying out unpaid work and removing graffiti instead of prison sentence or fines.[22]

The reference to the juvenile element in the sanction proportionate to crime is that in the determination of what sanctions are grossly disproportionate the court of arbitration for sports ought to take cognisance of the age of the offender.

However, the jurisprudence of the court does not factor age as a mitigating element capable of affecting the proportionality of sanctions delivered by sports panels in the sports industry. This is evident in the case of S V FINA[23] where the court specifically mentioned that the age of the offending athlete which at that time was 17 does not absolve her from criminal responsibility and her age does not qualify as an exceptional circumstance capable of excluding criminal responsibility.

The fact that the court does not consider age or the juvenile status of the offender in terms of criminal responsibility is proof that it naturally would not consider age as a mitigating element in determination of what sanctions are grossly disproportionate towards an offender.

Nevertheless, there is proof that some sanctioning authorities take into cognisance the age of an athlete as stated in article 40(3) of the FIFA disciplinary code which provides that;

> *"When deciding the sanction, the body takes account of all the circumstances of the case. In particular the degree of guilt and the age of the person sanctioned, his record, Personal situation, culpability (intentional or negligent) the reasons prompting him to commit the infringement and the degree of seriousness of the infringement.*[24]

5.2. Ignorance of a Mixture of Fact and Law

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22 Government of Netherlands, ``Alternatives Sanctions fines an other sentences '' https://www.government.nl/topics/sentences-and-non-punitive-orders/alternative-sanctions-and-other-sentences last accessed on 28/10/2021

23 Arbitration CAS 2005 /A/830

24 Article 40 of the FIFA disciplinary code 2005

Ignorantia legis nulla excusatio est is the latin expression for ignorance of the law is not an excuse which means that the enforcement of a law and sanction against a person is not dependent on the awareness of the law to the person who is in breach.

The sporting world in practise has elevated this principle to the presumption of breach and expectation to take all reasonable steps to prevent a breach of an offence especially the anti-doping provisions for instance the FINA Code provides that;

> *"It is each competitors personal duty to ensure that no prohibited substance enters his or her body. Competitors are responsible for any prohibited substance or its metabolites or markers found to be present in their bodily specimens. Accordingly, it is not necessary that intent, fault, negligence, or knowing use on the competitor's part be demonstrated in order to establish an antidoping violation under 2.1".*

The article concedes that the ignorance of a sports laws and offences especially to athletes governed by same but only when the law is unambiguous and capable of interpretation by an average athlete.

To start with, in the RVFINA case where a female athlete had rubbed a local cream on her body prescribed by her mother was made culpable for the violation of the foregoing regulation despite the fact that the cream was rubbed on her body and not ingested.

The CAS suggested based on the FINA Code that irrespective of how a prohibited substance gets into an athlete's body the athlete is culpable and the athlete should have informed the Doctor to examine whether the athlete could use the cream in case it contains prohibited substances.

The fact is that a sports athlete could not have reasonably expected that a chemical in a cream will be able to penetrate her skin and have such staying power in her body metabolism to require the expertise of a Doctor to advise on the content of a cream not ingested.

Also, by the literal interpretation rule it is quite a unique set of facts that may not align with the FINA code because the phrase ``enter the body '' suggests ingestion and even if the sporting world athletes expect that chemicals can enter their skins en route their bodies the duration of the time of the stay of the chemical through the skin may not be to the knowledge of the athlete necessitating the advise of a Doctor.

6. Legal Exemption Rule

The proportionality of sanctions is also affected by exemptions which are usually mitigating or non-culpability items the courts must consider to reach an equilibrium between an offence and sanction imposed.

The legal exemption proves that the court of arbitration for sports and other sports quasi-judicial panels are mandated to ensure that an athlete is not unnecessarily sanctioned or that legally recognised reasons were not considered in mitigating the sanctions imposed after conviction which will be reviewed below;

(a) No fault or Negligence

The "no fault or negligence" element referred to by the court and other quasi-juducial sports authorities as an item on the exceptional circumstances list to the culpability for an offence committed in sports. This is typified by the provisions of the World Anti-doping code which provides that;

"``No fault or Negligence: The Athlete's establishing that he or she did not know or suspect, and could reasonably have known or suspected even with the exercise of utmost caution, that he or she had used or been administered the prohibited substance or prohibited method".[25]

The first observation on the exceptional circumstance of no fault or negligence is that most sports judicial panels distinguish between a ``no fault situation'' and a ``significant fault situation''.

