

CASTER SEMENYA AND OTHERS V. INTERNATIONAL ASSOCIATION OF ATHLETICS FEDERATIONS

An athlete or a player cannot win unless he or she or they can participate in the competition. Several of the most significant legal challenges in sports have concerned the right of a particular individual to play in a sport or to compete in the event. It is fascinating how many of the cases have reflected the changing attitudes or sensibilities in the society at large as the courts have encountered challenges for alleged discrimination on the basis of gender, youth, disability or race. The world of sport is a highly gendered one. Our culture constructs a woman and produces particular notions of gender, sex¹ and the difference in a very strict manner.

BACKGROUND

Gender testing or ascertaining gender identity through physical examination was first introduced at the European Athletics Championships in 1966. The IOC became the first organisation to establish a Medical Commission for testing of gender. The 'gender parade' was one of the practices of the IOC Medical Commission undertook at international games or Olympics, in which women athletes were made to parade naked in front of the IOC Medical Commission members. This policy of gender testing continued till 2000, when it was widely criticized as discriminatory and intrusive and was looked down upon as a blatant violation of the right to privacy.

The IOC had allowed transsexuals to participate in the Olympics prior to 2000. However, in order to preserve the sanctity of the sport, the IOC held the right to examine individual athletes if it was suspicious about the gender of the particular athlete.

This paper discusses the discrimination based on non-conformity to either of the sexes. There have been many instances of sex-testing female athletes like Stella Walsh of Poland, Helen Stephens of the United States, German high-jumper Dora Ratjen, Ewa Klobukowska, a Polish sprinter, Maria José Martínez Patiño, a Spanish hurdler and Veronica Brenner, a Canadian Skier, apart from those that have been discussed further in the paper. The first relevant case² concerning the same was that of Renee Richards, a transsexual tennis player. She was born a male, and underwent sex change operation. She then wanted to participate in the US Open and was denied entry.

Another case of participation by a transgender arose for Tia Thompson, a volleyball player, born as a male, but later converted to a woman. She faced a lot of criticism from fellow players and was said to have unfair advantages because of her sex.

The IOC required hormone replacement therapy for at least two years prior to competition, genital reconstruction surgery and a change in their gender identity on all legal documents. But in 2015, the requirement was made more relaxed and said that trans women do not pose an unfair advantage in sports as long as their testosterone levels are consistent with those of

¹For the purpose of this paper, I refer to 'sex' as the category of biological traits usually attributed to males or females, different from 'gender' and 'gender identity' the social role attributed by society to individuals, or the sense of self experienced by individuals.

² Richards v. US Tennis Assn, 93 Misc.2d 713 (1977).

female athletes.³ The IOC also, very importantly ruled that sex reassignment surgery and hormone therapy are redundant. It makes no impact on the performance of the athlete. The limit of testosterone set was at 10 nmol/L.⁴

The controversy arises because only female athletes are discriminated against. Players who have biological advantages like endurance runners having mitochondrial variants, which increase aerobic capacity and resistance to fatigue, or basketball players having large hands or swimmers having fin like palms and feet are not asked to correct themselves. More importantly, there are no scientific proofs that higher testosterone levels necessarily increase the performance. The asking of maintaining testosterone level to below 10nmol//L is not only unnecessary but also raises a question on bodily autonomy. Athletes from poorer sections of the society cannot even bear the costs of these elaborate procedures and often don't even have access to such facilities.

India's tryst with transsexuals in sports arose in the case of *Santhi Soundarajan*. An Indian runner, who won a silver medal in the women's 800 meters at the Doha Asian Games, failed a gender test at the games and the Olympic Council of Asia took off her medal.⁵ She suffers from Androgen Insensitivity Syndrome (AIS). The International Association of Athletics Federation⁶ can request contenders to take such tests at any time and include intensive evaluation by a gynecologist, an endocrinologist, a psychologist, and an internal medicine specialist. There was stark difference in the way Soundarajan was treated by India and the way Semenya, as will be discussed later in the paper was treated by South Africa.⁷

IOC, in 2011 released a new policy in an effort to sidestep the grey area of defining sex. The test of sex was not to be based on chromosomes, DNA or genitals but on hormone levels (specifically androgens). The matter would be best resolved if the sports governing bodies adopt an approach which has a clear legal foundation in international human rights law.

Medical experts opine that these gender tests are immoral.⁸ The entire process of selective testing raises a serious question on the method. Athletes are singled out on the basis of their looks and especially non-white athletes often come under the fire. More so, it is said that when the femininity of non-white athletes are judged by the standards of white femininity thereby making it much easier to find departures and differences.

