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WHY AN IMPROPER VENUE CAN HAVE LASTING EFFECTS ON THE INTERSECTION OF SPORT  
AND HUMAN RIGHTS

By  
Jenna Ebersbacher\*

I. INTRODUCTION

Picture it's 2012. You just won your first Olympics in the 800-meter dash. This is the moment you've prepared for since childhood. You return home to crowds of people full of pride and celebrating your success. You win again in 2016. Then a group of people who don't look like you, think like you, or know anything about you decide that you can no longer pursue your dream. This is the reality that two-time Olympic Gold-Medalist runner Caster Semenya is facing along with thousands of other intersex athletes across the world.<sup>1</sup>

Caster Semenya is a 29-year-old South African cisgender<sup>2</sup> woman.<sup>3</sup> It was not until she was 18 that she was classified as intersex<sup>4</sup> after being subjected to gender testing where the level of testosterone in her blood was measured to determine if it fell within the standard range for a female.<sup>5</sup> In April 2018, the governing body of the Olympics, World Athletics (called the International Association of Athletics Federation ("IAAF")) when the decision was announced), announced new eligibility regulations that restrict intersex athletes like Semenya from participating in long distance running events in the Olympics unless they reduce their testosterone levels.<sup>6</sup> Semenya appealed this regulation to the Court of Arbitration for Sport ("CAS"), the legal authority of World Athletics, who upheld the

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1. *See How common is intersex?* INTERSEX SOCIETY OF N. AM. (1993-2008), <https://isna.org/faq/frequency/>.

2. Cisgender: of, relating to, or being a person whose gender identity corresponds with the sex the person had or was identified as having at birth, *Merriam-Webster.com Dictionary*, MERRIAM-WEBSTER (2020), <https://www.merriam-webster.com/dictionary/cisgender>.

3. *Caster SEMENYA Biography*, OLYMPIC CHANNEL (last visited Jul. 10, 2021), <https://www.olympicchannel.com/en/athletes/detail/caster-semenya/>.

4. Intersex: Intersex is an umbrella term that describes bodies that fall outside the strict male/female binary. There are many ways someone can be intersex. Intersex is a general term used for a variety of situations in which a person is born with reproductive or sexual anatomy that doesn't fit the boxes of "female" or "male." *See What's intersex?*, PLANNED PARENTHOOD (2020), <https://www.plannedparenthood.org/learn/gender-identity/sex-gender-identity/whats-intersex>.

5. INTERSEX SOCIETY OF N. AM., *supra* note 1; *See Testing your testosterone: It's tricky*, HARV. HEALTH PUB. (last visited Oct. 25, 2020), <https://www.health.harvard.edu/prostate-health-and-disease/testing-your-testosterone-its-tricky>.

6. *See IAAF introduces new eligibility regulations for female classifications*, WORLD ATHLETICS (Apr. 26, 2018), <https://www.worldathletics.org/news/press-release/eligibility-regulations-for-female-classifica>.

regulation.<sup>7</sup> She appealed again to the highest court in Switzerland, the Swiss Federal Tribunal (“SFT”), where all CAS appeals go for review. However, the CAS decision was ultimately affirmed.<sup>8</sup>

Semenya’s case is a matter of human rights. Access to sport is a human right protected by international standards to ensure equality and inclusion for all as recognized by the International Olympic Committee (“IOC”) and the United Nations.<sup>9</sup> World Athletics prides itself on a “sport for all” mission.<sup>10</sup> The Semenya decision will affect thousands of athletes all over the world and should have been decided outside of the bounds of arbitration. Arbitration has many benefits when it comes to international commercial disputes including expediency and freedom of choice, however, Semenya was not served well by this process. In her case, the CAS did not have the requisite expertise or representation to decide this issue. This article will discuss and analyze the history of discrimination in sport that led to the ruling in the Semenya case; the factors that contributed to the ruling; the ramifications of using a court of arbitration in a primarily centralized human rights dispute; the insufficiency of the appeals process; and the proposed alternative to submit all human rights disputes in sports directly to the European Court of Human Rights, a venue better equipped for these matters.

## II. HISTORY OF DISCRIMINATION IN SPORT

### A. *Sex and Sport*

Up until 1900, women were not able to compete in the Olympic Games.<sup>11</sup> Since then, the sporting world has remained the same—defined by a socially constructed gender binary regardless of advancements in our understanding of biology and physiology. Where does this leave 1 out of 100 individuals who are born as differing from a standard male or

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7. COURT OF ARB. FOR SPORT, *Executive Summary in the case of Caster Semenya and the Athletics South Africa* (Apr. 30, 2019), [https://www.tas-cas.org/fileadmin/user\\_upload/CAS\\_Executive\\_Summary\\_\\_5794\\_.pdf](https://www.tas-cas.org/fileadmin/user_upload/CAS_Executive_Summary__5794_.pdf).

8. *World Athletics welcomes Swiss Federal Tribunal decision on its Eligibility Rules for Athletes with Difference of Sex Development*, WORLD ATHLETICS (last visited July 10, 2021), <https://www.worldathletics.org/news/press-releases/swiss-federal-tribunal-ruling-dsd-rules>.

9. See INT’L OLYMPIC CHARTER, *Olympic Charter* 11 (July 17, 2020), <https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/General/EN-Olympic-Charter.pdf>; See *Access to Sport ‘a Fundamental Human Right’*, Says Secretary-General in Video Message for Summit of Rio Paralympic Games, UNITED NATIONS (2020), <https://www.un.org/press/en/2016/sgsm18063.doc.htm>.

