

ARTICLE

A Call for Review: Female Athletes' Access to Justice and the Dispute Resolution Process at the Court of Arbitration for Sport, Lausanne, Switzerland

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The eligibility regulations imposed on women in sport is one of the most contentious topics in sport and law today. Following the European Court for Human Rights' judgment concerning Caster Semenya, the Court of Arbitration for Sport's capacity to handle sports-related human rights disputes has been a topic of debate. It warrants a specific focus on the culture at the Court of Arbitration for Sport and its inadequacy to protect women's rights. Against the background of discriminatory eligibility regulations, this article discusses the current position of female athletes at the Court of Arbitration for Sport and possible options for reform to protect women's rights in sports-related dispute resolution processes in the future.

I Introduction

Over the last century, women's rights have progressed in every area except sport. Today, fundamental rights of female athletes are found in eligibility regulations that can be challenged at the Court of Arbitration for Sport (CAS), widely accepted as the "true Supreme Court of world sport".¹ Well-known athletes Dutee Chand and Caster Semenya have challenged these regulations at CAS. However, the outcomes have fallen short of what is required to protect women's rights in sport. This article argues that there are five key features of the sports-related dispute resolution process at CAS that contribute to the violation of women's rights in sports at an international level.

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1 Louise Reilly "Introduction to the Court of Arbitration for Sport (CAS) & the Role of National Courts in International Sports Disputes" (2012) 1 J Disp Resol 63 at 64.

Part II of this article outlines the background to this issue. It explains the role of CAS, the current international framework for women's rights, the nature of the rights violated by the regulations and the development of the eligibility regulations from 1936 to today. Part III discusses the harmful effect of the regulations, drawing from two landmark cases: *Chand v Athletics Federation of India (Chand)* and *Semenya v International Assoc of Athletics Federations (Semenya)*.² Part IV explains why the operation of CAS stunts the progression of women's rights in sport. It highlights the autonomy of CAS as a non-state actor, its lack of human rights expertise, the underrepresentation of women and diverse groups, the impaired decision-making process of CAS and the limited scope of review of CAS awards under Swiss law. Finally, Part V proposes reform to protect female athletes' rights at CAS, and discusses what the referral of *Semenya* to the Grand Chamber means for the future development of women's rights in sport.

II Background

A What is the CAS?

In 1984, the International Olympic Committee (IOC) created the CAS in response to the increasing number of sports-related disputes and the lack of a specialised authority to deal with these issues.³ Since its inception, CAS has become the leading venue in international arbitration to resolve sports-related disputes quickly and inexpensively.⁴ The International Council of Arbitration for Sport plays a supervisory role, protecting the independence of CAS and performing financial and administrative duties.⁵ CAS annually updates the *Code of Sports-related Arbitration (CAS Code)*, which governs the dispute resolution process.⁶ The organisation of CAS is split into three divisions: the Ordinary Arbitration Division, the Anti-Doping Division and the Appeals Arbitration Division.⁷

The Anti-Doping Division deals solely with doping matters.⁸ The Ordinary Arbitration Division deals primarily with contractual disputes in instances where the parties have not attempted to initially resolve the issue elsewhere.⁹ Appeals against decisions made by sports governing bodies occur within the Appeals Arbitration Division,¹⁰ comprising 90 per cent of the CAS caseload.¹¹ This article focuses on the Appeals Arbitration Division, which handles appeals brought forward by women concerning eligibility regulations.¹²

2 *Chand v Athletics Federation of India (Arbitral Award)* CAS 2014/A/3759, 24 July 2015 [*Chand*]; and *Semenya v International Assoc of Athletics Federations (Arbitral Award)* CAS 2018/O/5794, 30 April 2019 [*Semenya*].

3 Court of Arbitration for Sport "History of the CAS" <www.tas-cas.org>; and see also Paul David "The Rise of Arbitration in the World of Sport" (paper presented to Arbitrators' and Mediators' Institute of New Zealand Conference, July 2013).

4 See generally Reilly, above n 1, at 63.

5 Court of Arbitration for Sport *Code of Sports-related Arbitration* (1 February 2023) [*CAS Code*] at [S2].

6 At [S1].

7 At [S3]; and Reilly, above n 1, at 64.

8 *CAS Code*, above n 5, at S20.

9 Eric T Gilson "Exploring the Court of Arbitration for Sport" (2006) 98 L Libr J 503 at 506.

10 Tsubasa Shinohara "Human Rights in Sports Arbitration: What Should the Court of Arbitration for Sport do for Protecting Human Rights in Sports?" (2023) 45 Liverpool Law Review 185 at 196; and *CAS Code*, above n 5, at [S20].

11 Clifford J Hendel "Jurisdiction of the CAS –The Basics" (2017) 1 International Arbitration Insights: CAS & *Lex Sportiva* 12 at 13.

12 See, for example, *Chand*, above n 2, at [532]–[548]; and *Semenya*, above n 2.

B *The current international framework for women's rights*

The notion of women's rights encompasses many rights and freedoms guaranteed to women. This article will focus on the right to equality and freedom from discrimination. Many international frameworks protect the right to equality and freedom from discrimination. However, the leading convention for women's rights is the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),¹³ which is:¹⁴

... known as the international bill of women's human rights, as it is the only near-universally ratified legally binding instrument that comprehensively protects women's civil, cultural, economic, political and social rights.

The objective of CEDAW is based on the fundamental principles in the United Nation's *Universal Declaration of Human Rights (UDHR)*,¹⁵ illustrating that women's rights are fundamentally human rights.¹⁶ Articles 2, 7 and 8 of *UDHR* are particularly relevant, granting women freedom and "equal protection" from discrimination and an "effective remedy" where these rights are violated.

The ultimate purpose of CEDAW is the "elimination of all forms of discrimination against women".¹⁷ CEDAW defines "discrimination against women" as:¹⁸

[A]ny distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

This article argues that a key reason why women's rights are violated at CAS is because the arbitration process only protects women from direct discrimination and grants formal equality. In reality, the regulations themselves cause indirect discrimination against women, and fail to recognise substantive equality and protect against informal inequality. CAS must incorporate principles from CEDAW, as CEDAW specifically addresses this gap.

The rights to equality and freedom from discrimination are interrelated. CEDAW identifies three interpretations of equality: "full equality", "formal equality" and "substantive equality".¹⁹ Moreover, CEDAW distinguishes "direct discrimination" from "indirect discrimination".²⁰ The essence of formal equality is that "likes be treated alike",²¹

13 Convention on the Elimination of All Forms of Discrimination against Women 1249 UNTS 13 (opened for signature 18 December 1979, entered into force 3 September 1981) [CEDAW].

14 Inter-Parliamentary Union and the Office of the United Nations High Commissioner for Human Rights *The Convention on the Elimination of All Forms of Discrimination against Women and its Optional Protocol: Handbook for Parliamentarians* No. 36 (February 2023) [Inter-Parliamentary Union and OHCHR] at 18.

15 *Universal Declaration of Human Rights* GA Res 3/217A, A/RES/3/217A (1948).

16 Rikki Holtmaat "The CEDAW: a holistic approach to women's equality and freedom" in Anne Hellum and Henriette Sinding Aasen (eds) *Women's Human Rights: CEDAW in International, Regional and National Law* (Cambridge University Press, Cambridge, 2013) 95 at 97.

17 At 95.

18 CEDAW, art 1.

19 Holtmaat, above n 16, at 106.

20 Inter-Parliamentary Union and OHCHR, above n 14, at 38.

21 Sandra Fredman and Beth Goldblatt *Gender Equality and Human Rights* (United Nations Women, Discussion Paper No 4, July 2015) at 1.

meaning women are not excluded just because they are women.²² Similarly, direct discrimination refers to the idea that a woman is excluded solely based on the fact that she is a woman.²³

Initially, women were excluded from the ancient Olympics, illustrating that formal equality for women in sport has not always been the norm.²⁴ Nowadays, there is formal equality for women in sports because women, like men, are entitled to compete in international sporting events.

The introduction of substantive equality²⁵ was a pivotal movement in understanding women's rights because it revealed that discrimination towards women can co-exist with formal equality.²⁶ Today, even though women in sport are granted formal equality, women remain subject to indirect discrimination; women are disproportionately disadvantaged compared to men when it comes to eligibility requirements.²⁷ Substantive equality addresses the cultural, political and social barriers contributing to indirect discrimination towards women.²⁸ Instead of focusing on "equality of treatment", substantive equality emphasises "equality of results or equality of opportunity".²⁹

C A brief history of the eligibility regulations

The eligibility regulations to which women must conform to compete in international sport have been coined "'femininity control', 'sex testing', [and] 'gender verification'"³⁰ as well as "gender policing".³¹ World Athletics sets out the current eligibility regulations in the *Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development) (DSD Regulations)*, stating:³²

A Relevant Athlete who wishes to be eligible to compete in the female classification at a World Rankings Competition, and/or to have recognised any World Record performance in the female classification at a competition that is not a World Rankings Competition, agrees, as conditions to such eligibility: ... to comply in full with these DSD Regulations.