³ DO TRANS ATHLETES HAVE AN UNFAIR ADVANTAGE IN SPORTS? Adele Jackson-Gibson, May 31, 2017, Available at <http://www.excellesports.com/news/trans-athletes-unfair-advantage-sports/>.

⁴ Ibid.

⁵ CAUGHT IN THE MIDDLE, 2 Aug, 2012, Samantha Shapiro, Available at http://www.espn.in/olympics/story/_/id/8192977/failed-gender-test-forces-olympian-redefine-athletic-career-espn-magazine.

⁶ hereinafter IAAF.

⁷ Available at http://www.espn.in/olympics/story/_/id/8192977/failed-gender-test-forces-olympian-redefine-athletic-career-espn-magazine.

⁸ THE HUMILIATING PRACTICE OF SEX-TESTING FEMALE ATHLETES, Ruth Padawer.

June 28, 2016, The New York Times, Available at <https://www.nytimes.com/2016/07/03/magazine/the-humiliating-practice-of-sex-testing-female-athletes.html>.

DUTEE CHAND V. IAAF⁹

Dutee Chand is an Indian athlete from a village in Odisha, having a biological condition named Hyperandrogenism.¹⁰ The IAAF's Regulations Governing Eligibility of Females with Hyperandrogenism to Compete in Women's Competition¹¹ was in question. The preface to the above mentioned regulations state that the difference in performance of males and females is caused due to higher levels of androgenic hormones in males. The regulations provide for a framework of detecting on suspicion and testing and investigation of female athletes for having higher testosterone levels.

When the case went to CAS, the challenges raised by Chand were fourfold:

1. The Regulations impermissibly discriminated against female athletes on grounds of a natural physical characteristic (namely their androgen levels) and/or sex ("Ground 1");
2. The Regulations were based on the factually flawed assumptions that men and women could be distinguished by reference to testosterone levels and that elevated levels of natural testosterone produced enhanced athletic performance ("Ground 2");
3. The Regulations were not proportionate to their legitimate objectives ("Ground 3"); and
4. The Regulations were an unauthorized form of doping sanction in violation of the World Anti-Doping Agency Code¹² Ground 4").

The panel held that Grounds number 1 and 3 can be granted to Chand but not 2 and 4.

The reasoning given for grounds 1 and 3 is as follows. The IAAF had not raised any dispute to the claim that the regulations were discriminatory in nature and were only applicable to female athletes on natural physical characteristics. The burden of proof that the Regulations were required at all and if necessary, proportionate or reasonable, was on the IAAF.

Fairness in sport is an essential tenet and both the parties agreed upon that. Now on the question of proportionality, Chand claimed that being faced with such charges leads to a lot of detriments like stigma, long-term health risks, invasive medical investigations etc. IAAF, on the other hand argued that the regulations in place were to protect the interests of other female athletes.

The panel held that the regulations were "*antithetical to the fundamental principle of Olympism and that every individual must have the possibility of practicing in sport, without discrimination of any kind*" and imposed a "significant detriment" on the athletes concerned. The IAAF had failed to prove that Hyperandrogenism had a significant advantage over other biological or genetic factors. In these circumstances, the Panel could not say that the advantage was any greater than the "legitimate" advantages arising from factors such as "*nutrition, access to specialist training facilities and coaching, and other genetic and biological variations*".

⁹ Ms Dutee Chand v. Athletics Federation of India (AFI) and The International Association of Athletics Federations (IAAF), Available at http://www.tas-cas.org/fileadmin/user_upload/award_internet.pdf.

¹⁰ Hyperandrogenism means the biological state of a person whose body naturally produces an exceptionally high level of androgens (such as testosterone).

¹¹ Available at <https://www.iaaf.org/about-iaaf/documents/medical>.

¹² Available at <https://www.wada-ama.org/en/what-we-do/the-code>.

On ground number 2, the panel held that Chand could not prove that testosterone was not a material causative factor in athletic performance. Her evidence did not suggest the non-relation of Lean Body Mass and testosterone level in an individual. The difference between endogenously produced testosterone and exogenous administration of the same was not discussed in detail.

On ground 4, the panel briefly said that the regulations do not amount to an inadvertent doping sanction as they do not involve any punishment or censure and did not serve any retributive or deterrent purpose.

The court, hence, suspended the regulation for a period of two years subject to IAAF submitting further evidence addressing *“in particular, the actual degree of athletic performance advantage sustained by hyperandrogenic female athletes... by reason of their high levels of testosterone”*, at the end of the two year period.