10. *About World Athletics*, WORLD ATHLETICS (last visited Oct. 25, 2020), <https://www.worldathletics.org/about-iaaf>.

11. INTERNATIONAL OLYMPIC COMMITTEE, *FACTSHEET WOMEN IN THE OLYMPIC MOVEMENT 4* (June 2020), [https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/Factsheets-Reference-Documents/Women-in-the-Olympic-Movement/Factsheet-Women-in-the-Olympic-Movement.pdf#\\_ga=2.110256581.1127930734.1602962162-1776319619.1602962162](https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/Factsheets-Reference-Documents/Women-in-the-Olympic-Movement/Factsheet-Women-in-the-Olympic-Movement.pdf#_ga=2.110256581.1127930734.1602962162-1776319619.1602962162).

female?<sup>12</sup> These individuals are more commonly identified as intersex (not to be confused with transgender) which encompasses multiple conditions that can impact one's anatomy making them not a "typical" male or female.<sup>13</sup> In this article, the term Disorder of Sex Development ("DSD") will be used as it better encompasses the myriad of conditions of sexual ambiguity a person may be born with and the majority of articles surrounding this issue reference it as such.<sup>14</sup>

Historically, female athletes who do not fit the common stereotype of what a female "looks" like are forced to be tested.<sup>15</sup> Women of color, like Semenya, are disproportionately targeted.<sup>16</sup> Gender testing in sports started during the Hitler Olympics in Berlin during the 1930's where athletes would have their genitalia physically examined by a committee of men who would determine if they could compete.<sup>17</sup> Testing was officially mandated for all females in the 1968 Winter Games by the IOC to ensure no men were posing as females.<sup>18</sup> Mandatory testing started with on-site physical examinations, but due to the demeaning nature and invasiveness of gynecologic exams it switched to laboratory tests involving a blood sample. Blood sample testing has led to questionable accuracy due to multiple false positives.<sup>19</sup> At the 1996 Atlanta games, the IOC agreed to increase privacy and accuracy of testing by issuing gender verification cards, with physical examination and recommendations for estrogen therapy or surgical intervention by doctors for those who screened positive for DSD.<sup>20</sup> By 1999, most of this testing was discontinued, after it was banned in Norway, due to its discriminatory nature and the significant cost imposed on the IOC. Another reason the testing was discontinued is because no men were found intentionally posing as women, the initial purpose of the test.<sup>21</sup> The only gender testing still used is in specific instances where an athlete's gender is in question.<sup>22</sup>

### B. Caster Semenya

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12. See INTERSEX SOCIETY OF N. AM., *supra* note 1.

13. *Id.*

14. See Ritchie et al., *Intersex and the Olympic Games*, 101 (8) J. OF THE ROYAL SOC'Y OF MED., 395-399 (Aug. 1, 2008), <https://doi.org/10.1258/jrsm.2008.080086>.

15. Anna North, "*I am a woman and I am fast*": what Caster Semenya's story says about gender and race in sports, VOX (May 3, 2019, 7:30 AM), <https://www.vox.com/identities/2019/5/3/18526723/caster-semenya-800-gender-race-intersex-athletes>.

16. *Id.*

17. Ritchie et al., *supra* note 14, at 395.

18. Louis J. Elsas et al., *Gender verification of female athletes*, 2 GENETICS IN MED. 249, 249 (2000).

19. *Id.*

20. *Id.* at 252.

21. *Id.* at 253.

22. *Id.*

Beginning in 2009, there was widespread scrutiny of athlete Caster Semenya for her masculine physical appearances and unique speed at the World Athletics Championship.<sup>23</sup> Her opponent, Elisa Cusma of Italy criticized, “These kind [sic] of people should not run with us. For me, she is not a woman. She is a man.”<sup>24</sup> After Semenya’s significant win at the 2009 Track and Field World Championships, she was forced to undergo genetic testing.<sup>25</sup> It was determined Semenya has a condition called hyperandrogenism, meaning she produces higher than normal levels of testosterone, which falls under the DSD category.<sup>26</sup> In 2011, IAAF issued a testosterone limit banning female athletes who fell above this range.<sup>27</sup> The ban was lifted from all intersex athletes due to lack of evidentiary support, allowing Semenya to compete and win in the 2012 and 2016 Olympics.<sup>28</sup> However in 2018, World Athletics gathered more evidence surrounding athletes with DSDs and issued a new rule stating:

The new regulations require any athlete who has a ... [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 (ie: whether she is in competition or out of competition) for so long as she wishes to remain eligible.<sup>29</sup>

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23. See Ruth Padawer, *The Humiliating Practice of Sex-Testing Female Athletes*, N.Y. TIMES (June 26, 2016), <https://www.nytimes.com/2016/07/03/magazine/the-humiliating-practice-of-sex-testing-female-athletes.html?module=inline>.

24. *Id.*

25. *Id.*

26. North, *supra* note 15.

27. WORLD ATHLETICS, *supra* note 8.

28. See Rick Maese, *Court rules Olympic runner Caster Semenya must use hormone-suppressing drugs to compete*, WASH. POST (May 1, 2019, 3:21 PM), <https://www.washingtonpost.com/sports/2019/05/01/court-decides-against-caster-semenyas-appeal-controversial-rule/>.