Under this framework, women are required to provide a sample, which is subsequently reviewed by an Expert Panel, which ultimately determines if their levels of testosterone

22 Holtmaat, above n 16, at 106.

23 Fredman and Goldblatt, above n 21, at 4.

24 Chantalle Forgues "A Global Hurdle: The Implementation of an International Nondiscrimination Norm Protecting Women from Gender Discrimination in International Sports" (2000) 18 BU Intl LJ 247 at 249.

25 Catherine Barnard and Bob Hepple "Substantive Equality" (2000) 59 CLJ 562 at 564.

26 Fredman and Goldblatt, above n 21, at 4.

27 Allison Weir "Feminism and Freedom" in Ann Garry, Serene J Khader and Alison Stone (eds) *The Routledge Companion to Feminist Philosophy* (Routledge, New York, 2019) 665 at 669; and see also Barnard and Hepple, above n 25, at 568.

28 See Inter-Parliamentary Union and OHCHR, above n 14, at 38.

29 Sandra Fredman "Substantive equality revisited" (2016) 14 ICON 712 at 723; see also Fredman and Goldblatt, above n 21, at 1.

30 Sonja Erikainen "Policing the sex binary: gender verification and the boundaries of female embodiment in elite sport" (PhD Thesis, University of Leeds, 2016) at 4.

31 Helen Jefferson *Gender, Athletes' Rights, and the Court of Arbitration for Sport* (Emerald Publishing, Bingley (UK), 2018) at 116; and see Annie Blazer "Gender Policing in Girls' and Women's Sports" (2023) 14 Religions 1054 at 1054.

32 World Athletics *Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development)* (31 March 2023) [DSD Regulations] at [2.1].

are under the threshold.³³ Although the substance of these regulations has changed over time, eligibility regulations as a prerequisite to competing in the women's category in sport have been enforced for nearly a century.

It was not until the 1900 Olympics in Paris that women were permitted to compete in limited events.³⁴ In 1928, women were allowed to enter track and field events,³⁵ and shortly after, concerns around the sex of athletes in the Olympics began.³⁶ In 1936, after achieving a record speed in the 100-metre final, Helen Stephens was subjected to a physical examination, marking the first sex test in international-level sport.³⁷ Stephens subsequently came out as a man, which generated anxiety about "gender fraud" in sport, normalising sex testing.³⁸ Cold War tensions exacerbated existing anxieties, leading to mandatory gender regulations in sport being introduced in 1946.³⁹ Scientific advancement over the 50 years following the Stephens incident saw the regulations imposed on women rapidly evolve. "Nude parades"⁴⁰ shortly developed into smear tests,⁴¹ and from the 1980s onwards, testosterone became the determining factor for eligibility regulations imposed on women in sport.⁴²

Following pressure from the Athletes Commission, mandatory gender regulations were abandoned in 1999.⁴³ Although women were no longer collectively required to submit to gender regulations, the IOC retained authority to carry out "suspicion-based checks" on a case-by-case basis, which remains common practice today.⁴⁴ Following Semenya's success in the 2009 Olympics, World Athletics required women to have under 10 nmol/L of testosterone to compete as a woman in sport in the future.⁴⁵ In 2014, Chand successfully challenged the validity of the 2011 *IAAF Regulations Governing Eligibility of Females with Hyperandrogenism to Compete in Women's Competition (Hyperandrogenism Regulations)*,⁴⁶ and CAS suspended these regulations based on insufficient scientific backing.⁴⁷ World Athletics subsequently substituted the *Hyperandrogenism Regulations* for the current *DSD Regulations*, which are essentially the same.

33 At [4]–[4.15].

34 Forgues, above n 24, at, 249.

35 At 249.

36 Lindsay Parks Pieper *Sex Testing: Gender Policing in Women's Sports* (University of Illinois Press, Urbana (Illinois), 2016) at 18.

37 At 11.

38 Blazer, above n 31, at 5.

39 Pieper, above n 36, at 31; and Camille M Croteau "Science and Sex Testing: The Beginnings of a Female Testing Discourse" (PhD Thesis, The University of Western Ontario, 2020) at 37.

40 Jefferson, above n 31, at 116.

41 Pieper, above n 36, at 54.

42 Tylyn Wells "Intersex, Hyperandrogenism, Female Athletes: A Legal Perspective on The IAAF Doping Regulations and Where Hyperandrogenic Female Athletes Fit In" (2019) 17(2) Santa Clara Journal of International Law 1 at 3.

43 Pieper, above n 36, at 174.

44 At 175.

45 Wells, above n 42, at 5.

46 International Association of Athletics Federations *IAAF Regulations Governing Eligibility of Females with Hyperandrogenism to Compete in Women's Competition* (1 May 2011).

47 Chand, above n 2, at [532]–[548].

III The Regulations in Practice

A *The harmful effect of the regulations on women*

The regulations protect a fundamental principle in sport, maintaining the boundaries between men and women.⁴⁸ Despite the regulations containing anti-discrimination clauses,⁴⁹ the regulations are discriminatory towards women and limit the enjoyment of several rights. Men are not subject to an equivalent regulation and can compete in international-level sport regardless of their biological functions. It can, therefore, be argued that the regulations constitute direct discrimination because only women are subjected to eligibility regulations. The initial purpose of the regulations was to identify men masquerading as women in sport,⁵⁰ and they are currently justified by the need to “[preserve] a ‘level playing field’”.⁵¹ Given that men are not subject to an equivalent regulation, it is unusual that this interest is not extended to preserve a level playing field within the men’s category. The lack of an equivalent regulation for men can be explained as maintaining control over women.⁵²

To illustrate whether any group of persons is oppressed, Iris Maron Young conceptualised the “five faces of oppression”: exploitation, marginalisation, powerlessness, cultural imperialism and violence.⁵³ The *DSD Regulations* manifest these five faces, indicating that women in sport as a group are oppressed,⁵⁴ and women are excluded from substantive equality rights.⁵⁵

First, the *DSD Regulations* perpetuate marginalisation because the regulations disproportionately harm women on a psychological and physical level. Women who “fail” the regulations lose the right to compete or must undertake hormonal medication, restricting their personal autonomy.⁵⁶ On the other hand, men are free to exercise their right to compete in the international sporting arena without altering their biological function, surgically or medically.⁵⁷

Second, the regulations disempower women, stripping them of any autonomy in the sports-related dispute resolution process⁵⁸ by forcing women to submit solely to CAS.⁵⁹

Third, the regulations are “deeply racially biased”, disproportionately affecting women of colour,⁶⁰ illustrating the fourth face of oppression: cultural imperialism. Both instances where the regulations have been challenged at CAS have been brought forward by women of colour⁶¹ because women of colour find themselves forced to conform to the biological

48 Erikainen, above n 30, at 2.

49 See *DSD Regulations*, above n 32, at [2.7.2]; and see also *Intersection of race and gender discrimination in sport: Report of the United Nations High Commissioner for Human Rights* UN Doc A/HCR/44/26 (15 June 2020).

50 Pieper, above n 36, at 27.

51 See *Chand*, above n 2, at [35]; and see also *Semenya*, above n 2.

52 Blazer, above n 31, at 1; and see also Pieper, above n 36, at 185.

53 Iris Young *Justice and the Politics of Difference* (Princeton University Press, Princeton, 1990) at 40.

54 At 64.

55 See Fredman, above n 29, at 738.

56 Young, above n 53, at 52–54.

57 Wells, above n 42, at 14.

58 Young, above n 53, at 56.

59 See Part IV of this article.

60 Human Rights Watch “*They’re Chasing Us Away from Sport*”: *Human Rights Violations in Sex Testing of Elite Women Athletes* (4 December 2020) at 3.

61 See *Semenya*, above n 2; and *Chand*, above n 2.

norms of female athletes from the Global North.⁶² Therefore, the discrimination caused by the regulations is intersectional because women of colour are discriminated against on the basis of gender *and* race.⁶³ Ongoing “suspicion-based checks”⁶⁴ are a form of profiling in sport because the system results in predominately women of colour from the Global South being targeted by sports governing bodies.⁶⁵

There is a link between violence and cultural imperialism,⁶⁶ and the regulations encourage gender-based violence, disguised as benign administrative practices.⁶⁷ Both Stephens and Semenya endured public scrutiny after test results, which is considered a less severe form of violence.⁶⁸ Furthermore, female athletes, particularly women of colour, live in fear, knowing that they “are liable to violation, solely on account of their group identity” and may be targeted by a suspicion-based check, which is considered another form of violence.⁶⁹ In 2019, an athlete verbalised this fear, warning her coach, “let’s not plan too far ahead because I may be [stopped] under this rule”.⁷⁰

The regulations have normalised more severe forms of gender-based violence, forcing hormone-altering medication, surgeries and female genital mutilation upon women.⁷¹ In the past, female athletes have been coerced into gonadectomies and clitoridectomies, where there were no medical concerns, and the sole reason was to meet the eligibility regulations.⁷² Again, men do not have to undergo any surgical or hormonal alterations to be eligible to enter the international sporting arena,⁷³ nor are they treated as guinea pigs under eligibility regulations.