The immediate effect of the award is that players like Chand get to compete in future competitions at the domestic and international level as well. The award emphasizes on general principals of human rights’ laws and the Olympic Charter rather than specifically on IAAF rules. In the recent Press Release¹³, dated January 19, 2018 by CAS, the suspension on the IAAF rules has been continued for six more months, as was done after September 2017.

CASTER SEMENYA V. IAAF

Caster Semenya is a 28-year old South African middle-distance runner. She won the 800-m race at the Track and Field World Championship in 2009.

Semenya’s success was quickly tarnished by allegations that she was not a woman and that she was undergoing tests to confirm her sex. She was singled out on the basis of her appearance and questions were raised on her gender. She was subjected to genetic testing owing to her masculine looks.¹⁴ The results of her test were not made public but speculations nevertheless ensued about her high testosterone levels and possibility of her having difference of sex development (DSD), which, as explained further below, means that while she is female, her sexual development has been atypical.

Following the controversy in Berlin, Caster Semenya was subsequently withdrawn from international competition until 6 July 2010 when, it is understood that following hormone treatment, she was allowed to return to international athletics. Semenya went on to compete successfully in a number of international events, winning silver medals in the 800m at both the World Championships in South Korea in 2011 and the London Olympics in 2012 (both of which were bumped up to gold, following the disqualification of the winning Russian athlete for doping offences). For the reasons set out below, Semenya was also able to compete without any

¹³ THE APPLICATION OF THE IAAF HYPERANDROGENISM REGULATIONS REMAIN SUSPENDED, Media Release on Athletics - Dutee Chand Case, January 19, 2018, Available at http://www.tas-cas.org/fileadmin/user_upload/Media_Release_3759_Jan_2018.pdf.

¹⁴ CASTER SEMENYA AND THE “QUESTION OF TOO”: SEX TESTING IN ELITE WOMEN’S SPORT AND THE ISSUE OF ADVANTAGE, Jamie Schultz, Feb 14, 2012, Available at <https://www.tandfonline.com/doi/abs/10.1080/00336297.2011.10483678>.

hormone treatment between July 2015 and April 2018, during which time she won the gold medal for the 800m at the Olympic Games in Rio de Janeiro, Brazil.

In cases of typical sexual development, an individual will have XX chromosomes if she is female and XY chromosomes if he is male. Where a Y chromosome is present, a baby will ordinarily develop testes around the tenth week of pregnancy. Absent any Y chromosome, a baby will ordinarily develop ovaries.

“Disorders of sex development”, or DSDs, are a group of rare conditions, characterised by atypical sexual development. There are many different types of DSD. Some individuals with a DSD, for example, will have XX chromosomes but “ambiguous” or male-looking genitalia, or will be born without a womb. Others may have neither a second X chromosome nor a Y chromosome (XO), or will have an additional chromosome (XXY), which will typically result in atypical development during puberty.

A further type of DSD exists where women have female external genitalia, XY chromosomes and undescended testes. This particular DSD is referred to by doctors as “46 XY” (the majority of the DSDs that are the subject of the DSD Regulations, as set out further below).

Athletes with a DSD will typically have hyperandrogenism, meaning that they will have naturally elevated levels of androgens, including testosterone. An athlete may have high levels of testosterone without the hormone having any effect (or any notable effect) on her body because, for example, she is insensitive or resistant to androgens.

In March 2018, the IAAF informed the CAS that it intended to withdraw and replace the Hyperandrogenism Regulations. The following month, the IAAF enacted the IAAF Regulations for Female Classification (Athletes with Differences of Sex Development), 2018, (“DSD Regulations”).¹⁵

The DSD Regulations establish new requirements governing the eligibility of women with certain DSDs to participate in the female classification in eight events (the Restricted Events).

The Restricted Events include the 400m, 800m and 1500m races (Regulation 2.2(b)2). Caster Semenya regularly participates in each of those events at the international level.

DSD athletes with XX chromosomes do not fall within the scope of the new regulations, in their amended form. Instead, a female athlete will only fall within the scope of the DSD Regulations where she has: one of a number of specific DSDs (which, in the new regulations (as amended) involve XY chromosomes only); an endogenous testosterone level of 5 nmol/L or above; and “sufficient androgen sensitivity for those levels of testosterone to have a material androgenising effect”¹⁶. Athletes with 46 XY DSD ordinarily have testosterone levels well into the male range.

