THE FIRST STEP TOWARDS A MORE INCLUSIVE ENVIRONMENT IN SPORTS? CASE NOTE OF THE ECTHR'S *SEMENYA V. SWITZERLAND* JUDGMENT

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Abstract: The case of Caster Semenya, a South African athlete, has been a subject of interest for more than a decade. The intersex athlete, who identifies as a woman, is not only one of the world's most successful middle-distance runners, but also one of the most controversial sports rights issues. The IAAF (now known as World Athletics) has repeatedly sought to restrict Semenya under various regulations, claiming that she enjoys an unfair competitive advantage because of her high testosterone levels. The presentation of the case before the ECtHR is intended to elaborate on the above polemical situation. In this paper, we will attempt to review the Court's position in detail, including the judicial proceedings that preceded the ECtHR's decision. Reactions and reflections of civil organisations to the decision's direction will also be underlined to provide a more holistic overview of the case. The study aims to contribute to the literature on LGBTQIA+ rights and to the discourse on the rights of marginalised communities.

Keywords: Caster Semenya; discrimination; intersexuality; LGBTQ rights; sports law

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The case of Caster Semenya, a prominent South African middle-distance runner, has long been the subject of intense debate in both sports and legal circles. At the heart of the issue lies the intersection of gender identity, human rights, and fair competition in sports, and most importantly Semenya's, and other intersex sportspersons' challenge to comply with the regulations concerning issues leading beyond the adequate levels of testosterone. The legal background of testosterone level measurements is rather scarce. Though organizations and different competitions do have policies in this regard, there is no uniform standard which is followed by organisations. The legal battle of intersex sportspersons culminated in a ruling by the European Court of Human Rights (ECtHR) which represented a landmark moment in the ongoing discussion about the rights of intersex athletes and the regulation of sports competitions. The present paper analyses the Court's ruling in *Semenya v. Switzerland*, examining its broader implications for gender equality, LGBTQIA+ rights, and sports law.

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This paper is structured to offer a comprehensive review of the legal, ethical, and human rights issues surrounding the *Semenya* case. It begins by providing a detailed background on the events leading up to the ECtHR ruling, including the history of IAAF regulations, Semenya's career achievements, and the judicial proceedings that preceded the case. This context is essential for understanding the legal framework within which the Court operated and the specific challenges Semenya faced. The core of the paper is a comprehensive case analysis of Semenya's *victory* over the regulator before the ECtHR which is followed by implications for the future. The methodology employed in this paper involves a critical legal analysis of the ECtHR ruling, drawing on legal scholarship, case law, and critical legal theory. This implies that the study proposes the examination of not only the case, the facts, and the reasoning behind the Court's decision, but the Court's interpretation of Articles 8 and 14 of the European Convention on Human Rights, which address the rights to privacy and freedom from discrimination, respectively, as well as the reactions from civil society organizations, legal experts, and sports bodies, as well as an authorial analysis providing a holistic view of the case's impact. The critical aspect is further supported by two analytical cases. First, a reflective segment is introduced based on the pertaining literature and the review thereof. Secondly, in the authorial analysis, the participatory model is presented based on existing scholarship in this domain.

The findings of this paper have significant practical implications. First and foremost, the ruling sets a precedent for how international sports organizations regulate athletes with intersex traits and other gender non-conforming characteristics. While the Court found that the IAAF's regulations were discriminatory, it also acknowledged the complexities of balancing fairness in competition with individual rights. This nuanced approach highlights the challenges faced by governing bodies in ensuring both inclusivity and fairness in sports. Moreover, the decision has broader ramifications for the rights of marginalized communities, particularly those within the LGBTQIA+ spectrum. The case underscores the importance of protecting the rights of individuals whose identities do not fit neatly within traditional categories, whether in sports or other areas of public life. The paper concludes by considering the potential future developments in sports law and policy, particularly considering ongoing debates about the participation of transgender athletes in competitive sports.

BACKGROUND OF THE INVESTIGATION

The 2009 World Athletics Championships in Berlin, organised by the International Association of Athletics Federations (formerly known as the International Association of Athletics Federations, now known as World Athletics, or IAAF), provided interesting and important lessons from a sporting, organisational and legal perspective. It was at this World Championships that Usain Bolt set an all-time best time in the men's 100-metre sprint (9.58 seconds), followed by a world-leading time in the 200-metre and a world record in the 100-metre sprint for the Jamaican relay team in Berlin. In terms of organisation, the competition was a unique arena for strict anti-doping

measures, with the IAAF organisers carrying out nearly 1,000 doping tests during the World Championships, one of the strictest anti-doping procedures in the history of athletics.[1] Finally, the Olympic Stadium in Berlin, the main venue for the World Championships, was also the scene of a particular legal controversy, with the most important competitions taking place there. On 19 August 2009, Caster Semenya, then only 18 years old and representing the Republic of South Africa, achieved the best result in the world that year in the women's 800-metre middle distance final, beating the Kenyan and British podium finishers by a wide margin. However, the legal issue is not directly based on the unparalleled sporting performance. Semenya is an intersex woman[2] with XY chromosomes and, according to the literature, a natural heterogamous testosterone level, which can be colloquially interpreted as an extremely high testosterone level for an average woman. Semenya's competition in the women's category has resulted in one of the most controversial events in professional athletics in the last 10 years,[3] as the IAAF required Semenya to undergo an eligibility test after the South African athlete's victory, the purpose of which is to determine whether she is eligible to compete as a woman in the athletics category.[4] The IAAF applied the test only to Semenya at the World Championships, arguing, inter alia, that the extremely rare and rigorous procedure was justified by Semenya's rapid and particularly marked improvement in her results. Although the official test results have not been made public to date, unofficial reports have suggested that Semenya's medical condition gave her what the IAAF considered to be an unfair competitive advantage.[5] The case was a leading story in the international media, with reports from the BBC and other media outlets summarising Semenya's result as raising three significant questions: (1) can she achieve what a "normal" (*sic!*) woman can achieve an excellent result such as Semenya's, (2) whether women should be tested to show that female athletes who achieve extraordinary results are "really women" (*sic!*) and, also referring to the main problem underlying the IAAF's investigation, (3) whether or not testing shows that the physicality and abilities of a female athlete are different from those of a "normal woman" (*sic!*) constitutes an unfair competitive advantage.[6]

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1 Cf. DASGUPTA, L. Russian twister and the World Anti-Doping Code: time to shun the elitist paradigm of anti-doping regime. *International Sports Law Journal*. 2017, Vol. 17, No. 1–2, pp. 4–8.

