

## INTERSEXUALITY AND TRANSGENDER IDENTITY AS A "PROBLEM" OF PARTICIPATION IN SPORTS COMPETITIONS (MEDICAL AND LEGAL ASPECTS OF DECISION-MAKING PRACTICE) / Andrea Erdősová, Erik Dosedla, Petra Gašparová, Zuzana Ballová

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**Abstract:** *Amidst a global landscape where transgender individuals face unprecedented challenges in accessing equitable sexual health care, our review breaks new ground by exploring the intricacies of sexual health within the transgender community. Unveiling the critical gaps in current health care practices, our research not only amplifies the voices of those often marginalised in health narratives but also pioneers a comprehensive, culturally sensitive approach to transgender sexual health. The literature review tries to find medical and subsequent legal justifications for PRO and CONS of participation of transgender and intersex athletes in the category of the opposite sex. It tries to analyse which differences in life can be relevant in defining competitive advantages, which nowadays lead to very controversial, often politically motivated conclusions. The opinions of the professional and sports public do not go along with some decisions of sports associations and authorities. It therefore also deals with the recent decision of the European Court of Human Rights in the case of Caster Semenya, as well as the participation of athletes across different sports disciplines and categories. It does not ignore the question of the adequacy of anti-discrimination measures. Furthermore, it evaluates the impact of such participation on the integrity and fairness of competitive sports, highlighting the need for a balanced approach that respects the rights of all athletes. This study stands at the forefront of transforming sexual health care for transgender individuals worldwide.*

**Key words:** *Transgender Person; Intersexuality; Sex Determination Processes; Hyperandrogenism; Testosterone; Discrimination; „Very Weighty Reasons“; Arbitration; European Court of Human Rights*

**Suggested citation:**

Erdősová, A., Dosedla, E., Gašparová, P., Ballová, Z. (2024). Intersexuality and Transgender Identity as a "Problem" of Participation in Sports Competitions (Medical and Legal Aspects of Decision-Making Practice). *Bratislava Law Review*, 8(1), 83-98. <https://doi.org/10.46282/blr.2024.8.1.855>

**Submitted:** 05 April 2024  
**Accepted:** 18 June 2024  
**Published:** 07 July 2024

## 1. THE QUESTION OF COMPETITIVE ADVANTAGE AND DIFFERENCE WHEN IT COMES TO GENDER

The WHO has a decent definition: "Gender refers to the characteristics of women, men, girls, and boys that are socially constructed". When society talks about "gender norms", it refers to behaviours and roles associated with men, women, girls, and boys.<sup>1</sup> While not inaccurate, the WHO's definition is incomplete because it implies a kind of binary. There are more genders beyond men, women, girls, and boys. The Canadian Institutes of Health Research (further as **CIHR**) provides a fuller definition: "Gender refers to the socially constructed roles, behaviours, expressions and identities of girls, women, boys, men, and gender diverse people".<sup>2</sup> In short, gender is a social construct that varies over time and across societies.

How is gender different from sex? The CIHR defines sex as "a set of biological attributes in humans and animals." These attributes include chromosomes, gene expression, hormone levels and function, and reproductive/sexual anatomy. Sex is typically categorised as "male" or "female," but even within sex, categories are more complex than a binary.<sup>3</sup>

The question of competitive advantage finds its extensive justifications in the jurisprudence that concerns illegal doping. When examining the circumstances, it is important that "(...) it is not a matter of responsibility for the culpable use of a prohibited substance, but of a super-objective responsibility "for the body", i.e. for the fact that the substance was found in the athlete's body after the competition and that he/she competed in situations, when he/she was favoured over others due to his/her health dispositions." (David, 2012, p. 157). There is no doubt that it was this substance that favoured the athlete. But Ludvík David (2012, p. 157) gives an example from decision-making practice, when it seems particularly difficult to balance the degree of responsibility, if it is, for example, a long-term endurance load, during a several-hour cycling stage, which can increase the level of testosterone in some competitors due to a non-specific reaction of the body to such an extent that it exceeds the permitted limit.

Nowadays, there is increasing pressure on athletes from the outside, which motivates them in the pursuit of records and leads to the team production of a "champion factory". In the light of this ambivalent view, athletes appear in the eyes of the public not only as cheaters, but also as victims (Lipovietsky, 1999, cited by Dávid, 2012, p. 160).

Cultural awareness and social recognition of many forms of gender identity, gender expression and gender roles are developing worldwide (Wipfler, 2016, p. 494).

