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# Is the Lex Sportiva on Track for Intersex Person's Rights?

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*Is the Lex Sportiva on  
Track for Intersex Person's Rights?  
The World Athletics' Regulations  
Concerning Female Athletes with  
Differences of Sex Development in the  
Light of the ECHR*

AUDREY BOISGONTIER<sup>1</sup>

I. INTRODUCTION

IN FEBRUARY 2021, the South African athlete Caster Semenya submitted her case before the European Court of Human Rights (ECtHR).<sup>2</sup> The applicant challenged the decision of the Swiss Federal Tribunal (SFT) allowing World Athletics (previously known as the International Association of Athletics Federations, IAAF) to regulate her participation in the female category in athletics events by applying the 'DSD Regulations'.<sup>3</sup> The Federation indeed requires

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<sup>2</sup>Registrar of the Court, Notification of *Semenya v Switzerland*, ECHR 148 (2021), 17 May 2021. Since the finalisation of this paper, the Semenya case has been decided: the Court found that the athlete was a victim of discrimination since Switzerland did not afford her sufficient procedural safeguards, leading to a violation of articles 13 and 14 (combined with article 8) of the Convention (*Semenya v Switzerland* (2023) App no 10934/21 (ECtHR, 11 July 2023).

<sup>3</sup>International Association of Athletics Federations (IAAF), *Eligibility Regulations for the Female Classification (Athletes with Difference of Sex Development)*, 23 April 2018, followed by the version 2.0 published on 1 May 2019 (hereinafter 'IAAF Eligibility Regulations'). Since the beginning of the procedure, a new version of the Regulation has been published (World Athletics, *Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development)*, 30 November 2021).

that female athletes with ‘Differences of Sex Development’<sup>4</sup> (DSD) (ie intersex<sup>5</sup>), naturally producing levels of testosterone considered as above the normal male range – such as Semenya – should reduce these with medical treatment to be allowed to compete in international events.<sup>6</sup> The goal of this regulation is to ensure a ‘fair and meaningful’<sup>7</sup> competition, since World Athletics considers that having too high testosterone levels is a source of abnormal sports performances and compromises equality between female athletes.<sup>8</sup> According to the applicant, the implementation of the regulation violates her fundamental rights, including the right to human dignity, the right to bodily and mental integrity, and the right not to be discriminated on the grounds of sex.<sup>9</sup> The ECtHR will therefore have to rule whether Switzerland<sup>10</sup> correctly interpreted the – private – regulations of World Athletics in light of the European Convention on Human Rights (ECHR). This case emphasises the potential conflicts existing between *lex sportiva* that refers to the set of rules shaping a ‘transnational legal order of sport’,<sup>11</sup> and the European human rights law principles, in particular regarding gender equality.

This chapter aims to demonstrate that this ongoing case is not only an opportunity for the Strasbourg Court to expand its jurisprudence related to self-determination and gender equality, but also to shape *lex sportiva* as a more inclusive framework. Indeed, I argue that the ECtHR, through its jurisprudence

<sup>4</sup>The Regulation defines DSD as ‘congenital conditions that cause atypical development of their chromosomal, gonadal, and/or anatomic sex’; it applies in particular to the following DSDs: ‘5 $\alpha$ -reductase type 2 deficiency; partial androgen insensitivity syndrome (PAIS); 17 $\beta$ -hydroxysteroid dehydrogenase type 3 (17 $\beta$ -HSD3) deficiency; ovotesticular DSD; any other genetic disorder involving disordered gonadal steroidogenesis’ (IAAF Eligibility Regulations 2019 (n 3)9, para 2.2(a)(i).

<sup>5</sup>Intersex individuals are persons ‘who cannot be classified according to the medical norms of so-called male and female bodies with regard to their chromosomal, gonadal or anatomical sex’ (Commissioner for Human Rights, *Human Rights and Intersex People*, Council of Europe, 12 May 2015, CommDH/IssuePaper(2015)). If every individual has sexual variations, some are considered as not feminine or masculine enough and therefore cannot fit into one of the two categories, even though these physical variations are natural, such as having a higher level of testosterone.

<sup>6</sup>Athletes with complete androgen insensitivity syndrome (CAIS) are not affected by the regulation, since they eliminate the physiological effect of testosterone. An athlete with partial androgen insensitivity syndrome (PAIS) will be affected only if she is sufficiently sensitive to this hormone.

<sup>7</sup>IAAF Eligibility Regulations 2019 (n 3) 1.

<sup>8</sup>*ibid* 2: ‘These Regulations exist solely to ensure fair and meaningful competition within the female classification, for the benefit of the broad class of female athletes’.

<sup>9</sup>*Semenya v Switzerland* (2021) App no 10934/21 (ECtHR, communicated case, 18 February 2021).

<sup>10</sup>The case is brought against Switzerland since the procedure of appeal of CAS awards (based in Lausanne) is before the Swiss Federal Tribunal.

<sup>11</sup>A Duval, ‘What Lex Sportiva Tells You About Transnational Law’ (TMC Asser Institute, 2019) 8, <https://papers.ssrn.com/abstract=3400656>. If the term *lex sportiva* is indeed closely linked to the *lex mercatoria* concept, the notion is however far from being univocal, as some authors are only referring to the jurisprudence of the Court of Arbitration for Sport (CAS) (F Latty, *La Lex Sportiva: Recherche sur Le droit transnational* (Martinus Nijhoff Publishers, 2007) 32); on the complexity of the notion and its different uses, see also J Lindholm, *The Court of Arbitration for Sport and Its Jurisprudence* (Springer, 2019) 8.

developed in areas such as bodily integrity,<sup>12</sup> gender stereotypes,<sup>13</sup> or even non-discrimination,<sup>14</sup> can challenge the regulations of sports governing bodies' (SGBs) such as World Athletics. If we can agree that sport relies mainly upon physical characteristics of the body, it does not necessarily mean that this feature should overrule athletes' rights: the criteria, such as testosterone, used to define sex categories in sport according to binarism are not optimal to ensure sports values of fairness, respect, and non-discrimination,<sup>15</sup> and I believe even violate female athletes' fundamental rights. In this sense, the following developments suggest that the implementation of ECHR principles could oblige *lex sportiva* to converge more closely with human rights, and SGBs to withdraw or at least modify their regulations on the eligibility of athletes in the female category based on testosterone levels. Therefore, the Caster Semenya case becomes 'a question of what sport is willing to accept and what degree of difference we are willing to allow in sport',<sup>16</sup> a particularly key question bearing in mind the recent growing debate related to the participation of trans persons<sup>17</sup> – especially trans women – in sport.<sup>18</sup>

The analysis is structured in two parts: firstly, I start by looking at the roots of the so-called 'DSD Regulations' from a historical perspective, to critically examine how the implementation of this Regulation is in line with the long process of constant control over female athletes' bodies that raises several human rights

<sup>12</sup> *AP, Garçon and Nicot v France* (2017) App nos 79885/12, 52471/13, 52596/1 (ECtHR, 6 April 2017) para 135; *X and Y v Romania* (2021) App nos 2145/16, 20607/16 (ECtHR, 19 January 2021) para 168.

<sup>13</sup> *Konstantin Markin v Russia* (2012) ECHR 2012-III 1 77.

<sup>14</sup> *Vallianatos and others v Greece* (2013) ECHR 2013-VI 1 125, para 77.

<sup>15</sup> The Olympic Charter mentions as part of the fundamental principles of Olympism that 'the practice of sport is a human right' and that 'every individual must have the possibility of practising sport, without discrimination of any kind and in the Olympic spirit, which requires mutual understanding with a spirit of friendship, solidarity and fair play' (International Olympic Committee, 'Olympic Charter', 17 July 2020, 11). World Athletics specifies itself that 'athletics is no longer just about high performance, gold medals and records, but also about "sport for all" and about ensuring that the maximum number of citizens are able to participate in athletics', [worldathletics.org/about-iaaf](http://worldathletics.org/about-iaaf).

<sup>16</sup> S Patel, 'Gaps in the Protection of Athletes Gender Rights in Sport – a Regulatory Riddle' (2021) *The International Sports Law Journal*.

<sup>17</sup> Unlike cisgender individuals, trans persons have a gender identity and/or expression that do not fit with the sex assigned to them at birth.

<sup>18</sup> The controversy has grown as some trans women have started to participate in and win international competitions, such as the New Zealand weightlifter Laurel Hubbard, the first openly trans woman to compete in the Olympic Games in 2021. The policies including trans athletes in female competitions are often contested for being unfair for cisgender female athletes, since the former would have a biological advantage regarding their male physical characteristics (for eg, a group of 38 medical experts recently published a position paper criticising the International Olympic Committee's framework for ignoring scientific and medical aspects related to trans women's performances, see F Pigozzi et al, 'Joint Position Statement of the International Federation of Sports Medicine (FIMS) and European Federation of Sports Medicine Associations (EFSMA) on the IOC Framework on Fairness, Inclusion and Non-Discrimination Based on Gender Identity and Sex Variations' (2022) 8 *BMJ Open Sport & Exercise Medicine* e001273), leading some federations to adopt rules restricting the participation of trans women in female competitions (see n 97).

issues, albeit largely disregarded by SGBs, such as World Athletics (section II). Secondly, by using an analytical approach, I subsequently focus on how the use of the ECHR's principles by the ECtHR in the case of Caster Semenya may (or may not) shape the governance of athletics by infusing more gender equality into *lex sportiva* (section III).