The former reiterates the fact that in the offense levelled against an athlete, such athlete has fully complied with the duty of care standard expected by the sporting authority on each athlete

[25] Article 10.5.2 of the world anti-doping code

under its jurisdiction but has still violated the regulation but with total absence of the mens rea which then excludes any form of culpability while the latter underscores a situation where an athlete has not fully complied with the expected duty of care required of the athlete which has resulted in the commission of an offence.[26]

In the case of the significant fault scenario, the court for arbitration for sports and other sports judicial panels navigate from the general test of duty of care to the particular or individual circumstance considering the reasons why a particular athlete failed to fully comply with the standard of care required to prevent a breach of a regulation and if it is determined that the fault was not significant then the sanctioning body can deviate from the standard or fixed sanction in the regulation.[27]

There is a clear indication from the foregoing that the intention of the law is to purnish actual guilt fuelled by negligence or recklessness. However, the law does not specify whether it is the objective or subjective test that will be utilised in determining in particular circumstances where significant fault has been established living the interpretation of such situation to the discretion of the sanctioning body which ultimately makes proportionality of sanctions difficult to assess.

Suggestions have been made by some sanctioning authorities as to items considered in the particular circumstances in a signifacnt fault situation as mentioned by the World Anti-doping agency chairman Mr. Richard Pound who mentioned at the centinennial congress on May 21,2004 in Paris that;

> *There is a universal view that each doping case has to be considered as an individual case and that all of the facts relevant to that case (such as the circumstance of the athlete, the nature and quantity of substance, and the repetition of offences have to be studied before any sanction could be considered''. The World doping agency shares this philosophy entirely.*

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[26] Fifa v World Anti-Doping Agency CAS 2005/C/976 & 986

[27] ibid

There is an indication from the quote of the Chairman that in considering particular circumstances to establish significant fault that he prefers a combination of the objective and subjective test because the items mentioned above can be segmented into these two categories.

The mention of the particular circumstance of course suggests a subjective test but evidence as presented earlier in this work that particular circumstances of athletes on items such as age, inability to interpret regulations have not been considered to mitigating sanctions or affect their proportionality. Although this does not suggest that other particular circumstances of an athlete are not usually considered.

The reference to nature and quantity of substance could be said to be mitigating items requiring an objective test since such items in terms of facts are not necessarily particular or exclusive to the particular athlete.

However, there seems to be a fundamental error of law considering the last item which is that of repeat offences by an athlete if that is indeed the ideology of a sanctioning body such as WADA is that the consideration of repeat offences helps to largely prove guilt or culpability and has no necessary bearing on the sanctions neither the proportionality of same.

However, this may be a venture into illegality because the use of repeat offences to establish either guilt or bearing of proportionality of sanctions may violate the rule of mens rea i.e the need to establish in every particular set of fact and not repeated fact the presence of a guilty mind. More so, even in a repeated offence perpetuated by the same athlete, it is the responsibility of the sanctioning body to insist that the athlete is presumed innocent until proven guilty.[28]

However, there is statutory evidence that proves that some sports sanctioning authorities utilize a repeated offense by an athlete as an instrument for increasing the sanction proportionality to the present offence of an athlete based on previous conduct and not

[28] Peter Weten ``Two Rules of Legality in Criminal law" Law and Philosophy vol 26 no 3 pg 229-305 (2007)

solely on case to case basis to act as a form of deterrent to other athletes which expressly deflates proportionality

This is evident in the FIFA Disciplinary code which provides that;

> *Unless otherwise specified, the body may increase the sanction to be pronounced as deemed appropriate if an infringement has been repeated.*[29]

6.1 Quantum of Significance

The quantum of significance is usually considered in the determination of the mitigation levels of sanctions in the determination of proportionality. However, there is no clear mode in determining the gravity of non-compliance to duty of care expected of an athlete under the jurisdiction of a sanctioning authority.

The fact is that there seems not to be a consensus as to the direction on the determination of how the individual athlete quantum of significance is to be determined and to help guide sanctioning authorities on whether the sanctions prescribed in the legal framework as to whether it corresponds with the sanction imposed.