The regulations perpetuate discriminatory norms and assert “male-dominated power structures”,⁷⁴ stunting the progression of substantive equality for women in sport. Requiring women to change their physiological characteristics reinforces prejudicial conceptions surrounding the physiology of women and the role of women in society.⁷⁵ For example, these regulations reinforce the historical belief that women belong in the “private sphere” and not the sporting world.⁷⁶ Additionally, women, particularly women of colour, who do not conform to “patriarchal norms” concerning androgen or testosterone levels are punished by the regulations.⁷⁷

62 See Sandy Montañola and Aurélie Olivesi *Gender Testing in Sport. Ethics, cases and controversies* (Routledge, New York, 2016) at 1.

63 See Jefferson, above n 31, at 124; and see generally UN Women “Intersectional feminism: what it means and why it matters right now” (1 July 2020) <www.unwomen.org>.

64 Pieper, above n 36, at 174–176.

65 See Rebecca Jordan-Young, Peter Sönksen and Katarina Karkazis “Sex, health, and athletes” (2014) *BMJ* 348 at 349; and Human Rights Watch, above n 60, at 80.

66 Young, above n 53, at 63.

67 Inter-Parliamentary Union and OHCHR, above n 14, at 93.

68 Young, above n 53, at 61.

69 At 62 (emphasis omitted).

70 Human Rights Watch, above n 60, at 90.

71 At 60–62; and see generally Inter-Parliamentary Union and OHCHR, above n 14, at 93.

72 Human Rights Watch, above n 60, at 44; and see Luísa Winter Pereira “Intersex legal activism. United Nations on the Rights of Intersex People” (2022) 18 *Age of Human Rights Journal* 181 at 183.

73 Wells, above n 42, at 14.

74 Inter-Parliamentary Union and OHCHR, above n 14, at 93.

75 See Erikainen, above n 30, at 32.

76 See Ruth Rubio-Marin *Global gender constitutionalism and women’s citizenship: a struggle for transformative inclusion* (Cambridge University Press, Cambridge, 2022) at 29.

77 Diane Rosenfeld *The Bonobo Sisterhood: Revolution through Female Alliance* (Harper, New York, 2022) at 87.

The regulations are proven to have a traumatising effect on women.⁷⁸ Over the last century, men have not been subjected to surveillance nor the same “watchful eye” as women.⁷⁹ In the case of winning an Olympic competition, women are scrutinised, whereas men are met with praise.⁸⁰ To illustrate, Usain Bolt’s success is admired, and his testosterone levels remain unquestioned.⁸¹ The regulations effectively define what it means to be a woman, and female athletes who do not conform to the regulations are left questioning their identity, thus feeling isolated. In the past, this has led to female athletes attempting suicide after failing to meet the gender regulations, illustrating the extent to which these regulations have taken a toll on women beyond physical effects.⁸²

In summary, the five faces of oppression illustrate that the regulations are harmful and that women in sport as a group are oppressed. Additionally, the regulations enforce pre-existing discriminatory norms and hegemonic structures. Women are marginalised as they are disproportionately affected by sports regulations compared to men. Moreover, the regulations encourage violent practices, particularly targeting women of colour.

B *Challenging the regulations*

Chand and Semenya are the only women to challenge the eligibility regulations at CAS on discriminatory grounds.⁸³ It is important to outline these two cases to depict the features of CAS that contribute to unsatisfactory outcomes. Both cases have been subject to widespread criticism, and the reasoning adopted by the CAS Panels illustrates why. In particular, the burden of proof has been criticised as misplaced, leaving female athletes to prove that they are “not as fast as men” to win their case.⁸⁴ Additionally, the “necessary, reasonable and proportionate” test adopted by CAS is a discriminatory precedent, infringing on women’s rights. As long as the false standard of a level playing field is prioritised by CAS (which does not appear to be shifting), the violation of women’s rights will continue.

(1) Dutee Chand

After a routine test revealed Chand’s male hormone levels were too high, she was considered ineligible to compete in the Commonwealth Games.⁸⁵ In 2014, Chand subsequently challenged the validity of the *Hyperandrogenism Regulations* set out by the International Association of Athletics Federations (IAAF), now World Athletics, on several grounds, including that the regulations were discriminatory towards female athletes.⁸⁶

CAS’s determination of whether the regulations were discriminatory towards female athletes based on sex was in two parts: first, whether the regulations were, in fact,

78 Wells, above n 42, at 17.

79 At 12.

80 Jefferson, above n 31, at 119–120.

81 At 124.

82 At 117.

83 At the time of writing, these were the results for the search terms “discrimination”, “eligibility”, and “women” at Court of Arbitration for Sport “Jurisprudence” <<https://jurisprudence.tas-cas.org>>.

84 Jonathan Cooper “Testosterone: ‘the Best Discriminating Factor’” (2019) 4(3) *Philosophies* 36 at 172; and see also Silver Lin “Problems of Proof for the Ban on Female Athletes with Endogenously High T Endogenously High Testosterone Levels” (2019) 20 *Chi J Int’l L* 217 at 237–250.

85 *Chand*, above n 2, at [13]–[16].

86 At [4].

discriminatory; and second, whether the discrimination was “disproportionate” to the “legitimate objective being pursued”.⁸⁷ In this case, the legitimate objective is to preserve a level playing field among female athletes.⁸⁸ Ultimately, the Court found that the regulations were *prima facie* discriminatory, and the onus shifted to the IAAF to establish that the regulations were necessary and proportionate to pursue the legitimate objective (a level playing field) amongst female athletes.⁸⁹ The IAAF was unable to provide sufficient evidence to link testosterone and athletic performance in hyperandrogenic athletes, making Chand eligible to compete and invalidating the IAAF regulations.⁹⁰

Despite this being a win for Chand, the approach CAS adopts is detrimental to women. When determining whether a discriminatory regulation should be invalidated, CAS has developed a precedent that is harmful to women: a discriminatory rule will remain in place if it is “necessary, reasonable and proportionate” to maintain a level playing field within the women’s category.⁹¹ Instead, the regulations should be declared void solely on the basis that they are discriminatory to protect the interests of female athletes. Following *Chand*, World Athletics repealed the *Hyperandrogenism Regulations* and introduced the *DSD Regulations*.⁹²

(2) Caster Semenya

In 2018, Semenya challenged the *DSD Regulations* because the regulations were discriminatory and “likely to cause grave, unjustified and irreparable harm to affected female athletes”.⁹³ Following the reasoning in *Chand*, the majority of the Panel agreed that the regulations were discriminatory, but that:⁹⁴

... such discrimination is a necessary, reasonable and proportionate means of achieving the aim of what is described as the integrity of female athletics and the upholding of the “protected class” of female athletes in certain events.

On appeal, the Swiss Federal Supreme Court (SFC) upheld the CAS decision on the grounds that the decision did not violate “public order”, which was the standard the SFC was required to apply.⁹⁵ In 2023, the European Court of Human Rights (ECtHR) reviewed the CAS and SFC judgments and ruled that fairness in sport did not justify violating Semenya’s rights as a female athlete.⁹⁶ This decision affirms that the “necessary, reasonable and proportionate to preserve a level playing field” test should be abandoned to protect women’s rights in sports. The regulations violated Semenya’s rights to privacy, an effective

87 At [35].

88 At [501].

89 At [450].

90 At [547]–[548].

91 See *Chand*, above n 2; *Semenya*, above n 2; and *Blake Leeper v World Athletics (Arbitral Award)* CAS 2021/A/7930, 4 November 2021.

92 See Cooper, above n 84, at 36.

93 *Semenya*, above n 2, at [2].

94 At [626].

95 Federal Supreme Court of Switzerland “DSD Regulations: Caster Semenya’s appeal against the decision of the Court of Arbitration for Sport dismissed” (press release, 8 September 2020) at 2.