2 SWARR, A. L. et al. South African Intersex Activism: Caster Semenya's Impact and Import. *Feminist Studies*. 2019, Vol. 35, No. 3, p. 657.

3 LOLAND, S. Caster Semenya, Athlete Classification, and Fair Equality of Opportunity in Sport. *Journal of Medical Ethics*. 2020, Vol. 46, p. 584.

4 FARHAM, B. Caster Semenya – the Questionable Practice of Gender Verification. *South African Medical Journal*. 2019, Vol. 109, p. 543.

5 LOLAND, *c. d.*

6 AMY-CHINN, D. Doing Epistemic (in) Justice to Semenya. *International Journal of Media & Cultural Politics*. 2011, Vol. 6, No. 3, pp. 311–326.

THE NEW IAAF RULES AND THE PROCEDURE OF THE COURT OF ARBITRATION

The IAAF has reminded Semenya that in order to continue competing in the women's category, she must undergo a testosterone reduction procedure to bring her testosterone levels below the IAAF threshold and, as a result, continue competing in the women's category.[7] Semenya's results did not show any medical interference caused by the procedure; she won gold medals at the World Championships in South Korea and at the London 2012 Olympics.[8] In 2015, in the case of an Indian athlete, Dutee Chand,[9] the Court of Arbitration for Sport suspended the IAAF's ability to impose hormone treatment procedures on the grounds that the court found the IAAF's argument that "hyperandrogenic"[10] athletes like Semenya and the Indian athlete involved in the case, Dutee Chand, had a significant and unfair competitive advantage insufficient.[11] Following the judgment, on 23 April 2018, the IAAF published a new standard (the IAAF Code or DSD Code),[12] the Women's Category Qualification Code, which provided guidance to athletes with gender developmental differences on how to compete in the Women's Category.[13] Although Semenya did not object to the fact that she, as an intersex woman, is covered by the IAAF Code, she refused to comply with the standard, which would have required her, among other things, to undergo a new hormone treatment with unknown side effects.[14]

In summer 2018, Semenya initiated arbitration proceedings before the International Court of Arbitration for Sport in Lausanne, Switzerland, challenging the validity of the IAAF's new rules (the South African Athletics Federation joined the proceedings, supporting Semenya).[15] The International Court of Arbitration for Sport consolidated the cases and delivered its judgment in 2019. The court rejected Semenya's application, arguing that although the IAAF rules are undoubtedly discriminatory, they are necessary to ensure fair competition. In the ruling, the Court of Arbitration for Sport elaborated in detail on the specificities of male-female physiques and abilities, based on expert opinions, highlighting the discrepancies and potential poles caused by differences in a contextual interpretation of roles and gender.[16] In its reasoning, the court argued that,

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7 COOPER, J. Protecting Human Rights in Sport: Is the Court of Arbitration for Sport up to the Task? A Review of the Decision in *Semenya v. IAAF*. *The International Sports Law Journal*. 2023, Vol. 23, p. 151. Also cf.: *Semenya v. Switzerland*, no 10934/2, § 5, ECHR 2023 (*Semenya* case).

8 *Semenya* case, § 6.

9 CAS 2014/A/3759 *Dutee Chand v. AFI & TAAP*.

10 Individual with high male hormone levels.

11 FRANKLIN, S. What Statistical Data of Observational Performance Can Tell Us and What They Cannot: The Case of *Dutee Chand v. AFI & IAAF*. *British Journal of Sports Medicine*. 2018, Vol. 52, No. 7, p. 420.

12 "DSD" stands for Differences of Sex Development.

13 IAAF Athletics, Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development), 2018.

14 Cf.: PASTOR, A. Unwarranted and Invasive Scrutiny: Caster Semenya, Sex-Gender Testing and the Production of Woman In 'Women's' Track and Field. *Feminist Review*. 2019, Vol. 122, No. 1, pp. 1–155.

15 CAS 2018/0/5798 *Athletics South Africa v. International Association of Athletics Federations*; CAS 2018/0/5794 *Mokgadi Caster Semenya v. International Association of Athletics Federations*.

16 CAS 2018/0/5794 *Mokgadi Caster Semenya v. International Association of Athletics Federations*, §§ 288–289.

although athletes have the right to compete and not to suffer any discrimination in the process of competing, female athletes are biologically in a different position than male athletes and therefore female athletes have the right and interest to compete with women.[17] The majority of the judges stated that higher testosterone levels represent a significant improvement in sporting performance from a practical point of view.[18]

After examining the physical and biological issues, the court considered the necessity and reasonableness of enforcing the rules against Semenya and other athletes in the same situation. Here the court applied an interesting reasoning; the judges separated the concepts of a biological woman and a "legal" woman. As the judgment puts it, the fact that a person is legally recognised as a woman and identifies as such does not necessarily mean that they do not have the insurmountable competitive advantages associated with certain biological characteristics that predominate in people who are usually (but not always) legally recognised as men and identify themselves as such. It is human biology, not legal status or gender identity, that determines which individuals possess the physical attributes that give her this insurmountable advantage.[19]

On this basis, the Court of Arbitration found that, given the competitive advantage resulting from the biological endowment, compliance with the IAAF Rules was necessary and reasonable to protect the rights of female athletes competing in the women's category. In this light, the court found that the IAAF had also demonstrated the necessity and proportionality of the new rules.

SUMMARY OF THE PROCEEDINGS BEFORE THE SWISS FEDERAL SUPREME COURT

In 2019, Semenya, as plaintiff, filed a civil action before the Swiss Federal Supreme Court (SFSC) seeking, inter alia, a declaration of gender discrimination against male and female athletes covered by the IAAF Code and a violation of its human dignity and personal rights.[20] Semenya's application was rejected by the SFSC, on the ground, inter alia, that the Court of Arbitration for Sport is sufficiently independent for its decisions[21] in cases involving that body to be regarded as genuine judgments similar to those of the public courts.[22] In this context, the SFSC, referring back to the *Mutu and Pechstein* case, explained that there is a clear interest in ensuring that disputes in the context of professional sport, in particular those with an international dimension, are brought before a specialised court capable of reaching a decision quickly and cost-effectively.[23] In the light of these considerations, the SFSC held in its judgment that, as a federal court, it cannot be considered to be the equivalent of an appeal court supervising the Court of Arbitration for Sport and therefore does not have the power to freely