29. See WORLD ATHLETICS, *supra* note 8.

This rule required Semenya, and athletes like her, to artificially reduce their testosterone levels with medication in order to compete in the 2020 Tokyo Olympics.<sup>30</sup> Semenya appealed this regulation to the CAS who upheld the regulation in April of 2019.<sup>31</sup> The court stated:

[T]he DSD Regulations are discriminatory but that, on the basis of the evidence submitted by the parties, such discrimination is a necessary, reasonable and proportionate means of achieving the legitimate objective of ensuring fair competition in female athletics in certain events and protecting the “protected class” of female athletes in those events.<sup>32</sup>

Semenya appealed this decision to the SFT and on September 8, 2020, it dismissed the appeal on the grounds that fairness and equality in sport competition trumps one’s legal sex or gender identity.<sup>33</sup> The SFT may reverse only on limited grounds including a jurisdictional issue, a violation of fair hearing, or an incompatibility with public policy.<sup>34</sup> This decision sparked a debate across the globe as one of the greatest controversies the sport world has yet faced.<sup>35</sup>

### C. Human Rights Argument

Human rights organizations are amongst the most vocal in support of Semenya. The IOC declares that the practice of sport is a human right.<sup>36</sup> It prides itself on representing sport as a human right and stresses the importance of sport being accessible to everyone.<sup>37</sup> It states, “Sport is one of the best ambassadors to promote human rights and the inclusion of all. Through sport, people learn values that cross gender, creed, nationality, age, economic position and even physical condition.”<sup>38</sup> The IOC also recognizes that “gender

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30. Maese, *supra* note 28.

31. COURT OF ARB. FOR SPORT, *supra* note 7, at 1.

32. *Id.*

33. TRIBUNAL FED., *DSD Regulations: Caster Semenya’s appeal against the decision of the Court of Arb. for Sport dismissed* (Sept. 8, 2020), [https://www.bger.ch/files/live/sites/bger/files/pdf/en/4A\\_248\\_2019\\_yyyy\\_mm\\_dd\\_T\\_e\\_18\\_18\\_10.pdf](https://www.bger.ch/files/live/sites/bger/files/pdf/en/4A_248_2019_yyyy_mm_dd_T_e_18_18_10.pdf).

34. *See* Court of Arb. for Sport, *Frequently Asked Questions*, <https://www.tas-cas.org/en/general-information/frequently-asked-questions.html> (last accessed: Nov. 8, 2020).

35. *See* Fernando Duarte, *Caster Semenya: ‘Once I thought she was cheat. Now I’m sure she belongs in women’s athletics’*, BBC WORLD SERVICE (Sep. 11, 2020), <https://www.bbc.com/sport/africa/54116114>.

36. INT’L OLYMPIC CHARTER, *Olympic Charter 11* (July 17, 2020), <https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/General/EN-Olympic-Charter.pdf>.

37. *See Sport as a Human Right, Olympism in Action Forum*, OLYMPIC.ORG (Oct. 6, 2019), <https://www.olympic.org/olympism-in-action/sport-as-a-human-right>.

38. *Id.*

equality is a critical component of effective sports administration and continues to support the promotion of women and girls in sport at all levels and in all structures off the field of play.”<sup>39</sup> It is evident the decision in the Semenya case goes against the ideals of the IOC because it does not make sport inclusive for all. “Inclusive of all” should not mean “all who fit our standards.” This should include all women. World Athletics promotes gender equality and places importance on protecting women, while ignoring that Semenya is a woman. This is a clear human rights violation because it denies her access to sport and intentionally discriminates against her on account of something she cannot control.

In addition to the Olympic Charter, the United Nations Human Rights Council Advisory Committee issued a report examining the possibilities of using sport and the Olympic ideal to promote human rights.<sup>40</sup> The report addresses the importance of combatting discrimination and social barriers in sport, especially gender discrimination.<sup>41</sup> It specifically states, “[i]n sports, any type of discrimination is prohibited, such as based on race, colour, gender, language, religion, political or other opinion, national or social origin, belonging to national minority, property, disability, birth or other status.”<sup>42</sup> One of the pillars of World Athletics social responsibility plan, “Athletics for a Better World”, is about focusing on the use of athletics to bring people together and overcome the challenges caused by social inequality.<sup>43</sup> CAS directly contradicts the mission of equality that the IOC, the UN, and World Athletics purport to uphold and even concedes that the DSD regulations are discriminatory.<sup>44</sup> While its counterargument to intersex female athlete participation in sport is fair competition for women who produce less testosterone, the CAS is not considering the full meaning of “fair.” It sees sport as a means to determine who is faster, stronger, or more athletic, and forgets the underlying benefit of sport that unites people all over the world from different walks of life to meet a common goal. Something this world needs more of. This leaves many questioning the intentions of World Athletics and its ability to interpret the IOC charter as this decision only further divides.<sup>45</sup>

The IAAF made a counterargument to Semenya’s claim that basically ignores human rights altogether. It claims it is a private body, not a public authority, and therefore is not subject to the Universal Declaration of Human Rights or the European Convention

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39. INT’L OLYMPIC COMMITTEE, *supra* note 11, at 1.

40. See UNITED NATIONS HUMAN RIGHTS COUNCIL, *Progress report of the Human Rights Council Advisory Committee on the study on the possibilities of using sport and the Olympic ideal to promote human rights* (August 25, 2014), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/146/16/PDF/G1414616.pdf?OpenElement>.

41. *Id.* at 9.

42. *Id.*

43. *But see Athletics for a Better World*, WORLD ATHLETICS (last accessed: Jul. 10, 2019), <https://www.worldathletics.org/athletics-better-world/what-is-abw>.

44. *But see* COURT OF ARB. FOR SPORT, *supra* note 7, at 1.