96 See European Court of Human Rights “Discrimination against international-level athlete who was not afforded sufficient procedural safeguards when challenging World Athletics regulations” (press release, 11 July 2023); and *Semenya v Switzerland* ECHR 10934/21, 11 July 2023.

remedy and freedom from discrimination under the European Convention on Human Rights (ECHR).⁹⁷

IV Criticism of CAS

Many international human rights bodies and legal scholars have brought to light the violation of human rights at CAS. Human Rights Watch published the most significant report, *“They’re Chasing Us Away from Sport”: Human Rights Violations in Sex Testing of Elite Women Athletes*, which illustrates the harm these regulations cause.⁹⁸ The United Nations,⁹⁹ ECtHR,¹⁰⁰ Human Rights Tribunals,¹⁰¹ and CAS itself¹⁰² have recognised that the regulations are discriminatory and harmful towards women. Similarly, medical experts believe the latest policies undermine medical and ethical care,¹⁰³ and the scientific community does not back the standard of a “level playing field”.¹⁰⁴ Therefore, the question remains: why do women continue to be violated and discriminated against in sport? The remainder of this article attempts to answer this question, highlighting five particular features of CAS.

A Illusion of choice

Before explaining why CAS fails to protect women’s rights in sport, it is important to note that CAS is the only avenue of dispute resolution in international-level sport.¹⁰⁵ Arbitration relies on the consent of the parties.¹⁰⁶ However, female athletes’ consent to the jurisdiction of CAS can be considered forced.¹⁰⁷ The *DSD Regulations* state that:¹⁰⁸

Any dispute arising between World Athletics and a Relevant Athlete (and/or their Member Federation) in connection with these DSD Regulations will be subject to the exclusive jurisdiction of the CAS.

The regulations permit female athletes to revoke their consent at any time and state that medical or surgical interventions will not be forced.¹⁰⁹ However, female athletes are faced

97 European Court of Human Rights, above n 96, at 1.

98 Human Rights Watch, above n 60.

99 *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health* UN Doc A/HRC/32/33 (4 April 2016) at [57].

100 *Semenya v Switzerland*, above n 96.

101 See Jefferson, above n 31, at 135.

102 See *Semenya*, above n 2; and *Chand*, above n 2.

103 Jordan-Young, Sönksen and Karkazis, above n 65, at 350.

104 See Deborah Healey “The Myth of the Level Playing Field in Sport” in Ulrich Haas and Deborah Healey (eds) *Doping in Sport and the Law* (Hart, Portland, 2016) 3 at 7.

105 See European Court of Human Rights, above n 96, at 2.

106 Gary B Born *International Commercial Arbitration* (Kluwer Law International, The Netherlands, 2009) at 197–200 as cited in Viktoriya Pashorina-Nichols “Is the Court of Arbitration for Sport Really Arbitration?” (LLM Research Paper, Victoria University of Wellington, 2015) at 22; and Human Rights Watch, above n 60, at 107.

107 Lloyd Freeburn *Regulating International Sport, Power, Authority and Legitimacy* (Brill, Leiden, 2019) at 120.

108 *DSD Regulations*, above n 32, at [7.1].

109 At [3.3.1].

with an “impossible choice”, suffering harm whether they choose to conform to the regulations or not.¹¹⁰ As Katrina Karkazis and Morgan Carpenter articulated:¹¹¹

The alternatives available to athletes are presented under the guise of choice, but each option carries its own high price. The choice is to subjugate oneself to power: alter your body, accept being labelled, or leave. It is an impossible set of choices.

Although individuals usually decide to be bound to the exclusive jurisdiction of an arbitration body in case of a dispute, they typically have a choice as to which arbitration body they submit to. Female athletes are disempowered in this stage of the arbitration process, and if they have doubts about the competency of CAS, they are not free to choose an alternative arbitration body if they want to compete in international sport.

B CAS as an autonomous body

The current position at CAS is that human rights law does not extend to arbitration.¹¹² Violations of human rights in international arbitration have generally been difficult to challenge at arbitration, and this is particularly true when it comes to the violation of female athletes' right to freedom from discrimination.¹¹³ A key reason is that sport is treated as an “autonomous private body immune from the law”,¹¹⁴ and CAS is a private, non-state actor.¹¹⁵ This status makes it difficult to hold CAS accountable under international obligations imposed on states. In other words, CAS is not bound to international obligations that normally require states to protect women from discrimination, nor are sports governing bodies setting the regulations, as they are also private bodies.¹¹⁶ As Juan Carlos Landrove explains:¹¹⁷

Only States are liable for violations of the ECHR and only the State must ultimately indemnify a party for violations committed. Hence, the ECHR does not apply directly to arbitrators.

The signing of the ECHR occurred during the rise of arbitration in the 1950s. However, the founders could not foresee that obligations needed to be extended to private arbitration

110 Human Rights Watch, above n 60, at 70–74.

111 Katrina Karkazis and Morgan Carpenter “Impossible ‘Choices’: The Inherent Harms of Regulating Women’s Testosterone in Sport” (2018) 15 JBI 579 at 586.

112 Wei Gao “The ECHR in action: its applicability and relevance for arbitration” (2022) 26 IJHR 1608 at 1608.

113 Jacquelyn Silva “Transnational Corporation & International Human Rights Disputes: Alternatives to Litigation” (2021) 61 Santa Clara L Rev 867 at 869.

114 Seema Patel “Gaps in the protection of athletes gender rights in sport—a regulatory riddle” (2021) 21 ISLJ 257 at 259.

115 Human Rights Watch, above n 60, at 3.

116 See Patel, above n 114, at 258; see also Fredrik Ringquist “Do Procedural Human Rights Requirements Apply to Arbitration—a Study of Article 6 (1) of the European Convention on Human Rights and its Bearing upon Arbitration” (LLM Thesis, University of Lund, 2005) at 8; and see also Juan Carlos Landrove “European Convention on Human Rights’ Impact on Consensual Arbitration: An État des Liux of Strasbourg Case-Law and of a Problematic Swiss Law Feature” in Michel Hottelier, Samantha Besson and Franz Werro (eds) *Human rights at the center* (Schulthess, Zurich, 2006) 73 at 99–101.

117 Landrove, above n 116, at 100.

bodies to protect women's rights in sport.¹¹⁸ Both the ECtHR and CAS recognise that the ECHR "indirectly" applies to CAS proceedings,¹¹⁹ and its applicability tends to be limited to procedural rights.¹²⁰ More recently, the ECtHR concluded that the nature of forced consent to the jurisdiction at CAS means CAS awards must effectively comply with the ECHR. Yet, again, this tends to be limited to art 6 of the ECHR, which is a procedural right rather than a substantive right.¹²¹

Fundamental characteristics of arbitration further distance CAS from any obligations to protect women. For example, honouring CAS as the "supreme court of sport" respects the need for a uniform global sports law (*lex sportiva*).¹²² The nature of arbitration is fundamentally private,¹²³ maximising the autonomy of arbitrators.¹²⁴ On one hand, this has allowed CAS to provide specialised sport expertise, which courts could not normally provide. On the other hand, this is at the expense of women's rights, and this allows CAS to escape any women's rights obligations.

The private nature of arbitration also means that state courts are generally hesitant to intervene in arbitration proceedings.¹²⁵ Courts prefer a "hands-off approach", which is consistent with the principle of non-interference in arbitration.¹²⁶ Additionally, CAS has been recognised as an independent tribunal, meaning CAS awards are as enforceable as state courts' judgments.¹²⁷ Consequently, CAS is "immune" to external intervention,¹²⁸ shielding CAS from meeting states' obligations as the international commitments to women's rights grow.

C Lack of women's rights expertise

The expertise of CAS lies in sport, not human rights. As a result, women's interests tend to be neglected in the decision-making process. Recently, CAS has received widespread criticism about its lack of human rights expertise,¹²⁹ labelled a "phantom regime"¹³⁰ and

118 See Toms Krūmiņš *Arbitration and Human Rights: Approaches to Excluding the Annulment of Arbitral Awards and Their Compatibility with the ECHR* (Springer Nature, Switzerland, 2020) at 38.

119 At 45; *Union Cycliste Internationale (UCI) v Velasco & Real Federación Española de Ciclismo (RFEC) (Arbitral Award) CAS 2011/A/2384*, 6 February 2012, at [22]; and see also Mark James "A victory for Caster Semenya—but still no right to compete" (2023) 23 ISLJ 149 at 150.

120 See Federal Act on Private International Law 1987 (Switzerland), art 190.

121 James, above n 119, at 150. Procedural rights protect formal equality rights such as "like treated alike" and substantive rights protect substantive equality such as equality of result rather than equality of treatment. See Fredman and Goldblatt, above n 21.

122 Ken Foster "Lex Sportiva: Transnational Law in Action" in Robert C R Siekmann and Janwillem Soek (eds) *Lex Sportiva: What is Sports Law* (TMC Asser Press, The Hague, 2012) 235 at 238.

123 Gus van Harten "The public-private distinction in the international arbitration of individual claims against the state" (2007) 56 ICLQ 371 at 372.

