

Human rights, trans athletes and intersex athletes in sport

Erikainen, Sonja; Mitra, Payoshni; Torrance, Hugh; Englefield, Louise
The European Gay & Lesbian Sport Federation

In September 2020, the Governing Board of the Council of Europe's Enlarged Partial Agreement on Sport (EPAS) decided to organise the 2021 EPAS diversity conference on the issue of transgender/ intersex athletes and human rights in sport. This study report has been prepared for EPAS and written by the author team above on behalf of the European Gay and Lesbian Sport Federation (EGLSF).

Methodology

This report is based on a combination of policy analysis and interviews and focus groups with stakeholders. The policy analysis component was based on relevant sport governing bodies' regulations and human rights frameworks, and all cited documents were accessed in December 2020 and January 2021. The interviews and focus groups were conducted with trans athletes and intersex / DSC athletes who have lived experience of relevant issues, and with sports experts and individuals involved in sports governance.

Terminology note

Transgender persons have a gender identity which is different from the gender they were assigned at birth label, includes persons who do not identify with the labels 'male' and 'female.' This includes people who change aspects of their physical bodies or presentations to be different from the expectations of the gender label assigned to them, for example via gender affirming medical interventions, clothing and accessories, mannerism, speech patterns, or cosmetics.

In this report, we will use **trans** as shorthand for transgender, but also with an awareness that "trans" is inclusive of not only transgender but also of other ways that individuals use to conceptualise their gendered selves and histories (e.g. transsexual). We use the trans term to also encompasses non-binary persons unless we specifically refer to trans women or men, while recognising that non-binary overlaps with but is not synonymous with trans: many trans people identify as non-binary but not all do, and many non-binary people identify as trans, but not all do.

Non-binary persons are persons who have a gender identity which is not exclusively or consistently either man/male or woman/ female, including persons who identify as gender queer, agender, or any other gender that is not restricted to man/male or woman/ female

Intersex persons are persons with innate bodily variations of sex characteristics that do not fit typical binary notions of female or male bodies, and which can manifest in a wide range of different ways at different sites of the body including genitals, chromosomes, gonads, hormone production or sensitivity. Intersex is considered an umbrella term as many different forms exist. There is a variety of terminology used with reference to intersex persons, sometimes referred to in policy and medical literature as persons with disorders of sex development or differences of sex development (DSD). They are also sometimes referred to as persons with variations in sex characteristics (VSC) or **diversity in sex characteristics (DSC)**. We will use the term intersex in this report in common with international human rights activism, but we also recognise this as a term that is rejected by many individuals, including many of those whom the authors have spoken with and whose views are incorporated into this paper. With respect to this we will use the term intersex/diversity in sex characteristics (**intersex/DSC**) throughout the paper. Intersex is not the same as gender identity.

1. Introduction

In May 2019, World Athletics,¹ the international governing body of athletics, published a press release in which they explicitly stated,

the IAAF is not a public authority, exercising state powers, but rather a private body exercising private (contractual) powers. Therefore, it is not subject to human rights instruments such as the Universal Declaration of Human Rights or the European Convention of Human Rights.²

The foundations of this interpretation and press release are highly problematic as, if upheld, would allow any non-state authority to declare that they are free to ignore Human Rights conventions and legal instruments.

This press release concerned a recent decision by the Court of Arbitration for Sport (CAS) to uphold the World Athletics *Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development)* (DSD), which restrict the right of intersex / DSD athletes to compete in middle-distance running races, after the regulations were disputed at CAS by the South African middle-distance runner Caster Semenya on the grounds that they are discriminatory and violate human rights. Emphasising the principle of autonomy in sport, which protects sport governing bodies' autonomy to create their own rules and regulations, World Athletics further stressed that their regulations can only be disputed in CAS, deeming national courts ineligible to deal with this issue:

Athletes and member Federations are bound ... to resolve any dispute arising in connection with the DSD Regulations – and in particular 'the validity, legality and/or proper interpretation or application' of the DSD Regulations – before the Court of Arbitration for Sport (and not in any other forum).³

CAS was created in 1984 by the International Olympic Committee (IOC) specifically to settle sport-related disputes through arbitration; it continues to be funded by the IOC⁴ and it holds exclusive jurisdiction over sports. As such, CAS cannot be considered independent and indeed its independence⁵ and impartiality⁶ have often been questioned and challenged, including in the European Court of Human Rights.

¹ The International Association of Athletics Federations (IAAF) changed its name to World Athletics in 2019. Throughout this report, we will refer to it as World Athletics.

²World Athletics (2019, May 7th) IAAF Publishes Briefing Notes and Q&A on Female Eligibility regulations. <https://www.iaaf.org/news/press-release/questions-answers-iaaf-female-eligibility-reg>

³ Ibid.

⁴ Court of Arbitration for Sport <https://www.tas-cas.org/en/general-information/frequently-asked-questions.html>

⁵ Voser, N, George, A & Wittmer, S. (2010, December 1st) Swiss Supreme Court clarifies standard of impartiality required of party-appointed arbitrators. Thomson Reuters Practical Law ([https://uk.practicallaw.thomsonreuters.com/2-504-0957?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/2-504-0957?transitionType=Default&contextData=(sc.Default)&firstPage=true))

⁶ Freeburn, Lloyd, Forced Arbitration and Regulatory Power in International Sport - Implications of the Judgment of the European Court of Human Rights in Pechstein and Mutu v Switzerland (August 4, 2020). Available at

SSRN: <https://ssrn.com/abstract=3706476> or <http://dx.doi.org/10.2139/ssrn.3706476> (To be published in Marquette Sports Law Review, 2021)

Major human rights organisations and authorities have noted that the DSD Regulations, which mandate unnecessary medical interventions as an eligibility criterion for some intersex / DSC athletes, violate human rights. The UN Human Rights Council, for example, expressed concern that the regulations “contravene international human rights norms and standards,” may lack objectivity and proportionality between the regulations’ aim and the proposed measures to achieve this aim, and called upon states to “ensure that sporting associations and bodies implement policies and practices in accordance with international human rights” and repeal policies that fail to respect these rights.⁷ More specifically, they expressed concern that these regulations contravene athletes’ rights to equality and non-discrimination, highest attainable standard of physical, mental, sexual and reproductive health, work and just and favourable conditions of work, privacy, freedom from torture and degrading treatment, and respect for the dignity, bodily integrity and bodily autonomy.⁸ UN Special Rapporteurs similarly wrote a letter to the World Athletics President Sebastian Coe expressing “strong concern” that the regulations are not compatible with international human rights, including the rights of intersex women / women with DSC “to equality and non-discrimination, to physical and mental health, and to physical and bodily integrity.”⁹

Relatedly, in October 2020, World Rugby published a new Transgender Guideline policy advising that “transgender women may not currently play women’s rugby” due to safety and fairness concerns. The guideline excludes trans women who have undergone the androgenising effects of testosterone during puberty from women’s contact rugby even if they have undergone testosterone reduction treatments, on the grounds that such treatments do not sufficiently reduce trans women’s presumed biological advantage over other women players, which they presume to also create injury risks. The policy was implemented even after 84 academic experts in relevant fields, including sport science and public health or who have conducted research involving trans people themselves, wrote an open letter to World Rugby opposing the ban due to there being “no peer-reviewed, scientific evidence to justify a ban which would only be harmful to trans and gender diverse people.”¹⁰ Moreover, the policy was based on research which does not use trans athletes’ performance data directly, but rather incorrectly uses men’s performance as a proxy for trans women.

The World Rugby decision to ban trans women from women’s contact rugby coincides with wider debates, including in the popular media especially in the global north, over trans women’s participation in different sports, and so-called “anti-gender” campaigns, which promote traditional gender roles and oppose women’s and gender and “sexual minority” rights activism, have proliferated across Europe.¹¹ In this context, it is noteworthy that despite opposition to trans athletes’ inclusion in sports, there have been no openly trans athletes competing in the Olympic Games since the introduction of the International Olympic Committee (IOC) 2003 *Stockholm Consensus* policy, which was the first policy to set formal eligibility conditions for trans athletes in the Olympics. Throughout the long history of the modern Olympics, there have been no cases of so-called “gender fraud” either, despite

⁷ See e.g. UN Human Rights Council (2020, March 20th) Elimination of Discrimination Against Women and Girls in Sport. A/HRC/40/L.10/Rev.1. <https://www.right-docs.org/doc/a-hrc-res-40-5/>

⁸ Ibid.

