

BALANCING FAIRNESS AND INCLUSION: THE QUEST FOR EQUALITY OF OPPORTUNITY IN SPORTS

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Abstract: The world of competitive sports has long struggled with issues surrounding gender identity and the fairness of competitions. The study delves into three landmark cases that have significantly influenced the discourse on gender and athletes. By analysing these cases, our aim is: to examine the complex interplay between gender identity, biological diversity and the principles of fair competition; to underline the importance of policies from international sports organizations that respect individual rights, the ethical considerations surrounding gender questioning and testing; and to understand the impact of these regulations, decisions and practices of sporting bodies on the lives and careers of athletes. These situations not only highlight the personal and professional struggles of the athletes involved, but also underscore the broader implications for sports regulations and the ongoing discussion around gender, human rights, non-discrimination regulations and equality of opportunity.

As society's perception of gender continues to evolve, this study helps us gain a deeper understanding of the complexities regarding gender and competitive fairness, as well as the ongoing quest for inclusivity and justice in the sporting world. Also, it is important to understand that sports organizations have the imperative mission to adopt policies that uphold the integrity of competition while ensuring athletes are not marginalized based on their gender identity or biological characteristics.

Keywords: sports law; equal treatment in professional sports; discrimination; Disorders of Sexual Development

Introduction

In the complex world of competitive sports, the link between gender identity, biology and fairness has become a contentious and highly debated issue. As stated by Puț & Costăș (2021), "integrity is an essential point in maintaining the values of fair play, solidarity, fair competition and team spirit". However, aligning these values with the principles of fairness and inclusion is challenging, particularly in cases involving athletes, as it requires balancing equality of opportunity with the preservation of fair competition in sport. Cooper (2023), citing the International Olympic Committee (IOC), stated that "the practice of sport is a human right. Every individual must have the possibility of practicing sport, without discrimination of any kind and in the Olympic spirit, which requires mutual understanding with spirit of friendship, solidarity, and fair play". In this regard, Bowman-Smart et al. (2024), citing Martowicz et al., mentioned that "the International Olympic Committee released a position statement outlining a non-binding framework [IOC Framework on Fairness, Inclusion and Non-Discrimination on the Basis of Gender Identity and Sex Variations], outlining ten relevant principles". At the same time, the IOC released the Framework on Fairness, Non-

Discrimination and Inclusion – Media Round Table (2021), which contains key milestones of this process (IOC, 2021):

- 2003 - IOC allows transgender athletes to compete, provided they undergo sex reassignment surgery;
- 2009 - First public investigation on hyperandrogenism around Caster Semenya's case;
- 2015 - CAS ruling on Dutee Chand suspends any hyperandrogenism rule;
- 2015 - Consensus Statement removes surgery requirement, but still requires 10 nmol/l level of testosterone for transgender female athletes;
- 2019 - World Medical Association takes position on unethical medical intervention;
- 2019 - The World Health Organization (WHO) removes "gender identity disorder" from its global manual of illnesses;
- 2019 - IOC revamps process to include, for the first time, consultation with affected athletes;
- 2019 - Human Right Council (HRC) condemns use of medical intervention on athletes on basis of human rights standards;

- 2020 - Swiss Tribunal presents its decision on CAS and Caster Semenya's case;
- 2020 - HRC presents its report on discrimination on sport and gender identity;
- 2021 - Tokyo 2020 Games with first openly transgender athletes;
- 2021 - IOC finalizes consultations and releases Framework;
- 2022 - Roll-out of the IOC Framework.

As mentioned by Gleaves (2023), “the IOC’s new Framework came in the wake of several high-profile decisions by International Federations (IFs) and rulings by the Court of Arbitration for Sport that specifically focused on the role of testosterone, fairness, and safety for women athletes”. The Framework is designed to assist International Federations in the development of policies for the participation of transgender athletes and those with sex variations. These policies should be sport-specific, grounded in evidence, and respectful of athletes’ rights. This approach aligns with human rights principles, including the right to participate in sports, as stated in the Olympic Charter. At the same time, Cooper (2023) said that “[...] the regulations should be built on a consistent and principled basis of what «fair competition» means in a particular sport; any regulations should only exclude or restrict participation to the minimum degree necessary to achieve the sense of fair competition so articulated; [and] SGBs [Sports Governing Bodies] should be transparent about what their values are and where their priorities lie [...]”.

In this context, numerous sports organizations implemented policies to address the criteria for sex-based categories in sports. One of the main issues was the inclusion of female athletes with DSD [differences in sex development]. “The term DSD (also known as intersex variations, or more exact aetiological terminologies) refers to a heterogeneous group of congenital conditions that arise when chromosomal, gonadal, or anatomical sex is atypical” (Bowman-Smart et al., 2024). On this matter, the International Association of Athletics Federations (now, World Athletics) tried to introduce measures to prevent women with DSD and hyperandrogenism from competing.