This lacunae or complexity stated above is further reiterated by the statutes of some sports sanctioning authorities. An example is FIFA which states in its disciplinary code that in the determination of the scope and duration of a sanction against a natural or artificial person;

> *The body shall take account of all relevant factors in the case and the degree of the offenders guilt*[30]

The offender's degree of guilt mentioned in the FIFA disciplinary code is a synonym for the significant fault referenced above but more importantly there is a reference to factors to eb considered to establish the degree of guilt of the alleged offender but the FIFA disciplinary code seems to be silent in this respect.

Although the FIFA disciplinary code has suggested some factors in its statute by stating that;

> *When deciding the sanction, the body takes account of all the circumstances of the case. In particular the*

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[29] Article 40 of the FIFA Disciplinary Code 2017

[30] Section 5 article 39 of the FIFA disciplinary code 2017

> *degree of guilt and the age of the person sanctioned, his record, Personal situation, culpability (intentional or negligent) the reasons prompting him to commit the infringement and the degree of seriousness of the infringement.''.*[31]

The first observation on the foregoing rule is that it mentions the actual factors to be subjectively considered by the body in determining significant fault for addressing equilibrium of sanction and alleged offence but this regulation is that of 2005 but the more recent codes are silent on those factors.

This therefore brings to the fore whether in the regulation mechanism of FIFA a previous law is abrogated by the enactment of a new law or both law exist together. This is to emphasize that in more recent FIFA codes the factors are not expressly mentioned like in that of 2005 and it is difficult to interpret whether the 20005 provision still subsists for the purpose of determining the degree of guilt or significant fault.

Despite the attempts of FIFA to use specific factors to prove significant guilt in individual circumstances, these strides may not ascribed to the court of arbitration for sports which perceives these factors as being not well defined and in practise a mixture of objective and subjective circumstances and not necessarily subjective as posited in the statutes of FIFA.

6.2. Utmost Caution

The utmost caution rule strictly applies to athletes that due to no fault of theirs either intentionally or negligently culpable for the commission of an offense or could not have reasonably predicted, suspected that his or her inaction will lead to the commission of an offence after displaying the highest level of safeguards.[32]

Also, in the foregoing case in the Rugby Football Union panel in its attempt to expatiate on the safeguards required by every athlete

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31 Article 40 of the FIFA disciplinary code 2005

32 International Rugby Board v Jason Keyter Arbitration CAS 2006/A/1067 award of 13 October2006

in their particular circumstance to comply with the utmost caution, the Panel commented that;

> *The player consumed nearly half a bottle of vodka and at least one glass of champagne and one cocktail containing champagne, vodka and red bull. This was probably an underestimate and the panel formed the view that the player must have been drunk on 19 October. Any elite rugby player knows that he must monitor carefully anything he eats or drink and it was extremely careless of this player to take drinks from strangers in a club where drugs were likely to be present.*

The inference to be deduced to be deduced as to the application of the utmost caution element as derived from the foregoing case is that when a determination of a no fault or negligence is to be determined, the individual action of an athlete which alleged to be an offense is compared to the expected behaviour of a faultless behaviour of a diligent and careful athlete.[33]

The court of arbitration for sports also labelled the element of utmost action as a situation where an athlete has made conceivable efforts to avoid the commission of an offence but despite all due care has still resulted in the commission of the said offense.[34]

There seems to be a consideration of the specific acts or behaviour and placed under the objective lens expected of a diligent athlete. The case above gives a description of the kind of athlete that the specific behaviour will be compared and they include faultless, diligent, and careful athlete.

Despite all the definitions ascribed to the utmost caution element, the definition suggests extremism and impossibilities especially when offence results that may be out of the control of the athlete. The extreme nature of the utmost caution is reflected by the international Rugby federation case cited above where the athlete was said to have fallen outside the category of utmost caution

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[33] Fifa v World Anti-Doping Agency CAS 2005/C/976 & 986

[34] Robert Kendrick v International Tennis Federation CAS 2011/A/2518 Award of 10 November 2011

because he ingested so much alcohol where drugs could have been distributed which resulted in the possible spiking of the athletes drink.

This proves the unreliable application of the utmost caution element to a set of facts being that the standard is so high that it urged the panel at the rugby appeal panel to believe that the utmost caution rule should expect athletes to control actions of others in a public place that may affect them. This is the only interpretation that can be deduced because how can an athlete in a public place prevent persons from distributing drugs that may expectedly get into his drink.

More so, the utmost caution principle seems to suggest the curbing of the social life of athletes which may interfere with their right to liberty. It is canvassed that the utmost caution principle should only focus on what an athlete has absolute control and not activities of others that may affect him which he or she is expected to control or prevent.

