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DIVERSITY, EQUITY AND INCLUSION (OR EXCLUSION) IN SPORT: A REVIEW OF THE CASTER SEMENYA CASE

ANNETTE GREENHOW* AND KIM WEINERT**

The right to participate in sport, regardless of race, gender, or other defining characteristics is enshrined in various international arrangements. Ratification of these instruments by nation states is located in the development of policies and initiatives which embrace and promote a 'sport for all' ethos — where principles of diversity, equity and inclusion are advanced and promoted. International sport federations and world governing sporting authorities are expected to develop policies and regulations as guardians and custodians of the sport to advance this ethos. The parameters of the participatory right to sport have recently been questioned following the arbitral award by the Court of Arbitration ('CAS') involving Caster Semenya and the International Association of Athletics Federations ('IAAF'). This article briefly critiques the Semenya decision using Dworkin's rights theory and contributes to the literature by framing the analysis of decision-making vis a vis an intersex person's right to sport as one that involves measuring individual rights against utilitarian preferences. It posits the question as to whether it is time to review the wider social context and human rights considerations in sport-related disputes and whether the private arbitral framework of the CAS is the appropriate forum in such cases.

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The United Nations General Assembly Human Rights Council...Calls upon States to ensure that sporting associations and bodies implement policies and practices in accordance with international human rights norms and standards, and to refrain from developing and enforcing policies and

practices that force, coerce or otherwise pressure women and girl athletes into undergoing unnecessary, humiliating and harmful medical procedures in order to participate in women's events in competitive sports, and to repeal rules, policies and practices that negate their rights to bodily integrity and autonomy.

– United Nations General Assembly.¹

I INTRODUCTION

On 1 May 2019, the Court of Arbitration for Sport ('CAS') issued an executive summary of its highly-anticipated decision in the sports arbitration case between elite athlete Caster Semenya and Athletics South Africa (as claimants) and the International Association of Athletics Federations ('IAAF') (herein referred to as 'the Semenya decision'). Later, the CAS released full details of the Semenya decision in a 163-page arbitral award representing a pivotal decision in the CAS's 35-year history as the global sports dispute resolution body. As this article will illustrate, the Semenya decision was indeed a pivotal one, and as evidenced from the above extract from the United Nations Human Rights Council Draft Resolution, the impact of the Semenya decision transcends beyond the private dispute-resolution framework under the CAS arbitral regime.

The Semenya decision upholds regulations promulgated by the IAAF, the Eligibility Regulations for the Female Classification — Athletes with Differences of Sex Development ('DSD Regulations') — which subsequently discriminates against and establishes an eligibility criteria for competitive female athletes who are considered non-binary based on defining biological characteristics such as high levels of naturally occurring testosterone. The operative sections of the DSD Regulations are discussed further in Part II of this article. The most polarising aspect of the DSD Regulations, drawing condemnation from the Human Rights Commission, involves the displacement of a female athlete's right to bodily integrity and autonomy, by having them medicate to reduce blood testosterone level to fit within the IAAF's limits and maintain this continuously 'for so long as she wishes to maintain eligibility to compete in the female

¹ United National General Assembly, Human Rights Council, *Elimination of Discrimination Against Women and Girls in Sport*, 40th sess, Agenda Item 3, UN Doc A/HRC/40/L.10/Rev. 1 (25 February-22 March 2019).

classification in Restricted Events at International Competitions...'.² In non-sporting contexts, it is hard to imagine a case where the general welfare of society would justify the displacement of such a right to bodily integrity and autonomy.³

The Semenya decision, made within the scope of a private arbitral framework, was justified by the CAS on the basis that the DSD Regulations were a necessary, reasonable and proportionate measure that would ensure a fair competition in certain events for elite level female athletes.⁴ In balancing conflicting rights between female athletes who do and do not have DSD,⁵ the CAS Panel considered the IAAF's approach to be 'a rational resolution of conflicting human rights'.⁶

As an individual, 28-year-old Caster Semenya identifies as female.⁷ As such, the 'rights' boundaries' within this article are framed by Semenya exercising her legitimate, individual right of autonomy over her body and asserting her gender identity. This article will demonstrate that the Semenya case is one about an individual's rights and not about collective or majoritarian rights.⁸ By applying Dworkin's rights theory,⁹ this article critiques the Semenya decision and argues that CAS is not the appropriate forum to determine matters which result in displacement of an individual's right over body and gender. Specifically, this article will examine the public condemnation of the DSD Regulations by prominent global actors, such as the General Assembly of the United

² *Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development) Version 1.0*, International Association of Athletics Federations (entered into force 1 November 2018) reg 2.3(c) ('IAAF DSD Version 1.0 Regulations'). The IAAF issued Version 2.0 of the DSD Regulations which was published on 1 May 2019 after the Semenya decision. This article refers to Version 1.0 of the *IAAF DSD Regulations* as this was the version considered by the CAS Panel in the Semenya Decision. See also *Mokgadi Caster Semenya v International Association of Athletics Federations (Award)* (Court of Arbitration for Sport, Case No 2018/O/5794, 30 April 2019) [425]–[53] ('*Arbitral Award*').

³ It is beyond the scope of this paper to examine such cases, but only the most egregious of cases would likely fall within contemplation of forced or coerced medical intervention against the will of an individual.

⁴ The CAS Panel consisted of three Arbitrators, and the Semenya decision was awarded by a two-third majority: *Ibid.* As to the requirement of the regulation being necessary, reasonable and proportional see *Arbitral Award* (n 2) [556]–[581], [582]–[619]. See especially the conclusion on reasonableness and proportionality, see *Arbitral Award* (n 2) [620]–[624].

⁵ See *ibid* [554].

⁶ *Ibid* [589].

⁷ For further discussion on evidence of Semenya as female, see John M. Sloop, "'This is not natural:' Caster Semenya's Gender Threats' (2012) 29(2) *Critical Studies in Media Communication* 81, 86-8.

⁸ The authors have applied an individual rights approach to undertake this critique of the Semenya decision. The authors acknowledge, however, that a group rights approach could also be applied to the case and form the basis of future research in this area. Indeed, the CAS Panel acknowledged constraints on the Panel's competence and role, and that the majority of the Panel did not consider it necessary or appropriate to seek to make any assessment of the possible wider impact of the DSD Regulations. See *Arbitral Award* (n 2) [589].