[17] Ibid., §§ 491–492.
[18] Ibid., §§ 579–580.
[19] Ibid., § 558.
[20] *Semenya* case, § 27.
[21] Cf.: *Mutu and Pechstein v. Switzerland*, nos 40575/10 and 67474/10 (ECtHR 2 October 2018).
[22] BGE 129 III 445, para 3.3.4.
[23] *Mutu and Pechstein v. Switzerland*, nos 40575/10 and 67474/10, § 98, ECHR 2018.

review the merits of the international arbitration awards concerned. On the issue of discrimination against Semenya, the SFSC explained that the women's category would be infringed as a "protected class" in sport if the IAAF rules could not be enforced, taking into account the view of the Court of Arbitration for Sport on the physical differences between male and female athletes.[24] Overall, therefore, the SFSC considered mandatory compliance with the Code to be necessary and proportionate. It should be noted that the SFSC also referred to the European Court of Human Rights judgment *FNASS ao v. France*, in which the Court held that the pursuit of fair and genuine sport as a legitimate aim can result in and justify serious violations of athletes' rights.[25] This element of reasoning is important because doping was the fundamental issue in the French case, but the SFSC drew an analogy between doping and natural advantage, arguing that Semenya's physical and hormonal endowments gave her a similar advantage in competition. In a related context, the SFSC reiterated the ruling of the Court of Arbitration for Sport that categorisation of different competitions on a biometric basis is mandatory because of the potential harm and violations caused by an unfair advantage; categories and distinctions, the SFSC argued, create a more level playing field. In this context, the SFSC uses the example of weight categories in boxing as a way of levelling the playing field in terms of physical strength. In addition, the SFSC rejected all other arguments in their entirety; Semenya also invoked the violation of public order, her personal rights and dignity, while the SFSC consistently invoked the prevention of unfair competitive advantage, which in the case of competing rights may provide a basis for certain restrictions of fundamental rights. The case was subsequently referred to the ECtHR, in which Semenya invoked violations of Articles 3, 6, 8, 13, and 14 ECHR.

THE PROCEDURE BEFORE THE ECTHR

Before presenting the ECtHR judgment, it is worth briefly discussing the preliminary objections of the defendant (Switzerland).[26] In its preliminary assessment, the respondent stressed that Switzerland as a state had no role in the creation of the IAAF statutes and, moreover, since the IAAF is an international organisation based in Monaco, Switzerland and the Swiss authorities have no influence on the activities of the actors involved in the case, in particular the IAAF. Switzerland has therefore primarily raised jurisdictional objections. As regards jurisdiction, Semenya, as the applicant, submitted that the Court of Arbitration for Sport is, in turn, based in Switzerland and that therefore jurisdiction is ratione personae under Article 1 of the ECHR, which is applicable in the present case.[27] The judgments of the Court of Arbitration for Sport are recognised as valid under Swiss law and it should be stressed that the SFSC has review jurisdiction to review the validity of the Court of Arbitration for Sport's judgments. In

[24] *Semenya v. Switzerland*, no 10934/2, § 32, ECHR 2023.
[25] *Fédération nationale des associations et syndicats de sportifs (SFSC) and Others v. France*, nos 48151/11 and 77769/13, ECHR 2018.
[26] *Semenya* case, §§ 81–89.
[27] Ibid., §§ 92–97.

this context, the applicant submitted that the fact that she as a South African citizen did not raise jurisdictional concerns either, since, as stated above, if this would have raised a jurisdictional issue, she would not have been able to participate in the proceedings before the SFSC. The ECtHR clearly found in favour of the applicant on the jurisdictional issue, agreeing with the argument that the Court of Arbitration for Sport and its review were also subject to Swiss law.

The ECtHR then examined the violation of Article 14 ECHR in the context of Article 8. Before presenting the ECtHR's arguments, it is important to outline the content of the two articles. Article 14 provides for the prohibition of discrimination, in particular in relation to the enjoyment of the rights and freedoms set out in the Convention, on grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status. Article 8 provides for the right to respect for private and family life, according to which everyone has the right to respect for private and family life, home, and correspondence, and the exercise of this right may be interfered with by a public authority only in such cases as are prescribed by law, where such interference is necessary in a democratic society in the interests of national security, public safety, or the economic well-being of the country, for the prevention of disorder or crime, for the protection of public health or morals, or for the protection of the rights and freedoms of others.

The Court first examined the applicability of Article 8 in the case. With regard to Article 8, the ECtHR emphasised that the concept of "privacy" is broad and encompasses various aspects, including personal development and the ability to relate to others and the outside world. Here, the Court confirmed and recognised that a person's sexual characteristics, such as Semenya's gifts, fall within the scope of "privacy" under Article 8, and that the requirement that a woman must undergo medical treatment to reduce her testosterone levels in order to continue to participate in certain athletic competitions directly affects her personal identity. With regard to the treatment provided for in the IAAF Code, the ECtHR underlined that one of the key issues in the *Semenya* case is whether Semenya should undergo medical treatment that is harmful to her physical and mental integrity in order to continue her profession or whether she should refuse treatment and give up her preferred competition and, consequently, her profession. In this context, the ECtHR has stated that Article 8 protects personal autonomy and that the choice faced by the applicant has an impact on the rights covered by Article 8 (the right to exercise her profession and the right to physical and mental integrity) and that the facts of the case fall within the scope of this provision. In the context of Article 8, it is also important to underline the ECtHR's findings on the correlation between gender identity and professionalism. In this context, the Court has held that Article 8 can also cover professional activities, including competitive sport. The applicant is severely hampered in the exercise of her profession by the IAAF DSD rules, which prevent her from participating in the international competitions where she has achieved her greatest success. As the Code relates to the gender characteristics (including genetics) of athletes, the provisions are part of the applicant's private life and, in addition, the provisions have significant consequences for her right to respect for her private life, including her reputation, privacy, and dignity. On the basis of these arguments, the Court declared

the complaint admissible, since it was not manifestly unfounded or inadmissible on any other ground under Article 35 of the Convention.[28]