45. *Id.*

on Human Rights.<sup>46</sup> Further, it asserts it must ensure “fair and meaningful competition in female athletics.”<sup>47</sup> Those outspoken in favor of the CAS decision claim it is a victory for female athletes everywhere because it protects the class of female sports and empowers women to equally succeed as their male counterparts do.<sup>48</sup> While the main focus here is on female athletes and testosterone, there currently exists no regulations for males who produce “higher than normal levels of testosterone.”<sup>49</sup> Additionally, there are no regulations for other categories of physical features that may give a person an advantage in sport like height, wingspan, webbed toes, etc. Michael Phelps has the “perfect swimming body” but not one regulation has surfaced in light of this.<sup>50</sup> To require Semenya to change her body to fit what is “normal” for a female athlete creates a slippery slope, meaning that every athlete would have to change their physical feature that gives them a competitive advantage outside the range of “normal” for their gender.<sup>51</sup> All bodies are different, and under the prescribed rules in place, it would be impossible to identify every feature that might give an athlete an advantage.

#### *D. Lack of Science and Unsafe Practices*

Not only is denying sport to a targeted group of individuals a violation of human rights, but forcing individuals to undergo unsafe medical practices for the sake of being able to participate expands to additional violations of safety and bodily autonomy. First, the UN Human Rights Council (“Council”) spoke out objecting to these new regulations enacted by the IAAF, expressing direct concern that the regulations will violate international human rights norms and standards, including:

[T]he right to equality and non-discrimination, the right to the highest attainable standard of physical and mental health, the right to sexual and reproductive health, the right to work and to the enjoyment of just and favourable conditions of work, the right to privacy, the right to freedom

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46. IAAF publishes briefing notes and Q&A on Female Eligibility Regulations, WORLD ATHLETICS, <https://www.worldathletics.org/news/press-release/questions-answers-iaaf-female-eligibility-reg> (last accessed: Nov. 29, 2020).

47. *Id.*

48. Doriane L. Coleman, *A Victory for Female Athletes Everywhere*, QUILLETTE (May 3, 2019), <https://quillette.com/2019/05/03/a-victory-for-female-athletes-everywhere/>.

49. Jaime Schultz, *Caster Semenya, Testosterone and the History of Gender Segregation in Sports*, LIVE SCIENCE (May 6, 2019), <https://www.livescience.com/65412-caster-semenya-testosterone-gender-segregation.html>.

50. See Skye Gould & Kevin Loria, *Here’s an exact breakdown of why 6’4” Michael Phelps has the perfect body for swimming*, BUS. INSIDER (August 10, 2016 1:00 PM), <https://www.businessinsider.com/michael-phelps-rio-olympics-body-swimming-2016-8>.

51. See Julian Savulescu, *Ten ethical flaws in the Caster Semenya decision on the intersex in sport*, THE CONVERSATION (May 9, 2019 4:07 PM), <https://theconversation.com/ten-ethical-flaws-in-the-caster-semenya-decision-on-intersex-in-sport-116448>.

from torture or other cruel, inhuman or degrading treatment or punishment, and full respect for the dignity, bodily integrity and bodily autonomy of the person.<sup>52</sup>

Second, the Council calls upon states to refrain from enforcing practices “that force, coerce or otherwise pressure women and girl athletes into undergoing unnecessary, humiliating and harmful medical procedure(s).”<sup>53</sup> Doctors and scientists also denounce the flawed evidence used to support this decision calling into question the scientific integrity of the evidence.<sup>54</sup> The World Medical Association (“Association”) instructed doctors around the world not to administer this “flagrant” treatment as it would be highly unethical and unnecessary because there is no medical need and it opposes medical policy.<sup>55</sup> Doctors and scientists further condemn these practices because taking estrogen in high dosages increases risk of breast and cervical cancer and doubles the risk of blood clots.<sup>56</sup> The Association demanded the immediate withdrawal of these regulations in April 2019, which was clearly ignored by the SFT.<sup>57</sup> The IAAF responded to these criticisms by claiming their decision was backed by research done in the field, but refused to release findings claiming they were highly confidential.<sup>58</sup>

Notably, the CAS panel itself expressed concern for the future implementation of the DSD regulations and whether the effects justified by “fair competition”.<sup>59</sup> The IAAF responded to the concerns of harmful side effects by alleging that these side effects would be no different than those experienced by women taking oral contraceptives.<sup>60</sup> However, the free choice by a woman to take oral contraceptives is different from forcing female athletes to undergo procedures so that they may participate in sport. The IAAF is

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52. UNITED NATIONS HUMAN RIGHTS COUNCIL, *Elimination of discrimination against woman and girl in sport* (Mar. 20, 2019), [https://ilga.org/downloads/Elimination\\_of\\_discrimination\\_against\\_women\\_and\\_girls\\_in\\_sport.pdf](https://ilga.org/downloads/Elimination_of_discrimination_against_women_and_girls_in_sport.pdf).

53. *Id.* at 2.

54. Roger Pielke Jr. et al., *Scientific integrity and the IAAF testosterone regulations*, THE INT’L SPORTS L.J. 19, 18–26 (Feb. 7, 2019), <https://doi.org/10.1007/s40318-019-00149-4>.

55. *WMA urges physicians not to implement IAAF rules on classifying women athletes*, WORLD MED. ASS’N (April 25, 2019), <https://www.wma.net/news-post/wma-urges-physicians-not-to-implement-iaaf-rules-on-classifying-women-athletes/>.