An athlete that falls within the scope of the DSD Regulations will only be able to compete in a Restricted Event on the international stage where she:

- is recognised at law as female or intersex or an equivalent;

¹⁵ Available at <https://www.iaaf.org/news/press-release/eligibility-regulations-for-female-classifica>.

¹⁶ Regulation 2.2(a), DSD Regulations.

- reduces her blood testosterone to below 5 nmol/L for a continuous period of at least 6 months by, for example, using hormonal contraceptives; and
- maintains that level of testosterone both in and out of competition.

There is strict liability for compliance with the eligibility requirements¹⁷, which is the sole responsibility of the affected athlete¹⁸.

The DSD Regulations expressly note that the eligibility requirements do not prohibit an athlete from competing in non-international competitions or in anything other than the Restricted Events¹⁹. The regulations also seek to reassure affected athletes that “surgical anatomical changes are not required”²⁰ and that they are permitted to compete in the male classification or any intersex competition²¹.

The stated purpose of the DSD Regulations is to ensure “fair and meaningful competition in the sport of athletics”, by making sure that competition is organised “within categories that create a level playing field”. The Regulations are premised upon the idea that “high levels of endogenous testosterone circulating in athletes with certain DSDs can significantly enhance their sporting performance”, a proposition for which there is said to be a “broad medical and scientific consensus”²².

In one of the most controversial sporting disputes in recent years, Semenya sought to challenge the DSD Regulations, which place restrictions on the eligibility of women to compete as women in certain sporting events. The finding against her means that, unless she takes measures to reduce her endogenous testosterone levels, she will be unable to compete in events between 400 meters and 1500 meters at the international level.

The implementation of the DSD Regulations was delayed pending the challenge. The precise way in which Ms Semenya articulated her grounds of challenge would remain unclear unless and until further details of the CAS’s award are published. In summary, however, it is understood that the position of Ms Semenya and Athletics South Africa was that the DSD Regulations:

- unfairly discriminate against athletes on the basis of sex and/or gender because they only apply to female athletes and to female athletes having certain physiological traits;
- lack a sound scientific basis;
- are not necessary to ensure fair competition within the female classification; and
- are likely to cause grave, unjustified and irreparable harm to affected female athletes.

The Court of Arbitration for Sport, on May 1, 2019 gave an executive summary judgement in the case of Caster Semenya & Athletics South Africa v. the International Association of

¹⁷ Regulation 3.14, DSD Regulations.

¹⁸ Regulation 3.11, DSD Regulations.

¹⁹ Regulation 2.6, DSD Regulations.

²⁰ Regulation 2.4, DSD Regulations.

²¹ Regulation 2.6(b) and (c), DSD Regulations.

²² Regulation 1.1(d), DSD Regulations.

Athletics Federation²³ dismissing Semenya's request for arbitration and upholding the validity of the DSD Regulations. By a majority, the CAS dismissed Ms Semenya's requests for arbitration and confirmed the validity of the DSD Regulations.

The Panel unanimously concluded that the DSD Regulations are discriminatory, since they target a subset of female athletes (without imposing any restriction on their male counterparts) and since the regulations target a group of individuals on their immutable biological characteristics. That finding is unsurprising in light of the decision in *Dutee Chand* (where the issue was not even in dispute).

It was not in dispute that it was legitimate to have separate, binary categories in sports for men and women, which in turn required the IAAF to devise a means of determining which athletes fall into each category. The Panel in turn accepted the IAAF's submission that categorisation on the basis of a person's legal sex may not always constitute a fair and effective means of categorising athletes for the purpose of sport. The purpose of having separate categories for men and women was not to protect women from having to compete against men per se, but rather to protect those individuals who "lack insuperable performance advantages" from having to compete against those with such advantages. The fact that a person was recognised as a woman in law did not mean that she lacked those performance advantages.

The Panel unanimously found that endogenous testosterone is the primary driver of sex difference in sports performance between men and women. The CAS agreed with the IAAF that all of the factors that contributed to sporting performance are equally available to men and women, except exposure to adult male testosterone. Thus, if the male-female divide in sport is really a divide between those with and without the testosterone-derived advantage, then it is necessarily "category defeating" to permit any individuals who possess the higher levels of testosterone to compete in the lower- testosterone category.