⁹ Pūras, D., Melzer, N., & Radačić, I. (2018, September 18th). Dear Mr. Coe. https://www.ohchr.org/Documents/Issues/Health/Letter_IAAF_Sept2018.pdf

¹⁰ See Ingle, S. (2020, September 1st) World Rugby criticised by dozens of academics for trans women ban. The Guardian. <https://www.theguardian.com/sport/2020/sep/01/world-rugby-criticised-by-dozens-of-academics-for-trans-women-ban>

¹¹ See Kuhar, R. & Paternotte, D. (2017). *Anti-gender Campaigns in Europe: Mobilizing Against Equality*. London: Rowman and Littlefield

concerns having been expressed over the possibility that inclusion of trans people in sports may enable some men to masquerade as women to unfairly reap the benefits of success in women's sports.¹²

There have, however, been several recent high-profile cases involving the exclusion of intersex / DSD athletes from women's international sports, which has brought public attention to human rights issues. The most prominent cases have been those concerning Caster Semenya and Indian sprinter Dutee Chand, but it is the recently publicised story of Annet Negesa, a Ugandan female intersex / DSD athlete who was compelled to undergo medically unnecessary examinations and surgical intervention without her informed consent, that has raised serious concerns over institutionalised human rights violation in sports. In an interview given to German Television ARD for a documentary, Negesa made public her experience of having been treated as an "experiment" by sports regulators. The documentary also included the story of another athlete who was assessed and operated on in a hospital in France. She was one of four "young athletes from rural or mountainous regions of developing countries" whose case was published in a research paper by doctors and scientists associated with World Athletics.¹³ The paper documented an array of irreversible and potentially life altering interventions, including a "partial clitoridectomy with a bilateral gonadectomy" (i.e., partial removal of the clitoris and gonads), which were performed on these athletes, not for medical reasons, but because they would "allow them to continue elite sport in the female category."¹⁴

Following the documentary, 25 French athletes, including World and Olympic champions, wrote to the French government, World Athletics and the IOC asking them to investigate this matter, and the French Minister of Sport commenced an investigation. In June 2020, the Office of High Commissioner of Human Rights published a report which condemned these regulations, asked states to "prohibit the enforcement of regulations that pressure athletes to undergo unnecessary medical interventions as a precondition for participation in sport," and recommended sport governing bodies to "review, revise and revoke" these policies.¹⁵ In November 2020, Semenya announced that she has filed an application to the European Court of Human Rights against Switzerland for failing in its positive obligations to protect her against the violation of her rights under the and European Convention of Human Rights (ECHR) as a result of World Athletics' continuing discriminatory attempts to restrict the eligibility of certain women to participate in women's athletics competitions.¹⁶

It is notable that the above discussed developments are only examples of the more recent cases involving discrimination and human rights violations against intersex / DSD athletes and trans athletes in sports. Since the 1930s, international sport governing bodies have had in place eligibility regulations that restrict the right of some women to compete in

¹²Erikainen, S. (2019) *Gender Verification and the Making of the Female Body in Sport: A History of the Present*. London & New York: Routledge

¹³Fenichel, P., Paris, F., Philibert, P., Hieronimus, S., Gaspari, L., Kurzenne, J. Y., et al. (2013). Molecular Diagnosis of 5alpha-reductase Deficiency in 4 Elite Young Female Athletes Through Hormonal Screening for Hyperandrogenism. *J Clin Endocrinol Metab*, 98(6), E1055-1059.

¹⁴Ibid.

¹⁵OHCHR (2020, June 15th) Intersection of race and gender discrimination in sport, A/HRC/44/26. https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session44/layouts/15/WopiFrame.aspx?sourcedoc=/EN/HRBodies/HRC/RegularSessions/Session44/Documents/A_HRC_44_26_AEV.docx&action=default&DefaultItemOpen=1

¹⁶See Goh, Z. (2020, November 17th) Caster Semenya disputing World Athletics regulations at European Court of Human Rights. <https://www.olympicchannel.com/en/stories/news/detail/caster-semenya-world-athletics-dsd-regulations-european-court-human-rights/> (accessed 11/12/2020)

women's sports. These policies have collectively been called "sex testing" or "gender verification," and they have always been applied only to women athletes and aimed to ascertain that athletes' bodies conform to particular definitions of female physiology.¹⁷ These definitions have changed over time, and have involved emphasis on external genitalia, chromosomes and, most recently, hormones, but in all cases, the affected women have been compelled to undergo examinations and often medical interventions as a precondition to compete. Today, the policies take two different but related forms: regulations on the eligibility of athletes with VSV and on trans athletes. Additionally, many sport governing bodies now also have regulations on the eligibility of trans men to compete in men's sports, but these regulations are significantly less burdensome than those pertaining to women. All of the regulations give rise to human rights issues, however, that must be pertinently addressed.

In what follows, we provide a descriptive analysis of current issues connected with the human rights of trans athletes and intersex / DSC athletes in competitive sports, focusing on trans and intersex / DSC eligibility regulations. We focus on regulations enforced by large international sports governing bodies because they have governance remit over their sport as a whole, which means that their regulations also directly influence smaller national and regional sport governing bodies. Their regulations also directly impact all women, trans people and intersex / DSC people across all levels of sports and beyond, including because knowledge of exclusion at higher levels and anticipation of scrutiny of one's gender and sex attributes shape aspiring athletes' willingness to participate even in recreational and grassroots sports. We consider the central human rights and related ethical principles that apply to sports, how the eligibility regulations contravene these rights and principles, and what human rights challenges the affected athletes experience when participating and competing in sports. We then provide a framework for understanding the key issues arising at the intersection of trans athletes, intersex / DSC athletes, and human rights (violations) in sport, and consider how an inclusive and ethical competitive sports culture can be realised. We conclude with recommendations towards achieving this culture.

1. Relevant human rights framework and protections

The most pertinent overarching human rights protections pertaining to trans athletes and intersex / DSC athletes in relation to eligibility policies in sports are the right to respect for private life, prohibition of discrimination, and prohibition of torture, inhuman or degrading treatment proscribed by the UN Universal Declaration of Human Rights (UDHR) and the ECHR. The Council of Europe and affiliated governing bodies have adopted additional recommendations designed to combat human rights violations concerning gender identity and variations of sex characteristics, which extend these protections.

The ECHR declares respect for private life as a human right and the UDHR states that no one can be subjected to arbitrary interference with their privacy nor to attacks on their honour and reputation, and everyone has the right to legal protection against such interference or attacks. The right to private life encompasses physical, psychological and moral integrity, including medical treatment, psychiatric examinations, and physical and social identity including gender identification.¹⁸ Several European Commission and other human rights

¹⁷ Erikainen, S. (2019) op. cit.; Pieper, L. (2016). *Sex Testing: Gender Policing in Women's Sport*. Illinois: University of Illinois Press.

¹⁸EdeI, F. (2015) Case law of the European Court of Human Rights relating to discrimination on grounds of sexual orientation or gender identity. Council of Europe. <https://book.coe.int/en/human->

resolutions have recognised medical interventions prescribed as a pre-condition for gender recognition, or performed without informed consent, as human rights violations. For example, the Parliamentary Assembly of the Council of Europe Resolution on Discrimination Against Transgender People in Europe recognised that medical procedures as a precondition for gender recognition violate trans people's human right to private life and physical integrity.¹⁹ Similarly, in its issue paper on Human Rights and Intersex People, the Council of Europe Commissioner for human rights called upon member states to ensure an end to medically unnecessary "normalising" treatments administered on intersex / DSC people without their free and informed consent, emphasising the right not to undergo medical treatments.²⁰ The Recommendation of the Committee of Ministers to Member States on Measures to Combat Discrimination on Grounds of Sexual Orientation or Gender Identity further called for member states to prevent unnecessary disclosure of one's medical or gender history, and to ensure both that individuals have effective access to appropriate gender affirming treatments when needed without being subjected to unreasonable requirements, and that no one should be subjected to such treatments without their consent.²¹

Performing unnecessary medical examinations or interventions on people without their consent can constitute acts of torture and is encompassed under the UDHR and ECHR prohibition against torture, inhuman and degrading treatment and punishment. The UN special rapporteur on torture noted, for example, that "medical treatments of an intrusive and irreversible nature, if they lack a therapeutic purpose, constitute torture or ill-treatment when enforced or administered without the free and informed consent of the person concerned," particularly when such "treatments are performed on patients from marginalized groups."²²

The UDHR and ECHR also dictate that everyone is entitled to their rights and freedoms without distinction or discrimination on any grounds, such as race, colour, sex, birth or other status, where gender identity and DSC are recognised as prohibited grounds for discrimination. While the non-discrimination principle does not prevent the taking of measures to promote full and effective equality, such measures must have an objective and reasonable justification, i.e., they must pursue a legitimate aim and employ means which are reasonable and proportionate to the aim pursued.²³

With regard to sports specifically, a key issue around eligibility regulations for trans athletes and intersex / DSC athletes is the relationship between human rights and the notion of "fairness" in sports. For example, according to a press release published in March 2020, the IOC has begun a consultation process around the eligibility regulations that considers relevant human rights issues alongside medical, scientific and legal perspectives, but "the discussions so far have confirmed considerable tension between the notions of fairness and