## II. THE CONTROL OF FEMALE BODIES IN OLYMPIC SPORTS AND THE DSD REGULATIONS: A CONTINUUM

### A. From Physical Characteristics to Testosterone Levels

#### *i. Who are 'Real' Women/Who is a Real Woman? Sex-Testing against Gender Fraud*

The establishment of a female-only category in sport has mainly been justified by the need to ensure women's visibility at a professional level and therefore some sort of fairness, since their performance would necessarily be inferior to that of men. If it is indisputable that athletes who were assigned as male at birth in general perform better at the elite level than athletes assigned as female,<sup>19</sup> it is important that it does not conceal the misogynistic motivations behind the creation of the female category by sports authorities and the will to control the bodies and performances of female athletes.<sup>20</sup> Since – at least<sup>21</sup> – the first participation of women at the Olympic Games in 1900, women have had to face gender stereotypes:<sup>22</sup> female athletes were only able to compete in certain events, such as tennis or figure skating, considered to be compatible with their femininity

<sup>19</sup>This assertion is still valid today. For eg, the world record in the 800m male category with a time of 1'40.91 has been held by David Rudisha since 2012; for the same event, in the female category, the world record is held by Jarmila Kratochvílová with a time of 1'53.28 (Caster Semenya's record is 1'54.25 from 2018).

<sup>20</sup>P Liotard, 'From Apartheid to Segregation in Sports. The Transgressive Body of Caster Mogkadi Semenya' in S Montañola and A Olivési (eds), *Gender Testing in Sport: Ethics, Cases and Controversies* (Routledge, 2016) 19.

<sup>21</sup>It is even possible to go back in time to the ancient Olympic Games in Greece. Women were excluded from the event both as participants and also as spectators, at the risk of 'being thrown from a precipitous mountain'. This exclusion was mainly due to the religious significance of the Ancient Olympics, being held in honour of Heracles, the 'great hero-warrior'. It was believed that the presence of women would have been a threat to the strength of the 'warriors' power'. In order to avoid any transgression, such as the one committed by the woman athlete and trainer Kallipáteira, the judges of the Games (Hellanodicae) decided to pass a decree stating that athletes should compete naked (See J Mouratidis, 'Heracles at Olympia and the Exclusion of Women from the Ancient Olympic Games' (1984) 11 *Journal of Sport History* 41, 50ff).

<sup>22</sup>Their inclusion was not without challenges, particularly from Pierre de Coubertin, former President of the International Olympic Committee (IOC), who was against it. He did not see the point of organising a 'small female Olympiad next to the major male Olympiad', at the risk of being 'impractical, uninteresting, unattractive', in short, 'incorrect' (P de Coubertin, 'Les femmes aux Jeux Olympiques' (1912) 79 *Revue Olympique* 109, 111).

and harmless for their fertility.<sup>23</sup> It was not until 1928 that a female category was introduced in athletics events, and women were soon subjected to rules determining their eligibility to compete as female. The first formal rule of this kind was known as the ‘gender verification’ test or ‘sex testing’:<sup>24</sup> the primary justification for its implementation was the need to avoid gender fraud, that is a man who pretends to be a woman in order to win a competition.<sup>25</sup> The first tests conducted based on this rule focused on physical appearance. Thus, during the 1966 European Athletics Championships, all athletes competing in the women’s category had to submit to so-called ‘nude parades’ in front of a panel of doctors.<sup>26</sup> In the same year, female competitors had to undergo gynaecological examinations of their genitals during the British Empire and Commonwealth Games.<sup>27</sup> However, these medical examinations were considered too humiliating, and in 1968 the International Olympic Committee (IOC) decided to use chromosomal tests instead in order to identify the presence of the X chromosome (the ‘Barr body test’),<sup>28</sup> and later in 1992, the Y chromosome (PCR amplification of the SRY gene).<sup>29</sup> Even though these tests were less invasive (since they consist of taking a smear of cells from the mouth), they were not more reliable in determining the gender of the athletes.<sup>30</sup> For example, the ‘Barr body test’ is supposed to reveal the Barr corpuscle, visible only in individuals with two X chromosomes (ie women). However, certain chromosomal variations, such as Klinefelter’s syndrome, reveal the existence of an extra X chromosome: a male athlete could therefore have an XXY karyotype and thus obtain a positive result in the Barr body test, and in theory, compete in the female category.<sup>31</sup>

These first attempts to verify the sex of female athletes highlight the difficulties (or even the impossibility) for the sporting and medical authorities to establish a single criterion that would allow individuals to be distinguished into two and only two categories. SGBs, therefore, moved to a different criterion than the appearance of genitals or karyotype and focused instead on hormonal sex, particularly testosterone levels.<sup>32</sup>

<sup>23</sup> Y Ripa, ‘Women and the Olympic Games’ (*Encyclopédie d’histoire numérique de l’Europe*, 22 June 2020), <https://ehne.fr/en/encyclopedia/themes/gender-and-europe/gendered-body/women-and-olympic-games>.

<sup>24</sup> JL Rupert, ‘Genitals to Genes: The History and Biology of Gender Verification in the Olympics’ (2011) 28 *Canadian Bulletin of Medical History* 339, 340.

<sup>25</sup> A Bohuon, ‘Sport et bicatégorisation par sexe : test de féminité et ambiguïtés du discours médical’ (2008) 27 *Nouvelles Questions Féministes* 80, 81; Rupert (n 24) 340.

<sup>26</sup> A Ljungqvist and JL Simpson, ‘Medical Examination for Health of All Athletes Replacing the Need for Gender Verification in International Sports: The International Amateur Athletic Federation Plan’ (1992) 267 *Journal of the American Medical Association* 850, 850.

<sup>27</sup> *ibid.*

<sup>28</sup> Bohuon (n 25) 83; Ljungqvist and Simpson (n 26) 851.

<sup>29</sup> Rupert (n 24) 356.

<sup>30</sup> Bohuon (n 25) 83.

<sup>31</sup> Ljungqvist and Simpson (n 26) 851.

<sup>32</sup> It should be noted, however, that chromosomal tests have not been completely abandoned. For example, the Federation Internationale de Natation (FINA) mentioned in its latest ‘policy on eligibility for the men’s and women’s competition categories’ that ‘all athletes must certify their chromosomal

ii. Who are the “Normal” Women? *The Pathologisation of Hyperandrogenism*

SGBs claim to have abandoned femininity testing in favour of regulations to reconcile the physical characteristics – in this case, androgen levels – of athletes with the objective of fairness in sports competitions.<sup>33</sup> However, I would argue that these regulations are part of a broader policy of control over women’s bodies, and inevitably lead to a renewal of ‘gender verification’ tests and that have fuelled the logic of the surveillance of women’s bodies since their very first participation in athletics events.

Indeed, World Athletics considers that testosterone is directly linked to advantages in ‘size, strength and power’,<sup>34</sup> and therefore uses it as a criterion to separate the male category from the female category, the latter being labelled a ‘protected class’.<sup>35</sup> Accordingly, the Athletics Federation published Regulations in 2011 (the ‘Hyperandrogenism Regulations’) requiring females with hyperandrogenism<sup>36</sup> to reduce their testosterone levels through medical treatment if they were above the normal male range (10 nmol/L).<sup>37</sup> These Regulations also mentioned ‘indicators’ of increased testosterone production that needed to be monitored by the ‘Expert Medical Panel’: increased muscle mass, male-like hair, clitoromegaly, etc.<sup>38</sup> The first female athlete to challenge this regulation before the Court of Arbitration for Sport (CAS) was Dutee Chand, an Indian sprinter excluded from female competitions for having a too high testosterone level. At that time, the CAS found that the use of testosterone levels was indeed a relevant criterion to separate male from female athletes, but that scientific evidence was insufficient to prove the actual advantage of having a higher level of testosterone than endosex<sup>39</sup> females.<sup>40</sup> The CAS, therefore, suspended the Regulations for

sex with their Member Federation in order to be eligible for FINA competitions’ (FINA, ‘Policy on Eligibility for the Men’s and Women’s Competition Categories’, 20 June 2022, p 6).

<sup>33</sup> K Karkazis and RM Jordan-Young, ‘The Powers of Testosterone: Obscuring Race and Regional Bias in the Regulation of Women Athletes’ (2018) 30 *Feminist Formations* 1, 16. For eg, World Athletics wrote in the 2011 Hyperandrogenism Regulations that ‘these Regulations replace the IAAF’s previous Gender Verification Policy and the IAAF has now abandoned all reference to the terminology “gender verification” and “gender policy” in its Rules’ (IAAF, *Regulations Governing Eligibility of Females with Hyperandrogenism to Compete in Women’s Competition*, 1 May 2011, para 1.4) (hereinafter ‘IAAF Hyperandrogenism Regulations’).

<sup>34</sup> IAAF Hyperandrogenism Regulations, *ibid*, para 1.2.1(b).

<sup>35</sup> Sebastian Coe, the President of World Athletics, recently said that ‘gender cannot trump biology’; he made this statement in the context of the controversial performances of transgender swimmer Lia Thomas, the first trans athlete who won a National Collegiate Athletic Association swimming title in the woman category in the United States (R Myers, ‘Lord Coe: Future of Women’s Sport is “Very Fragile”’ *The Times* (21 March 2022), [thetimes.co.uk/article/lord-coe-future-of-women-s-sport-is-very-fragile-h79qkhrw3](https://www.thetimes.co.uk/article/lord-coe-future-of-women-s-sport-is-very-fragile-h79qkhrw3)).

<sup>36</sup> Hyperandrogenism refers to a naturally higher production of androgenic hormones.

<sup>37</sup> IAAF Hyperandrogenism Regulations (n 33).

<sup>38</sup> *ibid* 20 (Appendix 2).

<sup>39</sup> Endosex, as opposed to intersex, refers to a person whose sexual characteristics at birth fit the typical and expected physical norms of female and male bodies.