As indicated by Karkazis & Krech (2024), “many of the women affected by World Athletics’ sex testing regulations, along with various UN [United Nations] entities, leading NGOs [non-governmental organizations], professional medical associations, and others, maintain that sex

testing regulations contravene international human rights norms and principles of medical ethics (citing Jordan-Young, 2014; Sönksen, 2015; UN Special Rapporteur, 2016&2018; World Medical Association, 2019&2023; Human Rights Watch, 2020; United Nations High Commissioner for Refugees, 2020; United Nations Human Rights Council, 2019)”. Nevertheless, despite numerous legal challenges, including cases before the Court of Arbitration for Sport (CAS), the European Court of Human Rights (ECtHR) and the Federal Supreme Court of Switzerland, such courts avoided the application of these standards, while misleadingly implying that they adopted a rights-based approach.

While Caster Semenya’s case has gathered significant attention in recent years, it is important to understand that she is not the first athlete to experience this problem. Sprinter Dutee Chand and transgender tennis player Renée Richards also encountered similar challenges. These earlier cases highlight the recurring nature of these issues and the ongoing struggle for athletes whose identities and biological characteristics do not conform neatly to traditional gender norms. Each of them faced significant challenges and controversies regarding their eligibility to compete in women’s sports categories.

These cases not only accentuate the personal and professional struggles of the athletes involved, but also underscore the broader implications for sports regulations and the ongoing discussion around gender, inclusivity and equity in sport.

The Renée Richards Case (Supreme Court, New York County, judgment of August 1977)

The case represents a significant one in the history of civil and sports rights, being closely related to the rights of transgender people in sports competitions.

Richard Raskind was a male professional tennis player from the USA, who underwent a sex reassignment operation in 1975 to become female; she later changed her name to Renée Richards and wanted to compete in women’s tennis.

In 1976, Richards attempted to enter the US Open, but was denied by the “tennis authorities [who] took an oppositional stance, one founded upon the binary beliefs cemented earlier by the IOC”, requiring players to submit a sex-chromatin test (the Barr body test) to confirm their gender (Pieper, 2012). “Claiming a violation of the New York State Human Rights Law [...] and the Fourteenth Amendment to the United States

Constitution, the plaintiff [sought] a preliminary injunction against the defendants, the United States Tennis Association (USTA), United States Open Committee (USOC) and the Women's Tennis Association (WTA)", viewing these rules as discriminatory (Ascione, 1977).

The New York Supreme Court ruled in favour of Richards, arguing that the test was indeed unjustified and discriminatory, and refusing to let the plaintiff play was a violation of her civil rights. The decision allowed Richards to compete in women's tennis tournaments, including the US Open.

In summary, the Renée Richards case stands as a significant landmark in the struggle for equality and civil rights, shaping regulations and perceptions regarding transgender athletes. This case has had major implications for the rights of transgender individuals in sports, sparking wider discussions about inclusion and fairness in athletic competitions. As mentioned by Tanimoto & Miwa (2021), "Given the belief that high levels of testosterone create a physical advantage, trans women have often been considered ineligible for participation in the female division in most official sports events". So, this case served (and still serves) as a reference point for policies concerning transgender athletes; it also contributed to the improvement of discussions about gender and sports and helped in finding better solutions to related problems.

The Dutee Chand Case (Arbitration CAS 2014/A/3759 Dutee Chand v. Athletics Federation of India & International Association of Athletics Federations, award of July 2015)

Dutee Chand is an Indian professional sprinter. In 2014, she was suspended by the Athletics Federation of India (AFI) following tests that revealed her testosterone levels exceeded the permissible limit for female athletes, as stipulated by the International Association of Athletics Federations (IAAF) in their regulations. Chand challenged these rules arguing that they were discriminatory and there was insufficient evidence to show that higher testosterone levels provide an unfair advantage in competition. For these reasons, she appealed to CAS and "sued the IAAF for deprivation of her eligibility on the basis of the sex test" (Takemura, 2020). The court stated that "the IAAF need[ed] to establish that the characteristic in question confer[red] such a significant performance advantage over other members of the category that allowing individuals

with that characteristic to compete would subvert the very basis for having the separate category and thereby prevent a level playing field" (paragraph 528, CAS award). Also, the court pointed out that the degree or magnitude of the advantage "that hyperandrogenic females enjoy over other females" was critical (Takemura, citing the CAS award, 2020).

In 2015, the CAS ruled in Chand's favour, stating that "there was insufficient evidence to support these rules, and World Athletics [IAAF] had 2 years to gather enough supporting evidence" to justify the rules [Bowman-Smart et al. (2024), citing Pape].

In conclusion, with regard to the meaning and implications, this case was a turning point in the discussion of athletes' rights and highlighted the need for better and more equitable regulations. The CAS ruling led sports organizations to reassess, revise and adjust their regulations concerning hyperandrogenism and hormone-based eligibility criteria to ensure they were (and hopefully still are) fair and non-discriminatory. It also helped to raise awareness of sex and gender issues in sports and promoted more informed and empathetic discussions.