⁹ Ronald Dworkin, *Taking Rights Seriously* (Bloomsbury, 1997), 106-7.

Nations Human Rights Council ('UNHRC')¹⁰ and the World Medical Association ('WMA'),¹¹ in seeking to advance, amongst other things, an individual's right to bodily integrity and autonomy. The fact that these global actors have publicly condemned the DSD Regulations lends support to examine whether utilitarian preferences should indeed have trumped individual rights as upheld by the CAS in the Semenya decision. A primary consideration, therefore, is to question whether the CAS is the appropriate forum for deciding matters involving new and emerging contemporary socio-legal issues, such as intersex participation in competitive sport.

In addressing the above questions, Part II will outline the background of the Semenya decision to illustrate the conflicts and competing interests that led to the arbitral dispute before the CAS. Next, Part III will examine the role of the CAS as a private arbitral body in sport and its function as an alternative regime to litigation in national courts. While the CAS's primary aim is to uphold a sport's integrity and utility, this part seeks to reconcile the CAS decision with Article 20 of The Universal Declaration of Human Rights and the failure by the CAS to take into account the broader social impact or human rights implications arising from its decision.¹² From here, Part IV applies Dworkin's rights theory to critically analyse how the CAS, while attempting to be the structural mechanism to achieve fairness for the majority, has consequently removed Caster Semenya's right to her bodily integrity and autonomy, and marginalised intersex bodies. By failing to determine and/or give consideration to the wider social context and human rights perspectives, and preferring to leave it as an 'ultimate [sic] matter for the courts of the various jurisdictions in question to determine',¹³ the Semenya decision reverts to the pre-CAS period where litigation before state courts was thought to be 'ineffective in resolving disputes in international sport'.¹⁴ This article concludes in Part V that the outcry following the Semenya case provides a compelling basis upon which to review whether

¹⁰ Human Rights Council, *Elimination of Discrimination Against Women and Girls in Sport*, 40th sess, Agenda Item 3, UN Doc A/HRC/40/L.10/Rev. 1 (25 February-22 March 2019).

¹¹ World Medical Association, 'WMA Urges Physicians not to Implement IAAF Rules on Classifying Women Athletes' (Press Release, 25 April 2019) <<https://www.wma.net/news-post/wma-urges-physicians-not-to-implement-iaaf-rules-on-classifying-women-athletes/>>.

¹² For further discussion about the compatibility with international human rights law, see *Arbitral Award* (n 2) [553]–[555]. For discussion about the wider social context, see *Arbitral Award* (n 2) [587]–[589].

¹³ See *ibid* [555].

¹⁴ Lloyd Freeburn, *Regulating International Sport: Power, Authority and Legitimacy* (Brill Nijhoff, 2018) 13.

or not the narrowly construed private arbitral system remains the most appropriate authoritative process to determine such matters.

II GENDER AND SUSPICION-BASED TESTING REGIMES

The hearing held at CAS headquarters in Lausanne between 18 to 22 February 2019, was not the first time Caster Semenya and the IAAF officials had interacted. Indeed, the background to the Semenya case illuminates the history and struggles in the IAAF's quest to regulate intersex athletes. Before considering the background to this relationship, it is worth briefly considering the evolution and development of intersex testing in competitive sport.

A From Dignity Depleting 'Peak and Poke' to Modern-Day Suspicion-Based Mechanisms

Patel provides a comprehensive review of gender as a defining characteristic that has influenced policies in seeking to balance the inclusion and exclusion of the right to participate in competitive sport.¹⁵ Patel traces the evolution and development from the 'peak and poke' testing regime arising from gender fraud in the Eastern Bloc, to modern day 'suspicion-based gender verification' cases involving intersex athletes.¹⁶ Through this analysis, Patel identifies the challenges faced by sports administrators in developing appropriate 'sport regulatory mechanisms' to address intersex concerns.¹⁷

Xavier and McGill chronicle the history of gender policies in national and international athletics, and explain the rationale around the earlier iterations of IAAF policies to address intersex concerns.¹⁸ The authors note that the 2011 IAAF Hypoandrogenism policy stipulated a 10 nmol/L upper limit for women's sports, creating for

¹⁵ Seema Patel, *Inclusion and Exclusion in Competitive Sport: Socio-legal and Regulatory Perspectives* (Routledge, 2015) 85–108.

¹⁶ *Ibid* 85-6. Patel refers to the Cold War as bringing about increased competition in sport and notes that sex testing began as a way of deterring deliberate cheats in the Eastern Bloc.

¹⁷ *Ibid* 88-93. Patel analyses the concept of fair and unfair advantages in sport and traces the regulatory mechanisms introduced by sport administrators by reference to several case studies involving intersex athletes. Citing Karkazis *et al*, Patel at [93] concludes that 'the policing of 'biologically natural bodies' is not entirely fair.

¹⁸ Neena A Xavier and Janet B McGill, 'Hyperandrogenism and Intersex Controversies in Women's Olympics' (2012) 97(11) *The Journal of Clinical Endocrinology & Metabolism* 3902.

endocrinologists a ‘new and prominent role in the evaluation and treatment of women with the potential to become elite athletes’.¹⁹

Early iterations of policies such as the International Olympics Committee’s (‘IOC’) Barr body test was introduced in 1968 and developed as enhanced scientific understanding emerged around genetic and hormone testing. According to Patel, spectators and competitors in sport were fearful that women with intersex characteristics would begin to dominate the sports.²⁰ These key actors were early influencers of the IOC’s decision to introduce and maintain various methods of testing with the objective to ‘prevent gender fraud, eliminate scandal, ensure fairness and fair performance advantage, and maintain the natural order of masculinity and femininity’.²¹ Based on Patel’s assessment, the confidential nature of testing makes it difficult to measure with any accuracy how many intersex females have been forced ‘quietly’ out of competition.²² She also concludes, however, that the ‘consequences of testing only some of the factors which determine sex can lead to unreasonable exclusion of innocent women who may naturally vary’.²³

B Caster Semenya and the IAAF

1 The 2009 Event

In 2009, 18-year-old South African middle-distance runner, Caster Semenya, found herself thrust into the public spotlight after she won the gold medal in the World Championships held in Berlin. This increased public attention was not due to her success on the track, but instead, it was due to questions raised as to her gender ‘ambiguity’ and eligibility to ‘race as a woman’ in the female classification in the 800-metre event.²⁴ Consequently, Semenya was subjected to a testing regime under an earlier iteration of the IAAF’s hyperandrogenism policy.²⁵

¹⁹ Ibid 3906.