<sup>40</sup> CAS, *Dutee Chand v Athletics Federation of India (AFI) & International Association of Athletics Federations (IAAF)*, 24 July 2015, 2014/A/3759, para 534.



two years. At the time, the case did not go any further since World Athletics announced new Regulations under which 100m and 200m events – Dutee Chand’s favourite events – were no longer affected. World Athletics withdrew the 2011 Hyperandrogenism Regulations and adopted instead a new set of rules in 2018, ‘the DSD Regulations’.<sup>41</sup> One of the major changes concerns testosterone levels, since the threshold to be barred from competing in female competitions is no longer set at 10 nmol/L but at 5 nmol/L, that is ‘the highest level that a healthy woman with ovaries would have’.<sup>42</sup> Thus, according to World Athletics, this new testosterone level reduced the scope of application of the Regulations only to women with XY chromosomes (since no individuals with XX karyotype can exceed this threshold).<sup>43</sup> The Federation is therefore not only using hormonal sex (ie testosterone levels) to distinguish female from male athletes, but is combining it with chromosomal sex since the DSD Regulations are ‘not about biological females’ but ‘biological males with 5-ARD (and other 46 XY DSDs), how their bodies respond to testosterone, and the performance advantages of that response when they compete against biological females’.<sup>44</sup>

Once again, however, the measurement of testosterone levels does not provide an infallible answer regarding distinguishing between male and female categories. Even if the Regulations claim that they do not question ‘the sex or the gender identity of any athlete’,<sup>45</sup> the rule follows a similar logic to the one adopted by ‘gender verification’ tests and shows that the way sex categories are implemented is a result of a long process of control of female athletes’ bodies by SGBs.<sup>46</sup> Indeed, while the fight against ‘gender fraud’ was initially aimed at preventing male athletes from competing among women, it also had the consequence of defining the normal female body. By controlling the testosterone levels of athletes with variations in sexual development, sports authorities seek to limit the ‘masculinisation’ of female competitions: hyperandrogenism is directly associated with a characteristic that is considered too masculine to allow these athletes to compete in female competitions. Indeed, the application of World Athletics’ rules is not systematic: when an athlete seems ‘suspicious’, either because of her physical appearance or her sporting performance, she may be required to undergo medical tests to continue competing. It was Semenya’s ‘deep voice and flat chest’ that caught the attention of the sporting authorities when she won the 800m race at the World Championships in Berlin.<sup>47</sup> It is therefore

<sup>41</sup> IAAF Eligibility Regulations (n 3).

<sup>42</sup> World Athletics, ‘IAAF Publishes Briefing Notes and Q&A on Female Eligibility Regulations’ (Press Release), <https://worldathletics.org/news/press-release/questions-answers-iaaf-female-eligibility-reg>.

<sup>43</sup> CAS, *Mokgadi Caster Semenya, Athletics South Africa and International Association of Athletics Federations*, 30 April 2019, 2018/O/5794 & 2018/O/5798, para 610; SFT, 25 August 2020, 4A\_248/2019 & 4A\_398/2019, para B.c.c.a.

<sup>44</sup> CAS 2018/O/5794 & CAS 2018/O/5798, para 292.

<sup>45</sup> IAAF Eligibility Regulations 2019 (n 3) para 1.1.5.

<sup>46</sup> Patel (n 16) 29.

<sup>47</sup> L Eckert, *Intersexualization: The Clinic and the Colony* (Routledge/Taylor & Francis Group, 2017) 1.

a question of ‘verifying’ the sex of an athlete based on a suspicious physical appearance which, in turn, is based on gender stereotypes.

Thus, if sports authorities seem to control only the athlete’s performance, they are also, in the end, delimiting what is expected of a female body for it to be allowed to participate in women’s competitions, and producing gender norms. Only ‘real’ women are allowed to compete with other ‘truly’ female athletes. The DSD Regulations are therefore more a ‘rebranding’ of gender verification testing than a new way of thinking about sports categories.<sup>48</sup> Despite the unreliability of these tests and the difficulty sports authorities face in capturing the full range of athletes’ bodies within a binary classification, SGBs persist in maintaining a dichotomy between male and female categories to pursue the objective of fairness.

## B. The DSD Regulations: Fairness before Human Rights

Even before the DSD Regulations came into force, Caster Semenya initiated proceedings before the CAS to challenge them<sup>49</sup> since the Regulations concerned events in which she regularly participated, such as the 800m race. The arbitrators confirmed the validity of the DSD Regulations,<sup>50</sup> and the award was later confirmed on appeal by the SFT.<sup>51</sup> While World Athletics argued that ‘the DSD Regulations do not give rise to any improper discrimination’,<sup>52</sup> the CAS nuanced this assertion. Applying the World Athletics’ Constitution and Rules, the Olympic Charter, and Monegasque law,<sup>53</sup> the Panel found that the DSD Regulations and their implementation might raise difficulties concerning their compliance with the fundamental rights of athletes. According to the CAS, the DSD Regulations are *prima facie* discriminatory both on grounds of legal sex (since they only apply to athletes who are not legal males) and innate biological characteristics (since they only apply to athletes who do not have a 46 XX karyotype and/or have DSD).<sup>54</sup> The CAS also expressed ‘grave concerns’ concerning the ability of athletes to maintain their testosterone levels below the 5 nmol/L thresholds.<sup>55</sup>

<sup>48</sup> Karkazis and Jordan-Young (n 33) 15.

<sup>49</sup> The request for arbitration with the CAS was made on 18 June 2018 against the IAAF, while the DSD Regulations came into force on 1 November 2018.

<sup>50</sup> CAS, *Mokgadi Caster Semenya & Athletics South Africa v IAAF*, 30 April 2019, 2018/O/5794 & 5798.

<sup>51</sup> SFT, 25 August 2020, no4A\_248/2019. Since the CAS is officially seated in Lausanne, decisions might be appealed only to the Swiss Federal Court.

<sup>52</sup> CAS 2018/O/5794 *Mokgadi Caster Semenya v IAAF* and CAS 2018/O/5798 *Athletics South Africa v IAAF*, 30 April 2018, para 294.

<sup>53</sup> *ibid* para 424.

<sup>54</sup> *ibid* para 547.

<sup>55</sup> *ibid* para 620.

These concerns about the compatibility of the DSD Regulations with human rights – including the right to freedom from torture and other cruel, inhuman, or degrading treatment or punishment, the right to respect for the dignity, bodily integrity, and bodily autonomy of the person, or the right to sexual and reproductive health – have been shared by several human rights bodies.<sup>56</sup> For example, in his report, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, recommended sporting organisations to ‘implement policies in accordance with human rights norms and refrain from introducing policies that force, coerce or otherwise pressure women athletes into undergoing unnecessary, irreversible and harmful medical procedures in order to participate as women in competitive sport’.<sup>57</sup> In a letter to World Athletics’ President, Sebastian Coe, three Rapporteurs from UN bodies expressed their concerns and asked World Athletics to withdraw the DSD Regulations.<sup>58</sup> More recently, the Human Rights Council expressed the same concerns by adopting a resolution on the ‘Elimination of discrimination against women and girls in sport’,<sup>59</sup> which was followed by the publication of a Human Rights Watch report denouncing the human rights violation faced by women athletes because of the ‘sex testing’ policies.<sup>60</sup>

However, despite these numerous statements from human rights bodies, sports institutions as well as the SFT have always found that fairness must be given greater weight than the protection of human rights, and that the DSD Regulations are hence compatible with those principles. The CAS estimates that the DSD Regulations are necessary to ensure fairness and protect female athletes against the ‘significant performance advantage’ that female athletes with a higher testosterone level have.<sup>61</sup> The Panel, therefore, concluded that using hormone levels as a criterion to separate athletes into the men and women categories was legitimate to ensure fair competition. Indeed, since it is ‘human biology, not legal status or gender identity, that ultimately determines which individuals possess the physical traits which give rise to that insuperable advantage’, it is then necessary to refer to biological characteristics such as testosterone levels to define which athletes have a physical advantage.<sup>62</sup>

<sup>56</sup> Human Rights Council, *Report of the United Nations High Commissioner for Human Rights*, 15 June 2020, A/HRC/44/26 and examples below.

<sup>57</sup> Human Rights Council, *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, 4 April 2016, A/HRC/32/33, para 57.

<sup>58</sup> UN Letter to Mr. Coe, 18 September 2018, OL OTH 62/2018, ohchr.org/Documents/Issues/Health/Letter\_IAAF\_Sept2018.pdf.

<sup>59</sup> Human Rights Council, *Elimination of Discrimination Against Women and Girls in Sport*, 4 April 2019, A/HRC/RES/40/5.

<sup>60</sup> Human Rights Watch, ‘“They’re Chasing Us Away from Sport” Human Rights Violations in Sex Testing of Elite Women Athletes’ (2020), hrw.org/sites/default/files/media\_2020/12/lgbt\_athletes1120\_web.pdf.

<sup>61</sup> CAS 2018/O/5794 & CAS 2018/O/5798, para 580.

<sup>62</sup> *ibid* para 558.

According to the CAS, the performance advantage of athletes with a 46 XY DSD condition is so great that it is necessary to lower their testosterone level ‘to maintain fair competition in female athletics’.<sup>63</sup> The DSD Regulations are reasonable for the same reasons that they are necessary: ensuring fair competition for female athletes by giving an equal chance to endosex women to successfully compete in sporting competitions.<sup>64</sup> Finally, according to the Panel, the scientific evidence at the time did not establish that the intake of oral contraceptives to lower testosterone had significant negative side effects: the DSD Regulations were therefore proportionate.<sup>65</sup> The Panel noted that the same side effects are ‘experienced by the many thousands, if not millions, of other XX women, who take oral contraceptives’.<sup>66</sup>

These conclusions have been endorsed by the SFT, which delivered its final judgment in August 2020.<sup>67</sup> Under a narrow jurisdiction and based on the factual findings of the contested award,<sup>68</sup> the Tribunal found that the sovereign appreciation made by the CAS concerning the DSD Regulations was compatible with the principles of Swiss public policy. In fact, the examination by the Tribunal is limited to the award’s compatibility with public order,<sup>69</sup> ie the fundamental values that are the basis of every legal order.<sup>70</sup> The Swiss Court adopts a very restrictive interpretation of Swiss public policy: for the award to be set aside it must be manifestly ‘untenable’, ‘seriously disregard’ legal principles, or ‘shockingly offend the sense of justice and equity’.<sup>71</sup> The SFT also specifies that violations of the ECHR cannot be directly invoked to challenge the CAS award, but only to interpret the notion of public policy.<sup>72</sup> In the present case, the SFT rejected Caster Semenya’s appeal and concluded that the award was not contrary to public policy as the decision did not violate the prohibition of discrimination, her personality rights or human dignity. Instead, the Swiss judges recognised the ‘insurmountable advantage’ of having a high level of testosterone,<sup>73</sup> and the need to ensure fairness in sport despite the violation of intersex athletes’ bodily integrity by imposing these testosterone regulations.<sup>74</sup> Both the CAS and the SFT recognised that the DSD Regulations are *prima facie* discriminatory but also that female athletes with a higher level of testosterone competing in the female category would be a threat to fairness. This discrimination was therefore

<sup>63</sup> *ibid* para 580.