Currently, we are witnessing the tension of arguments on both sides. Some organisations defend the rights of transgender (the problem mainly focuses on women transitioning to a man, i.e. "FtM" for short) and hyperandrogynous women and their ability to compete without discrimination in women's sports disciplines compete with the opposite ones.<sup>4</sup> At the opposite pole of the discourse, the arbitrators of the rights of other participants in sports competitions operate, arguing for equality of conditions and fair play rules for all. The question is whether this is the result of a modern-day ideological

<sup>1</sup> World Health Organization (WHO). Gender and health. Available at: [https://www.who.int/health-topics/gender#tab=tab\\_1](https://www.who.int/health-topics/gender#tab=tab_1) (accessed on 12.02.2024).

<sup>2</sup> Canadian Institutes of Health Research (CIHR). What is gender? What is sex?. Available at: <https://cihr-irsc.gc.ca/e/48642.html> (accessed on 12.02.2024).

<sup>3</sup> *Ibid.*

<sup>4</sup> UN Expert warns Biden Administration: Rule changes in women & girls' sports would breach "human rights obligations". In: *ADF International*, published on 28.12.2023. Available at: <https://adfinternational.org/news/un-expert-warns-against-us-rule-changes-in-womens-sports> (accessed on 21.01.2024).

struggle, or the problem is still so scientifically unexplained that the uncertainty and contradiction in the rules across the whole world and in different types of sports fit right into that vacuum.

*"One high jumper could be taller and have longer legs than another, but the other could have perfect form and then do better. One sprinter could have parents who spend so much money on personal training for their child, which in turn, would cause that child to run faster"* (Medley and Sherwin, 2019).

We should keep in mind that success and performance in sports is more or less a multifactorial matter, which is a combination of not only biological factors, but also psychological and physical preparation, sports conditions, but also finances, a good trainer, coach, physiotherapist, discipline, character features and health condition. Each of these factors can work both for and against an athlete. However, if we move the discourse to the scientific level, which solves the issue of biological and anatomical prerequisites in sports, as well as to the legal level, which should create a fair sports environment in which there is no discrimination, it is necessary to look at the biological criteria for determining gender and establish clear demarcation differences in the sexes.

## 2. BIOLOGICAL CRITERIA OF SEX DETERMINATION AND GENDER DIFFERENCES

According to the criteria of Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development) (hereafter referred to as "**DSD**"), it is i. a. stated that "since puberty, males are generally at a considerable advantage compared to females in terms of size and strength, mainly due to a significantly higher level of circulating testosterone and from the point of view of the potential impact of these differences on sports performance, it is generally accepted that mutual competition between male and female athletes would not be fair and relevant and could discourage women from participating in sports competition" (IAAF Athletics, 2018, p. 1).

A certain disadvantage can be described in the case of a FtM transgender person, *nota bene*, if we are talking about a skeletal and muscular predisposition, because they will generally be lower and thinner. If, on the other hand, we are describing MtF and the person has gone through male puberty, then it will not only be a prerequisite for a larger and taller body structure, but also a higher level of testosterone in the body before these persons start taking oestrogen.

As a result from the IAAF Eligibility Regulation for DSD, to be eligible to compete in the female classification in a Restricted Event at an international competition, or to set a world record in a competition that is not an international competition, a relevant athlete must meet each of the following conditions (the eligibility conditions). A relevant athlete who does not meet the eligibility conditions (and any athlete who is asked by the IAAF Medical Manager to submit to assessment under these regulations and fails or refuses to do so) will not be eligible to compete in the female classification. However, that athlete will be eligible to compete: in the female classification at competitions that are not international competitions: in all track events, field events, and combined events, including the restricted events; or at the male classification or any applicable intersex or similar classification that may be offered (IAAF Athletics, 2018).

While referring to participation in sports competitions at the primary and secondary school level, bringing up the topic of gender differences could do more harm than good. However, the situation is different if we are talking about the professional level of sport. This does not only refer to a selective approach to the gender identity, but also to the overall view of sport as such, which should also be a form of entertainment, physical benefit and socialisation.

However, the situation is different if we are talking about professional sports, not only athletics, swimming, or strength sports.