[rights-and-democracy/6472-case-law-of-the-european-court-of-human-rights-relating-to-discrimination-on-grounds-of-sexual-orientation-or-gender-identity.html](https://www.coe.int/en/web/assembly/6472-case-law-of-the-european-court-of-human-rights-relating-to-discrimination-on-grounds-of-sexual-orientation-or-gender-identity.html)

¹⁹Parliamentary Assembly of the Council of Europe. (2015, April 22nd) Resolution 2048 Discrimination against transgender people in Europe. <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=21736#>

²⁰Council of Europe Commissioner for Human Rights. (2015) Human rights and intersex people. <https://rm.coe.int/16806da5d4>

²¹Council of Europe. (2010) Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity. <https://www.coe.int/en/web/sogji/rec-2010-5>

²²The Centre for Human Rights & Humanitarian Law and the Anti-Torture Initiative. (2014) Torture in Healthcare Settings: Reflections on the Special Rapporteur on Torture's 2013 Thematic Report. http://antitorture.org/wpcontent/uploads/2014/03/PDF_Torture_in_Healthcare_Publication.pdf

²³Council of Europe. (2010) op. cit.

inclusion, and the desire and need to protect the women's category."²⁴ Relatedly, in our conversations with stakeholders, the IOC Medical and Scientific Director Dr. Richard Budgett noted that

Fairness is another main driver. It is a balancing act and it is about degree and proportion as people have advantages in many areas such as their nutrition, access to training, equipment etc which do not affect their eligibility and similarly there are different groups within women's sport.

Fairness is also, however, a foundational principle under the Council of Europe Code of Sport Ethics,²⁵ according to which sport should be practised according to fair play, and where "fair play" is defined inclusively as incorporating friendship, respect for others and sportsmanship. The Code promotes combating discrimination of all kinds in sport in pursuit of fairness, and calls for the establishment of systems that reward sports ethics and personal achievement in addition to competitive success. It requests that sports ethics principles guide the formulation of rules governing participation in competitions and the organisation of competition categories. Correspondingly, the European Sports Charter²⁶ aims include the protection and development of sports' moral and ethical bases and human dignity of those involved, including safeguarding athletes from abusive or debasing practices. The Charter prohibits discrimination in access to sports activities and mandates that support for top level sports is devised in ways that give full respect to athletes' individual personality, physical and moral integrity. If one follows these conceptualisations of fairness, there is no apparent tension between the notions of fairness and inclusion but rather, fairness and inclusion are directly aligned.

Further, the Council of Europe Ministers Responsible for Sport Resolution on Protecting Human Rights in Sport highlighted that sport organisations have a responsibility to respect and protect human rights but, moreover, public authorities' obligations around human rights include the protection of individuals' rights from violations by non-State actors, such as sports organisations.²⁷ The Resolution stressed the importance of guaranteeing athletes' right to justice and fair trial, and highlighted the increasing relevance of European juridical instruments to prevent and remedy human rights abuses in sport, particularly combating arbitrariness and ensuring the proportionality of sanctions imposed. It noted that the Council of Europe is uniquely placed to undertake this task.

International sports governing bodies also include respect and endorsement of human rights principles in their foundational documents. The Olympic Charter, the foundational document of the Olympic movement, declares that the practice of sport is a human right that it must free from discrimination of any kind,²⁸ and the IOC Code of Ethics highlights the Olympic movement's commitment to respecting international human rights conventions where they apply to the Olympics, including respecting human dignity and rejecting discrimination,

²⁴ IOC (2020, March 3rd) IOC Executive Board opens second meeting of the year.

<https://www.olympic.org/news/ioc-executive-board-opens-second-meeting-of-the-year> (accessed

²⁵Council of Europe. (2010) Recommendation CM/Rec(2010)9 of the Committee of Ministers to member states on the revised Code of Sports Ethics. <https://rm.coe.int/16805cecaa>)

²⁶ Council of Europe. (2001) Recommendation No. R (92) 13 Rev of the Committee of Ministers to member states on the revised European Sports Charter. <https://rm.coe.int/16804c9dbb>

²⁷Council of Europe. (2018) 15th Council of Europe Conference of Ministers responsible for Sport Resolution MSL15(2018)10 Protecting human rights in sport: obligations and shared responsibilities.

<https://rm.coe.int/resolutions-adopted-by-the-15th-council-of-europe-conference-of-minist/16808e70ae>

²⁸IOC. (2020) The Olympic Charter.

https://stillmedab.olympic.org/media/Document%20Library/OlympicOrg/General/EN-Olympic-Charter.pdf#_ga=2.161414781.159448113.1607434684-2088610855.1607015549)

harassment and abuse.²⁹ Concerning these commitments, recent independent expert Recommendations for an IOC Human Rights Strategy³⁰ highlighted that the most significant human rights challenges currently facing the IOC include risks of harm and discrimination experienced by LGBTI+ athletes. They noted especially the severe harms (including coerced medical interventions) experienced by trans women and intersex women / women with DSC under the current International Sports Federations' eligibility requirements for women's competitions.

2. Eligibility policies in international sports

3.1 Intersex / DSC athletes

Current regulations restricting the right of intersex / DSC athletes to compete pertain only to athletes competing in women's sports at international competitions. Perhaps the most prominent are the World Athletics *Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development)*,³¹ restrict the right of athletes with certain DSC to compete in the female classification at international competitions and set world records in races between 400m to one mile, if they have functional circulating testosterone levels in blood above five nmol/L. To become eligible, affected athletes must be legally recognised as female³² and reduce their testosterone level to below five nmol/L for a continuous period of six months minimum, which in practice entails undergoing medical intervention, and maintain this lower level continuously as long as they compete. In case an athlete fails to comply with these conditions, to continue international athletics competition, her options are to re-specialise in events other than middle-distance races, to compete in the male classification if she qualifies, or to compete in any applicable intersex or similar third gender classifications, which do not currently exist.

Other sports governing bodies have implemented similar regulations. While the IOC is currently in the process of reviewing its regulations, its most recent regulations, adopted just prior to the London 2012 Olympics, restricted the right of women with elevated androgenic hormone production (medically referred to as "female hyperandrogenism") to participate in women's events. Under the IOC *Regulations on Female Hyperandrogenism*,³³ an investigation could be initiated if an athlete was suspected to have elevated androgen levels and the athlete could then be submitted to "further investigation." These could include medical examinations to determine whether her testosterone level is within the "male range" (and functional), but no definition was provided as to what exactly the "male range" threshold was. Should the athlete being investigated fail to provide the requested information or undergo examinations, she may be suspended, and should she be found to have hyperandrogenism, she may be declared ineligible to compete, in which case her only other option to continue competing internationally was to compete in the male classification, if she qualified. The IOC also mandated that each

²⁹ IOC. (2020) Code of Ethics. <https://www.olympic.org/documents/code-of-ethics>

³⁰Al Hussein, Z.R. & Davis, R. (2020) Recommendations for an IOC Human Rights Strategy. https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/News/2020/12/Independent_Expert_Report_IOC_HumanRights.pdf#_ga=2.164560639.159448113.1607434684-2088610855.1607015549

³¹ World Athletics. (2019) Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development). <https://www.worldathletics.org/news/press-release/eligibility-regulations-for-female-classifica>

³² Or a third gender (e.g. "intersex") as some countries now legally recognise third genders.

³³ IOC. (2012) IOC regulations on female Hyperandrogenism, 2012. https://stillmed.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2012-06-22-IOC-Regulations-on-Female-Hyperandrogenism-eng.pdf

National Olympic Committee (NOC) should, “prior to the registration of its national athletes, actively investigate any perceived deviation in sex characteristics and keep complete documentation of the findings.” However, in 2015, CAS caused a suspension of these regulations after ruling in favour of Dutee Chand, who challenged the regulations’ legitimacy at CAS. The effect was that the IOC had no regulations on intersex / DSC athletes in place during the 2016 and 2018 Olympic events. The IOC did, however, support World Athletics’ efforts to collect evidence in support of the reinstatement of hyperandrogenism rules. At the Rio Games, much media attention was directed to the Women’s 800m race, won by Caster Semenya followed by two women speculated to have high testosterone. Dutee Chand also competed in 100m race but did not receive as much attention, perhaps because she lost in the heats.