With regard to Article 8, Semenya argued that the application of the IAAF Code as a regulation on sex differences discriminates against intersex persons because the Code is targeted at certain biological characteristics, including the high testosterone levels of the persons concerned. This, in Semenya's assessment, constitutes discrimination on two grounds. On the one hand, the application of the Code discriminates against female athletes who do not possess these characteristics (in particular, naturally high testosterone levels may be highlighted). On the other hand, Semenya has also argued that the Code is also discriminatory towards male athletes. On the one hand, men with high testosterone levels are not covered by the Code, and on the other hand, the Code is primarily concerned with defining femininity and woman as a biological sex, a concept that, according to them, should not apply to men. Finally, the applicant underlined that the IAAF Code disproportionately affects athletes from the "Global South",[29] leading to indirect discrimination on the basis of race, ethnicity, and colour. With regard to the repeated unfair competitive advantage in the rulings of the Court of Arbitration for Sport and the IAAF, the applicant claimed that the causal link between testosterone levels and the performance advantage was disputed. In this respect, Semenya pointed out that there is no consensus and insufficient scientific evidence that higher testosterone levels clearly confer a competitive advantage to the athlete concerned. In this respect, the applicant also pointed out that even the limited evidence that could point to a performance advantage due to high testosterone levels in female athletes shows an average advantage of only 1.6%, which is significantly lower than the advantage observed in men (10–12% on average),[30] and that the most significant performance advantage in the above context is not in the middle distance running but in the sports of hammer throw and pole vault, which are not mentioned in the IAAF Code.[31] Finally, Semenya underlined that there are concerns about the use of treatments involving the reduction of testosterone levels (such as oral contraceptives), both because the effects of such treatments on elite athletes are unknown and because there are no specific guidelines for the doctors responsible for the treatment.[32]

The defendant, Switzerland, highlighted in its arguments the margin of appreciation and the protection of the women's category as a legitimate aim. With respect to the margin of appreciation, the defendant underlined that, although the IAAF Code is indeed discriminatory with respect to biological sex, the provisions of the Code are necessary, reasonable, and proportionate to ensure fairness and protection of the female athletes as a "protected class" and to guarantee fair competition. The Respondent emphasised that, contrary to Semenya's argument, testosterone is the primary factor in the physical advantage and gender performance gap, so that athletes competing in the female category

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[28] Ibid., § 128.

[29] Ibid., § 129. Also, in this regard refer to: BATELAAN, K. – ABDEL-SHEHID, G. On the Eurocentric Nature of Sex Testing: The Case of Caster Semenya. *Social Identities*. 2020, Vol. 27, No. 2, pp. 146–165.

[30] *Semenya* case, § 134.

[31] Ibid.

[32] Ibid., §§ 129–138.

who have higher, and in some cases equal, testosterone levels to male athletes enjoy a significant competitive advantage. The defendant derived the question and limitation of the competitive advantage from the principle of fair and equitable competition. In this context, the Respondent argued that in most sports, including athletics, women and men compete in separate categories because men have a natural physical advantage and, although the binary classification of athletes into male and female categories can be challenging, the differentiation of categories is a necessary and proportionate procedure to ensure that athletes can compete on as equal a footing as possible.

Third party participants have also intervened in the case. The World Athletics argued that the main issue in the case is whether Semenya has benefited from a system of institutional and procedural guarantees that are fair to resolve the dispute and whether Switzerland has fully complied with its positive obligation in this respect. They argue that, given the evolving nature of the area and the lack of consensus, states and sporting organisations should have considerable discretion in determining the appropriate balance of interests. They contest the violation of the athlete's right to exercise her profession, considering the application of the IAAF Code as a necessary and proportionate measure to ensure fair competition. Athletics South Africa, a South African NGO, also shared its views, arguing that the provisions of the Code are disproportionate and arbitrary against female athletes with high testosterone levels. Three UN experts invited by the Court (Tlaleng Mofokeng, Nils Melzer, and Melissa Upret) also commented on the case. The UN experts expressed their concern about the stereotypical nature of the Code, arguing that the IAAF DSD rules are based on gender and racial stereotypes about who is a woman and, in particular, who is a female athlete. The experts also pointed out that these stereotypes are simplistic and, echoing Semenya's argument, have a disproportionate impact on female athletes of African or Asian origin, especially those from the Global South region mentioned above.[33] The Canadian Centre for Sport Ethics also pointed out that only a minimal number of sports use the biometric categorisation (such as weight categorisation) repeatedly invoked by the defendant and that the IAAF DSD Code is the only case where a physical characteristic is used as an eligibility criterion and consequently limits the access of certain athletes to competition. Partly in line with this, three organisations working to defend the rights of women athletes (Women Sport International, International Association of Physical Education and Sport for Girls and Women (IAPESGW) and International Working Group for Women in Sport (IWG)) have also argued that the Code is simplistic and exclusionary in its provisions on the physical attributes of certain athletes. It is noted that many other physical, psychological, and biological characteristics, as well as social and economic factors, influence sport performance, not only and exclusively testosterone levels.[34] The case also raises concerns about the exclusion of intersex people, the ethical aspects of treatment and the integrity of athletes in relation to the IAAF DPD Code.[35]

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[33] Ibid., § 149.
[34] Ibid., § 151.
[35] Ibid., §§ 152–154.

The ECtHR began its assessment of the case by laying down general principles.[36] In relation to Article 14, the Court emphasised that discrimination is discriminatory if it is not based on objective and reasonable justification, i.e., if it does not serve a legitimate aim or if there is no reasonable proportionality between the means employed and the aim pursued.[37] Discrimination therefore generally covers cases where one person or group is treated less favourably than another without adequate justification – even if the Convention does not require the most favourable treatment.[38] The final fundamental principle of discrimination highlighted by the ECtHR is the issue of the burden of proof. Here, also referring to the *Biao* judgment cited several times in the case, the Court held that where the applicant has proved the existence of different treatment, it is for the respondent to prove that the different treatment was justified. Applying the above principles and findings to the present case, the primary issue in the case is therefore whether Semenya was discriminated against and, if so, whether Switzerland has fulfilled its obligations in this respect. The ECtHR agreed with Semenya's argument that she had been discriminated against because of her testosterone level. The Court notes that the provision on discrimination based on *sex* under Article 14 also covers discrimination based on sex (genetic) characteristics. The Court first reflected on the discrimination of male athletes and athletes from the Global South, as raised by Semenya. Here, the Court categorically stated that the ECtHR would refrain in this case from considering the question of whether Semenya could rely on discrimination based on race, ethnic origin, or colour and would focus specifically on the possible discrimination of the applicant. With regard to Semenya, the Court found that, although there was no adversarial debate in the domestic proceedings on the question of whether the applicant was comparable to persons in a situation analogous or comparable to hers, it was implicitly accepted in the domestic proceedings that the situation of female athletes and Semenya as an intersex athlete was equivalent and comparable to that of other female athletes, and thus accepted the applicant's claims of discrimination based on sex and gender characteristics as a whole.[39] In relation to Switzerland's obligations, the ECtHR focused on the identification and assessment of the positive obligations of the state;[40] i.e., whether Switzerland had fulfilled its positive obligations to protect the applicant against possible discriminatory treatment under the DSD legislation. The Court emphasised, in the context of Article 8 ECHR, that a state will only adequately fulfil its positive obligations if it ensures respect for privacy in relations between individuals by establishing a normative framework which takes into account the different interests to be protected in the particular case concerned.[41] In this context, the Court recalled the exceptional

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36 Ibid., §§ 155–156.