The results clearly show that gender plays a big role in winning. Female athletes—meaning athletes with ovaries instead of testicles and testosterone (T) levels that a woman's unandrogenised body can produce—are not competitive against men—by which we mean athletes with male-scale testicles and male T levels. The lower end of the male range of hormone levels is three times higher than the upper end of the female range. Consistent with the much lower T levels in women, the range in women is also very narrow, while the range in men is wide (Coleman and Shreve, n.d.).

### 3. THE IMPACT OF BIOLOGICAL GENDER DIFFERENCES ON SPORTS PERFORMANCE

The influence of inherent biological distinctions on athletic performance is nuanced and becomes pronounced with age. During early childhood, organised sports typically emphasise the cultivation of fundamental motor and social competencies, with little to no separation based on gender. At this stage, the performance gap in sports between boys and girls is usually minimal or considered to be of little significance (Hilton and Lundberg, 2021).

As children approach puberty, notable differences in body composition and size begin to manifest, driven by gender-specific hormonal fluctuations, including variations in testosterone, oestrogen, progesterone, luteinising hormone, follicle-stimulating hormone and growth hormone (Sandbakk, Solli and Holmberg, 2018). During this phase, boys experience a significant surge in testosterone production, which can be up to 20 times higher than pre-puberty levels, resulting in testosterone concentrations vastly exceeding (15 times higher) those in females at any age stage (Hilton and Lundberg, 2021).

Testosterone, a key endogenous hormone and primary androgenic steroid synthesised by the testicles, plays a crucial role in promoting the development and maintenance of male characteristics. While it also acts as a precursor for oestrogen in females, its anabolic properties significantly enhance muscle mass growth (Wood and Stanton, 2012). The presence of testosterone leads to marked differences in muscle mass, strength, body measurements, and haemoglobin levels among males, contributing to distinct sexually dimorphic traits (Hilton and Lundberg, 2021).

This hormonal influence results in males developing a higher proportion of muscle mass relative to body fat during growth, enhancing muscle strength and both anaerobic and aerobic energy capacities (Sandbakk, Solli and Holmberg, 2018). Notably, males tend to have a greater concentration of muscle mass in the upper body, which contributes to a higher upper-to-lower body strength ratio, particularly in the arms, impacting not only strength and energy production capabilities but also technique (Hegge et al., 2016).

Differences in endurance capabilities between genders are also evident, attributed to factors such as higher testosterone levels, increased haemoglobin, and a physique characterised by greater muscle mass and less fat in males, facilitating enhanced aerobic and anaerobic energy delivery and production (Hegge et al., 2016).

In the context of transmasculine athletes (those transitioning from female to male) undergoing hormone therapy with testosterone, there appears to be no significant competitive advantage over cisgender males in male sports categories. However, the discussion often centres around transfeminine athletes (those transitioning from male to female), who may retain certain physiological performance characteristics associated

with male physiology, primarily due to testosterone, potentially offering them an advantage in competition (Tidmas, Halsted, Cohen and Bottoms, 2023).

Roberts et al. (2020) reviewed athletic performance and medical records of 29 transmen and 46 transwomen who started gender affirming hormones while in the United States Air Force. Results indicated that oestrogen treatment in transwomen led to an increase in weight and a decrease in athletic performance, while testosterone treatment in transmen was associated with improved athletic performance, without significant changes in body composition. Before undergoing hormone therapy, transwomen had a 15–31% athletic advantage over cisgender women, which decreased after receiving feminising treatments. Despite this reduction, transwomen maintained a 9% higher average running speed even after a year of testosterone suppression, as per World Athletics' guidelines for women's event participation. These findings offer valuable insights for sports organisations and policy-makers regarding the inclusion of transgender athletes in competitive sports (for more see Roberts, Smalley and Ahrendt, 2020).

#### 4. SPORT AND PARTICIPATION CRITERIA IN WOMEN'S DISCIPLINES

In April 2015, decathlete Caitlyn Jenner, formerly known as Bruce Jenner, revealed her transgender identity. It was a turning point moment at a time when transgender issues were constantly making headlines. Now, Jenner is considered one of the most famous come out transgender people in the world.<sup>5</sup> Obviously, even at this point, the transgender community has a mixed reaction to her Vanity Fair reveal and beautiful photos, as some activists blamed her for the lack of compassion and appalling conditions in which many transgender women and men live and cannot experience this transition and coming out, especially of colour.