While World Athletics and the IOC have both rejected the term “gender verification” as anachronistic and maintain that their policies do not and should not aim to determine “gender,” In 2011, FIFA introduced a policy titled *Gender Verification Regulations*. The FIFA policy, somewhat mirroring the IOC, mandates that prior to the nomination of national teams, member associations must ensure “the correct gender of all the players” considered for nomination, by “actively investigating any perceived deviation in secondary sex characteristics and keeping complete documentation of the findings.” If these investigations indicate that an athlete’s “gender” is not consistent with the gender initially indicated by the player and/or their association, the case may be referred to a disciplinary committee, which can then impose sanctions on the player and/or association. In effect, this policy grants national federations the power to investigate and exclude football players on the grounds of “perceived deviations,” which has resulted in confusion as the policy has been interpreted differently by different national federations and applied loosely, and there are reports of this having resulted in psychological, physical and economic harm to players.³⁴

The FIFA policy does not explicitly require medical interventions as an eligibility condition, and it offer no guidance about medical procedures, making it a policy based on principles of exclusion without suggesting further medical steps. However, there is several reported examples where footballers were advised to undergo medical interventions. For example, Equatorial Guinean footballer Genoveva Anonma has shared with news reporters her experiences of humiliation under this policy: “they asked me to take all my clothes off in front of officials ... and the Equatorial Guinea team, I was really upset, my morale was low and I was crying. It was totally humiliating.”³⁵ Similarly, a young footballer self-identifying as intersex, who took part in a recorded panel discussion at a Football vs Homophobia event in 2020, described their experience of being compelled to undergo medical assessment without their consent.³⁶ The athlete was dropped from their national team, asked to undergo surgery, and made to feel incomplete, resulting in severe psychological harm and loss of livelihood. Relatedly, even though the FIFA regulations do not advise medical intervention, some footballers have reported experiencing pressure from national federations to take medical steps, including surgery, to compete. Indeed, officials such as Ahmad Hashemian, Chair of Iranian Football Federation’s Medical Commission, has commented that “if these people can

³⁴ See Fagan, K. (2015, June 13th) FIFA targets female players with gender verification guidelines. https://www.espn.com/espnw/news-commentary/2015worldcup/story/_/id/13072424/fifa-targets-female-players-gender-verification-guidelines

³⁵ Sheringham, S. (2015, January 14th) Genoveva Anonma: 'I had to strip naked to prove I was a woman.' <https://www.bbc.co.uk/sport/football/30760929>

³⁶ Football vs Homophobia (2020, July 25th) Can football do what athletics couldn't? <https://www.youtube.com/watch?v=gFyXYVdYx6k>

solve their problems through surgery and be in a position to receive the necessary medical qualifications, they will then be able to participate in [women's] football.”³⁷ The above examples illustrates how FIFA policy can be applied arbitrarily without consistent standards by national federation officials, causing severe harm to affected footballers in the process.

3.2 Trans athletes

Current regulations restricting trans athletes' right to compete set different eligibility conditions for trans men (to compete in men's sports) and trans women (to compete in women's sports), with the latter being significantly more constraining than the former. The most restrictive current regulations are the World Rugby *Transgender Guideline*,³⁸ which mandates that trans women who transitioned post-puberty and “have experienced the biological effects of testosterone during puberty and adolescence” are banned outright from playing contact rugby with other women. Despite noting that “many people do not meet cultural or norms or stereotypes related to the expression of gender identity,” World Rugby allows anyone who may have “concerns about safety or fairness” relating to an athlete to raise these concerns with their Rugby Union, which in turn may initiate a process of further medical assessments. The Guideline operates as a “policy” in World Rugby tournaments, but World Rugby has also requested national federations to use it as guidance, however many national federations have openly rejected the policy due to concerns over its failure to comply with equality standards.³⁹

Other sports governing bodies also have in force eligibility regulations restricting trans women's eligibility. While the IOC 2003 *Stockholm Consensus* policy mandated that all trans athletes must undergo surgical anatomical changes, including genital surgery and gonadectomy, and have legal recognition of their gender to compete in the Olympics,⁴⁰ the IOC 2015 *Consensus Meeting on Sex Reassignment and Hyperandrogenism* correctly recognised that these requirements were not relevant for sport performance and were inconsistent with human rights.⁴¹ The IOC thus introduced new guidelines under which a trans woman is eligible for women's competitions if she can declare that her gender identity is female, demonstrate that her total testosterone level in serum has been below 10 nmol/L for at least 12 months before her first competition, and maintain this level as long as she competes. In addition, she must submit to testing for compliance, or face suspension. The World Athletics *Eligibility Regulations for Transgender Athletes*⁴² are similar but the threshold for testosterone is lower: a trans woman must demonstrate that her testosterone in serum has been less than

³⁷Lyons, K. (2014, February 10th) Iranian women's football team forced to have gender testing. <https://www.dailymail.co.uk/news/article-2555602/Iranian-women-footballers-required-undergo-gender-testing-four-players-national-womens-team-revealed-men.html>

³⁸World Rugby. (2020) Transgender Guideline. <https://playerwelfare.worldrugby.org/gender>

³⁹Including e.g. USA Rugby and Rugby Canada, see: USA Rugby (2020, September 15th) USA Rugby Submits Transgender Feedback to World Rugby; Domestic Policy to Remain as is for USA membership. <https://www.usa.rugby/2020/09/usa-rugby-submits-transgender-feedback-to-worldrugby-domestic-policy-to-remain-as-is-for-usa-membership/>; Rugby Canada (2020, October 3rd) Rugby Canada Provides Update on Feedback to Proposed Transgender Guidelines. <https://rugby.ca/en/news/2020/09/rugbycanada-provides-update-on-feedback-to-proposed-transgender-guidelines>

⁴⁰IOC. (2003) Statement of the Stockholm Consensus on Sex Reassignment in Sports. https://stillmed.olympic.org/Documents/Reports/EN/en_report_905.pdf

⁴¹IOC. (2015) The IOC Consensus Meeting on Sex Reassignment and Hyperandrogenism. https://stillmed.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2015-11_ioc_consensus_meeting_on_sex_reassignment_and_hyperandrogenism-en.pdf

⁴²World Athletics. (2019) Eligibility Regulations for Transgender Athletes. <https://www.worldathletics.org/news/press-release/iaaf-council-219-decisions>

five nmol/L continuously for at least 12 months, maintain this level as long as she competes, and provide a written and signed declaration that her gender identity is female.

Comparable eligibility conditions do not apply to men. Under the World Rugby *Transgender Guideline*,⁴³ trans men may play men's rugby with the only eligibility condition being a confirmation of physical ability." For this purpose, "an experienced independent medical practitioner must provide confirmation that the player is physically capable of playing men's rugby ... supported by a musculo-skeletal evaluation and/or other relevant assessments," and the player himself must provide written acceptance of "risks of playing contact rugby with males," given the injury risks this is presumed to pose. The only eligibility condition posed by the World Athletics *Eligibility Regulations for Transgender Athletes* is a written and signed declaration stating that the athlete's gender identity is male, after the receipt of which a trans man will be eligible to compete and set records in men's athletics without restriction.⁴⁴ Under the IOC *Consensus on Sex Reassignment and Hyperandrogenism*, trans men are eligible to compete with other men without any restrictions.⁴⁵ While FIFA has no eligibility policies explicitly focused on trans athletes, it is noteworthy that the Preamble to their *Gender Verification Regulations* emphasise importance of "androgenic hormones" and their performance enhancing effects, "particularly on strength, power and speed" which, it is presumed, "may provide an advantage" and "influence the outcome of the game,"⁴⁶ but scientific evidence is not appropriately provided to support these claims. Relatedly, it should also be noted that trans men who undergo gender affirming testosterone therapy must obtain a Therapeutic Use Exemption (TUE) for testosterone because it is on the World Anti-Doping Agency (WADA) Prohibited List.⁴⁷ To obtain TUE, trans men must provide a health professional's report detailing their medical history, including previous treatments, an endocrinologist's report on hormone therapy, and a surgical report where applicable.

Despite less restrictive eligibility criteria, however, many trans men report barriers to participation connected to widespread misunderstanding of the relevant regulations. In our conversations with stakeholders, members of the trans community reported, for example, instances of other athletes inaccurately assuming that trans men have a particular testosterone-induced advantage. They also raised further limiting factors with regards to transgender athletes, including that athletes who are already competing at high levels in sport and wish to transition would find it difficult or impossible to do so without a high level of scrutiny and interest in their story, with little room for privacy. Where an athlete lives will also condition how easy it is to be able to change their gender mark legally or get the level of physician support required to meet eligibility criteria. Additionally, due to the existence of significantly different eligibility conditions and criteria in different sports including in relation to the provision of supporting medical evidence, and with different policies intersecting at different points of the performance pathway (e.g., youth to adult, national to international), in practice, trans athletes find the policy landscape confusing and difficult to navigate.

3.3 Non-binary athletes

Non-binary athletes face particular challenges in sports that are not equitable to those experienced by trans women, trans men, and women with DSC. Currently, non-binary athletes

⁴³ World Rugby. (2020) op. cit.