56. *Position statement - Combined oral contraceptives and cancer risk*, CANCER COUNCIL AUSTRALIA, [https://wiki.cancer.org.au/policy/Position\\_statement\\_-\\_Oral\\_contraceptives#\\_ga=2.66864684.366100634.1525588428-861852034.1525588428](https://wiki.cancer.org.au/policy/Position_statement_-_Oral_contraceptives#_ga=2.66864684.366100634.1525588428-861852034.1525588428) (last accessed: Nov. 29, 2020); ESHRE Capri Workshop Group, *Venous thromboembolism in women: a specific reproductive health risk* 19 HUMAN REPROD. UPDATE 471, 472 (Jul. 13, 2013).

57. *Id.*

58. WORLD ATHLETICS, *supra* note 43.

59. COURT OF ARB. FOR SPORT, *supra* note 7, at 1.

60. WORLD ATHLETICS, *supra* note 43.

attempting to compare a woman's right to reproductive justice and bodily autonomy to the IAAF forcibly taking control of women's bodies.

Lastly, it is important to note that defining a "normal" level of testosterone is extremely difficult as there are many factors that can influence each individual person's level of testosterone.<sup>61</sup> Current methods of testing testosterone levels vary greatly across laboratories throughout the world, meaning there is no widely accepted method to test how much testosterone one may have at any given point in time.<sup>62</sup> In females, testosterone levels shift according to menstrual cycles and there is no accepted range based on age.<sup>63</sup> Therefore, the timing of Semenya's test could greatly impact how she compares to the "average" range. These additional factors are not accounted for in the IAAF regulation.<sup>64</sup> Additionally, testosterone levels vary from person to person based on how sensitive one's receptors are to the hormone which can affect how much an impact testosterone actually has on one's functions.<sup>65</sup> For example, testosterone can play a role in one's physical appearances but not necessarily in their physical abilities, therefore the effect of testosterone on Semenya's speed is not actually quantifiable.<sup>66</sup> This makes it very difficult to define how much testosterone is "too much" for a female and to separate individuals into the rigid confines of the gender binary.

### III. INEFFECTIVENESS OF ARBITRATION IN HUMAN RIGHTS CASES

#### A. *Why Semenya's case failed in CAS*

The CAS is the governing body for the Olympics and World Athletics.<sup>67</sup> There are many benefits to using arbitration in international disputes including timeliness, costliness, freedom of contract, and privacy.<sup>68</sup> In many instances parties favor arbitration because they do not have to spend a lot of time and resources on litigation in court.<sup>69</sup> Litigation can take

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61. See Daniel Kelly, *Testosterone: why defining a 'normal' level is hard to do*, THE CONVERSATION (April 16, 2019), <https://theconversation.com/testosterone-why-defining-a-normal-level-is-hard-to-do-113587>.

62. George A. Kanakis et al., *Measuring testosterone in women and men*, 125 MATURITAS 41–44, 41 (April 3, 2019).

63. *Id.*

64. WORLD ATHLETICS, *supra* note 8.

65. Kelly, *supra* note 61.

66. Savulescu, *supra* note 51.

67. WORLD ATHLETICS, *supra* note 8.

68. James Carter & Alexander Chaize, *Caster Semenya ruling and the pros and cons of the Court of Arbitration for Sport*, DLA PIPER (Sep. 6, 2019), [https://www.dlapiper.com/en/uk/insights/publications/2019/09/sport-now/caster-semenya-ruling-and-the-pros-and-cons-of-the-court-of-arbitration-for-sport/?utm\\_source=Mondaq&utm\\_medium=syndication&utm\\_campaign=LinkedIn-integration](https://www.dlapiper.com/en/uk/insights/publications/2019/09/sport-now/caster-semenya-ruling-and-the-pros-and-cons-of-the-court-of-arbitration-for-sport/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration).

69. *Id.*

years, whereas arbitration is more expeditious.<sup>70</sup> Arbitration schedules are flexible because parties have a choice in factors that affect where, when, and how the decision will take place as opposed to being at the mercy of a court calendar. Factors that parties can control include who comprises the arbitral panel, what rule of law will apply, where the arbitration will take place, and what the award will look like.<sup>71</sup> Additionally, cost is a significant reason people choose to arbitrate.<sup>72</sup> Arbitration is typically faster and less complex than litigation; when costs increase, it is usually a signal to move to the courts.<sup>73</sup> Lastly, privacy is important to many parties involved in any sort of legal dispute. While decisions made in court are open to the public, the arbitration process can be held confidentially to provide protection to the parties involved.<sup>74</sup>

International arbitration is a process beneficial for commercial disputes where an expedient and cost-effective decision is needed to return to regularly programmed business.<sup>75</sup> CAS jurisdiction is limited to sport disputes usually relating to commercial disputes like sponsorship agreements or television rights, and disciplinary matters like doping or referee abuse.<sup>76</sup> The Semenya case, since it is a human rights matter, does not fit into the category of matters that are generally attracted to arbitration. It lacks arbitrability. This was not a decision that needed to be rushed or inexpensive. The IOC forced Semenya into arbitration through adhesive arbitration, meaning she was not afforded a real choice; she was unable to choose an arbitrator that would likely be on her side; she was underrepresented; and she was subjected to an insufficient appeals process.<sup>77</sup> Consequently, Semenya did not benefit from the ability to choose a dispute resolution process that worked for her.

Semenya was forced into the contract when she signed up to be an Olympic athlete.<sup>78</sup> If she did not accept this forum, she could not challenge the regulation at all.<sup>79</sup>

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70. See Barbara K. Repa, *Arbitration pros and cons*, NOLO (last accessed Oct. 25, 2020), <https://www.nolo.com/legal-encyclopedia/arbitration-pros-cons-29807.html>.