The Semenya Case - A Short History Before the European Court of Human Rights Judgment

Caster Semenya is an international-level athlete from South Africa. Prior to the European Court of Human Rights judgment, Ms. Semenya (the appellant) contested the World Athletics Regulations (DSD Regulations) at the Court of Arbitration for Sport [CAS Decisions 2018/O/5794 Mokgadi Caster Semenya vs. International Association of Athletics Federations (IAAF) & CAS 2018/O/5798 Athletics South Africa vs. IAAF] and to the Federal Supreme Court of Switzerland (Decisions 4A_248/2019 and 4A_398/2019), but these actions were dismissed.

With regard to the CAS arbitration request, the appellant challenged the validity of the DSD Regulations, but the court concluded that "[these rules] were indeed discriminatory, [but] it was nevertheless a necessary, reasonable and proportionate means to achieve the objectives pursued by the IAAF, namely ensuring a fair competition" (Costaş, Negru & Asociații, 2023). As for the proceedings before the Swiss Federal Supreme Court, the appellant claimed, "that she had been discriminated against on grounds of sex as compared to male and female athletes with no

DSD, and that her human dignity and personality rights had been violated” (point 27 of the ECtHR judgment) and requested the annulment of the CAS decision. However, the Swiss Court, through its judgment, “dismissed the appeal, finding that the IAAF regulation was an appropriate, necessary and proportionate measure to the legitimate objectives of sporting fairness and maintaining the «protected class» [referring to those female athletes who have a normal biological and hormonal configuration]” (Costaş, Negru & Asociații, 2023).

Judgment of the European Court of Human Rights – Case of Semenya v. Switzerland

In 2021, Ms. Caster Semenya lodged an application (no. 10934/21) with the European Court of Human Rights against the Swiss Confederation. This application was based on the complaints concerning Article 14 (Prohibition of discrimination) of the European Convention on Human Rights (ECHR) in conjunction with Article 8 (Right to respect for private and family life), and Article 13 (Right to an effective remedy) in relation to Article 14 in conjunction with Article 8.

Ms. Semenya (the applicant) challenged the International Association of Athletics Federations regulations that required athletes with “differences in sex development” (DSD) to lower their body’s natural testosterone levels in order to participate in international competitions at female category; however, the applicant refused to undergo the recommended medical procedures for fear of possible side effects, which prevented her from participating in competitions.

One of the issues raised during the trial (both at the CAS and at the ECtHR) was the allegation regarding the “sex or gender testing” (measurement of testosterone levels) that violates the bodily integrity of the athlete (point 21 of the ECtHR judgment). According to the CAS award (paragraph 601), “being subjected to an examination of virilization may be unwelcome and distressing [...]; at the same time, it also noted that all athletes are tested for testosterone for doping control purposes, which include identifying whether athletes have taken exogenous testosterone”. Consequently, CAS emphasized the importance of these tests in determining the existence of DSD, which could exonerate an athlete from suspicion of doping.

On the other hand, as mentioned by the Swiss Federal Supreme Court, in point 9.8.3.3, the CAS decision confirmed that “the aim of ensuring fair

competition in sports is an important one, capable of justifying serious interference with the rights of athletes”. However, the Swiss Court found that this situation represents a problem distinct from the issue of doping, considering the natural advantage present in the case of female athletes with the chromosomal formula 46 XY disorder of sexual development, which allows them to systematically beat female athletes without DSD (point 36 of the ECtHR judgment).

Thus, the ECtHR determined that Article 3 of the European Convention on Human Rights was not violated because the threshold of inhuman or degrading treatment defined in the article was not reached.

However, the ECtHR decided that the following articles were violated: “Article 14 of the Convention which provides for the prohibition of discrimination, Article 8 regarding the right to respect for private and family life, by forcing the applicant to reduce her testosterone level by taking medication, as well as Article 13 which provides the right to an effective remedy, related to Articles 14 and 8, since the applicant did not benefit from sufficient guarantees to challenge the decisions taken against her” (Costaş, Negru & Asociații, 2023).

In conclusion, this case represents a turning point in discussions about athletes’ rights, gender equality and doping policies, and, as stated by Bowman-Smart et al. (2024), “it does demonstrate the negative impact these regulations can have on athletes and sporting competitions”.

Conclusions

The cases presented in this paper highlight the ongoing challenges and complexities in addressing gender identity and biological diversity in competitive sports: Chand’s successful appeal against hyperandrogenism regulations led to a more inclusive approach to gender diversity in athletics; Richards’ case established an important precedent for the rights of transgender athletes, emphasizing the importance of individual identity and the right to compete; Semenya’s case underscored the tensions between natural physiological advantages and regulatory efforts to ensure fair competition.

By analysing these cases, our aim was to underline the importance of policies from international sports organizations that respect individual rights, the ethical considerations surrounding gender questioning and testing, and the impact of these regulations, decisions and practices of sporting bodies, on the lives and

careers of athletes. This helped us gain a deeper understanding of the complexities regarding gender and competitive fairness, as well as the ongoing quest for inclusivity and justice in the sporting world.

As society's perception and understanding of gender continues to evolve, sports organizations must adopt policies that uphold the integrity of competition without marginalizing athletes based on their gender identity or biological characteristics.

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