⁴⁴ World Athletics. (2019) op. cit.

⁴⁵ IOC. (2015) op. cit.

⁴⁶ FIFA (2011) op. cit.

⁴⁷ WADA. (2017) Transgender Athletes TUE Physician guidelines. https://www.wada-ama.org/sites/default/files/resources/files/tuec_transgender_version1.0.pdf

cannot usually compete internationally in an appropriate gender category because the vast majority of competitions (and opportunities for sports participation generally) are restricted to binary female and male competitions (with the exception of some mixed events, e.g. mixed-gender rugby). If they wish to compete, in most sports, non-binary athletes must choose one of these binary classifications, both of which may be inconsistent with their gender, which may present an insurmountable barrier that effectively excludes them from sports.

If non-binary athletes do choose to compete in one of the binary gender classifications, most sport governing bodies' regulations do not explicitly address non-binary athletes' eligibility, creating ideal conditions for confusion and uncertainty as to what conditions non-binary athletes must meet to be eligible. The World Rugby *Transgender Guideline* is the only one of the above discussed regulations to explicitly address non-binary athletes, and, whether a non-binary athlete may play in women's or men's rugby is determined by whether "the player has experienced the biological effects of testosterone during puberty and adolescence."⁴⁸ Non-binary athletes who have experienced these effects can play men's rugby without restriction but cannot play women's rugby, and athletes who have not experienced these effects can, at least theoretically, play either men's or women's rugby, subject to the following conditions: to play men's rugby, they must submit to the eligibility conditions prescribed for trans men, and to play women's rugby, they must provide confirmation of any "medical treatment and the timing thereof," which means that if they have undergone gender affirming testosterone therapy, they would almost certainly not be eligible.

It should be noted, however, that some local and regional sports governing bodies have recently implemented policies introducing a new non-binary gender classification. For example, the Berlin triathlon and Stockholm marathon have included third gender categories, while the regional governing body of Scottish Athletics has introduced a *Policy on Non-Binary Athletes Competing Within Scottish National Championships*, which makes it compulsory for all Scottish Athletics affiliated championship events to include a non-binary category in addition to female and male classifications within the event entry options.⁴⁹

3.4 Overarching issues

There are some common problems that cut across the above discussed regulatory landscape. The regulations all proclaim to be based on the imperative to ensure fair and meaningful sports competition especially in the female classification, and they are justified on the grounds that the affected athletes have an unfair performance advantage over other women, or, in the case of the World Rugby, that they undermine other women's safety. Sport governing bodies justify these claims by arguing that their regulations are based on scientific evidence that shows the existence of such unfair advantage or safety issues. World Athletics, for example, stated that "there is a broad medical and scientific consensus, supported by peer-reviewed data and evidence from the field," showing that women with elevated testosterone have an unfair performance advantage.⁵⁰ Firstly, however, the scientific evidence in question is highly

⁴⁸ World Rugby. (2020) op. cit.

⁴⁹ Scottish Athletics. (2019) Scottish Athletics Policy on Non-Binary Athletes Competing Within Scottish National Championships. <https://www.scottishathletics.org.uk/wp-content/uploads/2015/11/Scottish-Athletics-Policy-on-non-binary-athletes-competing-within-Scottish-National-Championships.pdf> (accessed 14/12/2020)

⁵⁰ World Athletics. (2018) Op. cit.

contested. Numerous experts have argued that the science underlying the policy is flawed,⁵¹ undermining any claims to a scientific consensus. Secondly, as noted above, under the European Sports Charter and Council of Europe Code of Sport Ethics, “fairness” is defined inclusively in terms of friendship, respect for others and sportsmanship, and the commitment to fair play sits alongside a commitment to freedom from discrimination including in the formulation of rules governing competition categories and the right to sports participation. To the extent that sport governing bodies conceptualise fairness in ways allowing discrimination on the basis of gender identity and intersex / DSC, even though these are prohibited grounds of discrimination, they contravene the Sports Charter, Code of Sport Ethics, and the broader framework of international human rights.

Sport governing bodies also state that they regard respecting and preserving athletes’ dignity and privacy as essential and express a commitment to resolving all cases arising under the regulations in confidence. They state that athletes will not be forced to undergo any assessments or treatment, but concurrently mandate that any affected athlete who wishes to compete in women’s sport must fully comply with the regulations and co-operate with medical personnel, including by submitting to medical testing and interventions, and by providing all appropriate consents and waivers for such. This gives rise to unwarranted pressures for athletes to submit to whatever is requested of them to continue competition, which undermines the principle of free and informed consent. It consequently also undermines athletes’ right to private life and physical integrity and gives rise to practices of inhumane and degrading treatment, as we detail further below. The athletes themselves are solely responsible for continuing compliance with the regulations, including adhering to any prescribed treatments and carrying the financial costs these may give rise to.

It is worth noting that anti-doping surveillance is also used to evaluate athletes’ compliance with sex category eligibility regulations, even though doping is a separate issue that cannot be conflated with questions concerning the competition eligibility of trans athletes and intersex / DSC athletes: firstly, doping officials observe athletes during urine sample collection, which invites scrutiny of athletes’ genitals especially when they do not reflect expected norms of sex-typical genital appearance. Secondly, the WADA 2021 Anti-Doping Code explicitly allows sport governing bodies to use data from anti-doping control to assess athletes’ compliance with female category eligibility regulations,⁵² meaning that athletes whose doping test results show atypical findings may be subjected to further assessments and scrutiny of their sex characteristics due to suspicions raised via doping control.

Further, as we also noted above, eligibility regulations restricting the right of trans athletes and intersex / DSC athletes to compete in sports have already been widely condemned by human rights authorities and independent scholars alike, including due to their failure to comply with international human rights, yet in sports related matters like those pertaining to eligibility regulations, while an athlete may appeal a decision made under such regulations, they may not bring proceedings in any court, including national and international courts, other than the CAS. In other words, CAS holds exclusive jurisdiction over sport,

⁵¹The scientific debate regarding this evidence is extensive and beyond the scope of this report, but for an overview of key contested areas, see: Pielke, R. (2018) A Call for Berman and Garnier (2017) to be Retracted,” post to “The Least Thing” (blog), <http://leastthing.blogspot.com/2018/07/a-call-for-bermonand-garnier-2017-to.html>; Sönksen, P. et al. (2018) Hyperandrogenism Controversy in Elite Women’s Sport: An Examination and Critique of Recent Evidence, *British Journal of Sports Medicine*, 2018, 52(23): 1481-1482.

⁵² WADA. (2021) World Anti-Doping Code. <https://www.wada-ama.org/en/resources/the-code/world-anti-doping-code>

including the validity, legality, interpretation and application of sport regulations. CAS, however, is an arbitration body that makes decisions based on the rules of sports. Human rights are not an intrinsic part of these rules and they are thus not an intrinsic part of the CAS terms of reference.

In addition, there is concern of a trickledown effect where, in the absence of clear robust national and localised guidance, policies designed for elite sports end up governing access to grassroots sport not only in relation to the regulations but also the associated ideas, culture and norms. Also, athletes find the regulations confusing at the different parts of the performance pathway, (such as when moving from youth to adult, or national to international) and the different requirements at each point, such as the supporting medical evidence required, for example.

The development of policy seldom takes athletes experiences into account and international policy reflects little understanding of lives and experiences of transgender people in different countries e.g., athletes in some places cannot change their sex marker on official documents, yet evidence requirements in some policy requires this.

4. Human rights and eligibility policies in international sports

4.1 Private life and physical integrity

While sport governing bodies have stated their commitment to protecting athletes' privacy and confidentiality, such commitments are not always realised or are, in practice, unrealisable. This is especially because the highly public nature of international sports and limited options provided to athletes who are ruled ineligible under the current regulations often make ensuring privacy and confidentiality extremely difficult or impossible. In all cases, affected women can only choose to discontinue competition, switch to the male category (or any third gender categories that may be offered in the future), re-specialise in a different sport if they qualify, or challenge the regulation itself by appealing the ruling of their ineligibility to CAS. Switching to a different gender category or appealing the ruling would amount to an immediate disclosure of the athlete's confidential medical information, as this would publicly declare that the athlete does not meet a prescribed set of physical criteria. A sudden decision to drop out of competition or to re-specialise in a different sport may invite harmful speculation concerning the reasons for such decisions, especially if the affected athlete is subject to public interest due to sporting success or does not conform to social gender norms. Switching to a different sport or even a different event within a sport (e.g., switching from middle- to short- or long-distance running) is also extremely challenging due to the amount of specialisation, event specific skill and training required for elite level sports competition, making this option generally unrealistic. The Human Rights Watch has called the resulting dilemma that athletes face an "impossible choice" that in effect makes compliance with the mandated medical examinations and interventions the only viable option in most cases.⁵³ Additionally, in our conversations with stakeholders, members of the trans community also highlighted that trans eligibility policies place a burden on trans people to 'out' themselves to sports regulators themselves even when the regulators do maintain confidentiality, when many trans people generally do not, and are not required to in other spheres of life, to declare their gender history.