124 George A Bermann "The self-styled 'autonomy' of international arbitration" (2020) 36 Arb Intl 221 at 223–229.

125 Antonio Rigozzi "Challenging Awards of the Court of Arbitration for Sport" (2010) 1 JIDS 217 at 254.

126 At 219.

127 *Mutu and Pechstein v Switzerland* ECHR 40575/10 and 67474/10, 4 February 2019 at [159]; see also Matthew J Mitten "The Court of Arbitration for Sport and its Global Jurisprudence: International Legal Pluralism in a World Without National Boundaries" (2014) 30 OSJDR 1 at 22.

128 Foster, above n 122, at 244.

129 Lena Holzer "What Does it Mean to be a Woman in Sports? An Analysis of the Jurisprudence of the Court of Arbitration for Sport" (2020) 20 HR L Rev 387 at 404.

130 Daniel West "Revitalising a phantom regime: the adjudication of human rights complaints in sport" (2019) 19 ISLJ 2 at 4.

“ill equipped” to deal with human rights expertise.¹³¹ Additionally, the United Nations has questioned whether CAS is “fit for purpose” for such disputes,¹³² and there has also been a general demand for broader expertise at CAS.¹³³ Cases similar to *Chand* and *Semenya* require additional, alternative expertise in sport.

As discussed, a key feature of CAS is to provide specialised sport expertise, which traditional courts cannot provide.¹³⁴ Consequently, human rights expertise at CAS is not prioritised, and CAS arbitrators tend to be primarily experienced in commercial law and sports law.¹³⁵ The appointment process for CAS arbitrators reflects this prioritisation, with the main requirement being:¹³⁶

... appropriate legal training, recognized competence with regard to sports law and/or international arbitration, a good knowledge of sport in general and a good command of at least one CAS working language.

These criteria effectively leave CAS Panels unprepared and in new territory regarding fundamentally different cases concerning women's rights issues.

Most disputes resolved by CAS generally concern commercial disputes and disciplinary matters, not human rights issues.¹³⁷ Out of the 2466 disputes handled by CAS since 1986, there have only been 32 human rights cases.¹³⁸ From this pool, two concerned gender discrimination,¹³⁹ showing that female athletes raising human rights issues do not have proper access to justice. *Semenya* and *Chand* were not cases that “needed to be rushed or inexpensive”,¹⁴⁰ especially when there is so much at stake for female athletes.

Given that *Semenya* and *Chand* occurred within the last 10 years, the human rights expertise of CAS could be considered to be evolving and human rights women's rights expertise in CAS may improve over time. In 2023, CAS produced a report *Sport and Human Rights: Overview from a CAS Perspective*, which could be considered an attempt at creating a reference point for future CAS arbitrators dealing with human rights disputes.¹⁴¹ However, despite pressure from the international human rights community and amendments being made to the *CAS Code* in 2023, CAS has made no substantive changes to its human rights expertise.¹⁴²

131 Jonathan Cooper “Protecting human rights in sport: is the Court of Arbitration for Sport up to the task? A review of the decision in *Semenya v IAAF*” (2023) 23 ISLJ 151 at 151.

132 Grit Hartmann *Tipping the Scales of Justice – The Sport and Its “Supreme Court”* (Play the Game, November 2021) at 45.

133 At 54.

134 Court of Arbitration for Sport, above n 3.

135 Holzer, above n 129, at 405. See also Jenna Ebersbacher “Why an Improper Venue Can have Lasting Effects on the Intersection of Sport and Human Rights” (2021) 13(10) ArbLR 1 at 10–11; and compare Court of Arbitration for Sport *Sport and Human Rights: Overview from A CAS perspective* (28 November 2023).

136 *CAS Code*, above n 5, at [S14].

137 Holzer, above n 129, at 11–14.

138 At the time of writing, these statistics were based on a search of the webpage Court of Arbitration for Sport “Case Law Documents” <<https://jurisprudence.tas-cas.org>>.

139 At the time of writing, these were the results for the search terms “discrimination” and “gender discrimination” at Court of Arbitration for Sport, above n 83.

140 Ebersbacher, above n 135, at 10.

141 Court of Arbitration for Sport, above n 135.

142 See *CAS Code*, above n 5.

D Underrepresentation of women and diversity

A lack of diversity, coupled with the underrepresentation of women amongst CAS Panels, leads to CAS overlooking women's rights. CAS has been recognised as independent and impartial by the SFC and the ECtHR.¹⁴³ CAS has tried to maintain this recognition, requiring arbitrators to carry out their duties objectively and impartially.¹⁴⁴ However, a lack of diversity remains, which impairs the decision-making process and leads to women's voices being ignored.

The international arbitration arena is generally male-dominated¹⁴⁵ and traditionally known as "pale, male and stale",¹⁴⁶ leaving the underrepresentation of women in international arbitration as the "status quo".¹⁴⁷ More recently, the presence of women in international arbitration has improved,¹⁴⁸ but CAS can still be considered a "jurisdictional no-woman's land".¹⁴⁹ Only 4.5 per cent of CAS arbitrators are women.¹⁵⁰ Unfortunately, this cannot be attributed to a lack of female arbitrators because the number of female arbitrators has increased.¹⁵¹ Attention has been drawn to the underrepresentation of women in CAS¹⁵² and the unequal distribution of Panel appointments.¹⁵³ However, this has not changed the fact that CAS Panels tend to consist of the same few males, known as "super-arbitrators", who receive "more than 45 per cent of all appointments" despite making up seven per cent of the overall 400 arbitrators on the CAS closed list.¹⁵⁴

Athletes are free to choose the arbitrator for their proceeding. However, the lack of diversity means female athletes appealing regulations must choose from a panel that does not have the relevant expertise. For example, Semenya was free to choose the arbitrators for her Panel, and she did. However, her choices were limited to a closed list of arbitrators.¹⁵⁵ To illustrate:¹⁵⁶

143 *Mutu and Pechstein v Switzerland*, above n 127, at [159].

144 *CAS Code*, above n 5, at S18; and see also *Swiss Arbitration Swiss Rules of International Arbitration Practice Note* (October 2024) at 14.

145 Taylor St John and others "Glass Ceilings and Arbitral Dealings: Explaining the Gender Gap in International Investment Arbitration" (paper presented at the PluriCourts and iCourts Workshop on "Gender on the International Bench", Oslo, March 2017).

146 Lucy Greenwood and C Mark Baker "Getting a Better Balance on International Arbitration Tribunals" (2012) 28 *Arb Intl* 653 at 653.

147 At 654.

148 See Matteo M Winkler and Mikaël Schinazi "Diversity and Inclusiveness in International Arbitration" in W Michael Reisman and Nigel Blackaby (eds) *Arbitration Beyond Borders: Essays in Memory of Guillermo Aguilar Álvarez* (Wolters Kluwer Law International, Alphen aan den Rijn, 2023) 469 at 475–478.

149 Rosenfeld, above n 77, at 96.

150 Hartman, above n 132, at 18.

151 At 268.

152 Nathalie Allen, Leonor Díaz Córdova and Natalie Hall "If Everyone is Thinking Alike, Then No One Is Thinking": The Importance of Cognitive Diversity in Arbitral Tribunals to Enhance the Quality of Arbitral Decision Making" (2021) 38 *J Intl Arb* 601 at 601–603.

153 Hartmann, above n 132, at 26.

154 John Lindholm *The Court of Arbitration for Sport and Its Jurisprudence: An Empirical Inquiry into Lex Sportiva* (TMC Asser Press, The Hague, 2019) at 223; and see generally *Court of Arbitration for Sport*, above n 3.

155 Ebersbacher, above n 135, at 11.

156 At 11.

[Semenya] 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. The panel in this case was comprised of two white men and one white woman.

Similarly, the Panel in *Chand* consisted of two males and one female, all over the age of 70 and white, yet determined a 27-year-old Indian woman's future.¹⁵⁷

An unequal share of Panel appointments for women leads to poor quality arbitral decision-making, unfairness to the parties and decreased overall legitimacy of the arbitration system.¹⁵⁸ More importantly, it leaves female athletes vulnerable in the dispute resolution process. For example, if women, particularly women of colour, "look into the pool of available arbitrators and see no faces like theirs looking back, they are thereby deprived of the autonomy to appoint an arbitrator of their choice".¹⁵⁹ More concerning, the lack of women of colour amongst CAS arbitrators means that women of colour who are most affected by the regulations are less likely to have their case heard by someone who truly understands their position.

Even when an effort is made, Panels consisting of arbitrators with similar backgrounds and shared characteristics cannot fully comprehend the concerns of complainants with different backgrounds.¹⁶⁰ In judicial roles, women speak with a different "voice", not solely due to biological differences but also due to "lived experiences" as a woman.¹⁶¹ Therefore, more substantial representation of women and diversity generally is required for women to have proper access to justice.