71. See THOMAS E. CARBONNEAU & HENRY A. BLAIR, *CASES AND MATERIALS ON ARBITRATION LAW AND PRACTICE*, 7-8 (West Academic Publishing ed., 8th ed. 2019).

72. Repa, *supra* note 70.

73. *Id.*

74. *Id.*

75. See *What is international arbitration?*, INTERNATIONAL ARBITRATION, <https://www.international-arbitration-attorney.com/what-is-international-arbitration/> (last accessed: Nov. 29, 2020).

76. Carter & Chaize, *supra* note 68.

77. Lena Holzer, *The Decision of the Swiss Federal Supreme Court in the Caster Semenya Case: A Human Rights and Gender Analysis*, OPINIOJURIS, (Sep. 30, 2020), <http://opiniojuris.org/2020/09/30/the-decision-of-the-swiss-federal-supreme-court-in-the-caster-semenya-case-a-human-rights-and-gender-analysis/>.

78. *Id.*

79. *Id.*

“Many athletes and clubs have little or no say in the choice of CAS as the arbiter of their disputes since they are required to enter into a CAS arbitration agreement as a condition of competing in their chosen sport.”<sup>80</sup> Athletes are forced to choose between submitting to arbitration in the event of a dispute, and their career. Antonio Rigozzi and Fabrice Robert-Tissot have characterized this predicament as the “Hobson’s Choice.”<sup>81</sup> Forcing an athlete into adhesive arbitration, especially in a human rights matter like the Semenya case, undermines the legitimacy of arbitration for these matters. When an individual does not have the right to choose arbitration in the first place it contradicts the entire purpose of the process at its core.<sup>82</sup>

Additionally, World Athletics contended that Semenya could choose her arbitrators. However, she had to choose from a list of predominately white, cisgender males with expertise in sports, but no expertise on the impact of DSD in African women.<sup>83</sup> The panel in this case was comprised of two white men and one white woman.<sup>84</sup> This exemplifies the shortcomings of the CAS to hear this decision. It cannot provide a list of 300 arbitrators inexperienced in the human rights matters affecting the case and expect a fair outcome.<sup>85</sup> This may work in commercial disputes, where disputes are straighter forward and an arbitral panel may have long history of experience in this field, however, the combination of issues surrounding the Semenya case are far more complex.

The panel in Semenya’s case has purported expertise in gynecology and andrology, however, this expertise ignores the intersectionality of discrimination a woman like Semenya faces as an African, female, intersex athlete.<sup>86</sup> There were no available arbitrators

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80 Carter & Chaize, *supra* note 68.

81 Hobson’s Choice: [C]onsent is artificial. The arbitration clause is never negotiated or the product of a bargain in any real sense; it is imposed on a ‘take it or leave it’ basis. If a football player did not want to submit to arbitration, their only option would be to not play football at all. This is no choice and, as such, consent to such a clause is not ‘real’. Antonio Rigozzi & Fabrice Robert-Tissot, “Consent” in *Sports Arbitration: Its Multiple Aspects*, 41 ASA 59, 59, <https://lk-k.com/wp-content/uploads/2015/10/RIGOZZI-ROBERT-TISSOT-in-ASA-Special-Series-41-Sports-Arb.-A-Coach-for-Other-Players-2015-Consent-in-Sports-Arb.-Its-Multiple-Aspects-pp.-59-94.pdf> (last accessed: Nov. 29, 2020).

82. See CARBONNEAU & BLAIR *supra* note 71, at 7.

83. See Court of Arb. for Sport, *List of Arbitrators (general list)*, <https://www.tas-cas.org/en/arbitration/liste-des-arbitres-liste-generale.html?AbrADDEligibleSlct=6&nmIpt=&ContinentSelected%5B%5D=1> (last accessed: Nov. 8, 2020).

84. See Media Release, Court of Arb. for Sport, Cas Arbitration: Caster Semenya, Athletics South Africa (ASA) And International Association Of Athletics Federations (IAAF), (May 1, 2019) [https://www.tas-cas.org/fileadmin/user\\_upload/Media\\_Release\\_Semenya\\_ASA\\_IAAF\\_decision.pdf](https://www.tas-cas.org/fileadmin/user_upload/Media_Release_Semenya_ASA_IAAF_decision.pdf).

85. See John G. Ruggie, “For the Game For the World” *FIFA & Human Rights*, HARV. KENNEDY SCH., [https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/crj/files/Ruggie\\_humanrightsFIFA\\_reportApril2016.pdf](https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/crj/files/Ruggie_humanrightsFIFA_reportApril2016.pdf) 26 (last accessed: Nov. 29, 2020).

86. *Id.*

on the list Semenya was able to choose from with expertise on the socioeconomic effects of this decision, therefore she was forced to pick an arbitrator with no expertise on this specific issue.<sup>87</sup> These socioeconomic effects include, but are not limited to, the disproportionate discrimination and exclusion of black women in sport. The IOC addresses this as a problem, but when it comes to actually fixing the problem, it claims that discrimination is necessary to maintain the balance and competitiveness of sport.<sup>88</sup> This argument sets a dangerous standard; what other forms of discrimination would be necessary in its eyes? The CAS should have ensured that there was no discrimination seen in any step of the justice process, starting with representation, which is arguably the most important aspect of legal systems throughout the world.