<sup>64</sup> *ibid* para 583.

<sup>65</sup> *ibid* para 599.

<sup>66</sup> *ibid* para 598.

<sup>67</sup> SFT, 25 August 2020, 4A\_248/2019 & 4A\_398/2019.

<sup>68</sup> *ibid* para 5.2.2.

<sup>69</sup> *ibid* para 5.2.1; an appeal against a CAS award can be brought before the SFT only for a limited number of grounds: lack of jurisdiction, breach of procedural rules, and public policy.

<sup>70</sup> *ibid* para 9.1.

<sup>71</sup> *ibid*.

<sup>72</sup> *ibid* para 9.2.

<sup>73</sup> *ibid* para B.c.e.

<sup>74</sup> *ibid* para 10.2.

deemed necessary, reasonable, and proportionate since the testosterone level is presented as the main factor for sex differences in athletic performance.

This scientific assessment and the way to balance it with human rights principles, such as the right to bodily integrity or the protection from discrimination, is therefore at the very heart of the reasoning. I argue, however, that neither the sports authorities nor the CAS or the SFT handled this balancing in a way that permits the protection of athletes' fundamental rights, and that the uncertainties related to the correlation between high testosterone levels and strong sports performances should rather strengthen consideration for human rights arguments.

Indeed, since their first implementation, regulations related to female athletes with a DSD are mainly focused on the scientific reasoning establishing a high level of testosterone as a threat to fair female competitions, leaving little room for the protection of athletes' fundamental rights.<sup>75</sup> The focus on scientific evidence has, for example, positioned the CAS panels' 'decisions as "objective", taken within the realm of science and outside of human rights politics'.<sup>76</sup> According to World Athletics, the DSD Regulations 'are based on a strong scientific, legal and ethical foundation'.<sup>77</sup> This statement is, however, far from accurate: from the Dutee Chand case to the challenge made by Caster Semenya, the arbitral and legal procedures have demonstrated that this scientific argument, at the heart of the SGB's reasoning, is contested. Thus, when the athlete Dutee Chand challenged the 2011 rules in force at that time,<sup>78</sup> the CAS first suspended the Regulations, considering that the Federation did not provide sufficient evidence to show that athletes with hyperandrogenism had a significant advantage compared to other female athletes.<sup>79</sup> Two years later, World Athletics provided two new scientific studies in order to demonstrate further the correlation between testosterone levels and athlete's performances.<sup>80</sup> Even if they were not examined by the CAS (since the Federation later announced the adoption of a new regulation that did not exclude Dutee Chand from competition anymore<sup>81</sup>), this new scientific evidence was already criticised at the time by some authors.<sup>82</sup> It is interesting to

<sup>75</sup> Patel (n 16).

<sup>76</sup> L Holzer, 'What Does It Mean to Be a Woman in Sports? An Analysis of the Jurisprudence of the Court of Arbitration for Sport' (2020) 20 *Human Rights Law Review*, 394.

<sup>77</sup> CAS 2018/O/5794 & CAS 2018/O/5798, para 286.

<sup>78</sup> See text at section II.A.ii.

<sup>79</sup> *Chand v AFI & IAAF* (n 40) para 548.

<sup>80</sup> E Eklund, B Berglund, F Labrie et al, 'Serum Androgen Profile and Physical Performance in Women Olympic Athletes' (2017) 51 *British Journal of Sports Medicine* 1301; S Bermon and PYves Garnier, 'Serum Androgen Levels and their Relation to Performance in Track and Field: Mass Spectrometry Results from 2127 Observations in Male and Female Elite Athletes' (2017) 51 *British Journal of Sports Medicine* 1309.

<sup>81</sup> The new regulation did not apply to 100m and 200m events, see IAAF Eligibility Regulations 2018 (n 3).

<sup>82</sup> See, eg, P Sönksen et al, 'Hyperandrogenism Controversy in Elite Women's Sport: An Examination and Critique of Recent Evidence' (2018) 52 *British Journal of Sports Medicine*.

note that a lack of consensus also exists concerning the similar IOC regulation related to trans female athletes' eligibility, which also uses testosterone levels as a threshold.<sup>83</sup> The World Medical Association expressed severe doubts concerning the 2018 DSD Regulations just before the CAS released its Semenya decision. The Association asked for 'the immediate withdrawal of the regulations' since they are 'contrary to international medical ethics and human rights standards'.<sup>84</sup> Some medical professionals also criticised the Regulations, 'for being based on ethical and scientific flaws'.<sup>85</sup> While the CAS pointed out the 'scientific complexity' of the case<sup>86</sup> and some difficulties regarding the 'scientificity' of the Regulations,<sup>87</sup> the Panel mainly based its award upon scientific evidence and the expert testimonies provided at the hearing. It concludes that the study made by Stéphane Bermon and Pierre-Yves Garnier in 2017 (ie the contested study provided during the Chand case) was admissible.<sup>88</sup> The scientific evidence underlying the paper is, however, doubtful, leading the British Journal of Sports Medicine to publish a 'correction' to the original paper from 2017.<sup>89</sup> Stéphane Bermon and Pierre-Yves Garnier, both employees of World Athletics, admitted that 'there is no confirmatory evidence for causality' between high-level testosterone and improved athletic performance in women,<sup>90</sup> and 'recognise that statements in the paper could have been misleading by implying a causal inference'.<sup>91</sup> In a previous article published in 2018, they already admitted that the analysis made in their first study was exploratory and not confirmatory.<sup>92</sup>

Given this lack of consensus concerning testosterone, the DSD Regulations are 'motivated by a misguided sense of fairness',<sup>93</sup> a notion that should rely

<sup>83</sup> Patel (n 16).

<sup>84</sup> The World Medical Association, 'WMA Urges Physicians not to Implement IAAF Rules on Classifying Women Athletes' (25 April 2019), [wma.net/news-post/wma-urges-physicians-not-to-implement-iaaf-rules-on-classifying-women-athletes/](http://wma.net/news-post/wma-urges-physicians-not-to-implement-iaaf-rules-on-classifying-women-athletes/).

<sup>85</sup> Holzer (n 76) 411.

<sup>86</sup> CAS 2018/O/5794 & CAS 2018/O/5798, para 582.

<sup>87</sup> *ibid*: see, eg, 'the Panel does have concerns as to the maximum level of 5 nmol/L and the practical ability of female athletes with 46 XY DSD to ensure that their levels of testosterone do not exceed that level' (para 617); 'The evidence of actual (in contrast to theoretical) significant athletic advantage by a sufficient number of 46 XY DSD athletes in the 1500m and 1 mile events could be described as sparse' (para 623).

<sup>88</sup> Bermon and Garnier (n 80), mentioned in CAS 2018/O/5794 & CAS 2018/O/5798, at para 516.

<sup>89</sup> S Bermon and PY Garnier, 'Correction: Serum Androgen Levels and their Relation to Performance in Track and Field: Mass Spectrometry Results from 2127 Observations in Male and Female Elite Athletes' (2021) 55(17) *British Journal of Sports Medicine* e7.

<sup>90</sup> As an example, Caster Semenya's performances in the 800m events do not seem unattainable for other athletes. Thus, during the last 2020 Olympic Games in Tokyo, the American athlete Athing Mu won the gold medal with a time of 1'55.21, while Caster Semenya won the same race in 2016 with a time of 1'55.28.

<sup>91</sup> Bermon and Garnier (n 89).

<sup>92</sup> S Bermon, AL Hirschberg, et al, 'Serum Androgen Levels are Positively Correlated with Athletic Performance and Competition Results in Elite Female Athletes' (2018) 52(23) *British Journal of Sports Medicine*.

<sup>93</sup> P Sonksen et al, 'Medical and Ethical Concerns Regarding Women With Hyperandrogenism and Elite Sport' (2015) 100 *The Journal of Clinical Endocrinology & Metabolism* 825, 825.

more on non-discrimination and reflect the right to participate for all ‘regardless of economic, social, religious, racial/ethnic, and linguistic background or sexual orientation’.<sup>94</sup> This understanding of fairness might be adopted by the ECtHR, using ECHR principles to place human rights at the heart of this notion, and more broadly, at the centre of *lex sportiva*.

### III. MOVING TOWARDS THE RESPECT OF INTERSEX ATHLETES’ FUNDAMENTAL RIGHTS? APPLYING ECHR PRINCIPLES TO THE DSD REGULATIONS

#### A. *Lex Sportiva* and the ECHR

*Lex sportiva* is mainly the product of SGBs, ie private entities not directly subjected to European human rights law in the same way as states.<sup>95</sup> According to the ‘vertical effect’, since only the latter can become party to the ECHR, they should be the only ones legally bound by the Treaty. This situation places ‘non-state actors such as sport bodies outside of the legal regime and creates a gap in the protection of athletes’ rights’.<sup>96</sup> Indeed, following this mechanism, SGBs’ decisions are not supposed to be bound by ECHR principles, including recent jurisprudential developments related to the right to bodily integrity<sup>97</sup> or non-discrimination.<sup>98</sup> However, the ECHR is not fully alien to *lex sportiva*.<sup>99</sup> The CAS itself progressively recognised the indirect applicability of the Convention,<sup>100</sup> and through the concept of the ‘indirect horizontal effect’ of the European judge, indirect obligations might be imposed on non-state actors such as SGBs.<sup>101</sup>

This indirect application can lead to tensions when it comes to confronting ECHR principles with regulations made by private sports entities. The difference in reasoning and interests between the two systems (*lex sportiva* and the ECHR) is particularly visible when it comes to the sex of

<sup>94</sup> *ibid* 826.