Although Jenner only transitioned after her athletic career ended, there are countless athletes who demand the opportunity to compete in elite sports while transitioning. At the same time as these requirements, others are demanding more. I. a. a South Dakota lawmaker proposed visual examination of athletes' genitalia; a Californian initiative banned trans people from sharing opposite-sex locker rooms; the State of Ohio has ruled that transgender female high school athletes must be screened to see if they show a physical advantage in terms of bone structure and muscle mass. Besides, the law of Ohio, combined with a pending set of administrative rules, can make Ohio one of the most restrictive states for transition-related medical care for minors and adults (Yurcaba, 2024).

Even for those who are generally active in supporting the rights of LGBTQI+ people (lesbian, gay, bisexual, transgender, queer or questioning, intersex, and more, hereafter referred to as „LGBTQI“), there is currently a major dilemma of how to find a "fair" way to allow someone to play for a team of the opposite gender to the athlete's natal sex. This is especially true for trans women, who identify as female but likely have (and retain) the strength, agility, body mass, and stamina of a man.

Supporters of transgender athletes argue that medically prescribed puberty blockers and oestrogen suppress testosterone levels and reduce muscle mass in transgender women, reducing potential competitive advantages. Supporters also argue

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<sup>5</sup> Jenner came out as transgender in April 2015: see ABC news. *Bruce Jenner: 'I'm a Woman'*, published on 25 April 2015. Available at: <https://abcnews.go.com/Entertainment/bruce-jenner-im-woman/story?id=30570350> (accessed on 12.06.2024); the legal transition in the Jenner case was publicly known as official in September 2015, see for more details Toomey and Machado (2015).

that sport, especially youth sport, is also about belonging, well-being and socialising young people. The American Medical Association says legislation banning trans women from playing sports on women's teams harms transgender mental health (O'Reilly, 2021).

However, the requirement to verify gender in sports is probably the most controversial. Since the mid-twentieth century, sports institutions have responded to the participation of transgender women and women suspected of being transgender, male, or intersex by adding conditions that are variously determined by physical examination, sex chromosomes, and sex hormones.<sup>6</sup>

As of April 2023, there is no uniform international framework for the participation of transgender people in competitive sports. Traditionally, the criteria for the inclusion of women's sports were decided by individual sports bodies at the national and international level (Hilton and Lundberg, 2021).

In the United States, the anti-LGBTQI+ movement that emerged in the early 1920s led to some US states passing legislation restricting the participation of transgender youth in high school sports or trans women and girls in women's sports. Several international governing bodies, including World Athletics, World Aquatics and World Rugby, have restricted transwomen who have gone through male puberty from participating in the women's category (Middleton, 2023; Strashin, 2023).

## 5. CONTROVERSIAL DARTS AND CHESS

Undoubtedly, it remains questionable whether such sports as i. a. arrows, are among those where a different physical predisposition is manifested in the comparison between men and women. What we see in other power sports, such as swimming or athletics, as a complex issue of physical strength and body structure, in darts can be reduced to the duality of a functional hand and good eyesight (Liew, 2023).

Victoria Monaghan is a nerd who made history as the first transgender woman to compete in the World Darts Championships and has been playing since she was 12 years old. While she is supported by the New Zealand Darts Council, there has been a wave of backlash from anti-LGBTIQ+ people after qualifying for the international tournament. They backed up their claims by arguing that female darts should be banned from MtF, claiming that her participation was unfair due to alleged "biological advantages" (Reed, 2023).

One of the arguments is also the physical advantage consisting in the ability to throw harder and more accurately, which can also be given by the width of the shoulders.

Even Martina Navrátilová, a former tennis player who has not hidden her lesbian orientation for years, is one of those athletes who fight against the participation of transgender athletes in women's categories. She similarly rejected Monaghan's participation in the international tournament (Reed, 2023).

From August 2023, whether it is rugby, swimming, or athletics – transgender women are prohibited from participating in international events in women's categories. The number of sports where these rules are established is growing, most recently chess was on this list.

On the other hand, even though it may seem like a battle of opinions and subjective attitudes, the extent to which testosterone levels affect cognitive abilities and the overall structure of the brain is not yet sufficiently researched. Of course, this is also

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<sup>6</sup> Sexuality and Gender Perspectives on Sports Ethics. In: *Clearinghouse for Sports*, updated on 02 February 2022. Available at: [https://www.clearinghouseforsport.gov.au/kb/sexuality-and-gender-perspectives-on-sports-ethics#competitive\\_sport](https://www.clearinghouseforsport.gov.au/kb/sexuality-and-gender-perspectives-on-sports-ethics#competitive_sport) (accessed on 10.01.2024).

a question that can move the issue to the territory of games, not exclusively sports, for example chess. And again, it will not be possible to exclude arguments that speak in favour of overall mental abilities, which are broader than just cognitive and speak in favour of exceptional female chess players, even if it is a predominantly male representation.