Lastly, while Semenya started on uneven ground, she also had the burden of proof. This means that she has to prove why she should not be discriminated against, rather than what is traditionally accepted amongst international arbitration norms, which is the standard of proof falling on the party imposing the discriminatory regulation.<sup>89</sup> The CAS is not bound to an evidentiary standard, rather they make their rules on a case-by-case basis.<sup>90</sup> It has been argued that that the burden of proof for the necessity of the ban should be on the regulating entity and that the CAS should have adopted the American Daubert standard in this case.<sup>91</sup> The CAS “could have applied some of the Daubert factors by asking whether the study’s conclusion had been tested, subjected to peer review, established with an acceptably low error rate, and accepted by the scientific community.”<sup>92</sup> The CAS purports that the Semenya decision was based on the “unanimous opinion of experts.”<sup>93</sup> As previously mentioned, this decision is clearly not the unanimous opinion of doctors, or scientists, or experts in the field. The panel failed to account for the 23 experts who testified in favor of Semenya and against the DSD regulations.<sup>94</sup>

Not only was Semenya forced to arbitrate, she was faced with a lack of representation, and the procedural process of the burden of proof created an extremely high standard to meet. The odds were stacked against her from the start. While it is possible some of these disparities of arbitration in human rights could be addressed, it makes more sense to use a venue that is accustomed to these matters and has decided on human rights issues before.

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87. See LIST OF ARBITRATORS (GENERAL LIST), *supra* note 83.

88. FACTSHEET WOMEN IN THE OLYMPIC MOVEMENT, *supra* note 11.

89. Silver Lin, *Problems of Proof for the Ban on Female Athletes with Endogenously High Testosterone Levels*, 20 CHICAGO J. OF INT’L. L. 219, 228, (Jan. 1, 2019) <https://chicagounbound.uchicago.edu/cjil/vol20/iss1/6>.

90. *Id.* at 219

91. *Id.*

92. *Id.* at 249

93. DSD REGULATIONS: CASTER SEMENYA’S APPEAL AGAINST THE DECISION OF THE COURT OF ARB. FOR SPORT DISMISSED, *supra* note 33.

94. Holzer, *supra* note 74.

## *B. Insufficiency of the appeals process*

As mentioned earlier, CAS decisions are appealed to the SFT. Appeals are taken on very limited grounds including, “lack of jurisdiction, violation of elementary procedural rules (e.g. violation of the right to a fair hearing) or incompatibility with public policy.”<sup>95</sup> Semenya appealed her decision on the grounds that the CAS violated the prohibition of discrimination, human dignity and Semenya’s personality rights (right to bodily integrity, identity, private life and economic freedom).<sup>96</sup> The SFT examined whether this went against public order and held that it did not on the grounds that discrimination is necessary for fair competition which does not violate public order.<sup>97</sup>

Furthermore, it is significant that the SFT supports its decision with the fact that the European Court of Human Rights (“ECtHR”) “attaches particular importance to the aspect of fair competition” while simultaneously claiming it may not invoke the European Convention on Human Rights because IAAF “is not a public authority, exercising state powers, but rather a private body exercising private (contractual) powers,” meaning it is not subject to the rules of human rights laid out by the Universal Declaration of Human Rights or the European Convention on Human Rights.<sup>98</sup> Perhaps when a court’s decision is based on the fact that the imposing party does not have to abide by human rights norms, it is not the adequate and appropriate forum for a human rights focused matter; especially, if the Court is not going to apply that standard evenly. The Court supports the standard when the IAAF invokes it, but rejects it when it comes to the human rights violations Semenya is facing.

The human rights issue arose in other decisions from the CAS that were appealed to the SFT. Most notably, in the *Case of Mutu and Pechstein v. Switzerland*.<sup>99</sup> Pechstein, an Olympic skater who was banned from the sport after a doping incident and sought relief from the CAS and was rejected, made “allegations about the way CAS is funded; the lack of CAS arbitrators appointed by athletes rather than sports federations; and the absence of any public hearing during the process” which she argued “breached Article 6 of the European Convention on Human Rights (“ECHR”).”<sup>100</sup> The SFT also dismissed her appeal, so she appealed to the ECtHR which held that because the decision to arbitrate is compulsory, it ignores the right to a fair trial laid out by Article 6 of the ECHR, and these safeguards may not be waived by the CAS.<sup>101</sup> This decision was upheld in *Case of Ali Riza*

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95. Court of Arb. for Sport, *supra* note 34.

96. Holzer, *supra* note 74.

97. DSD REGULATIONS: CASTER SEMENYA’S APPEAL AGAINST THE DECISION OF THE COURT OF ARB. FOR SPORT DISMISSED, *supra* note 33.

98. IAAF INTRODUCES NEW ELIGIBILITY REGULATIONS FOR FEMALE CLASSIFICATIONS, *supra* at note 7.

99. Mutu and Pechstein v. Switzerland (No. 3), 2018 Eur. Ct. H. R., [https://hudoc.echr.coe.int/eng#{"itemid":\["001-186828"\]}](https://hudoc.echr.coe.int/eng#{).

100. Carter & Chaize, *supra* note 68.

101 Holzer, *supra* note 74.

*and Others v. Turkey* regarding whether soccer players entered into employment contracts.<sup>102</sup> Semenya's appeal to the ECtHR will likely succeed on the same grounds, considering she did not receive a fair trial. Her case is also distinguishable because the facts in the *Pechstien* and *Ali Riza* revolved around an alleged action the athlete took, as opposed to Semenya who took no action to be in the position she is in, furthering the human rights argument that she is being forced to change how she was born by an unjust decision with insufficient support.