²⁰ Patel also explains that this fear reinforced the belief that the possession of a male Y chromosome produces superior athletic ability. See Patel (n 15) 86.

²¹ For further discussion, see generally Patel (n 15) 87.

²² Ibid 86.

²³ Ibid 88.

²⁴ Cheryl Cooky, Ranissa Dycus and Shari L Dworkin, “‘What Makes a Woman a Woman?’ Versus “‘Our First Lady of Sport: A Comparative Analysis of the United States and the South African Media Coverage of Caster Semenya’ (2013) 37(1) *Journal of Sport and Social Issues* 31, 39.

²⁵ The IAAF policy was the *Regulations Governing Eligibility of Females with Hyperandrogenism to Compete in Women’s Competition*. See *Arbitral Award* (n 2) [7]. Patel also considered the 1985 case of Spanish

According to Patel, the IAAF had earlier requested the IAAF Member Federation in South Africa, Athletics South Africa ('ASA') to withdraw her from the team competing in Berlin.²⁶ The ASA refused, and when Semenya won gold in the 800-metre event, she was subjected to a 'suspicion-based' testing regime. Patel notes that the IAAF 'ordered' the 18-year-old to undergo a 'gender-verification' test,²⁷ that involved an extensive medical evaluation conducted by a range of medical experts in the field. The IAAF was accused of the 'clumsy handling' of the 2009 Semenya case, primarily based on the absence of a clear policy and for the public humiliation caused to the 18-year-old runner.

2 The Right to Participate

In addition to the enjoyment of fundamental human rights, athletes are also entitled to the promotion and protection of the right to participate in sport, free from all forms of discrimination. Indeed, many significant constituent documents embed such a right. To illustrate, the fundamental principles of Olympism in the Olympic Charter recognise that

[T]he practice of sport is a human right. 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.²⁸

With a specific reference to the rights enjoyed by athletes, the Olympic Charter provides that

... [t]he enjoyment of the rights and freedoms set forth in this Olympic Charter shall be secured without discrimination of any kind, such as race, colour, sex, sexual orientation, language, religion, political or other opinion, national or social origin, property, birth or other status.²⁹

In recognition of the right to participate in the sport of athletics free from discrimination, the 2017 IAAF Constitution provides an object as:

hurdler, Maria Martinez Patino, Indian 800m runner, Santhi Soundarajin, Caster Semenya and South Korean footballer, Park Eun-Seon. For further discussion, see Patel (n 15) 91–3. See also Xavier and McGill (n 18).

²⁶ Patel (n 15) 90.

²⁷ Ibid.

²⁸ International Olympic Committee, *Olympic Charter* (in force 26 June 2019) art 4.

²⁹ Ibid.

... striving to ensure that no gender, race, religious, political or other kind of unfair discrimination exist, continues to exist or is allowed to develop in Athletics in any form, and that all may participate in Athletics regardless of their gender, race, religious or political views or any other irrelevant factor.³⁰

The 2009 event signalled the first displacement of Semenya's right to participate in sport free from discrimination. It also displaced Semenya's right to bodily integrity and autonomy due to her differences of sex development and naturally occurring genetic condition.

3 The IAAF's Regulatory Control

The IAAF asserted regulatory power and control to order Semenya to undergo this testing regime, primarily on the basis of its position as the international sports federation ('ISF') over the sport of athletics. Foster describes ISF's as 'autonomous organisations and independent of national governments', establishing their regulatory power and legitimacy.³¹

Although no direct contractual relationship exists between Semenya and the IAAF, she is bound to comply, through a series of interlocking arrangements, with the regulation and rules of the IAAF. The exact nature and extent of an ISF's legitimacy in asserting regulatory control over participants such as Semenya remains subject to legal debate. Several commentators suggest that the source of this power is based on the consensus amongst those involved in the sport, creating a binding series of interlocking arrangements cascading throughout the various tiers within the sport's pyramid in governing international athletics.³² Freeburn questions whether this relationship is truly

³⁰ *International Association of Athletics Federation (IAAF) Constitution* (1 January 2017) art 4.4 ('*IAAF Constitution*'). The *IAAF Constitution* was revised in 2019, effective 1 January 2019 (*IAAF 2019 Constitution*) and removed reference to the former art 4.4. Instead, the 2019 IAAF Constitution now provides a new Purpose in art 4.1(j) to 'preserve the right of every individual to participate in Athletics as a sport, without unlawful discrimination of any kind undertaken in the spirit of friendship, solidarity and fair play'. The DSD Regulations came into force on 1 November 2018 so the provisions of the IAAF 2017 Constitution are relevant to consider as the 2017 IAAF Constitution reflected the express object as provided in art 4.4.

³¹ Ken Foster, 'Is There a Global Sports Law?' in Robert C.R Siekmann and Janwillem Soek (eds), *Les Sportiva: What is Sports Law?* (T.M.C. Asser Press, 2012) 35, 36.