<sup>95</sup> As World Athletics has pointed out before, the CAS is ‘a private body, not a state body. It is therefore not subject to human rights instruments such as the UNDHR or the ECHR’ (CAS 2018/O/5794 & CAS 2018/O/5798, para 293).

<sup>96</sup> Patel (n 16).

<sup>97</sup> *AP, Garçon and Nicot v France* (n 12).

<sup>98</sup> *Vallianatos and others v Greece* (n 14).

<sup>99</sup> Thus, the ECtHR has already had to deal with cases concerning a CAS Award. See, eg, *Platini v Switzerland* (2020) App no 526/18 (ECtHR, 2020); *Mutu and Pechstein v Switzerland* (2018) App nos 40575/10, 67474/10 (ECtHR, 2 October 2018).

<sup>100</sup> A Duval, ‘Lost in Translation? The European Convention on Human Rights at the Court of Arbitration for Sport’ (2022) 22 *The International Sports Law Journal* 132, 134.

<sup>101</sup> A Di Marco, ‘Human Rights in the Olympic Movement: The Application of International and European Standards to the *Lex Sportiva*’ (2022) 40 *Netherlands Quarterly of Human Rights* 244, 255. As underlined by Antoine Duval, this applicability of the ECHR to SGBs is quite justified regarding their functioning ‘equivalent to public authorities’ (Duval (n 100) 134).

individuals. While the body – or material dimension of sex<sup>102</sup> – is becoming less relevant in the human rights law jurisprudence (gender identity, and therefore legal sex, does not have to match with genitals anymore for example<sup>103</sup>), sports authorities continue to focus their attention on physical characteristics in order to separate females from males in competitions, which makes sport one of the few activities ‘where sex segregation is accepted, required and controlled’.<sup>104</sup> Thus, while the IOC updated its guidelines which now provide that transgender athletes do not have to undergo hormonal treatment – and reduce their testosterone levels – to compete,<sup>105</sup> most of the SGBs maintain regulations related to the eligibility of trans athletes involving their hormone levels. Indeed, since the IOC’s framework is not legally binding on other SGBs, each sports federation can enact its own rules on the matter. For example, the International Swimming Federation (FINA) recently published a policy that allows trans athletes to compete in the female category if they have not experienced any part of male puberty beyond a certain stage or before the age of 12, and maintained their testosterone levels below 2.5 nmol/L.<sup>106</sup> For its part, World Athletics allows transgender male athletes to participate in the male category without any restrictions,<sup>107</sup> while transgender female athletes are still subject to hormonal treatment and must maintain their testosterone levels below a certain limit (5 nmol/L) to compete in the female category.<sup>108</sup> This difference in treatment is justified by the need to ‘guarantee fairness and safety within the sport’.<sup>109</sup> by decreasing their testosterone levels from the male range to the female range,<sup>110</sup> transgender female athletes are reducing their physical abilities and therefore their performances to not ‘discourage’ other athletes from this category.<sup>111</sup>

The same tensions are visible when athletes do not fit – according to SGBs – within the two sex categories. The legal sex assigned at birth and recognised by

<sup>102</sup> J Butler, *Bodies that Matter: On the Discursive Limits of ‘Sex’* (Routledge, 1993).

<sup>103</sup> AP, *Garçon and Nicot v France* (n 12).

<sup>104</sup> Patel (n 16).

<sup>105</sup> International Olympic Committee, *IOC Framework on Fairness, Inclusion and Non-Discrimination on the Basis of Gender Identity and Sex Variations*, 16 November 2021.

<sup>106</sup> FINA Policy (n 32) para F.4.

<sup>107</sup> A transgender male athlete only has to ‘provide a written and signed declaration, in a form satisfactory to the Medical Manager, that his gender identity is male’ (World Athletics, *Eligibility Regulations For Transgender Athletes*, 1 October 2019, para 3.1).

<sup>108</sup> However, the Regulations mention that the easiest way to decrease testosterone levels for a transgender female athlete is ‘with gonad-removing surgery (an orchidectomy, which may or may not be part of genital reconstruction surgery, ie, vaginoplasty), followed by oestrogen replacement therapy’ (ibid para 1.13).

<sup>109</sup> Ibid para 1.2.2(b).

<sup>110</sup> Ibid para 1.13: according to the Federation, the normal range of testosterone levels in a male is 7.7 to 29.4 nmol/L, while in a female it is 0.06 to 1.68 nmol/L.

<sup>111</sup> Ibid para 1.2.1(a).



the legal order is superseded by *lex sportiva's* own 'sport sex':<sup>112</sup> while athletes with DSD who are assigned as female by the state at birth (and are therefore administratively members of the female category), SGBs are invoking their physical characteristics to prevent them from competing in the category fitting their legal status. There is subsequently a gap between, on the one hand, the will of the ECtHR to consider sex/gender identity as part of the right to private life, and therefore exempt from any state authority prerogatives and, on the other, the attention paid to the material dimension of sex by SGBs due to the importance of the body in this field.<sup>113</sup>

The reasoning of SGBs (and the CAS) might, however, be challenged by the ECtHR since Caster Semenya contested the SFT decision before the Strasbourg Court,<sup>114</sup> which could lead to the 'humanrightisation' of the situation of athletes with DSD. What can we expect from the ECtHR? Will it agree on the need to limit testosterone levels to ensure fairness in sports competitions? If not, will the International Federation have to reconsider the 'binary sex paradigm'?<sup>115</sup> How can female athletes' rights and non-discrimination law be balanced with sports interests?

## B. How May the ECHR Apply *Lex Sportiva* to Intersex Athletes?

In May 2021, the ECtHR communicated the application of Caster Semenya to the Swiss Government and published its questions to the parties.<sup>116</sup> The applicant argued that there had been a violation, inter alia, of Articles 3 and 8 of the Convention, separately and combined with Article 14.<sup>117</sup> The following developments thus offer an analytical approach for the ECHR to consider whether the implementation of the DSD Regulations, and more broadly, regulations of SGBs related to intersex athletes, might be in conflict with human rights principles.<sup>118</sup> Therefore, ruling in favour of Caster Semenya could involve many changes regarding the apprehension of SGBs of gender equality. It could oblige SGBs to reconsider their regulations related to athletes with DSD and make them apply sports standards to and promote values – such as fairness and inclusiveness – for all athletes recognised as women, regardless of their physical characteristics.

<sup>112</sup> According to World Athletics, 'the right to participate in the female class cannot simply depend on whether an athlete is recognised in national law as female' (ibid para 458).

<sup>113</sup> The CAS found, for eg, that 'there are some contexts where biology has to trump identity' (CAS 2018/O/5794 & CAS 2018/O/5798, para 289).

<sup>114</sup> *Semenya v Switzerland* (n 9).

<sup>115</sup> C Lee, 'The Binary World of Sports' (2017) VII *The National Law Review*.

<sup>116</sup> Registrar of the Court, Notification of *Semenya v Switzerland* (n 2).

<sup>117</sup> Articles 6 (right to a fair trial) and 13 (right to an effective remedy) will not be discussed here, since they concern procedural aspects.

<sup>118</sup> As mentioned above, World Athletics is not the only sports federation that has adopted a regulation on intersex athletes. See, eg, FINA Policy (n 32).

*i. Prohibition of Torture and the Right to Respect for Private Life*

The Court will first have to decide whether medical examinations and treatments, including the obligation to take oral contraceptives to lower natural testosterone levels, lead to a violation of the human dignity, physical and mental integrity, and social and gender identity of the applicant under Article 3 (prohibition of torture and inhuman or degrading treatment or punishment) and Article 8 (right to respect for private life) of the Convention. Although the claims examined by the judges to state a potential breach of the ECHR are the same under Articles 3 and 8, the logic applied is slightly different between the two articles: while the former is non-derogable and requires a high threshold of seriousness to lead to a violation, the latter is subject to derogations including if the disposal is in accordance with the law or necessary in a democratic society.

Regardless of whether it concerns Article 3 or 8, the Court will have to decide if the allegations of violations amount to interference with the applicant's rights, 'or to a failure by Switzerland to comply with its positive obligations to protect the applicant against treatment contrary to these provisions by private entities (in particular the "IAAF")'.<sup>119</sup> Positive obligations relate to the duty of state parties to take measures to ensure that individuals are not subjected to a violation of their rights, including when the infringement is a result of actions of private parties. For example, in the *Platini* case, the Court decided that since the measure did not emerge from the State but a private law association, it could only examine whether the State had complied with its positive obligation (and not whether there had been an interference with the right).<sup>120</sup> The Court also reminds state parties that positive obligations 'may require the adoption of measures to respect the private life even in relationships between individuals'.<sup>121</sup>

Concerning the first claim, the violation of Article 3, the Court does not specify a list of criteria used to define the high threshold of seriousness needed to lead to a violation of the Convention. However, through the analysis of case law related to the prohibition of torture, it can be noted that the judges usually focus on the duration of the treatment, its effects, or the age and sex of the victim.<sup>122</sup> The Court also clarifies that the threshold required to qualify a particular treatment as torture or inhuman treatment is evolving. Some acts that were not considered as such are becoming so in the light of the current case law, due to the increasing standard of protection of human rights.<sup>123</sup> Further, those treatments might also impact mental integrity and are not limited to physical abuse.<sup>124</sup>

<sup>119</sup> *Semenya v Switzerland* (n 9).