The International Chess Federation, known as **FIDE**, will effectively stop allowing transgender women to participate in women's competitions.

The organisation will also take away some titles won by players in the women's categories and later transferred to the men's due to the transition. It will also remove some titles won by transgender men. Under the new guidelines, transgender people will still be allowed to compete in the "open" section of tournaments, where men and women typically compete against each other. Titles could be reinstated if the player undergoes detransition and can prove that he holds the appropriate FIDE ID under which he obtained the title. Cancelled degrees can also be converted to a "general degree of the equal or lower level".

Many elite events that are exclusively for women will be banned for those who have changed their gender from male to female until FIDE carries out a "further analysis" of the differences, which will take about two years (Kim, 2023).

FIDE also ruled that it has the right to "appropriately mark" the change of gender in a player's profile, as well as to inform tournaments organisers about all transgender competitors.<sup>7</sup>

When it comes to transgender people, the argument that is based on the full acceptance of their gender difference, intersexuality or transition process comes to the fore, and therefore a complete stop or complete exclusion from sports, which are often sources of livelihood, can be perceived as discriminatory. In addition, an athlete is an entrepreneur like everyone else, he is professionally engaged in an age-limited period of life, sports success itself brings him not only immediate profits, but above all, often "selling one's own person" within the framework of a brand or advertisement. Therefore, if we want to understand discrimination in a broader context, we cannot neglect this aspect, where a professional athlete, mostly exclusively focused on sports, can find himself without a job, discriminated against in the field of employment law, which often leads athletes to initiate lawsuits.

As we mentioned above, sometimes the physical structure and endurance or endocrinological factors are not in themselves the only criteria for success in sports. You also need a dose of endurance, discipline and hard training, as well as mental preparation. As a compromise solution, if possible, the introduction of a special category appears. This happened for the first time in the European Swimming Cup in Germany, where a special category for transgender swimmers was introduced for the first time in 2023.

## 6. THE CASE OF SEMENYA AND THE EUROPEAN COURT OF HUMAN RIGHTS (ECTHR)

The case of the South African athlete Mokgadi Caster Semenya,<sup>8</sup> who won gold medals at the Olympic Games in London (2012) and Rio de Janeiro (2016) on running tracks ranging from 800 meters to 3,000 meters and is a three-time world champion in

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<sup>7</sup> FIDE Regulations on Transgender Chess Players' Registration on FIDE Directory. Available at: [https://doc.fide.com/docs/DOC/2FC2023/CM2\\_2023\\_45.pdf](https://doc.fide.com/docs/DOC/2FC2023/CM2_2023_45.pdf) (accessed on 10.01.2024).

<sup>8</sup> ECTHR, *Semenya v. Switzerland*, app. no. 10934/21, 11 July 2023; referred to the Grand Chamber on 6 November 2023, judgment expected.

athletics (sometimes referred to as "light") recently resonated not only among the sports public sometimes referred to as "light".

With the increasing popularity and number of sports trophies, the resistance of not only competing female athletes who objected to unequal competition conditions, but also specific measures that made it difficult for Semenya to participate in competitions, grew. Such was, for example, the decision of the World Athletics Federation (hereinafter referred to as "IAAF", currently also World Athletics). The athlete was advised that she would need to reduce her testosterone levels in the following races in order to compete in running events from 800 meters to 3,000 meters. Caster Semenya refused to respect these rules, because part of them was the requirement to undergo the hormone therapy aimed at reducing the level of testosterone.

However, it is not fully proven with this therapy what different side effects it can cause. As for the suspicions, which consisted in the impossibility of determining what her gender identity is, these were refuted not only administratively, because she is a natal woman (in the registry, her gender has been indicated since birth), subjective gender identity (she openly declares her gender) but also by verifying her gender after winning the 800 meters at the World Championships in Berlin in 2009.