E Impaired decision-making

(1) Groupthink

Another reason women's rights are neglected in CAS is because the effects of "groupthink" impair the decision-making process and reinforce prejudicial norms about women.¹⁶² Groupthink is defined as:¹⁶³

... a mode of thinking that people engage in when they are deeply involved in a cohesive in-group, when the members' strivings for unanimity override their motivation to realistically appraise alternative courses of action.

Arbitration, in general, "make[s] the potential for groupthink real" due to the interconnected nature of the international arbitration community.¹⁶⁴ Unfortunately, CAS is

157 See *Chand*, above n 2, at [1]. The Panel consisted of The Hon Justice Annabelle Claire Bennett AC SC (1950), Professor Richard H McLaren (1945) and Dr Hans Nater (1943): see also Court of Arbitration for Sport "List of arbitrators (general list)" <www.tas-cas.org>.

158 Joshua Karton "Diversity in four dimensions" in Shahla Ali and others (eds) *Diversity in International Arbitration* (Edward Elgar Publishing, Cheltenham, 2022) 6 at 6.

159 At 12.

160 At 12.

161 Susan L Miller and Shana L Maier "Moving Beyond Numbers: What Female Judges Say about Different Judicial Voices" (2008) 29 J Women Pol & Pol'y 527 at 529-534.

162 Phillip Günther "Groupthink Bias in International Adjudication" (2020) 11 JIDS 91 at 94.

163 IL Janis *Victims of Groupthink: A Psychological Study of Foreign-policy Decisions and Fiascoes* (Houghton Mifflin, Boston, 1972) at 9 as cited in Günther, above n 162, at 94.

164 Catherine Rogers "A Window into the Soul of International Arbitration: Arbitrator Selection, Transparency and Stakeholder Interests" (2015) 46 VUWLR 1179 at 1183.

the perfect environment for groupthink to thrive. This effect can be illustrated by applying the General Group Problem Solving Model.¹⁶⁵ Among other factors, groupthink thrives in groups of three to four members, with a lack of diversity, similarity in expertise and “repeat players”.¹⁶⁶ The structure of CAS shares these characteristics because of the lack of diversity, dominant expertise in sport, and the closed list of arbitrators, which means many arbitrators appear on similar issues more than once. A legitimate risk of groupthink is that arbitrators aim for unity¹⁶⁷ and “typically resist change, keep ... calm, and [do] not rock the proverbial boat”.¹⁶⁸ Consequently, CAS Panels will make decisions following the same precedent, known as “cascades”.¹⁶⁹

It is important to note that “speaking with one voice” improves the legitimacy and cohesion of CAS.¹⁷⁰ However, groupthink makes it a real challenge for CAS Panels to practically approach issues concerning women’s rights impartially and objectively. The effect of groupthink means that arbitrators on CAS Panels aim for unity and avoid diverting from the norm in cases like *Semenya*, in an environment where sporting interests have been the long-established priority, not women’s rights.

(2) Bias

The same structural conditions contributing to groupthink at CAS also increase the risk of confirmation bias, attitudinal bias, and “egocentricity bias”.¹⁷¹ Two of the three arbitrators in *Chand* and *Semenya* appeared in both cases.¹⁷² It is normal for arbitrators to deal with similar legal issues.¹⁷³ Nonetheless, the consequence is that the arbitrators appearing on similar issues will rarely depart from their preconceptions made in previous cases.¹⁷⁴

“Egocentricity bias” refers to the tendency to “over-estimate [one’s] own ability”.¹⁷⁵ In the context of CAS, arbitrators tend to be at the peak of their careers and highly experienced in resolving sport-related issues. This experience may lead to CAS Panels believing they are resolving disputes to the best of their ability when, in reality, the issue falls outside their expertise. “Attitudinal bias” has a similar effect, distorting CAS Panels’ understanding of certain cases.¹⁷⁶ Prejudicial norms surrounding women in sport and society influence the minds of CAS Panels.¹⁷⁷ For example, the belief that men are fast and strong continues to have a subconscious effect on how women in the sporting world are perceived.¹⁷⁸ Other ideas about the way women should look, and biologically function in

165 Günther, above n 162, at 95.

166 At 98.

167 At 94.

168 ML Breger “Making Waves or Keeping Calm? Analyzing the Institutional Culture of Family Courts Through the Lens of Social Psychology Groupthink Theory” (2010) 34 Law & Psychol Rev 55 at 73 as cited in Günther, above n 162, at 100.

169 Karton, above n 158, at 18.

170 See Günther, above n 162, at 123.

171 Allen, Córdova and Hall, above n 152, at 614–615.

172 See *Chand*, above n 2; and see also *Semenya*, above n 2.

173 Allen, Córdova and Hall, above n 152, at 614–615.

174 See at 615.

175 At 618.

176 See at 611–612; and see Edna Sussman “Affiliation and Affinity: Unconscious Drivers of Arbitrator Decision-Making” (2022) 15 New York Dispute Resolution Lawyer 27 at 29.

177 See Lois Bryson “Sport and the Maintenance of Masculine Hegemony” (1987) 10 Women’s Studies International Forum 349 at 356–359; and see Lois Bryson “Sport and the Oppression of Women” (1983) 19 Aust NZ J Sociol 413 at 424.

178 Jefferson, above n 31, at 115–116.

terms of testosterone and androgen, are also likely to have an influential effect. Ultimately, the impact of bias on the decision-making process at CAS means that traditional sporting attitudes negatively shape panel decisions, and Panels overestimate their ability to solve sports-related disputes concerning women's rights.

The intersection between human rights issues and sports-related disputes has only been examined relatively recently. As with past human rights revolutions, groups resistant to change tend to cling to dominant ideologies. Thus, bias and overestimation of the ability to resolve disputes of a different nature from what is normally seen can be interpreted as clinging to dominant sporting attitudes and being resistant to change. Perhaps CAS will eventually be required to change its attitudes towards women in sport to reflect the broader progression of women's rights.

F Narrow scope of review under Swiss law

A major reason why women's rights continue to be violated in sport is because it is incredibly difficult to challenge CAS awards, even when the outcomes are prejudicial towards women. According to the law of arbitration (*lex arbitri*), the law of the place where the arbitration occurs determines how arbitral proceedings are to run, and state courts in the place of arbitration have control over the proceedings.¹⁷⁹ Accordingly, the *CAS Code* grants female athletes the right to challenge CAS decisions solely at the SFC.¹⁸⁰ The Swiss Federal Code governs any appeals on Private International Law (Swiss Code).¹⁸¹

A variety of factors position Switzerland as a leading venue for international arbitration.¹⁸² The Swiss Code grants maximum party autonomy and minimal interference by the SFC,¹⁸³ which would appear to make CAS decisions more robust.¹⁸⁴ Decisions of the SFC are final,¹⁸⁵ providing a "fast-track one-court procedure [that] guarantees the parties a minimal review of the arbitral award".¹⁸⁶ Moreover, Switzerland advertises itself as a "neutral" country in international arbitration, nested in a desirable European location,¹⁸⁷ attracting the attention of sports governing bodies.¹⁸⁸

The scope of review of the SFC is restrictive, limited to some procedural grounds or if the award is "incompatible with Swiss public policy".¹⁸⁹ Only one per cent of cases appealing CAS decisions have been overturned by the SFC,¹⁹⁰ making the chances of the

179 Gabrielle Kaufmann-Kohler and Philippe Bartsch "The ordinary arbitration procedure of the Court of Arbitration for Sport" in Ian Blackshaw, Robert C R Siekmann, and Janwillem Soek (eds) *The Court of Arbitration for Sport 1984–2004* (TMC Asser Press, The Hague, 2006) 69 at 71–78.

180 *CAS Code*, above n 5, at [R59].

181 See Kaufmann-Kohler and Bartsch, above n 179, at 78; and see Reilly, above n 1, at 75.

182 Oliver Hargreaves "Switzerland: A leading Venue for International Arbitration Litigation" (2010) *Arbitration & Dispute Resolution* at 149.

183 At 150.

184 Despina Mavromati "The Role of the Swiss Federal Tribunal and its impact on the Court of Arbitration for Sport (CAS)" (research paper, 29 September 2016).

185 Hargreaves, above n 182, at 151.

186 At 151.

187 At 149.

188 See Despina Mavromati "Autonomy and Good Governance in Sports Associations in Light of the CAS Case Law" (research paper, 5 March 2015).

189 Federal Act on Private International Law 1987 (Switzerland), art 17.

190 Michael Geistlinger and Stephan Gappmaier "Some thoughts on the role of the European Convention on Human Rights in the jurisprudence of the Court of Arbitration for Sport" (2013) 3 *YB on Intl Arb* 307 at 309.