⁵³ Human Rights Watch. (2020) "They're Chasing Us Away from Sport" Human Rights Violations in Sex Testing of Elite Women Athletes. <https://www.hrw.org/report/2020/12/04/theyre-chasing-us-away-sport/human-rights-violations-sex-testing-elite-women>

Relatedly, despite sport governing bodies' statements declaring that athletes will not be forced to undergo medical assessments and interventions, there is a significant element of coercion involved and whether the standards of free and informed consent are met under these conditions is questionable. Because the eligibility regulations require medical assessments and interventions as a precondition to compete, and because the options for athletes who decline to undergo these assessments and interventions are generally unviable, agreements to undergo assessments and interventions occur under coercive conditions. For example, the implications of dropping out of competition may include, alongside privacy and confidentiality breaches, loss of livelihood, as many athletes make their living from income generated from sports (e.g. prize money, sponsorships and scholarships). For athletes from impoverished backgrounds, this income may support family members as well, and its loss may have significant financial consequences (including return to poverty) both for the athletes themselves and family members dependent on them, creating high pressures to continue competing and thus to submit to any medical assessments or interventions that are mandated for eligibility.⁵⁴ Due to these pressures, the standards of consent are not met, which also amounts to a violation of medical ethics. As the Human Rights Watch observed, "an athlete choosing between the medical interventions demanded by the regulations and the end of her career is not making a free choice, but rather a coerced one."⁵⁵

Importantly, the mandated assessments and interventions are not undertaken for medical reasons. When athletes have not expressed a desire to undergo them for reasons other than meeting sports edibility conditions, they are not medically necessary nor beneficial. This is true both for intersex / DSC individuals and trans individuals, all of whom have the right to not undergo treatments (notably, even when such treatments may be generally considered gender affirming and therapeutically valuable, this does not entail they are so for everyone). Coercing athletes into undergoing medically unnecessary assessments and interventions merely to comply with eligibility regulations that sets physiological standards for one's right to compete in the gender classification with which one identifies contravenes physical integrity, both relating to medical treatments and physical and social identity including gender identification, all of which are encompassed under the human right to private life. This also relates to the use of anti-doping procedures for assessing compliance with female category eligibility regulations: as the Human Rights Watch noted, "while testing athletes for doping is a legitimate aim, the use of doping test data to target women athletes under sex testing regulations is not."⁵⁶ Consent to anti-doping testing does not entail consent to "sex testing." While these issues are more pressing for women due to the higher eligibility burdens imposed on them compared to men, they also apply to trans men, who are compelled to undergo medical assessment to confirm "physical ability," which includes providing sensitive medical information about any gender affirming treatments they have undergone to sports regulators. A mandate for confirming physical ability also places a burden on trans men to "prove" that they are physically fit enough to compete, where no similar burden is imposed on other men.

The Human Rights Watch has also provided evidence that intersex / DSC athletes are often given only partial or incomplete information about the assessments and interventions they are subjected to, and in some cases, they have been requested to undergo assessments under false pretences, for example by telling athletes they are undergoing "performance tests"

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Human Rights Watch. (2020) "They're Chasing Us Away from Sport" Human Rights Violations in Sex Testing of Elite Women Athletes. <https://www.hrw.org/report/2020/12/04/theyre-chasing-us-away-sport/human-rights-violations-sex-testing-elite-women>

when they are actually subjected to an examination of internal reproductive organs.⁵⁷ In these cases, there is a clear violation of informed consent to medical examinations, and thus, a clear violation of one's right to physical and moral integrity.

Furthermore, there are side effects and costs associated with the unnecessary medical interventions that are prescribed on athletes, which also undermine athletes' physical and moral integrity. The intervention generally required is testosterone reduction, which can induce effects including fatigue and chronic weakness, depression, sleep disturbances, decreased libido, decreased bone density and muscle strength, and adverse effects on lipid profile.⁵⁸ Depending on the interventions performed, treatments may be lifelong and as athletes must cover the costs of compliance with the regulations, they must also cover the treatment costs, which is significant especially for athletes from low-income contexts.

4.2 Inhuman or degrading treatment

The medical examinations that women athletes are compelled to undergo, including assessment of physiological characteristics and attributes like hormone levels, are degrading. They are undertaken solely for the purpose of scrutinising women's bodies to assess whether they conform to particular definitions of female physiology. This process is inevitably subjective and connected with social notions of perceived physiological masculinity and femininity. Most illustrative is the IOC and FIFA mandates for NOCs and member associations to "actively investigate" athletes for "perceived deviation in sex characteristics" and the World Rugby allowance that anyone with (undefined but presumably gender related) "concerns" about an athlete may raise these concerns, and thus possibly initiate a process of physiological scrutiny of any woman perceived as "concerning." This encourages the surveillance of all women and girls participating in sports for signs of sex and gender "deviance," especially women perceived as "masculine." Requesting investigations to be undertaken whenever such signs are perceived to manifest amounts to an invitation to subject women and girls to medical scrutiny based on subjective perceptions of athlete's failure to embody gender norms.

The process assessing physiological characteristics can include invasive and intimate examinations with no health purpose. The Human Rights Watch⁵⁹ has documented that assessments of intersex women / women with DSD have included examining genitalia and pubic hair pattern for signs of so-called virilisation, including larger than typical clitoris size. This is an intimate and degrading scrutiny of women's bodies that can lead to questioning athletes' sex and gender identity, and to their exclusion from the gender category they belong in. Further, there is evidence that medically unnecessary "normalising" interventions have been performed on athletes with variations of sex characteristics under the guise of these regulations that amount to genital mutilation. Above, we discussed an article by World Athletics affiliated scientists and physicians documenting invasive medical examinations and life altering, irreversible surgery, including removal of gonads and partial removal of the clitoris, performed on four athletes from the global south for the purpose of compliance with sports regulations on hyperandrogenism.⁶⁰ These interventions are not in any way relevant to sports

⁵⁷ Ibid.

⁵⁸ See e.g., Jordan-Young, R., Sönksen, P., & Karkazis, K. (2014) Sex, Health, and Athletes, *British Medical Journal*, 348.

⁵⁹ Human Rights Watch. (2020) op. cit.

⁶⁰ Fenichel, P., Paris, F., Philibert, P., Hieronimus, S., Gaspari, L., Kurzenne, J. Y., et al. (2013). Molecular Diagnosis of 5alpha-reductase Deficiency in 4 Elite Young Female Athletes Through Hormonal Screening for Hyperandrogenism. *J Clin Endocrinol Metab*, 98(6), E1055-1059.

performance, impair sexual function, and have been condemned by human rights authorities as a form of torture.⁶¹

Several high-profile athletes who have been affected by the regulations have also been victims of degrading and humiliating public scrutiny of their sex characteristics and gender presentation. Due to violations of athletes' right to privacy, several women, including but not limited to Caster Semenya, have been the subject of inhumane and degrading treatment especially in the public media, where their sex and gender have been publicly questioned and their intimate physiology subjected to speculation. Meanwhile, trans athletes such as Laurel Hubbard have received disproportionate levels of media attention attacking their right to compete, and social media onslaughts by those with little or no understanding of the issues.

Further, it is notable that LGBTI+ people in general, and trans people in particular are disproportionately victims of violence and abuse across levels of sports, which amounts to inhumane and degrading treatment. For example, a research report published as part of the Erasmus+ Outsport project documented that 36% of LGBTI people who disclosed negative experiences in sport had experienced physical abuse or violence, and the number is considerably higher for trans people's in particular.⁶² This was also a feature of experiences reported in our conversations with stakeholders in the trans community, one of whom stated, "I was a very feminine boy being forced to play [football] and I continually found myself in deliberately engineered violent situations. This went on for almost 3 years."

4.3 Discrimination

Sex category eligibility regulations clearly discriminate against individuals on the grounds of gender identity and intersex / DSC by imposing restrictive and harmful eligibility conditions, or by altogether excluding individuals, due to their gender identity or sex characteristics. As noted above, the discriminatory nature of these regulations has been acknowledged by human rights authorities, sport governing bodies and courts alike, with the UN High Commissioner for Human Rights, for example, noting that they deny some athletes "an equal right to participate in sports and violates the right to non-discrimination more broadly."⁶³ In World Rugby's case, they deny all trans women any player pathway in contact rugby, effectively banning them.