Lastly, it is flawed that a decision that will affect athletes around the world who wish to participate in the Olympics can only be appealed to a court that has limited grounds to overturn. For example, if a decision is appealed from SFT for going against public order, the decision is decided according to what would offend Swiss public policy.<sup>103</sup> This could mean that the decision in Semenya's case may not violate Swiss public policy, but could very easily go against the policy of other states that would not enforce regulations of forcing women to take hormonal medications. In cases of human rights, this appeals process is not only unfair, but insufficient. If the ECtHR has to repeatedly review the decision of the CAS because the SFT has limited review power, then the SFT is obsolete in this case. In order to save time, energy, and resources of the parties involved, World Athletics needs to either establish a better appeals process or look to a different dispute resolution method, such as skipping the CAS altogether and going directly to the ECtHR.

#### IV. ALTERNATIVES

There are a few ways to remedy the issue of using arbitration for human rights disputes. First, there must be no forced arbitration clauses used for these matters. This completely undermines the arbitral purpose by eliminating freedom of choice. If an athlete so chooses arbitration, then it may be an acceptable forum once a fair contract is drafted. However, World Athletics must separate common commercial disputes and doping cases apart from human rights violations. If the CAS must deny a party a basic human right laid out by the Universal Declaration of Human Rights or the ECHR, or concede to discrimination, then this is an issue that should be submitted to the ECtHR. If an athlete is given a choice between arbitration and litigation, it is likely they will choose litigation to ensure justice as the party with less bargaining power.<sup>104</sup> There is good reason that human rights should be left out of arbitration. Kathleen Stanaro of Colombia Law stated: "International arbitrators often lack the experience and sensitivity expertise in handling human rights concerns. Additionally, for many businesses, the purpose of arbitration is

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102. *Ali Riza and Others v. Turkey* (No. 2), 2020 Eur. Ct. H. R., [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-200548%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-200548%22]}).

103. Rep. of the U.N. Human Rights Council, *Intersection of race and gender discrimination in sport*, at 47, U.N. Doc A/HRC/44/26 (2020).

104. Ben Cisneros, *Forced Arbitration in Sport: A Knock-Out Blow?*, KEEP CALM AND TALK LAW (Sep. 14, 2018), <http://www.keepcalmtalklaw.co.uk/forced-arbitration-in-sport-a-knock-out-blow/>.

expediency and/or privacy in resolving problems.”<sup>105</sup> She warns that if human rights goals start to dominate the priorities of the contractors, businesses will often remove any human rights matters altogether.<sup>106</sup> The goal of arbitration clearly does not cater to human rights violations if they get eliminated when they become too complex or demanding.

Some countries have determined that the CAS is invalid under domestic laws. In *RFC Seraing v. FIFA*, the Brussels Supreme Court held that CAS was an invalid jurisdiction under Belgian Law.<sup>107</sup> Decisions like this along with *Pechstein*, *Ali Riza*, and *Semenya*, could have significant impacts on the future of the CAS as the governing body for sport. It would be more appropriate and efficient to submit these claims directly to a court that was established to protect human rights, the ECtHR, as opposed to wasting time in a venue insufficient to hear these claims. The Court was not originally established to hear sport claims, but since 2007 it has heard over 25 cases of human rights violations in the sports realm.<sup>108</sup> Semenya’s legal team announced in November 2020 that it would take this case before the ECtHR and the appeal was filed in February 2021.<sup>109</sup> If she wins, she will compete in the events she has always run in, if she loses she will only run in the 200-meter dash since the World Athletics regulations do not apply to that event. Had this case gone directly to the ECtHR, she would have received a decision sooner, and would not be in the dark regarding her right to compete in the Olympics without artificially altering her body.

## V. CONCLUSION

While analyzing each detail of gender testing, testosterone levels, sport regulations, courts decisions, and appeals, it is easy to forget what is underlying it all—Caster Semenya. She is a winning Olympic athlete, but she is also a wife, a mother, a daughter, a sister. The DSD regulation put her entire life in the world spotlight.<sup>110</sup> It halted her career, her training, her livelihood. Access to sport is a human right and discrimination is denounced by the IOC. World Athletics needs to be held accountable for decisions that upend people’s lives at no fault of their own by a process that is not fair. Arbitration is an adequate solution for many international disputes, but it is entirely inadequate when it comes to human rights. It is evident through the lack of diversity in arbitrators, the faulty appeals process, and the availability of a worthwhile alternative that the CAS did not intend to hear human rights

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105. Kathleen Stanaro, *The Evolving Role of Human Rights in International Arbitration*, THE AM. REV. OF INT’L ARBITRATION COLOMBIA LAW SCHOOL (Feb. 5, 2019), [http://aria.law.columbia.edu/the-evolving-role-of-human-rights-in-international-arbitration/?cn-reloaded=1&cn-reloaded=1#\\_ftn8](http://aria.law.columbia.edu/the-evolving-role-of-human-rights-in-international-arbitration/?cn-reloaded=1&cn-reloaded=1#_ftn8).

106. *Id.*

107. Cisneros, *supra* note 104.

108. SPORT AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS, EUROPEAN COURT OF HUMAN RIGHTS (last updated: MAY 2021), [https://www.echr.coe.int/Documents/FS\\_Sport\\_ENG.pdf](https://www.echr.coe.int/Documents/FS_Sport_ENG.pdf).

109. *Semenya v. Switzerland* (No. 10934/21), 2021 Eur. Ct. H. R.; *Athletics: Semenya to take fight to European Court of Human Rights*, REUTERS (2020), <https://uk.reuters.com/article/athletics-semenya/athletics-semenya-to-take-fight-to-european-court-of-human-rights-idUSXXN2I3005>.

110. Padawer, *supra* note 23.

disputes at all. A better venue for cases violating human rights standards, like the ECtHR, must be used before World Athletics and the CAS unjustifiably destroy any more careers.