³² Lewis and Taylor explain that international sport is arranged via a 'chain of interlocking associations/organisations responsible for the sport's governance at each level': see Adam Lewis and

based on contract or whether de facto power is a more 'plausible basis' to explain the power and control of ISFs under the existing regulatory regime.³³ Others go further to question the source of this power by arguing the absence of a direct contractual relationship undermines the legitimacy on the part of an ISF to assert regulatory power.³⁴

Under its constitution, the IAAF describes itself as the 'sole competent international authority for the sport of Athletics worldwide...'.³⁵ The IAAF sits at the apex of the sporting pyramid, a hierarchical model establishing a 'chain of interlocking associations responsible for the sport's governance at each level'.³⁶ In this position, the IAAF exercises control over many key functions in the promotion, organisation and regulation of athletics.³⁷ Moreover, the IAAF retains vertical oversight and control through this network of interlocking arrangements with member federations spread across diverse geographical locations.³⁸ To illustrate, the ASA is a member federation and acts as the national sports organisation in South Africa, contractually bound to comply with the 'Constitution, Rules and Regulations' of the IAAF.³⁹

4 Vulnerability and Consent

While some have questioned whether Semenya was entitled to disobey the 2009 IAAF order due to questions around vulnerability and absence of consent,⁴⁰ Semenya submitted to the process. Indeed, she had been training to compete in the Olympics, and by competing in international events, she would further her performance-driven aspirations and goals. A reasonable conclusion, therefore, is that Semenya considered compliance with the IAAF's directions as the only viable option, to enable her to excel in her sport and earn her living by practising her sport at the competitive level.

Jonathan Taylor, *Sport: Law and Practice* (Bloomsbury Profession, 3rd ed, 2014) [3.11]. See also Freeburn (n 14) 7–9, 42.

³³ For further discussion, see Freeburn (n 14).

³⁴ *Ibid.*

³⁵ *IAAF 2019 Constitution* (n 30) art 1.3. See also *IAAF 2017 Constitution* (n 30) art 2.1, referring to the IAAF as the 'world governing body for the sport of Athletics'.

³⁶ Lewis and Taylor (n 32) [3.11].

³⁷ *IAAF 2017 Constitution* (n 30) established the Objects of the IAAF in Article 4.1–4.16; see cl 4 Purposes, cl 4.1(a)–(n).

³⁸ *IAAF 2017 Constitution* (n 30) art 5.2, art 5.8 (b). See also, *IAAF 2019 Constitution* (n 30) art 6.2.

³⁹ *IAAF 2019 Constitution* (n 30) art 9(1)(b).

⁴⁰ In questioning the ethical and legal questions about the legality of sex testing in sport, Patel, citing Cooper, raises this as a point, albeit a moot point, as the case was not legally challenged at the time. See Patel (n 15) 90.

5 Enduring Suspicion

After being cleared to run again, Semenya's participation in her chosen events continued to raise suspicions and fears that she would dominate, leading to perceived unfairness by being included in female classified events. Others described her physical advantage, akin to an adult competing against a child in the same competition.⁴¹

In 2018, the IAAF released the new DSD Regulations, which came into force on 1 November 2018.⁴² The operative parts of the amended version of these are reproduced in the Semenya decision.⁴³ According to the IAAF, the new regulations

... require any athlete who has a Difference of Sexual Development (DSD) that means her levels of circulating testosterone (in serum) are five (5) nmol/L or above and who is androgen-sensitive to meet the following criteria to be eligible to compete in Restricted Events in an International Competition (or set a world record in a Restricted Event at competition that is not an International Competition):

(a) she must be recognised at law either as female or as intersex (or equivalent);

(b) she must reduce her blood testosterone level to below five (5) nmol/L for a continuous period of at least six months (e.g., by use of hormonal contraceptives); and

(c) thereafter she must maintain her blood testosterone level below five (5) nmol/L continuously (i.e. whether she is in competition or out of competition) for so long as she wishes to remain eligible.⁴⁴

The DSD Regulations Version 1.0 provide an alternative solution for female athletes who do not wish to comply. In this regard, the IAAF provides that:

⁴¹ 'Caster Semenya to Challenge IAAF Rules Forcing Her to Take Medication to Lower Her Testosterone Levels', *ABC News* (online, 19 June 2018) <<https://www.abc.net.au/news/2018-06-19/caster-semenya-to-challenge-iaaf-female-classification-rule/9884762>> ('*Caster Semenya to Challenge IAAF Rules*').

⁴² World Athletics, 'IAAF Introduces New Eligibility Regulations for Female Classification' (Press Release, 26 April 2018) <<https://www.iaaf.org/news/press-release/eligibility-regulations-for-female-classifica>>.

⁴³ See *Arbitral Award* (n 2).

⁴⁴ See *IAAF DSD Regulations Version 1.0* (n 2) reg 2.3 (c).

If a female athlete does not wish to lower her testosterone levels, the IAAF regulations provide will still be eligible to compete in:

(a) the female classification:

(i) at competitions that are not International Competitions: in all Track Events, Field Events, and Combined Events, including the Restricted Events; and

(ii) at International Competitions: in all Track events, Field Events, and Combined Events, other than the Restricted Events; or

(b) in the *male classification* (emphasis added), at all competitions (whether International Competitions or otherwise), in all Track Events, Field Events, and Combined Events, including the Restricted Events; or

(c) in any applicable intersex or similar classification that may be offered, at all competitions (whether International Competitions or otherwise), in all Track Events, Field Events, and Combined Events, including the Restricted Events.⁴⁵

Within a few months of the release of the DSD Regulations, Semenya challenged the validity of the rules based on her view that she should be 'entitled to compete the way she was born without being obliged to alter her body by any medical means'.⁴⁶ No longer was Semenya willing to comply with the IAAF eligibility requirement. From a human rights perspective, the intention to dispute the validity of the DSD Regulations signalled her intention to assert her rights to bodily integrity and autonomy.

So, what were Semenya's options in selecting an appropriate forum to hear her concerns? Based on the above discussion about the regulatory control of the IAAF, Semenya had submitted to the exclusive jurisdiction of the CAS as the private arbitral body to hear her dispute. In June 2018, Semenya filed her request for arbitration with the CAS against the IAAF, primarily seeking an award that the DSD Regulations be declared unlawful.⁴⁷

⁴⁵ Ibid.

⁴⁶ *Caster Semenya to Challenge IAAF Rules* (n 41).

⁴⁷ See *Arbitral Award* (n 2) [14].