<sup>120</sup> *Platini v Switzerland* (n 99) para 59.

<sup>121</sup> *ibid* para 60.

<sup>122</sup> See, eg, *VC v Slovaquie* (2011) ECHR 2011-V 1 381, para 100; *Jalloh v Allemagne* (2006) ECHR 2006-IX 1 281, para 67.

<sup>123</sup> *Selmouni v France* (1999) ECHR 1999-V 1 149, para 101.

<sup>124</sup> *Mursić v Croatia* (2016) App no 7334/13 (EctHR, 20 October 2016) para 97.

Arguably, the whole implementation process of the DSD Regulations entails a violation of the human dignity, physical and mental integrity of athletes. Regarding physical integrity, athletes are threatened at two levels: during the examination phase designed to reveal their hyperandrogenism, and when medical treatments are imposed to reduce their testosterone levels. Indeed, in addition to blood samples to measure the level of testosterone in the blood, the current Regulations provide the possibility of a full medical examination including, for example, a psychological evaluation or a gynaecological examination.<sup>125</sup> The DSD Regulations prescribe hormonal treatment (such as oral contraceptives) to reduce testosterone levels. In this regard, the SFT recognised that the imposed use of hormonal treatment ‘seriously infringes’ the athletes’ right to physical integrity, is not medically necessary, and is imposed without the free and informed consent of the athletes.<sup>126</sup> These unnecessary medical interventions may furthermore harm the athletes’ right to sexual and reproductive health, by affecting ‘hormones and reproductive anatomy and capacity’.<sup>127</sup> Moreover, they also have side effects,<sup>128</sup> impacting the athlete’s performance (Caster Semenya has, for example, lost almost two seconds off her time in the 800m after starting hormonal treatment<sup>129</sup>) and mental health. Female athletes with DSD are targeted for their physical appearance or behaviour and thus stigmatised as ‘suspicious’ women even before being subject to the Regulations.<sup>130</sup> The implementation of the DSD Regulations had stigmatising and humiliating consequences for Caster Semenya: her intersex variations have been revealed to the general public, and her identity as a woman has been denied multiple times. She claims, for example, that the testosterone-suppressing medication had ‘an enormous effect on her mental state’ and undermined ‘her self-confidence’. She further explained in front of the CAS that it was ‘deeply hurtful’ not to be considered as a woman by World Athletics,<sup>131</sup> and the arbitrators recognised that a medical examination to determine the extent of her ‘virilisation’ can be ‘highly intrusive’ and ‘result in psychological harm’.<sup>132</sup>

<sup>125</sup> IAAF Eligibility Regulations 2019 (n 3) 17.

<sup>126</sup> SFT, 25 August 2020, no4A\_248/2019, para 10.2.

<sup>127</sup> *Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E Méndez*, 1 February 2013, A/HRC/22/53, para 34 (d).

<sup>128</sup> Karkazis and Jordan-Young (n 33) 30; NA Xavier and JB McGill, ‘Hyperandrogenism and Intersex Controversies in Women’s Olympics’ (2012) 97(11) *The Journal of Clinical Endocrinology & Metabolism* 3906.

<sup>129</sup> When Caster Semenya won the 800m event at the World Championships in Berlin on 19 August 2009, her time was 1 min 55s 45. She then began hormone treatment in accordance with World Athletics’ Regulations; her times in the same event in 2011 (World Athletics Championships in Daegu) and 2012 (London Olympics) were 1 min 56s 35 and 1 min 57s 23 respectively. After stopping her hormone treatment, she won the 800m at the 2016 Rio Summer Olympics with a time of 1 min 55s 28.

<sup>130</sup> See text at section II.A.ii.

<sup>131</sup> CAS, 2018/O/5794 & CAS 2018/O/5798, para 78 et seq.

<sup>132</sup> *ibid* para 600.

On the assumption that these allegations do not reach the intensity level required by Article 3, it is, however, relevant to show that the DSD Regulations may lead to even more severe treatments that could be prohibited under the Convention. Indeed, the Regulations not only lead to the imposition of a hormonal treatment such as through the ingestion of oral contraceptive pills, but may also lead athletes to undergo surgery such as gonadectomy.<sup>133</sup> The 2019 Regulations states, ‘for the avoidance of doubt’, that surgery is not required under any circumstances to enable hyperandrogenic athletes to compete in the relevant competitions.<sup>134</sup> However, where hormonal treatments are not sufficient to maintain testosterone levels below the maximum threshold, and surgery (such as gonadectomy) is presented by the medical profession as the most effective means of achieving this objective, it cannot be ruled out.<sup>135</sup> In such circumstances, the athlete’s free and informed consent may be called into question if this type of surgery is the only alternative offered allowing them to participate in competitions. For example, a 2013 study shows that four young elite female athletes were informed by the medical team that ‘gonadectomy would most likely decrease their performance level but allow them to continue elite sport in the female category’.<sup>136</sup> They, therefore, agreed to undergo surgery (ie partial clitoridectomy, bilateral gonadectomy, feminising vaginoplasty, oestrogen replacement therapy) even though no health risks were diagnosed, and were allowed to compete in the female category by World Athletics<sup>137</sup> – who offered to pay for the procedures – the following year.<sup>138</sup> Therefore, given that the eligibility of these athletes to compete in the female category was dependent upon their consent to the removal of gonads and the additional feminising procedures, ‘the line between consent and coercion is blurred in this instance’.<sup>139</sup> The testimony of the Ugandan athlete Annet Negesa is also relevant in the context of this assessment. In 2012, after her high blood level of testosterone was discovered, World Athletics sent her to a specialised fertility centre. She underwent an orchiectomy (the removal of her internal testicles) without having given prior consent to the operation, of which she was not informed.<sup>140</sup> The situation of Annet Negesa is not an isolated case, several testimonies have been published in a 2020 report by Human Rights Watch.<sup>141</sup> Just as the Special Rapporteur on

<sup>133</sup> R Jordan-Young, P Sonksen and K Karkazis, ‘Sex, Health, and Athletes’ (2018) 348 *British Medical Journal* g2926.

<sup>134</sup> *ibid* para 2.4.

<sup>135</sup> “‘They’re Chasing Us Away from Sport’” (n 60) 74.

<sup>136</sup> P Fénichel et al, ‘Molecular Diagnosis of 5 $\alpha$ -Reductase Deficiency in 4 Elite Young Female Athletes Through Hormonal Screening for Hyperandrogenism’ (2013) 98 *The Journal of Clinical Endocrinology & Metabolism* E1057.

<sup>137</sup> *ibid*.

<sup>138</sup> Sonksen et al (n 93) 826.

<sup>139</sup> *ibid*.

<sup>140</sup> She was told by the medical team that she would only undergo ‘a simple surgery – like an injection’, see “‘They’re Chasing Us Away from Sport’” (n 60) 2.

<sup>141</sup> *ibid*.

torture and other cruel, inhuman, or degrading treatment or punishment did in 2013,<sup>142</sup> the European judge might condemn the recourse to involuntary medical treatments or surgeries on intersex persons promoted by World Athletics in its DSD Regulations.

The judge will consider the same allegations to determine whether there is a violation of Article 8 of the Convention. First, the Court will decide whether the applicant's claim falls within the scope of Article 8 (in the present case, the right to respect for private life), of which there should be little doubt. The concept has been indeed defined broadly, and includes 'not only a person's physical and psychological integrity, but can sometimes also embrace aspects of an individual's physical and social identity'.<sup>143</sup> In particular, it covers personal identity,<sup>144</sup> forced medical treatment,<sup>145</sup> and the right to self-determination.<sup>146</sup> Thereafter the Court will examine whether there has been an interference with this right or whether the State's positive obligations to protect the right have been engaged.<sup>147</sup> The European judge recognises that the States enjoy a certain margin of appreciation in this regard. However, in the Semenya case, this margin may be restricted since the case concerns 'a particularly important facet of an individual's existence or identity'.<sup>148</sup> In addition, this margin of appreciation might be restricted if the Court found European consensus within state parties. Even though only a few of them have adopted laws to prohibit – at least theoretically – medical treatment to 'normalise' intersex persons' bodies,<sup>149</sup> the way the European consensus is used by the ECtHR varies, and the judges 'might choose not to wait for the majority of the States of the Council of Europe to develop a shared approach to the issue at hand' – such as they did in the LGBT's rights area.<sup>150</sup> Finally, since Switzerland is the only state with the prerogative to review CAS awards and is therefore 'speaking for a worldwide community',<sup>151</sup> its margin of appreciation is expected to be narrow.

<sup>142</sup> Report of the Special Rapporteur (n 127).

<sup>143</sup> *AP, Garçon and Nicot v France* (n 12) para 92.

<sup>144</sup> *Vavříčka and others v the Czech Republic* (2021) App no 47621/13 (EctHR, 8 April 2021) para 261.

<sup>145</sup> *Acmagne and others v Belgium* (1984) App no 10435/83 (Commission decision, 10 December 1984) 255.

<sup>146</sup> *Pretty v the United Kingdom* (2002) App no 2346/02 (EctHR, 29 April 2002) para 61.

<sup>147</sup> See above n 9.

<sup>148</sup> *Dickson v the United Kingdom* (2007) ECHR 2007-V 1 99, para 78.

<sup>149</sup> Including Malta (Gender Identity, Gender Expression & Sex Characteristics Act, 14 April 2015, Chapter 540), Portugal (*Direito à autodeterminação da identidade de género e expressão de género e à proteção das características sexuais de cada pessoa*, Lei no 38/2018, Artigo 5), and Greece (Medically Assisted Reproduction Reforms Act, 19 July 2022, Articles 17 to 20).