While the principle of non-discrimination does not necessarily prevent taking measures to promote full and effective equality, if such measures are taken, they must have an objective and reasonable justification. Yet, as Human Rights Watch also found, the "discrimination, inherent in the regulations, is unnecessary and disproportionate."⁶⁴ Ensuring fair, meaningful and safe competition may be reasonable aims in principle, but the measures that sport governing bodies have taken to reach these aim in practice are not: the eligibility regulations not only encourage and rely on social norms of female physiology and subjective evaluations of compliance with these norms, but they also violate athletes' human rights. Committing human rights violations as a means to achieve (an abstract notion of) fair play is unreasonable,

⁶¹ See e.g. The Centre for Human Rights & Humanitarian Law and the Anti-Torture Initiative. (2014) Torture in Healthcare Settings: Reflections on the Special Rapporteur on Torture's 2013 Thematic Report. http://antitorture.org/wpcontent/uploads/2014/03/PDF_Torture_in_Healthcare_Publication.pdf

⁶² Menzel, T., Braumüller, B. & Hartmann-Tews, I. (2019). The relevance of sexual orientation and gender identity in sport in Europe. Findings from the Outsport survey. Cologne: German Sport University Cologne, Institute of Sociology and Gender Studies.

⁶³ United Nations High Commissioner for Human Rights. (2020). Intersection of race and gender discrimination in sport.

<https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session44/Pages/ListReports.aspx>

⁶⁴ Human Rights Watch. (2020) op. cit.

not consistent with the Council of Europe Code of Sport Ethics conceptualisation of fair play, and should not be seen as a valid justification for violating the non-discrimination clause.

Moreover, as there exist no comparable eligibility regulations for men and the relevant regulations are either imposed exclusively on women (like with regulations on intersex / DSC athletes) or entail significantly higher burdens on women than men (like with trans eligibility regulations), they are discriminatory against women as a group. Especially eligibility regulations for intersex women / women with DSC also effectively discriminate on the grounds of national and social origin and race, for two reasons: firstly, they encourage suspicion and scrutiny of women athletes based on cultural gender norms, and these norms privilege expressions of femininity and masculinity that are informed by western (white) ideals of feminine physiology and gender presentation.⁶⁵ Secondly, in high income countries especially in the global north, medically unnecessary “normalising” interventions are still often performed on intersex / DSC individuals in early childhood, despite the fact that these interventions have been condemned by human rights authorities and the Council of Europe.⁶⁶ The consequence is that intersex / DSC athletes from the global north are more likely to already have undergone medical interventions that enable compliance with sport governing bodies’ eligibility conditions. However, in low- and middle-income countries especially in the global south, where access to medical interventions in general is less widely available, intersex / DSC athletes often reach adulthood without being subjected to unnecessary medical “normalisation.” Consequently, athletes who become the victims of eligibility regulations concerning intersex / DSC are disproportionately women of colour from low- and middle-income countries in the global south.⁶⁷

The general lack of recognition for non-binary genders by sport governing bodies is also notable and creates conditions where non-binary people must either submit to having their gender incorrectly attributed (as either woman or man, though competing in women’s or men’s competition) or face exclusion. The former option may also be accompanied with mandates for medically unnecessary examinations and interventions, but the conditions under which non-binary athletes may (and may not) have to undergo such examinations and interventions have generally not been explicitly clarified, creating uncertainty about eligibility. While one way to facilitate non-binary inclusion may be the introduction of a third, non-binary gender classification – indeed, the Resolution on Discrimination Against Transgender People in Europe,⁶⁸ among others, has called for the inclusion of third gender options, for those who seek this option, as one general way to combat discrimination – non-binary inclusion cannot be used as a vehicle for further discrimination of trans women and intersex women / women with DSC. As these athletes are women, they should, accordingly, compete in female classifications. Both World Athletics and World Rugby have, however, indicated that they may in the future introduce third gender classifications, which they have referred to as an “intersex” classification and as an “open category,” respectively. If third gender classifications are introduced, in order for them not to be discriminatory, they must be a means to provide non-binary athletes accurate gender recognition, and not a means to exclude women from women’s sports (e.g. by labelling women “intersex” when they do not identify as such instead of recognising their status as women or by denying trans women their identity and status as women).

⁶⁵ See also *ibid.*

⁶⁶ See e.g. Council of Europe Commissioner for Human Rights. (2015) Human rights and intersex people. <https://rm.coe.int/16806da5d4>

⁶⁷ Human Rights Watch. (2020) *op. cit.*

⁶⁸ European Commission Parliamentary Assembly. (2015) *op. cit.*

Additionally, transgender persons with whom we had discussions highlighted that even when trans athletes and intersex / DSC athletes do comply with sport governing bodies eligibility policies, this may not stop discrimination by those with whom they engage in sports, yet sport governing bodies often do not act to address this, and do not have strategies to combat this. Trans women athletes especially face discrimination and hateful responses from other women athletes, and compliance with eligibility policies was experienced as having little to no positive effect on this.

a. Inadequate juridical mechanisms to address human rights violations

Owing to sport's long tradition of independence and autonomy, national and international jurisdictions can only intervene in sporting affairs in limited ways. International federations also benefit from a sports model of one federation per sport. Policy decisions made are therefore implemented sport wide. These factors add to the responsibility of each sports federation to find a solution that encompasses all human participation.

As noted above, CAS holds exclusive jurisdiction over sports. It was created in 1984 by the IOC specifically to settle sport-related disputes through arbitration. Since its creation, despite it having undergone several reforms and restructuring, CAS's independence⁶⁹ and impartiality⁷⁰ have often been questioned and challenged, including in European Court of Human Rights.⁷¹ This is not only because CAS is funded by the IOC and IFs, which are often parties in CAS cases, but also because its competence to deal with human rights issues in particular is disputed, due to the fact that the applicable CAS arbitration rules do not offer adequate human rights protection, and human rights are consequently often side-lined. For example, John Ruggie, who developed the UN Guiding Principles on Business & Human Rights, has noted that CAS arbitrators "generally lack human rights expertise,"⁷² while the Human Rights Watch and the experts who compiled Recommendations for an IOC Human Rights Strategy have expressed significant concerns about the extent to which CAS is fit to address human rights issues due to the nature of the arbitration body.⁷³ To borrow from the UN Office of the High Commissioner for Human Rights,⁷⁴

The Olympic Charter and the statutes of most international federations provide for the internal resolution of disputes, with appeals permitted exclusively to the Court of Arbitration for Sport. Therefore, ... national federations and their athletes ... must generally agree to forego recourse to national courts in favour of private arbitration before that Court. Such mandatory arbitration shields the global sports system from

⁶⁹ Voser, N, George, A & Wittmer, S. (2010, December 1st) Swiss Supreme Court clarifies standard of impartiality required of party-appointed arbitrators. Thomson Reuters Practical Law ([https://uk.practicallaw.thomsonreuters.com/2-504-0957?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/2-504-0957?transitionType=Default&contextData=(sc.Default)&firstPage=true))

⁷⁰ Freeburn, Lloyd, Forced Arbitration and Regulatory Power in International Sport - Implications of the Judgment of the European Court of Human Rights in Pechstein and Mutu v Switzerland (August 4, 2020). Available at SSRN: <https://ssrn.com/abstract=3706476> or <http://dx.doi.org/10.2139/ssrn.3706476> (To be published in Marquette Sports Law Review, 2021)

⁷¹ [Brown, A. \(2018, October 3rd\) Mixed message from ECHR on CAS's independence Sports Integrity Initiative. https://www.sportsintegrityinitiative.com/mixed-message-from-echr-on-cass-independence/](https://www.sportsintegrityinitiative.com/mixed-message-from-echr-on-cass-independence/)

⁷² Ruggie, J (2016) For the Game, For the World FIFA https://www.hks.harvard.edu/sites/default/files/Ruggie_humanrightsFIFA_reportApril2016.pdf

⁷³ Human Rights Watch. (2020) op. cit.; Al Hussein, Z.R. & Davis, R. (2020) op. cit.

⁷⁴ OHCHR. (2020, June 15th) Intersection of race and gender discrimination in sport, A/HRC/44/26.

regulation by national legal systems, which is where human rights are typically protected.

When CAS upheld the World Athletics *Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development)* in a majority decision against Caster Semenya's challenge against these regulations, it attracted criticism of CAS itself especially on the grounds that the decision

effectively and improperly placed the burdens of so-called 'gender equality'—in particular, the burden of [World Athletics'] history of gender discrimination, the burden of uncertainty in the [World Athletics'] evidence, and the burden of ongoing risk of harm arising from the [World Athletics'] regulations—on Semenya and other targeted female athletes.⁷⁵

While the majority of the CAS Panel recognised the paucity of evidence to support the regulations, it placed the burden of proof on the athletes who are discriminated against under these regulations, rather than on World Athletics, who were responsible for the discrimination.