III THE ROLE OF THE CAS

Established in 1984 as an alternative forum to state courts in resolving sport-related disputes, the CAS has evolved to become recognised as a legitimate and exclusive decision-making body. The CAS, despite the misnomer, is not an international court of law but instead an arbitral tribunal based in Switzerland.⁴⁸

The jurisdiction of the CAS is entirely based on the arbitral agreement whereby athletes agree, though a series of interlocking arrangements, to submit to the exclusive jurisdiction of the CAS.⁴⁹ The Code of Sports-Related Arbitration ('CAS Code') governs the administration and procedures of the CAS.⁵⁰ The IAAF Constitution contains a parallel provision which stipulates that final decisions made by the IAAF may be appealed exclusively to the CAS.⁵¹

The CAS Code provides the CAS with jurisdiction to hear all disputes which 'involve matters of principle relating sport or matters of pecuniary or other interests relating to the practice or development of sport and may include, more generally, any activity or matter related or connected to sport'.⁵² The nature of proceedings before the CAS fall within one of three divisions: the Ordinary Arbitration Division, the Anti-Doping Division, or the Appeals Arbitration Division.⁵³ The types of dispute include doping, contractual, disciplinary, governance, and nationality disputes. Other matters involve the interpretation and application of rules that impact an athlete's eligibility to participate in Olympics and other international competitions.⁵⁴ There is no reference to human rights determinations within the CAS framework. Patel notes that the CAS has

⁴⁸ *Code of Sports-related Arbitration* (in force from 1 January 2019) s 1 ('CAS Code').

⁴⁹ Lewis and Taylor (n 32); Freeburn (n 14).

⁵⁰ *CAS Code* (n 48).

⁵¹ *IAAF Constitution* (n 30) art 84.3. The IAAF 2017 Constitution (n 30) provides in Art 20.1 that all disputes under this Constitution shall, in accordance with its provisions, be subject to an appeal to the Court of Arbitration for Sport in Lausanne. The IAAF Constitution 2019 (n 30) provides in art 84.3 that final decisions made by the IAAF under the Constitution may be appealed exclusively to the CAS which will resolve the dispute definitively in accordance with the CAS Code of Sports-related Arbitration.

⁵² *CAS Code* (n 48) r 47.

⁵³ *Ibid* r 3.

⁵⁴ Rustam Sethna, 'A Data Analysis of the Arbitrators, Cases and Sports at the Court of Arbitration for Sport', *Law in Sport* (Web Page, 4 July 2019) <<https://www.lawinsport.com/topics/articles/item/a-data-analysis-of-the-arbitrators-sports-and-cases-at-the-court-of-arbitration-for-sport>>; Matthew J Mitten and Timothy Davis, 'Athlete Eligibility Requirements and Legal Protection of Sports Participation Opportunities' (2008) 8(1) *Virginia Sports and Entertainment Law Journal* 71, 74. See also Patel (n 15) 51.

... emphasised the responsibility of governing bodies to act in accordance with the general principles of law...including that rules must be construed in accordance with the fundamental rights protected under the ECHR.⁵⁵

The CAS adopts the Swiss Federal Code on Private International Law so the parties have rights, albeit limited rights, to lodge appeals from the CAS to the Swiss Federal Tribunal. Successful appeals from the CAS have been described as ‘few and far between’, with a recent study suggesting 82% of appeals being dismissed by higher courts and appeals successfully upheld in 2.5% of cases.⁵⁶

Prior to its establishment, state courts were ineffective forums in deciding sport-related disputes. Freeburn, however, cites other reasons which might have influenced the decision, including a desire by the IOC and ISFs to control, within a narrow framework, the ambit of decision-making in sport.⁵⁷ Furthermore, rather than freely negotiated contractual arrangements, the agreement to submit to the jurisdiction of the CAS is akin to forced mediation — whereby athletes have no rights to opt out or negotiate alternative arrangements for the resolution of sport-related disputes. In that regard, compliance motivations in submitting to the exclusivity of the CAS jurisdiction are likely to be influenced by normative, economic and social considerations rather than the exercise of free will.⁵⁸

CAS was established as an independent and impartial arbitral tribunal conducting hearings on a de novo basis and interpreting the rules, regulation and decisions of sport applicable to the IOC and other ISF's regarding a range of matters. Of relevance to the Semenya case is the role of the CAS through the Panel of arbitrators in reviewing the DSD

⁵⁵ Patel (n 15) 51, citing Lewis and Taylor (n 32) 344.

⁵⁶ Freeburn explains the right is limited to the grounds of lack of jurisdiction, violation of elementary procedural rules or incompatibility with public policy. See Freeburn (n 14) 14-5.

⁵⁷ Other motivations such as the desire of sports governing bodies for autonomy the financial risks association with litigation in national courts, and the reluctance of the state to become involved in resolution of sports disputes. Freeburn, (n 14) 13, nn 54.

⁵⁸ Simon Gardiner, et al. *Sports Law* (Routledge, 4th ed, 2012) 97; see also Freeburn (n 14) 105-6. While falling outside the scope of this paper, ‘take it or leave it’ terms in standard form agreements and contracts of adhesion could amount to unfair contract terms and potentially undermine the legitimacy of the international sports framework.

Regulations to determine whether they are necessary, reasonable and proportionate within the narrow arbitral framework.⁵⁹

CAS Panelists are appointed from a 'closed' list of arbitrators, based on their expertise in sports law. A recent review of the history of CAS awards, however, illustrates that most cases are determined by a relatively small number of arbitrators.⁶⁰

The legitimacy of CAS as an independent and impartial arbitral tribunal was reinforced in 2018 with the finding by the European Court of Human Rights ('ECHR') in *Adrian Mutu & Claudia Pechstein v Switzerland* confirming the CAS as a 'genuine arbitration tribunal'.⁶¹ The ECHR was asked to consider whether the CAS process was a violation of the right to a fair trial under the European Convention on Human Rights.⁶² While re-emphasising the CAS as an independent and impartial tribunal, the ECHR considered that acceptance of the CAS jurisdiction 'had not been freely given'.