37 *Biao v. Denmark* [GC], no 38590/10, § 90, ECHR 2016; *Khamtokhu and Aksenchik v. Russia* [GC], nos 60367/08 and 961/11, § 64, ECHR 2017.

38 *Abdulaziz, Cabales and Balkandali v. the United Kingdom* nos 9214/80; 9473/81; 9474/81, § 82, ECHR 1985.

39 *Semenya* case, § 161.

40 *Chassagnou and Others v. France* [GC], nos 25088/94, 28331/95 and 28443/95, §§ 91–92, ECHR 1999; *Timichev v. Russia*, nos 55762/00 and 55974/00, § 57, ECHR 2005.

41 *Platini v. Switzerland,* no 526/18, § 61, ECHR 2020, *López Ribalda and Others v. Spain* [GC], nos 1874/13 and 8567/13, § 113, ECHR 2019.

possibility of discrimination on grounds of sex, i.e., that discrimination based solely on sex can only be recognised as lawful on the basis of very strong considerations and "particularly compelling" reasons.[42] It is also important to note the Court's argument in favour of narrowing the scope of the state's discretion. In its judgment, the ECtHR also recalls the *Hämäläinen* and *Christine Goodwin* judgments, which state that where a particularly important aspect of an individual's existence or identity is at stake, the margin of appreciation left to the state is limited.[43]

The Court assessed the arguments concerning the assessment of the DSD Code by both the Court of Arbitration for Sport and the SSOA. From the judgment of the Court of Arbitration for Sport, the ECtHR highlights that two fundamental and critical concerns have been raised about the Code: (1) not only does hormonal treatment have "significant" side effects, but an athlete who strictly adheres to the prescribed hormonal treatment may still be unable to meet the requirements of the DSD Code and it is doubtful – at least not fully proven – whether athletes with higher testosterone levels are actually at an advantage in the middle distance running. Nevertheless, the Court of Arbitration for Sport did not suspend the DSD Code, as it did a few years earlier in the case of the Indian athlete Dutee Chand, mentioned above, because it had not been clearly established that hyperandrogenic athletes have a significant performance advantage over other female athletes. This controversy is further exacerbated by the fact that Article 2 of the DSD Code specifically provides that in case of doubt, the interests of the athlete should prevail. In addition to the scientific doubts, the ECtHR has also made an important finding on the link between exclusion and intersexuality. Citing, inter alia, reports by the UN High Commissioner for Human Rights, the ECtHR confirmed that there are serious concerns about discrimination against intersex athletes based on rules similar to those at the basis of the present case.[44] These concerns are supported by the comments of some third parties in the present case and by recent scientific research. In the light of the foregoing, the Court concludes that neither the Court of Arbitration for Sport nor the SFSC has thoroughly examined the reasons justifying the objective and reasonable justification of the DSD rules, in particular in the context of the provisions of the ECHR.

In the SFSC proceedings, the ECtHR found that in the federal proceedings the Swiss court merely confirmed the conclusions of the Court of Arbitration for Sport based on a very narrow concept of public policy, without carrying out its own examination of the issues in dispute. In this context, the Court also explained that the SFO had failed to carry out a comprehensive and adequate assessment of the alleged discriminatory treatment and a proper balancing of all relevant interests, as required by the ECHR. In this regard, the ECtHR analysed in detail that the SFSC failed to balance the legitimate aim of fair competition against the interests invoked by the applicant, including

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42 *Stec and Others v. the United Kingdom*, no 65731/01, § 52, ECHR 2005.

43 Both cases concerned the rights of transgender people: *Hämäläinen v. Finland* [GC], no 37359/09, § 67, ECHR 2014; *Christine Goodwin v. the United Kingdom* [GC], no 28957/95, § 90, ECHR 2002. Also see: *X and Y v. the Netherlands*, no 8978/80, ECHR 1985.

44 Report of the United Nations High Commissioner for Human Rights, Intersection of race and gender discrimination in sport, no A/HRC/44/26, 15 June 2020, §§ 24–35.

the applicant's dignity, reputation, physical integrity, privacy, and Semenya's specific gender characteristics. This analysis would also have been of paramount importance because the Court considered that Semenya had no real choice in complying with the DPD; either to comply with the medical treatment, risking damage to her physical and mental integrity, in order to reduce her testosterone levels and continue her profession, or to refuse the treatment, which could lead to the loss of the opportunity to participate in the competitions she preferred or even to the abandonment of her career. According to the Court, the SSOA also ignored the assessment of the side effects of hormonal treatments, in particular given that the health and performance of a professional athlete may be affected differently from that of a non-professional athlete. In the light of the above, the ECtHR found that Switzerland had exceeded the limited margin of appreciation available to it in the present case, which concerned discrimination based on sex and sexual characteristics and which could only have been justified by substantial and serious considerations, and that the DSD rules were disproportionate to Semenya.[45] In light of the above, the Court held that there had been a violation of Article 14 in conjunction with Article 8 ECHR.[46]

The ECtHR then also examined the violation of Article 3 ECHR. Article 3 prohibits torture, stating that *"no one shall be subjected to torture or to inhuman or degrading treatment or punishment"*. The investigation into the violation of Article 3 stems from Semenya's argument that, under the DSD rules, as an intersex athlete, she is obliged to submit her body, in particular her genitals, to tests that were not medically necessary.[47] This included the use of contraceptives, an obligation which violated the psychological integrity of the athlete. The third-party organisation World Athletics requested that the Article 3 investigation be dismissed, arguing that the DSD Code did not meet the threshold of seriousness for the application of Article 3, as the Code did not provide for compulsory medical treatment. The organisation noted that subjecting an athlete to the provisions of the Code is a discretionary decision of the athlete concerned.[48] Partly reflecting this, Athletics South Africa argued that the application of Article 3 could be based on the implications of the Code; in its view, the DSD Code could ultimately suggest that Semenya's physical condition is a "problem" that needs to be addressed by medical means and treatment, an image that is an affront to human dignity.[49] In support of this opinion, Human Rights Watch and two UN experts also indicated that the sex screening tests are extremely humiliating for the athletes concerned and that the extreme psychological burden of both the treatment and the attention and media publicity surrounding the participation in such treatment may provide grounds for a finding of a violation of Article 3.[50] The Court first introduced the principle argument in the judgment. Emphasising the previous practice of the ECtHR, the Court stated that the level of seriousness referred to above must be determined on a case-by-case basis, taking