<sup>150</sup> A Margaria, 'Trans Men Giving Birth and Reflections on Fatherhood' (2020) *International Journal of Law, Policy and The Family* 225, 243.

<sup>151</sup> M Krech, "'Sport Sex' before the European Court of Human Rights" (*Völkerrechtsblog*, 22 March 2021) [voelkerrechtsblog.org/sport-sex-before-the-european-court-of-human-rights](https://voelkerrechtsblog.org/sport-sex-before-the-european-court-of-human-rights); in this regard, Antoine Duval points out that SFT decisions 'are defining the life of every athlete worldwide and have a clear transnational dimension and effect' (Duval (n 100) 149).

The Court will eventually have to decide whether the alleged violation is ‘in accordance with the law’ and ‘necessary in a democratic society’.<sup>152</sup> However, since the DSD Regulations are not based on national law, Switzerland will have to defend a regulation adopted by a private entity based in Monaco.<sup>153</sup> Among the objectives that make the interference ‘in a democratic society’ legitimate, we can find ‘public safety’ or ‘the protection of the rights and freedoms of others’. Can the DSD Regulations be justified on the basis of one of these objectives? Are the Regulations, and therefore the medical examinations and treatments imposed, really needed to ensure the right of other female athletes to participate in fair competitions? Besides the lack of evidence demonstrating the ‘insurmountable advantage’ of female athletes with a DSD over their competitors,<sup>154</sup> I argue that it is difficult to find a fair balance between the general interest and the applicant’s interests.

Indeed, it is possible to stress here, as the SFT did, that if examinations are never imposed on athletes, the taking of hormonal contraceptives is nevertheless ‘not based on completely free and informed consent’.<sup>155</sup> The athletes are therefore facing an ‘impossible choice’<sup>156</sup> between, on the one hand, stopping their sporting activities and, on the other, being submitted to the medical examinations and treatments imposed by World Athletics.<sup>157</sup> An analogy can be made here with the *Mutu and Pechstein* case:<sup>158</sup> since the applicant had to choose ‘between accepting the arbitration clause and thus earning her living by practising her sport professionally, or not accepting it and being obliged to refrain completely from earning a living from her sport at that level’, the judges decided that her acceptance of CAS jurisdiction was not free and unequivocal.<sup>159</sup> To reach such a conclusion, the ECtHR might also draw on its jurisprudence related to trans persons’ rights, recognising that asking for proof of sex reassignment surgery (sterilisation) to modify their civil status is violating their right to respect their physical integrity under Article 8 of the ECHR.<sup>160</sup> The Court decided that making the recognition of trans persons’ gender identity conditional on sterilisation surgery or medical treatment placed them before ‘an impossible

<sup>152</sup> According to the second paragraph of Article 8, ‘there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others’.

<sup>153</sup> Krech (n 151).

<sup>154</sup> Sonksen et al (n 93).

<sup>155</sup> SFT, 25 August 2020, no4A\_248/2019, para 10.2.

<sup>156</sup> K Karkazis and M Carpenter, ‘Impossible “Choices”: The Inherent Harms of Regulating Women’s Testosterone in Sport’ (2018) 15 *Journal of Bioethical Inquiry* 579.

<sup>157</sup> The Regulation specifies that an athlete ‘must cooperate fully and in good faith’ even to a ‘medical physical examination’ at the risk of being ‘declared ineligible to compete in the female classification’ (IAAF Eligibility Regulations 2019 (n 3) para 3.5).

<sup>158</sup> *Mutu and Pechstein v Switzerland* App nos 40575/10 and 67474/10 (EctHR, 2 October 2018).

<sup>159</sup> *ibid* para 113 and 114.

<sup>160</sup> *AP, Garçon and Nicot v France* (n 12) para 135; *X and Y v Romania* (n 12) para 168.

dilemma'.<sup>161</sup> In that case, a trans person had to choose between undergoing sterilisation surgery or treatment and being able to change their gender markers in civil-status documents or fully exercise their right to bodily integrity by refusing the surgery but waiving recognition of their gender identity. Female athletes with higher testosterone levels face the same dilemma:<sup>162</sup> to compete in the category that corresponds to their assigned gender identity, they must undergo the medical treatment imposed by the Federation. Therefore, even if the Court might find that the interests of other female athletes must be protected (ie participation in fair and equal competitions), the implementation of the DSD Regulations is disproportionately restricting Caster Semenya's fundamental rights, including her right to bodily integrity.

Once again, we could also argue that the ruling has deep consequences on the self-confidence of athletes and the perception of their identity, and therefore, on their right to respect for private life. Athletes can face social stigma and psychological repercussions for having their sex characteristics revealed to their surroundings or media.<sup>163</sup> Apart from Caster Semenya's case, we can in this context mention the situation of María José Martínez-Patiño, a Spanish athlete banned from athletics competitions in 1986 for having an XY karyotype according to the sex test in place at that time (a buccal smear test). Her experience shows very precisely how sex testing – from the original assessment of genitals to the DSD Regulations – can have serious consequences on athletes' personal lives. Years later, she explained that when her story leaked to the press, she 'felt ashamed and embarrassed' and 'lost [her] friends, fiancé, hope and energy'.<sup>164</sup> Sex testing can therefore be extremely damaging for female athletes, both for their own personal identity and the pursuit of their professional careers.

## *ii. Prohibition of Discrimination*

Finally, the potential violation of Article 14 will be examined in conjunction with Article 3 and/or Article 8 of the Convention. The Court will have to decide

<sup>161</sup> *AP, Garçon and Nicot v France* (n 12) para 132.

<sup>162</sup> It can be noted that some SGBs have already adapted their regulations related to trans athletes to tackle this 'human rights issue' (as the former IOC Medical Commission Chairman Arne Ljungqvist said, see 'IOC Rules Transgender Athletes Can Take Part in Olympics Without Surgery' *The Guardian* (25 January 2016), [www.theguardian.com/sport/2016/jan/25/ioc-rules-transgender-athletes-can-take-part-in-olympics-without-surgery](http://www.theguardian.com/sport/2016/jan/25/ioc-rules-transgender-athletes-can-take-part-in-olympics-without-surgery)). In 2015, the IOC decided, for eg, that to compete in a category other than the one related to their sex assigned at birth, trans athletes do not have to undergo sex reassignment surgery anymore. The 2003 'Stockholm Consensus on Sex Reassignment in Sports' published by the IOC required surgical anatomical changes 'including external genitalia changes and gonadectomy', but the IOC policy has been later updated in 2015, considering that 'to require surgical anatomical changes as a pre-condition to participation is not necessary to preserve fair competition and may be inconsistent with developing legislation and notions of human rights' (IOC Consensus Meeting on Sex Reassignment and Hyperandrogenism, November 2015, para E).

<sup>163</sup> "They're Chasing Us Away from Sport" (n 60) 9.

<sup>164</sup> MJ Martínez-Patiño, 'Personal Account: A Woman Tried and Tested' (2005) 366 *The Lancet* S38.

whether the DSD Regulations discriminate against the applicant as a ‘woman with a naturally high level of testosterone’. This allegation of discrimination is particularly relevant, considering that ‘sport is the field par excellence in which discrimination against intersex people has been made most visible’.<sup>165</sup> While the SFT found that the principle of non-discrimination, in the context of its interpretation of Swiss public policy, only applies to the relationship between private persons and the State to protect the former from illegitimate interventions from public authorities (‘vertical effect’),<sup>166</sup> the jurisprudence of the ECtHR concerning the prohibition of discrimination is much wider. In particular, the principle does have a ‘horizontal effect’ and also applies in purely private situations.<sup>167</sup>

In the present case, the judge will first explore on which criteria the unequal treatment was based. The ground of sex will be relevant since the DSD Regulations only apply to female athletes with certain sex characteristics (in his report, the Commissioner for Human Rights argued that ‘the ground of sex/gender should be authoritatively interpreted to include sex characteristics as prohibited grounds of discrimination’),<sup>168</sup> and the Court will look at sex characteristics in the specific context of competitive sport for the first time.<sup>169</sup> Thereafter, the judge will analyse whether the applicant has been treated differently than another group of persons placed in a relevantly similar situation, that is other athletes without a DSD competing in either female or male categories. Indeed, only female athletes with a DSD are directly affected by the Regulations, and no regulation of this type has ever existed for male athletes with a higher level of testosterone than the normal range. The Strasbourg Court might also use other grounds such as the athletes’ health status since it already decided that a distinction made on this account should be covered by the term ‘other status’ in the text of Article 14 of the Convention.<sup>170</sup> This ground could refer to either testosterone levels or the karyotype of the athlete.

Finally, the Court will decide whether the differences in treatment lack objective and reasonable justification. The judge will explore whether the differences are based on public interest and strike a fair balance between the protection of the interests of the community and respect for the rights and freedoms safeguarded by the Convention.<sup>171</sup> The Court will therefore apply a proportionality test to decide whether the difference in treatment can be justified. Is there a legitimate aim for the difference in treatment? Is this difference *stricto sensu* proportionate? It is quite clear that the DSD Regulations aim to ensure fairness in athletics competitions; if this objective seems legitimate,

<sup>165</sup> Commissioner for Human Rights Issue Paper (n 5) 44.

<sup>166</sup> SFT, 25 August 2020, 4A\_248/2019 & 4A\_398/2019, para 9.4.

<sup>167</sup> *Pla and Puncernau v Andorra* (2004) ECHR 2004-VIII 179, para 59.

<sup>168</sup> Commissioner for Human Rights Issue Paper (n 5) 9.

<sup>169</sup> Krech (n 151).

<sup>170</sup> *Kiyutin v Russia* (2011) ECHR 2011-II 29, para 57.