SFC overturning a CAS decision that contradicts women's rights very slim.¹⁹¹ The Switzerland Supreme Court has yet to overturn a decision of CAS due to the award being incompatible with Swiss public policy, affirming that incompatibility with public policy is a concept more restrictive than arbitrariness.¹⁹²

Despite Switzerland priding itself on neutrality, the scope of review of CAS awards guaranteed under the Swiss Code disadvantages women. In particular, this limited scope deprives female athletes of the right to substantive equality and an effective remedy. Most concerning, CAS decisions infringing upon female athletes' rights tend to be final and unchallengeable.

According to Swiss law, a CAS award is:¹⁹³

... contrary to substantive public policy when it violates some fundamental principles of the law applicable to the merits to such an extent as it is no longer consistent with the notions of justice and system of values; among such principles are, in particular, the sanctity of contracts, compliance with the rules of good faith, the prohibition of abuse of rights, the prohibition of discriminatory and confiscatory measures, as well as the protection of incapable persons.

The definition of public policy has been subject to criticism.¹⁹⁴ The Swiss courts have attempted to distinguish "procedural" and "substantive" public policy.¹⁹⁵ However, there is no such distinction in practice.¹⁹⁶ In 2012, the Switzerland Supreme Court clarified that:¹⁹⁷

... the principle of good faith and the prohibition of abuse of rights, the prohibition of discriminatory and spoliatory measures and of expropriation without compensation, the protections afforded by ECHR provisions ... [do] not constitute a violation of substantive public policy ... [and is limited to procedural issues].

Thus, if the substantive public policy ground under the Swiss Code does not include protection of substantive equality rights granted under ECHR and CEDAW, then the scope of review is strictly limited to procedural issues. This article has established that the eligibility regulations affect substantive equality rights rather than formal equality rights. Concerningly, this means CAS awards that infringe upon substantive equality rights for female athletes are final and unlikely to be overturned unless there is also a procedural issue.

The reluctance of the SFC to intervene in CAS decisions, in addition to the restrictive interpretation of public policy under Swiss law, means that CAS awards that violate the

191 Mitten, above n 127, at 54.

192 *Semenya v Switzerland*, above n 96, at [175].

193 Swiss Federal Tribunal decision 4A_304/2013 (3 March 2014) as cited in Krūmiņš, above n 118, at 118, note 136.

194 Rigozzi, above n 125, at 251.

195 See generally United Nations Commission on International Trade Law *UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York, 1958) (United Nations, February 2017) at 237–261.

196 Ádám Boóc "Observations on the Definition of Public Policy (Ordre Public) in Swiss Arbitration Law" (2012) 53 *Acta Jur Hung* 181 at 192.

197 Laurence Burger "For the First Time, the Supreme Court sets aside an arbitral award on grounds of substantive public policy" (2012) 30 *ASA Bull* 603 at 606.

substantive rights of female athletes' rights are final.¹⁹⁸ The SFC affirmed this, finding that the right to non-discrimination under the ECHR does not have a "horizontal effect", so it will not amount to a decision being overturned under public policy grounds.¹⁹⁹

V Solutions

CAS is one of the most important contributors to global sports law, developing precedents for sports-related disputes and shaping norms, rules and practices in sport.²⁰⁰ The autonomy of CAS means that global sports law is essentially developing without proper representation of gender and diversity, without the necessary expertise and sufficient appeal mechanisms. Of course, these are factors that make international arbitration generally attractive. However, the degree to which this infringes on women's rights justifies intervention. Ken Foster has contemplated the idea of regulation, criticising global sports law as:²⁰¹

... a cloak for continued self-regulation by international sports federations [and] a claim for non-intervention by both national legal systems and by international sports law. It thus opposes a rule of law in regulating international sport.

The remainder of this article proposes four avenues of reform to protect female athletes' rights in sports: expanding the scope of review of the SFC; redirecting human rights-related disputes to an alternative venue to CAS; improving representation within CAS; and substantive equality rights within CAS.

A *Expanding the Swiss scope of review*

Expanding the scope of review of the SFC is a popular recommendation,²⁰² as well as expanding the grounds for appeal at CAS to include wider consideration of issues in the Appeals Arbitration Division.²⁰³ As discussed, the nature of the rights affected by the eligibility regulations tends to relate to substantive equality, and the harm caused is a form of indirect discrimination. Thus, expanding the scope of review of the SFC will allow scrutiny of CAS's awards that infringe on these types of rights rather than rights strictly related to procedural or formal equality. The ECtHR supports this proposal, recognising that the limited scope of review is appropriate in commercial arbitration. Still, the unequal footing between athletes and sporting organisations makes it "problematic" when human rights issues are involved.²⁰⁴

Unfortunately, this recommendation will unlikely come to fruition. The extent to which a government can hold actors accountable under international human rights law ultimately depends on its "political will".²⁰⁵ As discussed earlier, state courts are already

198 See generally Rigozzi, above n 125, at 254.

199 Antonio Rigozzi "Sports Arbitration and the European Convention of Human Rights – *Pechstein* and beyond" in Christoph Müller, Sébastien Besson and Antonio Rigozzi (eds) *New Developments in International Commercial Arbitration 2020* (Stämpfli Editions, Bern, 2020) 77 at 123–124.

200 At 53; see also Lindholm, above n 154, at 261.

201 Foster, above n 122, at 36.

202 Rigozzi, above n 125; see also Human Rights Watch, above n 60, at 10.

203 At 13.

204 See European Court of Human Rights, above n 96.

205 Inter-Parliamentary Union and OHCHR, above n 14, at 154.

hesitant to intervene in arbitration. Moreover, Switzerland is a guardian of autonomy in international arbitration and is a haven for sports governing bodies, making it unlikely for the scope of review to be expanded at the will of Switzerland.

B Redirection

Another option for reform is to redirect sports-related disputes, which inherently involve women's rights issues, to an alternative body that is better equipped to deal with such matters. Radical feminists demand entirely new institutions, free from hierarchical structures, and advocate for substituting sex categories in sport with identity categories.²⁰⁶ At a less extreme end, the ECtHR has been suggested as a more suitable venue for human rights sports-related disputes,²⁰⁷ or a possible specialist "Court of Arbitration for Sport and Human Rights".²⁰⁸

As discussed earlier, female athletes must submit to the jurisdiction of CAS to compete in sport at an international level, meaning all roads in international arbitration of sports-related disputes lead to CAS. An alternative body to settle sports-related disputes outside of CAS should be an option for women, regardless of whether CAS is fit to deal with women's rights issues so that female athletes have proper access to justice. Alternatively, women could remain required to submit to the jurisdiction of CAS, but also be granted control over the place of arbitration when CAS awards are challenged, in order to protect the "party autonomy principle" in arbitration.²⁰⁹ Fortunately, this has proven successful in protecting women's rights in relation to the eligibility regulations in the past. For example, female athlete Kristen Worley did not sign an affidavit submitting to the exclusive jurisdiction of CAS, enabling her to successfully challenge the eligibility regulations on the grounds of discrimination at the Human Rights Tribunal of Ontario.²¹⁰ Worley was able to compete successfully in international sport without submitting to the regulations,²¹¹ showing that providing women with an alternative body to decide sports-related disputes is a realistic solution to violations of substantive rights.

C Improving diversity and representation at CAS

Instead of redirecting disputes to an alternative venue, CAS could adopt internal measures to enable it to carefully handle sports-related disputes concerning the substantive rights of female athletes.²¹² This would require adopting international human rights standards,²¹³ including those set out in CEDAW, improving diversity, women's representation and human rights expertise (while respecting the need for sport expertise). There is demand to improve diversity in international arbitration in general,²¹⁴ and the benefits of doing so at CAS would reduce the risk of bias and groupthink, improving the overall decision-making process. Adopting this reform would improve the chances of women's voices and

206 Ann Travers "The Sport Nexus and Gender Injustice" (2008) 2 Stud Soc Justice 79 at 86.

207 Holzer, above n 129, at 16.

208 West, above n 130, at 14–15.

209 Pashorina-Nichols, above n 106, at 52.

210 Croteau, above n 39, at 107.

211 At 107.

212 See Holtmaat, above n 16, at 110.

213 Hartmann, above n 132, at 45.

214 Petra Butler "International Commercial Arbitration Put to the Test in the Commonwealth" (2020) 51 VUWLR 357 at 375.

concerns being heard. Additionally, more diverse Panels would allow arbitrators to feel more comfortable disagreeing with one another and diverting from dominant prejudicial ideologies in sport. Better representation of women and diverse expertise would lead to decisions that uplift women.

Gender diversity in arbitration has many benefits to the decision-making process;²¹⁵ for example, better reception of women's needs compared to a non-diverse panel.²¹⁶ Ironically, Switzerland is aware of the benefits of a diverse panel.²¹⁷ However, given its leading reputation in international sports arbitration, Switzerland will be reluctant to increase the diversity of CAS if this is perceived to be at the expense of sport expertise. Instead, pressure and solidarity, particularly among women, may be needed to shift this perception.