[45] *Semenya* case, § 201.
[46] Ibid., § 202.
[47] Ibid., § 206.
[48] Ibid., § 210.
[49] Ibid., § 211.
[50] Ibid., § 212.

into account the contextual elements of the case. Referring to the *Keenan v. the United Kingdom* judgment, the Court also pointed out that, according to its practice, treatment can be considered "degrading" if it causes fear, anxiety and feelings of inferiority, humiliates or degrades the person concerned, may break down the person's physical or moral resistance, and may lead the individual to act against their will or conscience. In the light of these principles, the ECtHR found no justification for the application of Article 3, since the applicant was not in fact subjected to the medical examinations or treatment indicated, given that Semenya herself had renounced the treatment, and therefore the threshold of gravity necessary for the application of Article 3 was not reached by the implementation of the DSD legislation.[51]

Finally, the ECtHR examined the violation of Article 13, i.e., the right to an effective remedy. In this context, the ECtHR essentially referred to the reasoning applied in the context of Articles 8 and 14 and found a violation of Article 13, i.e., that the Swiss SSO had not provided the applicant with adequate institutional and procedural guarantees. On the one hand, the ECtHR recalls that Semenya had no choice as regards the "first instance" procedure, since she was obliged to participate in the proceedings of the Court of Arbitration for Sport, which, as stated above, did not take into account the South African athlete's rights under the ECHR. On the other hand, the SFSC had a limited review of the decision of the Court of Arbitration for Sport, for example, it did not analyse in detail Semenya's claim of discrimination. Taking all these circumstances into account, the Court concluded that the remedies available to the applicant, in the particular context of the case, were not effective within the meaning of Article 13 of the Convention. As a result, the Court found not only a violation of Articles 14 and 8 of the Convention, but also a violation of Article 13. In this connection, the Court did not rule on the infringement of Article 6, since the right to apply to the courts, as set out above, does not raise a separate question.

To summarise the ECtHR's decision, the Court held by four votes to three that there had been a violation of Article 14 of the Convention in conjunction with Article 8, and also a violation of Article 13 in relation to that Article. By four votes to three, the Court also ordered Switzerland to pay the applicant the sum of EUR 60,000.

THE FIRST STEP TOWARDS A PROGRESSIVE ATHLETIC WORLD? – OPINIONS OF THE JUDGES AND EXPERTS' REFLECTIONS

As can be seen from the above paragraph, the ECtHR's decision was not unanimous, and a reading of the judgment shows that there were conflicting opinions among the judges. The following is a concurring opinion by Judge Pavli, a partially concurring opinion by Judge Serghides and a joint dissenting opinion by Judges Grozev, Roosma, and Ktistakis.

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[51] *Keenan v. the United Kingdom*, no 27229/95, § 110, ECHR 2001.

In his concurring opinion, Judge Pavli expressed his full agreement with and support for the majority position. Judge Pavli concluded that the Court's task is not to decide scientific disputes or to determine fairness in sport, but to examine whether the means used to achieve the desired end are proportionate and do not infringe the fundamental rights of sportsmen and sportswomen. In the opinion, Judge Pavli discusses the jurisdiction and the scope of review in the case, stressing that Swiss jurisdiction in this case is not merely an arbitrary use of Swiss courts, but relates to the compulsory arbitration procedure used by the applicant, which had an international dimension, underlining that he supports the majority position on Article 13. A particularly important part of the opinion deals with binary competition categories. Here, Judge Pavli points out that Semenya did not contest the binary categories and her legitimacy, but questioned whether she, as an intersex athlete who identifies as a woman, should be allowed to compete in the female category without any additional conditions relating to her biological characteristics. According to Judge Pavli, the Court's role is to ensure that the fundamental rights of athletes are respected, taking into account the challenges posed by non-binary situations. This is particularly important because the judge was highly critical of the national court's failure to address the issue of gender discrimination in sufficient depth. In relation to discrimination, Judge Pavli condemned the national court's minimisation of the issue of discrimination and also highlighted in his opinion the lack of emphasis on the assessment of the effects of ongoing hormone treatment on the physical and psychological integrity of the applicant, particularly in light of the ethical concerns raised by a number of medical organisations about the prescribed treatment protocol.

Judge Serghides partly agreed and partly disagreed with the majority decision. Judge Serghides agreed with the majority view on the finding of a breach of Articles 8, 13, and 14, but disagreed on the assessment of Article 3. According to them, in Semenya's case, Article 3 would not only have been applicable, but also a violation of Article 3 would have been established. Judge Serghides points out in this respect that the applicant was born a woman, was a woman from birth, and identified herself as a woman, competing with women throughout her career. The fact that Semenya had to choose between taking hormone treatment or essentially giving up racing created a forced and humiliating decision situation. The choice, and the discretionary decision of the competitor not to participate in treatment, highlights a deeper dilemma. Indeed, the treatment could have serious consequences for Semenya's physical and mental health, and the applicant had no alternative: either to undergo hormone treatment that would substantially interfere with her integrity and health, or to give up professional racing. According to Judge Serghides, this choice situation was also a "double-edged sword" for the applicant, as it forced her to violate one of her rights in order to preserve her physical integrity or to exercise her right to privacy – the judge described Semenya's decision situation as a choice between the plague and cholera, using a vivid example. The seriousness of Article 3 is therefore based, according to the judge, on the fact that the choice is also a threat; Semenya is therefore either undergoing an extremely stressful hormone treatment which seriously endangers her physical integrity, or giving up a career in which she has achieved excellent results – the exercise of autonomy is therefore a disadvantage, and giving up autonomy would have meant the opportunity to compete, but at

the sacrifice of physical integrity. This situation of constraint ultimately also leads to vulnerability, and therefore, in the light of the above, the judge considered that the Court was wrong to reject the complaint for breach of Article 3.