A majority of the panel concluded that elevated testosterone levels in athletes with 46 XY DSD gave such athletes a significant performance advantage over other female athletes. That conclusion – which is likely to be a source of controversy amongst experts in the field – was based on evidence concerning the performances and statistical over-representation of female athletes with 46 XY DSD,

Finally, a majority of the Panel concluded that the DSD Regulations constituted a proportionate interference with the rights of 46 XY DSD athletes. The CAS appears to have reached that conclusion on the basis that the DSD Regulations do not require athletes to undergo surgical intervention, and instead rely on athletes taking oral contraceptives. The CAS nonetheless expressed concerns as to how the DSD Regulations would operate in practice. In particular, the CAS voiced its concerns:

- about the side effects of hormonal treatment;
- that while the DSD Regulations imposed strict liability on athletes, athletes may inadvertently be unable consistently to maintain a natural testosterone level below 5 nmol/L; and

²³ CASTER SEMENYA AND ATHLETICS SOUTH AFRICA V. INTERNATIONAL ASSOCIATION OF ATHLETICS FEDERATIONS, Executive Summary, Available at https://www.tas-cas.org/fileadmin/user_upload/CAS_Executive_Summary_5794_.pdf

- that there was a lack of concrete evidence of actual significant athletic advantage by a sufficient number of 46 XY DSD athletes in both the 1500m and 1 mile events, and the IAAF was cautioned against applying the regulations to those events until further evidence is available. The IAAF has confirmed that it will continue to include the 1500m as a Restricted Event.

Further, the implementation of the DSD Regulations is going to raise a lot of concerns as the International Medical Association has clearly prohibited the usage of drugs for purposes they were not meant to serve. Like in this case, oral contraceptives being used to reduce the testosterone levels in athletes. In such a scenario, how is an athlete supposed to bring herself in the “normal” level without her doctor running the risk of breaching the code ethics and prescribing oral contraceptives?

CONCLUSION

The DSD Regulations offer Semenya, and so many others like her, a new kind of obstacle to women’s sport, as if there aren’t enough already. Reasoning that testosterone levels have a significant impact on one’s physical ability, they indicate that women like Semenya produce so much more testosterone – a hormone generally associated with men – than “normal” women, that certain track competitions between the two would be unfair.

A CAS decision in favour of upholding the DSD Regulations mean that if Semenya chooses to compete in these women’s events, she will have to reduce her natural testosterone levels using external means, frequently get tested to prove that the hormone is within a “normal range”, and finally, run in a body, which is not hers, a body she’s not used to. If changing her biology to her own detriment sounds a tad bit preposterous, there happens to be another option: she could compete without changing herself one bit, only she would have to compete with men. And if that sounds even worse, she could simply call it quits.

Needless to state, the DSD Regulations have been met with considerable critique. For starters, they apply only to women or intersex athletes, but not men. No man is ever asked to compete with women if he has low testosterone levels, and no man is asked to reduce these levels if he produces too much of it. It is almost as if men’s victories come unconditionally, while those of women are constantly met with suspicion.

Further, in attempting to implement a clear-cut, “scientific” rule, the IAAF comes off as almost myopic as far as their social ramifications are concerned. If pushed to a male event, would a woman be considered ‘woman enough’? Would her gender identity be of any consequence? How would it impact her social life outside of sport? With these shortcomings, it is unsurprising that even the United Nations Human Rights Council has called the DSD Regulations “unnecessary, humiliating and harmful”.

Agreed, men and women largely produce differing levels of testosterone, and some women tend to produce more of the hormone than others. However, whether this provides adequate reason to exclude their unaltered bodies from women’s competition remains contentious. In fact, some sports science experts have criticised the DSD Regulations for failing to demonstrate convincingly that high testosterone levels offer a performance advantage vastly greater than that offered by longer legs or better lung capacity.



The DSD Regulations, in the author's opinion are merely Hyperandrogenism Regulations-lite. Despite the criticism, the IAAF has not budged once on its stance, that an unregulated female sporting space can end up disastrous for "normal" women who are not blessed with high testosterone levels. The dystopian end of women's sport that the IAAF envisions is filled with women who produce abnormally high testosterone, effectively excluding all "normal" women from sport. One can't help but draw a parallel to the sporting world back in the '50s, when intrusive gender tests were conducted on merely female participants, just to make sure no man was disguised as a woman to hit the medal jackpot.

With their challenges, Semenya and Chand have revealed to us what's been wrong with sport all along: its incessant need to draw a fine line between male and female categories, where no such line can be conclusively established. If sport is socialized using rigid gender binaries, but regulated using rigid sex binaries, the result is nothing but messy. Especially in a world that is still coming to terms with sex and gender being a whole lot messier. In the immediate case however, a few things are clear: Semenya was born a woman, raised as a woman, and identifies as a woman. All she asks now is that she can run as one.