IV A DWORKIN'S RIGHTS THEORY AND THE SEMENYA CASE

Dworkin's rights theory is primarily concerned with assessing whether decisions that purport to embody utilitarian preferences — decisions justified as reflecting the greatest good for the greatest number — are balanced against the 'trade off' of an individual's rights in pursuit of the common good.⁶³ Dworkin argues that decisions which trade off an individual's right for the benefit of the whole community must be grounded on a compelling argument.⁶⁴ To that end, Dworkin reintroduced the 'old idea of individual human rights', challenging the founder of the utilitarianism, Jeremy Bentham, who had earlier dismissed these rights as 'nonsense on stilts'.⁶⁵

⁵⁹ Patel (n 15) 50; Mark James, *Sports Law* (Palgrave Macmillan, 2nd ed, 2013) 56.

⁶⁰ Sethna (n 54).

⁶¹ European Court of Human Rights, 'The Procedures Followed by the Court of Arbitration for Sport Complied with the Right to a Fair Hearing, Apart from the Refusal to Hold a Public Hearing' (Press Release No 324, ECHR, 2 October 2018).

⁶² See *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 6 §1.

⁶³ Dworkin refers to the theory of utilitarianism, which holds that law and its institutions should serve the general welfare, deriving from the philosophy of Jeremy Bentham. See Dworkin (n 9) 1.

⁶⁴ *Ibid* 116.

⁶⁵ *Ibid* 2.

A The CAS and the Utilitarian Preference

The most polarising element to the Semenya decision has centered on the ‘necessary, reasonable and proportionate’ discriminatory measures to ensure the IAAF ‘preserve the integrity of female athletics in the Restricted Events’.⁶⁶ By upholding the DSD Regulations as the structural mechanism to achieve fairness for the majority, the CAS has consequently removed Caster Semenya’s right to her bodily integrity and autonomy, and further marginalised intersex bodies.

Proportionate discrimination is not a new issue in sport. Australian anti-discrimination laws allow for numerous exemptions that restrict and prevent people from engaging in all sports based on various grounds such as, gender, physical ability and age.⁶⁷ Indeed, proportionate discrimination is recognised in Australian sport moderated by legislative instruments such as the *Equal Opportunity Act 2010* (Vic) with specific exceptions in relation to competitive sport.⁶⁸ Obliquely phrased as ‘discrimination in good faith’, statutory exemptions are supported by Article 29 of The Universal Declaration of Human Rights whereby an individual’s rights and freedoms are restricted for just requirements of public order and the general welfare of a democratic society. However, there remains a challenge to understand how Article 29 can be relied upon by both the CAS and the IAAF to discriminate against Semenya.

This challenge lies in determining with accuracy the status and function of the CAS. As discussed in Part III, the CAS can neatly be described as an appellate legal framework that resolves and determine sport-related disputes.⁶⁹ Unlike a State decision maker or tribunal, the CAS arguably makes determinations in the role as an international ‘guardian’ of all sports. Within this abstract role as a ‘guardian’, CAS is provided with political

⁶⁶ Court of Arbitration for Sport, ‘CAS Arbitration: Caster Semenya, Athletics South Africa (ASA) and International Association of Athletics Federation (IAAF): Decision’ (Media Release, 1 May 2019) 2 <https://www.tas-cas.org/fileadmin/user_upload/Media_Release_Semenya_ASA_IAAF_decision.pdf>.

⁶⁷ See *Anti-Discrimination Act 1991* (Qld) s 111; *Anti-Discrimination Act 1977* (NSW) s 38; *Equal Opportunity Act 2010* (Vic) s 72; *Equal Opportunity Act 1984* (WA) s 35; *Anti-Discrimination Act 1992* (NT) s 5; *Equal Opportunity Act 1984* (SA) s 48; *Anti-Discrimination Act 1988* (Tas) ss 29 and 43.

⁶⁸ For further discussion on the sporting exemption, see Victorian Equal Opportunity and Human Rights Commission <<https://www.humanrightscommission.vic.gov.au/discrimination/places-of-discrimination/sport#activities-for-people-of-one-sex-or-gender-identity-to-allow-for-strength-stamina-or-physique>>.

⁶⁹ See *CAS Code* (n 48) s 12.

authority to make decisions and directions over sport. The Semenya decision exemplified the reach of these decisions over all sport activity and individuals as participants.

B A Hard Case

The CAS Panel acknowledged that they found the Semenya case not an easy one to decide.⁷⁰ By framing Semenya's case as a hard or novel case, it suggests that the CAS considered itself in a position whereby it was constrained as being unable to participate in 'stretching or reinterpreting existing rules'.⁷¹ Indeed, by failing to determine and/or give consideration to the wider social context and human rights perspectives, and preferring to leave it as an 'ultimate [sic] matter for the courts of the various jurisdictions in question to determine',⁷² the Semenya decision implicitly suggests these socio-legal and human rights matters ought to be diverted to state courts. Paradoxically, one of the reasons for the establishment of the CAS in the first place was the view that state courts were 'ineffective in resolving disputes in international sport'.⁷³

CAS's reluctance to find for Semenya and to declare the regulations invalid or void pursuant to human rights legislation is reflexive of Sunstein's judicial minimalism.⁷⁴ The limited breadth of not upholding human rights law within the landscape of international sports law in the Semenya decision illustrates an unwillingness by CAS to craft new or good rules in this novel case and appears consistent with the view that CAS is not the appropriate forum to determine human rights matters in sport.

Commentators suggest that the commitment to policy over the application of legal rules and principles is done to avoid a broad ruling.⁷⁵ The notion of uncertainty might be one factor to consider in exploring CAS's motivations to undertake this approach. Should CAS have held that the regulations were unlawful, it would bring an implication of uncertainty

⁷⁰ Indeed, on many occasions throughout the Executive Summary and the Arbitral Award, the CAS went to great lengths to explain their decision-making framework and the constraints based solely on the evidence and arguments advanced by the parties. See 'Executive Summary', *Court of Arbitration for Sport* <https://www.tas-cas.org/fileadmin/user_upload/CAS_Executive_Summary__5794_.pdf> ('Executive Summary'). See also *Arbitral Award* (n 2) [469], [471].

⁷¹ Dworkin (n 9) 106.

⁷² See *Arbitral Award* (n 2) [555].

⁷³ Freeburn (n 14) 13.

⁷⁴ Cass R Sunstein, 'Beyond Judicial Minimalism' (Working Paper No 432, John M Olin Program in Law and Economics, 2008).