The foregoing factors combine in a major way to contribute the uncertainty of the standards or tests required of panellists at the Court of arbitration and other quasi-judicial panels in the sports judicial hierarchy and this affects the certainty of law or perception of justice by either party to a case.

The frustration created by the principle of the proportionality of sanctions is that it affects a very important element of law especially as it relates to the entire society which is the certainty of law for the society to at every material time to know the law and prevent the society from degenerating into chaos.

The need for certainty of law is the reason why sanctioning authorities prescribe in a written statute its sanctions to prevent uncertainty of law for instance the FIFA disciplinary code indicates that a sanctioning body must specify the duration. The code provides that;

> *The body pronouncing the sanction the scope and duration of it.*[35] *unless otherwise specified the duration of a sanction is always defined''*[36].

[35] Article 40(1) of the FIFA Disciplinary code 2005

The foregoing suggests that some sports sanctioning bodies value the certainty of law because of its predictability and positive effect on justice which is why the code prescribes for a defined sanction which is why the operation of principles of proportionality of sanctions that is operated in the Court of Arbitration for Sports may be a disservice to the certainty of law and perception of justice.

The discrimination of the sanctions prescribed by sports organisation by CAS by insisting on the proportionality of sanctions is largely posited to be because of the mode of enactment of sports laws and sanctions on the following criteria.

7. Mode of Enactment

Sporting organisations often use the committee system where professionals are co-opted into a committee to recommend regulations that are adopted by votes at a congress.[37]This enactment process leads to creation of most regulations of sports bodies in sports. Although these laws enjoy the legitimacy of the sporting world but makes the laws susceptible to variations such as the proportionality of sanctions promoted by CAS as opposed to laws by made by a municipal legislature or the congress of international organisation.

The appellate jurisdiction of the CAS is based on agreement of parties and largely due to the provisions of the regulations guiding specific sports bodies for instance Article 58 of the FIFA Statutes provide that;

Appeals against final decisions passed by FIFA's legal bodies and against decisions passed by confederations, member associations and leagues shall be lodged at CAS''.

The foregoing competence of appeal gives the CAS the powers similar to municipal courts of appeal to review and evaluate both facts, legal issues and the application of law to a certain set of facts.[38]However, the right of appeal does not include the amendment

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36 Article 40(3) of the FIFA Disciplinary code 2005
37 ibid
38 Alexandre Ludovic Riberio Periera v Football Club Zimbru Chisinau award of 23, March 2018

or review of law which is the intention of a principle such as proportionality of sanctions.

The responsibility of a judicial panel or quasi-judicial panel is to respect the letters of the law and not make law[39] even if the law is not proportional to an offence committed. The best that can be done is to interprete sanction as they are stated in the regulation and not seek to amend the law. However, concessions are made to circumstances that remove the culpability of an offender but nothing more for the sake of certainty of law and consistency on the perception of justice.

8. Findings and Recommendations

8.1 Findings

1. There are no specific standards in determining the gross element in determining the proportionality of sanctions in sports.
2. The evident element of proportionality is not precise in definition leading to two possible interpretations i.e either documentary evidence or clarity, obvious disproportionality either or oral or documentary.
3. The determination of proportionality of sanctions largely determined by the discretion of panellists inspite of the rule of the use of individual feeling in determining proportionality pf sanctions
4. The proportionality of sanction principle does not take cognisance of personal circumstances such as age, ability of athletes to interpret law or application of law to facts.
5. The principle of utmost caution which is an element in the determination of a no fault or negligence defence to sanction has the capacity to deprive athletes of their personal liberty.
6. The CAS in the determination of proportionality of sanctions uses its appellate jurisdiction to not only review facts and legal issues but tends to amend regulations.

[39] Storrie v Corris Texas 283,292;35 L.R.A 666,670

8.2 Recommendations

1. The CAS principle of proportionality should be amended to only be in operation where there are other elements that help alleged offender escape culpability.
2. The CAS should concern itself exclusively to the review of facts and the proper application of law to facts and not a law amendment body.

9. Conclusion

The proportionality of sanctions is a principle created by CAS and other sanctioning bodies to ensure justice in cases. However, justice and law are not necessarily mutually exclusive. They are in fact a nexus to each other so when the certainty of sanctions or law prescribed by a sanctioning body which is subject to possible review by the appellate body despite the strict letters of the law, makes justice unpredictable and chaos inevitable.