Finally, it is important to note the joint dissenting opinion of Judges Grozev, Roosma and Ktistakis. According to the joint opinion, by significantly extending the scope of the Court's jurisdiction, by extending it beyond Article 6 to include Articles 8 and 14, the Court has in effect created a comprehensive jurisdiction over the whole world of sport. As regards jurisdiction, the judges warn that the Court's jurisdiction is based on Swiss law, and that under the Convention it is for the federal court to interpret and apply national law. It is clear from the decision of the SSTC that Semenya is not domiciled in Switzerland and that the IAAF is based in Monaco, so that the limited review by the Swiss court, which is challenged in the present judgment of the Court, can be considered to be well founded. As regards the DSD rules, the three judges proposed different interpretations. In their view, the Code, which provides for treatment, has a specific objective; to ensure equal opportunities for women in sport. On the issue of discrimination, the judges explained that they consider that the majority's position comparing Semenya's situation with that of other women in the differential treatment test is questionable, given that the applicant is genetically very different from other women. In the light of the above, the judges indicated that they were "not convinced" that there had been a violation of Articles 8 and 14 in the case.

Immediately after the verdict, Caster Semenya issued a statement through her lawyers indicating that she is overwhelmed by the verdict, quoting the athlete as saying, *"justice has spoken but this is only the beginning"*.[52] Semenya said the ruling will be significant for all athletes as it casts doubt on the future of any similar rule [DSD rule]. However, the *final* verdict may be some time in coming, as World Athletics indicated immediately after the ruling that it would contact the Swiss government and request that the case be referred to the ECHR Grand Chamber for a final decision.[53]

Following the judgment, several NGOs welcomed the ECtHR decision. The Commission for Gender Equality (CGE) stressed that the decision is an important step against institutionalised discrimination on the basis of sex and called on the South African government to put pressure on the World Athletics Federation to ensure that the ECHR ruling is respected and, in particular, to protect female athletes who are unfairly discriminated against.[54] The UN experts, like the CGE, have issued a formal statement of support and appreciation for the ECtHR judgment. Citing from the report, the experts underlined that *"all women should be able to participate on an equal basis, and their*

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[52] IMRAY, G. Olympic champion Semenya says she is 'elated' after ruling in testosterone case but has suffered. In: *AP* [online]. 12. 7. 2023 [cit. 2024-08-29]. Available at: https://apnews.com/article/semenya-human-rights-court-ruling-testosterone-fe11e239e68c943781f024c99162747c.

[53] Court says Semenya can appeal testosterone limit for female athletes. In: *Reuters* [online]. 12. 7. 2023. [cit. 2024-08-29]. Available at: https://www.reuters.com/sports/athletics/semenya-wins-appeal-over-human-rights-violations-2023-07-11/.

[54] BALOYI, J. Commission for Gender Equality welcomes the European Court of Human Rights' ruling on Caster Semenya. In: *South African Government* [online]. 12. 7. 2023 [cit. 2024-08-29]. Available at: https://www.gov.za/speeches/commission-gender-equality-welcomes-european-court-human-rights%E2%80%99-ruling-caster-semenya-12.

sex characteristics should not be used as a reason to exclude them" and World Athletics and similar non-state actors *"must refrain from interventions that present women with the perverse choice of either compromising their health and sense of self, identity and integrity as women by accepting the interventions, or compromising their careers and indeed their livelihoods and socio-economic well-being by rejecting them"*.[55]

WHAT IS BEYOND THE FINISH LINE? – LAMENTATIONS ON THE FUTURE OF INTERSEX ATHLETES' RIGHTS FOLLOWING THE SEMENYA DECISION

The ECtHR's ruling in the *Semenya* case has undeniably marked a milestone for gender rights and inclusivity in sports; however, the road ahead for gender inclusivity remains fraught with challenges. While celebrated for affirming Semenya's rights and recognizing the discriminatory impact of testosterone regulations, the judgment has also highlighted the delicate balance between fairness in competition and respect for individual identity. One point is clear: there is a pressing need for fair, science-based policies that accommodate biological diversity while maintaining a level playing field. This challenge remains formidable, and thus far, no sports governing body has fully addressed it. Cases of similar complexity continue to emerge. For instance, during the drafting of this study, the case of Algerian boxer Imane Khelif attracted significant controversy at the Paris Olympics in the summer of 2024. Khelif, who ultimately won the gold medal, faced an unprecedented amount of media scrutiny – and online harassment – due to her physical appearance and alleged trans/intersex identity, despite these claims being entirely unfounded. Khelif's eligibility to participate in the women's boxing category was disputed when she was disqualified by the International Boxing Association (IBA) in a prior tournament after reportedly failing a gender test. A controversy similar to Semenya's ensued: the IBA's test differed from the one used by the International Olympic Committee (IOC), yielding conflicting results on the same gender-related question. Furthermore, the IBA's tests are not recognized by the IOC, leading to an "organizational impasse" that ultimately victimized Khelif.

The ECtHR's judgment is groundbreaking, especially when considering future cases such as Khelif's, as it raises the issue of gender categorization in sports to a supranational level, underscoring the enduring tensions around it. However, this judgment alone will not resolve such conflicts. Semenya's case not only highlights the challenges faced by intersex athletes but also raises broader questions about the treatment of transgender athletes and whether existing sports frameworks can evolve to embrace diversity. In this regard, gender expert Åsa Ekvall provides a critical perspective, noting that the current

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[55] United Nations. UN experts welcome European Court ruling upholding rights of women athletes in *Semenya v. Switzerland*. In: *UNHRC* [online]. 17. 7. 2023 [cit. 2024-08-29]. Available at: https://www.ohchr.org/en/press-releases/2023/07/un-experts-welcome-european-court-ruling-upholding-rights-women-athletes.

evaluation system is highly discriminatory, especially toward non-Western athletes, thus exposing a deeper socio-cultural and political layer to the problem.[56]

An agenda for reform must consider how biases regarding women's appearance intersect with gender discrimination, ensuring that future regulations do not disproportionately impact athletes based on nationality or race. Further scrutiny of the role of Western institutions, particularly in setting and enforcing standards, may reveal implicit biases that hinder global inclusivity. There is also an urgent need to address inconsistencies in testing standards. Revisiting Khelif's case and reflecting on Semenya's protracted struggle to *prove her gender*, organizations should aim to develop a uniform system of gender testing and evaluation that prevents conflicts and avoids questioning an athlete's eligibility based on sex. Future policies should integrate the evolving body of empirical findings from medical and sports science research, ensuring that sports regulations are rooted in objective science and not organizational standards.