⁷⁵ Justin Fox, 'Narrow Versus Broad Judicial Decisions' (2014) 26(3) *Journal of Theoretical Politics* 355, 357-8.

for all sports. Consequently, such uncertainty could undermine the nature of the strict binary divisions already entrenched within many competitive sports, and, moreover, impact decision-making vis a vis participation in competitive events.

On the issue of balancing individual rights, the CAS Panel states that

It is not possible to give effect to one set of rights without restricting the other set of rights. Put simply, on one hand is the right of every athlete to compete in sport, to have their legal sex and gender identity respected, and to be free from any form of discrimination. On the other hand, is the right of female athletes, who are relevantly biologically disadvantaged vis-à-vis male athletes, to be able to compete against other female athletes and to achieve the benefits of athletic success.⁷⁶

This mixed statement of egalitarianism attempts to preserve the notion that all competitors are equal subjects of sport within a strict dichotomisation of gender. CAS's functional account of how sport is and must be organised imposes a strictness on gender performativity. One view of this approach could be that by upholding this traditional division of the sexes, CAS has unwittingly linked women in competitive sport to inequality.⁷⁷ By reinforcing gendered ontologies and inequalities, the Semenya decision denotes a false ideal that while all competitors are equal subjects, they have unequal rights.

This departure from the general ideological understanding of general equality and human rights offers an insight into CAS's conservative thinking and reading around Caster Semenya's hyperandrogenism. By displacing her legal status as a woman, CAS took the preferred view that competitive athletics is 'founded in biology rather than legal status'.⁷⁸ A risk arising for such an interpretation could be to undermine efforts in areas such as law reform for the LGBTQI+ community in obtaining substantive equality.⁷⁹ Disregarding legal status, CAS reasoned on the evidence that 'endogenous testosterone

⁷⁶ See *Executive Summary* (n 70) [12]. See also *Arbitral Award* (n 2) [554].

⁷⁷ Aoife Cartwright, et al, 'An Investigation into the Relationship between Gender Binary and Occupational Discrimination Using the Implicit Relational Assessment Procedure' (2017) 67(1) *The Psychological Record* 121, 122.

⁷⁸ See *Executive Summary* (n 70) [18].

⁷⁹ See *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth).

as the primary driver of the sex difference in sports performance between males and females.⁸⁰ In essence, female intersex athletes disrupt fairness in the Restricted Events.⁸¹

The Semenya decision appears to be predicated on a desire to protect and uphold the integrity of fairness in sport. By recognising the IAAF DSD Regulations as necessary, reasonable and proportionate, the CAS has prioritised the collective interests of the IAAF and non-DSD athletes, over the interests of those falling within the ambit of the DSD Regulations.⁸² As such, the CAS's decision is firmly grounded in policy, rather than human rights principles, a point recognised by the CAS when the majority accepted that the DSD Regulations 'reflect a rational resolution of conflicting human rights'.⁸³ Dworkin would likely evaluate values such as fairness and equality as collective goals. These collective goals are either achieved or promoted by political efforts and intended to yield more utility. The IAAF's efforts to achieve fairness are measured by the extent to which they engaged in stakeholder consultation around the design and development of the DSD Regulations, and how the CAS subsequently interpreted the DSD Regulations as lawful. The fundamental aim of the DSD Regulations was to succeed in offering a fair playing field, specifically for those athletes who were competing against an athlete who was found to have a 'certain insuperable performance advantages derived from biology rather than legal status'.⁸⁴

C Levelling the Playing Field?

In attempting to level out the playing field, the DSD Regulations represent a mechanism designed to advance the principle of utility which is directed to satisfy the external welfare and happiness of the playing field, and others. The 'chorus of voices' from other female athletes had loudly condemned Semenya's performance as unfair in her playing field and, consequently, the IAAF took action.⁸⁵ The question remains unanswered, however, as to what might justify acceptable forms of naturally occurring characteristics

⁸⁰ See *Executive Summary* (n 70) [21].

⁸¹ *Ibid* [26].

⁸² As to finding the DSD Regulations as necessary, see *Arbitral Award* (n 2) [556]–[581]. As to finding the DSD Regulations reasonable and proportionate, see *Arbitral Award* (n 2) [582]–[586], [620].

⁸³ See *ibid* [589].

⁸⁴ *Ibid* [20].

⁸⁵ Madeleine Pape, 'I Was Sore About Losing to Caster Semenya but the Decision Against Her is Wrong', *The Guardian* (online, 1 May 2019)

<<https://www.theguardian.com/commentisfree/2019/may/01/losing-caster-semenya-decision-wrong-women-testosterone-iaaf>>.

known to enhance athletics performance. Indeed, an argument raised in support of Semenya noted that her naturally occurring genetic advantage be treated the same as someone with, for example, the genetic advantage of a basketballer's wide reach, or a swimmer's large feet.⁸⁶

Reaction from others in the field have welcomed CAS's ruling and have expressed their happiness about the necessity of the regulations to ensure fair competition, and that female athletes now have a path to success in sport.⁸⁷ The utility narrative of fairness and happiness in Semenya's decision is qualified by the use of the words: 'necessary', 'reasonable', 'proportionate' and 'burden'.⁸⁸

D Public Condemnation of the DSD Regulations

In March 2019, the IAAF was criticised by the General Assembly of the UNHRC over concerns that their

discriminatory regulations ... to medically reduce blood testosterone levels contravene international human rights ... including the right to equality and non-discrimination...and full respect for the dignity, bodily integrity and bodily autonomy of the person.⁸⁹

With specific reference to the IAAF's DSD Regulations, the UNHRC called upon states to 'ensure that sporting associations ... refrain from developing and enforcing policies ... that force, coerce or otherwise pressure ... athletes into undergoing unnecessary, humiliating and harmful medical procedures'. The UNHRC also requested the UN High Commissioner to prepare a report on the intersection of gender discrimination in sports and human rights to present to the Human Rights Council at its forty-fourth session, likely to be held in June 2020.