In addition, the IAAF also changed the rules of some athletic competitions preventing the participation of hyperandrogenic female athletes in the race. Its actions challenging the regulations in question before the Court of Arbitration for Sport (hereinafter referred to as "CAS") and the Federal Court were dismissed. However, these conflicted with the decision of the Court of Arbitration for Sport (CAS) seated in Lausanne, ruling in *Dutee Chand* (an Indian athlete, specialising in running 200 and 400 meters, who took part in the Junior Asian Championships, where her body's testosterone levels were measured to be high) v *Athletics Federation of India*.<sup>9</sup>

In a preliminary ruling, the CAS suspended for two years the validity of the then valid rules allowing persons with the upper limit of testosterone to compete in the women's category, on the grounds that there is not enough scientifically proven connection between sports performance and the level of testosterone in the athlete's body. During these two years, the IAAF had an obligation to credibly demonstrate a real advantage for women with hyperandrogenism over other women with the normal testosterone levels. Pursuant to this CAS decision, the IAAF issued (April 23, 2018) new rules for determining the conditions for the inclusion of athletes in the DSD female category, in which they reiterated that the level of testosterone circulating in the athletes' bodies is a key criterion for the inclusion in the male or female category (IAAF Athletics, 2018).

According to DSD, biological sex is an umbrella term that includes chromosomal, gonadal, hormonal, and phenotypic sex, and each of these categories usually points toward the binary designation of a male or female. However, there are individuals in whom congenital conditions cause atypical development in either chromosomes, gonads, or sex anatomy, referred to as DSD or intersex individuals. As stated in the 2018 rules, high levels of endogenous testosterone circulating in the bodies of athletes with various DSDs are scientifically proven to affect their athletic performance. At the same time, it should be noted that these rules do not constitute national or local law but have universal validity and all disputes that arise on the basis of them are the responsibility of the IAAF, the Department of Health and Science (IAAF Athletics, 2018).

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<sup>9</sup> CAS, *Dutee Chand v. Athletics Federation of India (AFI) & The International Association of Athletics Federations (IAAF)*, 2014/A/3759, 24 July 2015.



This was followed by an arbitration award by the CAS in Claimants Caster Semenya and Athletics South Africa v IAAF Monaco challenging the November 2018 DSD measure as unfairly discriminating against athletes based on sex, gender or certain psychological traits.<sup>10</sup>

The plaintiffs argued that these measures had no scientific basis and could cause irreparable harm based on unequal treatment.

Finally, on 19 April 2019, the Court of Arbitration for Sport dismissed the claim by Caster Semenya and Athletics South Africa on the basis that it was not its role to examine the validity of the DSD regulations, but whether the DSD regulations, which had been characterised as discriminatory, were also necessary, reasonable and proportionate. The arbitration court came to the conclusion that although it is possible to talk about discrimination in the case of DSD, it is based on the integrity of female athletes and the need to protect a "protected group" of athletes at individual sports events. At the same time, it stated in the justification that the regulations are a "living instrument", therefore their proportionality can be reassessed and they can be subject to changes if a new evidence is presented.

However, Caster Semenya's case was not closed by this because it was followed by a decision of a court of regional supranational jurisdiction. The European Court of Human Rights in the judgment of the ECtHR Chamber of 23.07.2023 in the case of *Semenya v. Switzerland* (complaint no. 10934/21) held by a narrow majority (4 votes to 3) that there had been: a violation of Article 14 (prohibition of discrimination) together with Article 8 (right to respect for private life) of the European Convention on Human Rights (hereafter "**ECHR**" or "**Convention**") and a violation of Article 13 (right for an effective remedy) in relation to Article 14 together with Article 8 of the ECHR. In particular, the Court considered that it had been established that the applicant had not been provided with sufficient institutional and procedural safeguards in Switzerland to enable her to effectively investigate her complaints, particularly as her complaints related to well-founded and credible claims of discrimination due to increased levels of testosterone causing developmental differences gender (DSD).

It follows, particularly with regard to the applicant's important personal interests – ergo participation in athletics competitions at international level and thus the exercise of her profession – that Switzerland exceeded the narrow margin of discretion granted to it in this case. Discrimination based on gender and gender characteristics requires very weighty reasons to constitute a legitimate interference with fundamental rights and freedoms. What was at stake for the applicant, as well as the narrow margin of discretion afforded to the respondent State, should together have led to a thorough institutional and procedural review, but the applicant failed to obtain such a review. The Court also found that the domestic remedies available to the applicant could not be considered effective in the circumstances of this case.