UNDERSTANDING AND RESOLVING TENSIONS BETWEEN TRADITION AND TRANSFORMATION – AN AUTHORIAL CASE FOR PARTICIPATORY JUSTICE IN SPORTS

Being a critical case analysis, it is important to include a brief authorial analysis, too. In view of the above segment as well, one question must be put in the forefront of sports law: should, or much rather, must global sports governance evolve beyond rigid categories? The *Semenya* case, at its core, comes down to the assessment of this polemic; it illustrates how current or *traditional* policies disproportionately affect intersex and non-binary athletes, but it also exposes how race and geography compound these injustices. However, one must not forget that these issues are novel. For athletes from the Global South, particularly women of colour, eligibility rules often function as gatekeeping mechanisms[57] that marginalize their achievements under the guise of fairness.[58]

To dismantle these inequities, a progressive, intersectional justice framework is instrumental to be introduced. One of the critical failures highlighted by the *Semenya* case is not only the overly bureaucratic and time-consuming assessment of such an intricate and sensitive topic but also the exclusion of athletes from the policymaking processes that profoundly affect their lives. Representation is critical and fundamental in this context and without it, decisions about eligibility criteria and competition rules may be, and demonstrably are often made in opaque settings dominated by bureaucrats and

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[56] Controversy surrounding Olympic boxing champion Imane Khelif: what does the future of gender inclusion in elite sport look like? In: *Erasmus University Rotterdam* [online]. 14. 8. 2024 [cit. 2024-11-08]. Available at: https://www.eur.nl/en/news/controversy-surrounding-olympic-boxing-champion-imane-khelif-what-does-future-gender-inclusion-elite.

[57] HEGGIE, V. Testing Sex and Gender in Sports; Reinventing, Reimagining and Reconstructing Histories. *Endeavour*. 2010, Vol. 34, No. 4, pp. 157–163.

[58] For a fantastic analysis of this phenomenon in more detail see: MAGUBANE, Z. E. Spectacles and scholarship: Caster Semenya, Intersex Studies, and the Problem of Race in Feminist Theory. *Signs*. 2014, Vol. 39, No. 3, pp. 761–785.

legal experts, with little input from those most impacted.[59] This top-down approach not only undermines the legitimacy of these policies but also perpetuates a sense of alienation; one that lowers the voice of those whose messages and concerns have been systematically disregarded in sports governance. The participatory model of governance, therefore, also addresses democratic deficit. Though currently, participatory governance in sports is rather rudimentary, or in the majority of cases, non-existent, the future policy-making and decision-making bodies in sports should establish formal mechanisms in three key areas. Firstly, they should include intersex, non-binary, and transgender athletes in decision-making processes. This might include athlete advisory councils, public consultations, and collaborative drafting of rules as well as the involvement of NGOs working in this field. Secondly, they should establish transparency rules in policymaking and decision-making in view of the participatory approach. This would involve a new transparency model that takes into account "stakeholderism" and organizational interests, however, it would also promote accountability and transparency in the establishment of rules on gender categories, making certain that evidence-based scientific findings and input from civic organizations are considered. Lastly, and perhaps the most radical but necessary step in establishing a new framework, is rethinking the current binary approach in competitive sports. I must accentuate here that this is not an advocacy for the reformulation of gender categories. Much rather, a wake-up call to governing agencies that the *Semenya* case is most probably one of the first decisions among many future cases that demonstrate the current limitations of the systems and frameworks that aim to categorize athletes as either male or female based on rigid criteria.

Achieving these transformations will be, undoubtedly, extremely difficult. Coordinated efforts across multiple stakeholders, political, and financial interests, as well as cultural and societal environments will be necessary. The *Semenya* case, however, provides a unique opportunity to start the conversation on a global coalition dedicated to reimagining sports governance.

CONCLUSIONS

The ECtHR's *Semenya* ruling is an important decision in the context of intersex and, more broadly, gender equality in Europe. The judgment is also relevant because the literature on Caster Semenya and the perception and perception of sexual minority athletes, which is largely ethical, humanities, and social science literature,[60] can be enriched with legal approaches, thus strengthening the academic discourse on the subject. While it is perhaps too early to speculate on the practical significance of the

[59] For athlete representation issues cf.: KIHL, L. A. – SCHULL, V. Understanding the Meaning of Representation in a Deliberative Democratic Governance System. *Journal of Sport Management*. 2020, Vol. 34, No. 2, pp. 173–184.

[60] For the more important ones regarding the present analysis: KARKAZIS, K. et al. Out of Bounds? A Critique of the New Policies on Hyperandrogenism in Elite Female Athletes. *The American Journal of Bioethics*. 2012, Vol. 12, No. 7, pp. 3–16; NYONG'O, T. The Unforgivable Transgression of Being Caster Semenya. *Women & Performance: A Journal of Feminist Theory*. 2010, Vol. 20, No. 1, pp. 59–100.

Semenya ruling, it is clear that the case can be seen as a key case in relation to identity politics surrounding sport, including the judgement of transgender athletes.[61]

The other practical issue of the ruling is specific to Semenya, who has been "banned" from competition for five years, and it is perhaps not an exaggeration to say that the rules have broken the athlete's career, rich in Olympic and world gold medals and records, in two.[62] Although the ECtHR ruling is binding on Switzerland, Semenya will have to challenge the rules at the Court of Arbitration for Sport in Lausanne, in order for Monaco-based World Athletics to consider withdrawing the rules.

To sum up, the ECtHR's ruling marks a significant moment in the intersection of sports law, gender rights, and human dignity.[63] While the judgment offers a degree of protection for athletes like Semenya, it also underscores the ongoing challenges in balancing fairness in competition with the rights of marginalized groups, including intersex and transgender athletes and sports ethics.[64]

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[61] BIANCHI, A. Transgender Women in Sport. *Journal of the Philosophy of Sport*. 2017, Vol. 44, No. 2, pp. 229–242.

[62] Semenya won gold medals in the 800m in both London (2012) and Rio de Janeiro (2016).

[63] SVÁK, J. Intersex Sportswomen as a Driving Force of Transnational Human Rights Protection. *Právny obzor*. 2023, Vol. 106, No. 6, pp. 543–566.

[64] CAMPORESI, S. – MAUGERI, P. Caster Semenya: Sport, Categories and the Creative Role of Ethics. *Journal of Medical Ethics*. 2010, Vol. 36, No. 6, pp. 379–379.