<sup>171</sup> *Zarb Adami v Malta* (2006) ECHR 2006-VIII 1 305, para 73.



it requires a reasonable relationship of proportionality between the means employed and the aim sought to be realised.<sup>172</sup> Once again, the margin of appreciation of the State should be reduced, not to mention that according to the Court's jurisprudence, differences in treatment on the ground of sex may be justified only by very weighty reasons.<sup>173</sup> Did the applicant suffer from discrimination based on gender stereotypes? As Caster Semenya has argued, the implementation of the DSD Regulations allows women to compete in the female category only if they have physical characteristics that fit the traditional understanding of a woman's body.<sup>174</sup> The applicant faced gender stereotypes both on her appearance and performance: she was considered 'too masculine' for a female athlete, as well as 'too strong' regarding her naturally higher testosterone levels, a hormone usually associated with male characteristics. This focus on testosterone reinforces the idea of a perfect biological dichotomy between the sexes: men produce testosterone, and women produce oestrogen. Hyperandrogenism is therefore a concept applied only to women. Having too much testosterone for a woman is a pathology, while the level of this hormone in men will never be questioned.

Both the CAS and the SFT found that discriminatory treatment was necessary to maintain sex categories and ensure fairness. However, why use testosterone levels while a lot of innate characteristics might seem unfair as well? Why choose testosterone as a significant marker of superiority and as an advantage, while many other genetic variations<sup>175</sup> and criteria have an impact on athletes' performances, and are sometimes even celebrated?<sup>176</sup> How is having hyperandrogenism different from other (natural) physical or even social advantages that do not require a specific regulation? For example, a study comparing the performances of British athletes and Indian athletes showed that the latter spend about one-third less time on Olympic Games preparation.<sup>177</sup> Another example of a natural physical condition that induces an advantage concerns Eero Mäntyranta, a Finnish cross-country skier who has a rare genetic mutation of the EPOR gene, leading to an augmented production of red blood cells, and therefore an increased oxygen transport capacity.<sup>178</sup> Those situations have been seen as a threat to fairness by the International Ski Federation (FIS), which regulated the maximum level of haemoglobin concentration in the blood of athletes

<sup>172</sup> See, eg, *Molla Sali v Greece* (2018) App no 20452/14 (ECtHR, 19 December 2018) para 135.

<sup>173</sup> See, eg, *Konstantin Markin v Russia* (n 13) para 127.

<sup>174</sup> SFT, 25 August 2020, no4A\_248/2019, para 11.1.

<sup>175</sup> S Camporesi, 'A Question of "Fairness": Why Ethics Should Factor in the Court of Arbitration for Sport's Decision on the IAAF Hyperandrogenism Regulations' (2019) 53 *British Journal of Sports Medicine* 797.

<sup>176</sup> Sonksen et al (n 93) 825.

<sup>177</sup> Holzer (n 76) 402.

<sup>178</sup> S Camporesi and M Hämäläinen, 'A Local Criterion of Fairness in Sport: Comparing the Property Advantages of Caster Semenya and Eero Mäntyranta with Implications for the Construction of Categories in Sport' (2021) 35 *Bioethics* 262, 264.

in 1997.<sup>179</sup> However, the FIS has not used a universal limit for all skiers since 2013. Instead, the Federation uses a personal limit: if an athlete has a haemoglobin level that differs greatly from the historical values, that athlete might be banned from a competition.<sup>180</sup>

It is possible to argue that discriminatory treatments based on testosterone are not simply made to ensure fairness, but to avoid ‘that certain women transgress gender norms by producing testosterone through so-called “male” reproductive organs’.<sup>181</sup> And even if there is a significant gap between the performances of athletes competing in the female category compared to the male category in most athletics events (and sports in general),<sup>182</sup> it does not mean that sex categorisation is the ultimate answer to achieving fairness. Thus, it is possible to hypothesise that this distinction is maintaining the gap between female and male athletes (but also less opportunity, fewer women in sports, state programmes, etc<sup>183</sup>), if not *creating* the gap itself.<sup>184</sup>

#### IV. CONCLUSION: DE-GENDERING SPORTS CATEGORIES?

Confronting the DSD Regulations with the ECHR principles, I have demonstrated that the European judge has the opportunity to at least protect female athletes’ fundamental rights, regardless of their physical characteristics: even if the ECtHR ends up finding that sex categories are necessary to ensure fairness, it is expected that the judge will at least conclude that the DSD Regulation and the use of testosterone levels are not proportionate considering the harm caused to the athletes concerned. The DSD Regulations cannot stay in place without violating the right to bodily integrity and non-discrimination from female athletes subject to them. It surely questions the relevance of sex categories in sports and the absurdity of the actual system. While World Athletics claims that its Regulations do not challenge athletes’ sex or gender identity, the Federation considers that female athletes with a DSD are ‘biologically male athletes’.<sup>185</sup> Therefore, despite having been assigned as female by the legal system when they were born, athletes with DSD are not allowed to compete in the female category because of their physical characteristics. There is,

<sup>179</sup> The German skier Evi Sachenbacher-Stehle was inter alia banned from the 2006 Turin Winter Olympics for having a too-high haemoglobin level in her blood (ibid 266).

<sup>180</sup> Camporesi and Hämäläinen (n 178) 266.

<sup>181</sup> Holzer (n 76) 403.

<sup>182</sup> Caster Semenya would not be able to qualify for male competitions even if she won a gold medal in female competitions.

<sup>183</sup> V Thibault et al, ‘Women and Men in Sport Performance: The Gender Gap Has Not Evolved since 1983’ (2010) 9 *Journal of sports science & medicine* 214.

<sup>184</sup> LA Wackwitz, ‘Verifying the Myth: Olympic Sex Testing and the Category “Woman”’ (2003) 26 *Women’s Studies International Forum* 553.

<sup>185</sup> CAS, 2018/O/5794 & CAS 2018/O/5798, para 462.

moreover, a need to reconsider sports sex categories, since some legal systems now recognise non-binary gender options.<sup>186</sup>

Caster Semenya's case is not only of importance for *lex sportiva*. Indeed, like sports law, European human rights law relies on a strict division of individuals between men and women, using sex categories within a binary system. The situation of intersex athletes thus reveals the inconsistencies of both legal and sports authorities in maintaining sex binary categories. While it might upend World Athletics' rules, it could also lead the Strasbourg judges to further expand their jurisprudence related to gender equality, non-discrimination, or gender stereotypes outside the traditional scope of sexual binarism. The Caster Semenya case could also be an opportunity for the ECtHR to infuse more intersectionality in its reasoning. Indeed, even if the Court does not mention it in the questions communicated to the parties, it would be relevant to raise discrimination on the ground of race to highlight the 'western gaze'<sup>187</sup> of the case. It is possible to argue that the Regulations create an equality gap between women from Western countries and racialised women, since the vast majority of the athletes who have been tested since the 2000s and are publicly known are from non-European countries.<sup>188</sup> The World Athletics' rules produce a difference in treatment between white and racialised women, since they rely on norms and representations based on Western criteria. The alleged unfair advantage of hyperandrogenic athletes also reflects a racist bias that black bodies are stronger, more resilient, and athletic.<sup>189</sup> Indeed, while the criteria used (testosterone levels but also physical virilisation indices) are presented as objective data, standards of femininity vary according to location and time. For example, you could cite the measurement of hair density, formerly used by anthropologists as a method for determining race.<sup>190</sup> These elements are also reminiscent of the historical stigmatisation of black bodies (especially genitalia). In this regard, the United Nations High Commissioner for Human Rights published a report that highlights the 'intersection of race and gender discrimination in sport'.<sup>191</sup> Lastly, according to Doctor Stéphane Bermon, working for World Athletics, women from non-European countries would be less likely to have undergone sex confirming surgery at birth,<sup>192</sup> medical practices that have been denounced

<sup>186</sup> Eg, Malta (Gender Identity, Gender Expression & Sex Characteristics Act, Chapter 540, 14 April 2015), Iceland (Act on Gender Autonomy No 80 /2019, 18 June 2019), Argentina (Decreto 476/2021, 20 July 2021).

<sup>187</sup> Holzer (n 76) 401.

<sup>188</sup> Eg, Maximilla Imali, Linda Kageha, Evangeline Makena (Kenya), Beatrice Masilingi, Christine Mboma (Namibia), Annet Negesa (Ouganda), Francine Niyonsaba (Burundi), Caster Semenya (South Africa), Aminatou Seyni (Federal Republic of Nigeria), Margaret Nyairera Wambui, Jackline Wambui (Kenya).

<sup>189</sup> Karkazis and Jordan-Young (n 33) 22.

<sup>190</sup> *ibid* 26.

<sup>191</sup> Human Rights Council Report (n 56).

<sup>192</sup> Karkazis and Jordan-Young (n 33) 22.

by human rights bodies. Therefore, these women with variations of sex development have an unfair advantage since they have not been ‘treated’ at birth, unlike most intersex persons in Western countries.<sup>193</sup> The medical treatment imposed by SGBs in order to allegedly preserve their health can thus be likened to ‘violent colonial interventions’ to save ‘women from their own [...] communities’.<sup>194</sup>

The situation of athletes with intersex variations clearly shows that the distinction of individuals within a binary system – in sports but also in the legal order – must be reconsidered and challenged. The ‘reductionist definition of female sex’ that results from this binarism leads to the exclusion of all women that do not fit into the typical female athlete profile drawn up by sports rules,<sup>195</sup> producing a far-removed effect from the stated aim of inclusiveness. A decision in favour of Caster Semenya from the ECtHR would not only be a success for intersex athletes, but it might also send a strong message of protection for every human’s body. The desire to reduce the complexity and variety of human bodies into a binary framework leads to violence and discrimination, hence the ECtHR’s decision is ‘not just about the right to participate in sport’ but also ‘about the right to be human’.<sup>196</sup>

<sup>193</sup> *ibid.*

<sup>194</sup> *ibid.* 27.

<sup>195</sup> Holzer (n 76) 410.

<sup>196</sup> In the words of Caster Semenya before the CAS, see CAS 2018/O/5794 & CAS 2018/O/5798, para 82.