In April 2019, prior to the decision of the CAS being released, the WMA, as the peak international organisation representing physician in upholding high standards of medical

⁸⁶ Andy Bull, 'Caster Semenya and the IAAF: If the science is wrong, the ruling is wrong', *The Guardian* (online, 1 May 2018) <<https://www.theguardian.com/sport/blog/2018/may/01/caster-semenya-iaaf-science-athletics-testosterone>>.

⁸⁷ David Wharton, 'Caster Semenya Loses Her Gender Case in Bid to Continue to Compete as a Woman', *Los Angeles Times* (online, 1 May 2019) <<https://www.latimes.com/sports/la-sp-caster-semenya-loses-appeal-20190501-story.html>>.

⁸⁸ *Executive Summary* (n 70).

⁸⁹ Human Rights Council (n 10).

ethics, issued a Press Release urging its members not to implement the IAAF DSD Regulations. The WMA, through the authority of its Council, 'demanded the immediate withdrawal of the regulations',⁹⁰ labelling the DSD Regulations as discriminatory, and contrary to international medical ethics and human rights standards. In doing so, the WMA has signalled its condemnation towards the implementation of the DSD Regulations.

A significant point to consider is whether, considering the nature of the WMA warning, physicians who disregard the warning would breach their ethical duty of 'do no harm' to patients. Indeed, according to the WMA, the DSD Regulations would 'constrain athletes to take unjustified medication not based on medical need'. With that knowledge, could a doctor then be held to have failed in compliance with best practice standards and medical ethics, falling short of the standards expected?

Another point of concern is the difference of opinions within the scientific community regarding the link between testosterone and performance advantage. In the Semenya case, the IAAF contend that the DSD Regulations are based on 'strong scientific, legal and ethical foundations'.⁹¹ On the contrary, the WMA contends that there are 'strong reservations about the ethical validity of these regulations', based on 'weak evidence' and currently being debated widely by the scientific community.⁹²

Rebutting general policy and political assumptions, the DSD Regulations and the Semenya decision aligns with the medical account of intersex, which attempts to normalise bodies.⁹³ Disregarding legal and socio-culture understandings of intersex, the Semenya decision strives to normalise her intersex body by imposing medical treatment as a non-negotiable condition for her to professionally compete which in turn ultimately imposes a condition on her employment. Consequently, the institution of sport has further

⁹⁰ World Medical Association (n 11).

⁹¹ *Arbitral Award* (n 2) [286].

⁹² The WMA did not give evidence in the Semenya case. However, WMA President Dr. Leonid Eidelman said 'We have strong reservations about the ethical validity of these regulations. They are based on weak evidence from a single study, which is currently being widely debated by the scientific community. They are also contrary to a number of key WMA ethical statements and declarations, and as such we are calling for their immediate withdrawal'. See World Medical Association (n 11).

⁹³ Fae Garland and Mitchell Travis, 'Legislating Intersex Equality: Building Resilience of Intersex People Through Law' (2018) 38 *Legal Studies* 587, 589.

embedded social, cultural and legal subjugation and marginalisation of Semenya and other intersex participants.

E The Cost of Semenya's Rights Trade-Off

The critical implication of the DSD Regulations and CAS's decision burdens Semenya's personal liberties, freedoms and rights. Although the CAS went to some length to explain the rationale for the majority finding in regard to Semenya being required to take oral contraceptives as not burdensome and proportionate to achieve the IAAF's policy goal of fairness, the decision makes it near impossible for Semenya to have autonomy and a right to make decisions about her body.⁹⁴ According to Dworkin, where decisions are being made for the community as a whole at the comprise of an individual's rights, then it is wrong to sacrifice the rights of one.⁹⁵ Here, CAS's decision has removed Semenya's individual right to her autonomy and her integrity over her body, personality and identity, and as a matter of principle based on Dworkin's rights theory, her rights should not have been traded off for a policy decision of utility.

Furthermore, Dworkin contends that another compelling argument or reason is required if an individual's rights are to be traded off for the benefit of the whole community.⁹⁶ Limitations of freedoms and rights, as captured by Article 29, provides for compelling arguments of public order and general welfare as justifiable reasons to these limits. However, questions arise as to whether CAS's policy decision is compelling enough to displace or limit the individual right of bodily autonomy of intersex bodies. Consequently, in CAS striving to formally protect women in competitive sport, it has excluded the purpose and principles of human rights through its decision, and in turn, has sent a message that permeates across the entire intersex community in the public sphere. If this outcome was, as appears from reading the Semenya decision, a product of the narrow private arbitral framework, then a broader discussion needs to be had about mechanisms to give a voice to these socio-legal and human rights considerations in sport.

⁹⁴ Based on the evidence presented, the majority of the CAS Panel concluded that the side effects of taking an oral contraceptive did not outweigh the need to 'give effect to the DSD Regulations in order to attain the legitimate objective of protecting and facilitating fair competition in the female category', see *Arbitral Award* (n 2) [599].

⁹⁵ Dworkin (n 9) 109.

⁹⁶ *Ibid* 116.

V REVIEW AND REFORM

The Semenya decision has now been appealed to the Swiss Federal Tribunal. While we wait for the outcome, a significant amount of academic and public discussion has focused on notions of fairness and finding the balance between individual rights and utilitarian preferences. These are important socio-legal questions that permeate beyond the seat of CAS in Lausanne. The public condemnation by UNHRC and the WMA suggests that challenges are likely to arise in areas such as the implementation, enforcement and efficacy of the DSD Regulations, leading ultimately to a fragmented sports system.

As noted earlier, by framing Semenya's case as a hard or novel case it suggests that the CAS considered itself constrained as not being in a position of 'stretching or reinterpreting existing rules'.⁹⁷ Indeed, by failing to determine and/or give consideration to the wider social context and human rights perspectives, and preferring to leave it to the courts of the various jurisdictions in question to determine,⁹⁸ the Semenya decision opens up the possibility to explore options to review the current regime in support of the view that CAS is not the appropriate forum to determine human rights matters in sport. At the very least, the Semenya decision suggests that reform is needed to balance information asymmetries that might exist around the contractual arrangements for vulnerable athletes when embarking upon their competitive sporting careers.

⁹⁷ Ibid 106.

⁹⁸ See *Arbitral Award* (n 2) [555].

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