To date, several athletes have openly spoken about being harmed by and having their human rights violated under discriminatory eligibility regulations, but few are able to take legal recourse because for most athletes, CAS remains inaccessible both geographically and financially despite it being the only court formally recognised by sport governing bodies.⁷⁶ This makes it very difficult for athletes to challenge human rights violations arising under sports regulations, which entails that sport is characterised by inadequate juridical mechanisms to address human rights infringements. Yet, access to remedy for human rights violations in sports is essential if sports organisations are to enjoy the privileges of autonomy, and indeed, the limitations of the CAS arbitration and dispute resolution mechanisms to address human rights claims mean that athletes are increasingly likely to seek access to mechanisms like the European Court of Human Rights.⁷⁷

5. Recommendations

5.1 To Committee of Ministers to Member States

- States should commit themselves to the implementation and application of internationally recognised human rights norms and standards with regards to: athletes who fall under their jurisdiction, sports which are governed within their jurisdiction, and sports events which take place in their jurisdiction. The autonomy and specificity of sports should not be a mechanism by which to legislate against the human rights of trans athletes or intersex / DSC athletes, nor a back door for sport to avoid its obligations.
- States have a welfare obligation and should ensure that sports federations and national agencies within its jurisdiction are meeting their wider human rights obligations to trans athletes and intersex / DSC athletes, including but not limited to: protecting athletes' rights to freedom from discrimination, harassment, and inhuman and degrading treatment, and right to private life and physical integrity encompassing freedom from violence and abuse.

⁷⁵ Krech, M. (2019) The Misplaced Burdens of 'Gender Equality' in Caster Semenya v. IAAF: The Court of Arbitration for Sport Attempts Human Rights Judication," *International Sports Law Review*, 19(3).

⁷⁶ Mitra, P. (2019, May 1st) What happened to the athletes who quit through shame? *The Telegraph*. <https://www.telegraph.co.uk/athletics/2019/05/01/happened-athletes-quit-shame/>

⁷⁷ Al Hussein, Z.R. & Davis, R. (2020) *op. cit.*

- Specifically, states should outlaw the enforcement of regulations that compel or pressure athletes into undergoing unnecessary medical interventions as a precondition for participating in sport and ensure that no state or non-state body under their jurisdiction allows or encourages this.
- States should ensure that national sports federations and agencies within their jurisdiction are held accountable for any and all breaches of human rights, and that trans athletes and intersex / DSC athletes have access to full legal support and protection.
- States have a responsibility for understanding pathways for trans athletes and intersex / DSC athletes to progress seamlessly from national to international competition on the performance pathway, and for expecting national sports federations to ensure education and adequate preparation of athletes in this regard. This includes commitment to communicating this pathway effectively and educating athletes on policies.
- States should ensure that where additional measures, initiatives and/or support exists to enable minority groups to access or participate in sport, these explicitly include trans athletes and intersex / DSC athletes. States should also proactively consider targeted and specific equality measures which should include centring the experiences of trans athletes and intersex / DSC athletes

5.2 To International Federations

- IFs have a duty of care towards all athletes, including trans athletes and intersex / DSC athletes competing in their sport. This duty of care should prioritise minimising harm of athletes in their respective sports. Medical interventions should take place only for medical purposes and medical investigations absolutely cannot be started on suspicion or undertaken without free and informed consent.
- IFs have a duty of care towards the ongoing support and aftercare of trans athletes and intersex / DSC athletes and should commit to reviewing their provisions in this respect. Provision of an ombudsperson could be one such way to achieve this. Athletes should expect that their federations will be there to support them, and federations should take proactive action such as communicating their policy and position publicly.
- The burden of proof of 'any unfair advantage' as a reason for exclusion in sport has historically been on trans athletes and intersex / DSC athletes. This burden, including financial support, should be upon the relevant IF rather than on the athlete, and internal processes should be overhauled to reflect this.
- As sole operators in the governance of their respective sports at an international level, IFs have a duty to ensure that every person is not only able to access the sport but also adequately represented within it. Diverse voices in governance, decision-making and sporting structures is a key enabler of this.
- IFs have a responsibility to ensure that robust education is carried out throughout their respective sport to ensure that athletes know their rights, and clearly understand the eligibility policies and their implications. Education should be delivered right across the sport as athletes, volunteers and officials are also future policy makers and decision makers. Education will also clarify the sport's understanding of key concepts such as discrimination and fairness.
- IFs have a responsibility to recognise the impact that eligibility regulations and the way they are implemented have for athletes as well as for culture, ideas and norms within a sport and particularly how this can give rise to discrimination. They should establish action

plans to build a culture of trust rather than a culture of suspicion and ensure that processes and actions take culture into account.

- IFs should review their policy making procedures and commit to adopting more democratic procedures. This includes ensuring a thorough consultation process involving impacted athletes and groups, and adequately taking the findings of this process into account. This should also include consultation with groups who represent trans athletes and intersex / DSC athletes interests, and civil society groups and non-governmental organisations led by and for trans people and intersex / DSC people. Understanding how athletes and groups are impacted is an ongoing process that should continue through policy implementation.
- In some states, there are more limited human rights provisions and athletes reaching international competition via those states may have less support to meet the criteria within eligibility policies and frameworks. IFs should provide support for athletes in those circumstances.

5.3 To EPAS

- EPAS should explore and identify an appropriate mechanism to keep a focus on this area and to carry on discussions about trans athletes and intersex / DSC athletes post-conference in a sustained way. (*Mechanisms to be explored could include establishing an advisory group or a human rights observer*).
- Inter-agency working on this topic within European institutions could be improved, such as how EPAS works with SOGI Unit and with EACEA, and there is room to develop better collaborative working on this. This could include EPAS proactively highlighting and supporting specific projects working in this area.
- EPAS should encourage, promote and support the development of guidance or good practice in centring the voices and experiences of trans athletes and intersex / DSC athletes within the development of sports policy.
- There is scope for EPAS to lead discussion with stakeholders which include but are not limited to ILGA-Europe, the SOGI Unit and EGLSF to explore ways of benchmarking member states performance and progress in relation to LGBTIQ+ issues in sport to specifically include trans athletes and intersex / DSC athletes. (*ILGA-Europe already produce a Rainbow Index but with no sport module, whilst the SOGI Unit already collect data*).
- There is a lack of data concerning trans athletes and intersex / DSC athletes within sport and there are challenges relating to collecting such data. This includes but is not limited to the diversity of boards, wider governance structures and decision-making structures within sport. EPAS should identify ways in which improvement strategies could be developed. Furthermore, EPAS should take data on trans athletes and intersex / DSC athletes into account when broader equality, discrimination or rights-based research work is being done.
- EPAS should collaborate with states, sports federations and agencies to promote the inclusion of trans people and intersex / DSC people in sporting activities, paying particular attention to those further marginalised as a result of their race, ethnicity or other minority characteristics.

5.4 To EGLSF

- There is a lack of opportunity for trans athletes and intersex / DSC athletes to come together on a European level. EGLSF should investigate opportunities to establish a formal European network.
- EGLSF should extend its education and awareness raising activities to ensure that LGBTIQ+ community members have a greater knowledge and understanding of the experiences of trans athletes and intersex / DSC athletes.
- LGBTIQ+ civil society and non-governmental organisations take a limited view of sport and it is seldom prioritised. EGLSF should engage with those organisations to raise the status of sport and to encourage them to review their positions in respect of sport.

5.5 To the IOC

- The IOC should take a human rights focus in any future guidance with regards to trans athletes and intersex / DSC athletes, ensuring clear principles of protecting rights, minimising harm, and ensuring coherence with international human rights legislation.
- The IOC should clarify examples of actions that IFs and sports bodies could take in the short, medium and long term to support trans athletes' and intersex / DSC athletes' participation.
- The IOC should recognise that even where they have no direct governance role, international and national federations will mimic policy in ways that often show little nuance for the local athlete experience or pathway or local context. The IOC could be more explicit about parameters and/or limits of any guidance as well as its jurisdiction.
- The IOC has a responsibility to educate athletes about their rights, and to educate NOC policy implementers on all aspects of trans athletes' and intersex / DSC athletes' participation.
- The IOC should collaborate with LGBTIQ+ organisations to ensure that LGBTIQ+ people are aware of sport related issues concerning trans athletes and intersex / DSC athletes⁷⁸
- IOC has existing recommendations on Harassment and Abuse which include addressing homophobia and transphobia, gender harassment, sexual abuse, hazing and bystander. The IOC must expand this work to include protecting trans athletes and intersex / DSC athletes who face harassment and abuse sanctioned by sport policies that lead to scrutiny and humiliation.

5.6 To WADA

- WADA should commit to ensuring that any samples which are collected from athletes for anti-doping purposes should not be used for any other purpose.

⁷⁸ Recommendations made by trans athletes' groups interviewed during this research, 2021