Redistributing power, reshaping institutional structures and improving agency are methods that improve diversity and protect substantive equality.²¹⁸ One way to improve diversity in arbitration is with appointments, which goes to "the heart of fairness in the process".²¹⁹ Fortunately, as an institution, CAS is in an excellent position to improve diversity by making changes in the appointment process.²²⁰ For example, CAS can implement "gender quotas"²²¹ or "gender mainstreaming"²²² to improve the number of female arbitrators and the share of appointments that are dedicated to women. Furthermore, planting a "devil's advocate"²²³ or "devil's arbitrator"²²⁴ in the arbitration process improves diversity. However, CAS is uniquely positioned among arbitration bodies due to its closed list of arbitrators, meaning such planting would be difficult.

CAS is the only arbitration institution with a closed list,²²⁵ meaning that only arbitrators on the list can be selected to appear on CAS Panels.²²⁶ Entering this closed list generally relies on "word of mouth" recommendations.²²⁷ More concerning, the closed list means that improving diversity depends on the will of CAS. Therefore, removing the closed list of arbitrators may be the best solution to improve diversity and protect women's rights.²²⁸

Another way CAS could improve diversity is by electing "younger, female, and non-Western arbitrators when exercising their power to appoint panel presidents and sole arbitrators".²²⁹ As discussed earlier, women of colour are disproportionately affected by the eligibility regulations and, therefore, are the majority of claimants appealing the

215 Winkler and Schinazi, above n 148, at 11.

216 At 13.

217 Caroline dos Santos "Diversity in international arbitration: A no-woman's land?" in Leo Staub (ed) *Beiträge zu aktuellen Themen an der Schnittstelle zwischen Recht und Betriebswirtschaft III* (Schultess, Zurich, 2017) 207 at 223–225.

218 See Fredman and Goldblatt, above n 21, at 6; Inter-Parliamentary Union and OHCHR, above n 14, at 49–53.

219 Rogers, above n 164, at 1179–1180.

220 dos Santos, above n 217, at 14.

221 See Johanna Adriaanse and Toni Schofield "The Impact of Gender Quotas on Gender Equality in Sport Governance" (2014) 28 *J Sport Manage* 485 at 485; and see also Inter-Parliamentary Union and OHCHR, above n 14, at 107.

222 At 62.

223 Rogers, above n 164, at 1184.

224 Karton, above n 158, at 19.

225 Pashorina-Nichols, above n 106, at 44.

226 Espen Auberg "The Court of Arbitration for Sport (CAS) - the role of the arbitrator" *EA Sports Law* (1 July 2023) <easportslaw.com>.

227 Allen, Córdova and Hall, above n 152, at 604.

228 Pashorina-Nichols, above n 106, at 45.

229 Lindholm, above n 154, at 275.

regulations at the Appeals Arbitration Division. Discrimination affects people differently,²³⁰ so it is necessary to require CAS Panels to have cultural competence, along with expertise in human rights and women's rights.²³¹

Not only is there an issue of justice for female athletes who are challenging eligibility regulations, but there is also an issue concerning the distribution of appointments of male to female arbitrators within CAS. To some extent, women within CAS are marginalised in the participatory process. Improving the number of women, particularly women of colour, at CAS is also important to address the disproportionate share of male appointments within CAS. Honouring arts 7 and 8 of CEDAW, along with substantive equality obligations, requires equal participation in the decision-making process at an international level.²³²

Taking measures to improve diversity and female representation in the CAS decision-making process is not only important to ensure women's rights are better protected, but also to protect CAS as an arbitral body: in particular, maintaining the legitimacy of CAS as the leading arena for sports-related disputes,²³³ improving the quality of awards²³⁴ and public perception of CAS to uphold the rule of law.²³⁵ Improving the number of women at CAS is important because people have more support in a system that "resonate[s] with their perspective",²³⁶ and the "international community needs to be able to see itself represented within the field".²³⁷

Of course, there are concerns that these measures will take a toll on sports expertise, but this does not require CAS to abandon sports expertise altogether.²³⁸ CAS can take this as an opportunity to become "diversity avant-gardists" in the international arbitration arena.²³⁹ If arbitral institutions do not reflect the diversity of parties that use their services, users will seek alternative means of resolution, which is a reason for concern.²⁴⁰ However, as discussed earlier, female athletes must exclusively submit to CAS for sports-related disputes under the *DSD Regulations* to compete in sport. Therefore, facing little competition, it is questionable whether CAS will be sufficiently motivated to take such measures to protect its reputation, let alone women's rights.

VI Conclusion

The regulations imposed on women in sport are discriminatory, infringing upon many rights granted under international human rights instruments like CEDAW and ECHR. Successfully overturning these regulations at CAS is a real challenge for women due to CAS's inherent characteristics. The private nature of arbitration and autonomy of CAS relieves CAS of any international obligations relating to women's rights. The lack of women arbitrators at CAS, particularly women of colour, coupled with its lack of human rights expertise, means that CAS Panels do not properly hear women's voices. Additionally, the

230 See Inter-Parliamentary Union and OHCHR, above n 14, at 52.

231 Karton above n 158, at 8–17.

232 Inter-Parliamentary Union and OHCHR, above n 14, at 106.

233 Lindholm, above n 154, at 271.

234 Allen, Córdova and Hall, above n 152, at 628.

235 Karton above n 158, at 15–16.

236 Samaa AF Haridi "Towards Greater Gender and Ethnic Diversity in International Arbitration" (2015) 2 BCDR Int Arb Rev 305 at 307.

237 Karton, above n 158, at 17.

238 At 18.

239 dos Santos, above n 217, at 15.

240 Karton above n 158, at 15–16.

structural conditions at CAS mean there is a real risk of bias and groupthink, compromising the quality of the decision-making process. Most concerningly, women's right to appeal CAS awards at the SFC can be considered superficial as Swiss law limits reviews to violations of formal equality or procedural issues, preventing challenges to substantive equality under eligibility regulations. Some of these reasons are natural consequences of choosing arbitration, which purposefully and efficiently resolves disputes with relevant expertise. However, protecting women's rights in global sports law ultimately depends on change, because the current arbitration system for sports-related disputes is inadequate.

Both internal and external changes can be made to ensure women's rights in sport are protected in the future. Some measures CAS can adopt include improving diversity and representation of women at CAS, which will allow stronger consideration of women's interests. Another way to achieve this is by expanding the scope of review of Swiss law, which would protect substantive rights rather than formal and procedural rights. Alternatively, sports-related disputes raising women's rights or human rights issues in general could be redirected to the ECtHR or an alternative authority with similar expertise to the ECtHR.

It must be noted that the future of women's rights in sport is in flux. In November 2023, World Athletics, supported by Switzerland, successfully challenged the ECtHR judgment concerning Semenya, and the Grand Chamber will rehear the case.²⁴¹ Earlier that year, World Athletics announced:²⁴²

We remain of the view that the DSD regulations are a necessary, reasonable and proportionate means of protecting fair competition in the female category as the Court of Arbitration for Sport and Swiss Federal Tribunal both found.

The Grand Chamber only accepts five per cent of referrals,²⁴³ limited to issues that will have a significant development on the law, or where clarification is required regarding the application of the ECHR, or where the outcome of the case will have important consequences.²⁴⁴ This shows that the relationship between protecting women's rights and the current sports-related dispute resolution process in international arbitration requires revision. The decision of the Grand Chamber will provide a broader assessment of what gender and sport mean today and, most importantly, clarify the direction of women's rights in sports-related disputes at CAS.²⁴⁵ Essentially, this will require the Grand Chamber to reconcile the tension between fundamental gender boundaries in sport and the changing meaning of gender in today's age.²⁴⁶

241 European Court of Human Rights "Grand Chamber Panel's decisions - November 2023" (press release, 6 November 2023).

242 World Athletics "World Athletics responds to European Court of Human Rights decision" (press release, 11 July 2023).

243 European Court of Human Rights *Practice Followed by the Panel of the Grand Chamber When Deciding on Requests for Referral Under Article 43 of the Convention: Note prepared by the Registry* (2 June 2021) at [10].

244 At [17]–[38]; and see also Faraz Shahlaei "The Caster Semenya Judgment of the ECtHR: Why It Should Not be the Final Whistle?" (25 July 2023) EJIL: Talk! - Blog of the European Journal of International Law <ejiltalk.org>.

245 See Michele Krech "To be a Woman in the World of Sport: Global Regulation of the Gender Binary in Elite Athletic" (2017) 35 Berk J Intl L 262 at 294.

246 Edward Schiappa *The Transgender Exigency: Defining Sex and Gender in the 21st Century* (Routledge, New York, 2021) at 174.