This decision thus confirmed that "sex characteristics" are a protected ground against discrimination under Article 14 of the ECHR. Collaterally, the ECtHR found a violation of the applicant's rights, but the DSD regulations, which exclude hyperandrogynous and transgender athletes from women's disciplines, remain in force. However, it would not be correct to interpret the decision so broadly that we read from it a clear message about the violation of the rights of every athlete in DSD, if he is subject to the rules of competitions that do not accept him unconditionally.

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<sup>10</sup> CAS, *Mokgadi Caster Semenya v. International Association of Athletics Federations*, 2018/O/5794, and *Athletics South Africa v. International Association of Athletics Federations*, 2018/O/5798, 30 April 2019.

Indeed, the decision recognises in a sense that the case of Semenya is different from the case of transathletes.

The ECtHR noted that the participation of trans athletes in international competitions is governed by various regulations – World Athletics' "Rules Governing the Eligibility of Transgender Athletes 2019". It imposes a similar requirement that female athletes competing in international women's sports must maintain testosterone levels below 5 nmol/l for at least 12 continuous months prior to a competition. They have to maintain this level of testosterone for as long as they want to participate in international women's competitions.

The ECtHR clarified that this is the same requirement imposed by the DSD regulations. However, the rationale for equal treatment of trans and intersex athletes is not self-evident, as in the case of trans women, any athletic advantage is due to their biological constitution, as they were born male. Indeed, the ECtHR admits that without wishing to prejudge any future cases brought before it, it simply notes at this stage that in the case of transgender athletes, the advantage they enjoy is due to the inequality inherent in their gender as well as men...and furthermore, the treatment they have to undergo to reduce their testosterone levels corresponds to the adaptation of the treatment they have already been prescribed.<sup>11</sup>

It is clear to the Court that its statements will not affect any future results in this matter. However, the focus of this case, as well as cases against the inclusion of trans women in women's sports, remains on testosterone. This persists even though studies show that there is no clear correlation between testosterone levels and physical ability.

However, Judge Pavli's concurring opinion contains important comments on the role of the Court in such cases. The opinion reiterates that athletes are entitled to fundamental rights. It continues that it is the Court's responsibility to examine whether the solutions implemented to include (or exclude) athletes from certain categories respect their fundamental rights and freedoms. The opinion emphasises that it is within the competence of the Court to review measures taken by sports authorities and how these measures affect the rights of athletes.

The ECtHR recalls the new regulations from 2023 from World Athletics,<sup>12</sup> which address the rules for all transgender athletes. These replaced the 2019 regulations referred to by the ECtHR.

Under the new regulations, trans male athletes who wish to compete in the male category must provide a written declaration that their gender identity is male. After its review, they can participate on the basis of a written certificate.<sup>13</sup>

However, the regulations are much stricter for trans women. All trans women who have gone through male puberty are excluded from women's world ranking competitions. Every trans woman who wants to participate in the women's category must meet three conditions:

1. Provide a written and signed statement that their gender identity is female.

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<sup>11</sup> ECtHR, *Semenya v. Switzerland*, app. no. 10934/21, 11 July 2023.

<sup>12</sup> World Athletics Council decides on Russia, Belarus and female eligibility. In: *World Athletics*, published on 23 March 2023. Available at: <https://worldathletics.org/news/press-releases/council-meeting-march-2023-russia-belarus-female-eligibility> (accessed on 02.02.2024).

<sup>13</sup> *Ibid.*

2. Have not experienced male puberty after Tanner stage 2 or age 12, whichever comes first.<sup>14</sup>
3. From puberty, they must constantly maintain a testosterone concentration below 2.5 nmol/l.

World Athletics also acknowledged that it had no specific evidence of any advantage for trans athletes that would affect the fairness of competitions. Regardless, they "decided to prioritise the fairness and integrity of the women's competition over inclusion."<sup>15</sup>

The Court referred to recent reports by the Parliamentary Assembly of the Council of Europe and the Office of the High Commissioner for Human Rights, which expressed concern about the exclusion of women from the sports sphere under similar regulations. These provide a good overview of human rights issues.<sup>16</sup>

Together with other LGBTI networks, TGEU<sup>17</sup> wrote a report on the experiences of LBTI women in sport. This provides a summary of key concerns from the perspective of activists and civil society.<sup>18</sup>

## 7. SOME NOTES ON THE PHILOSOPHY OF DISCRIMINATION, ART. 14 ECHR IN CONJUNCTION WITH GENDER DISCRIMINATION

Not all differences in treatment are relevant for the purposes of Article of the Convention. The examination for discrimination is only meaningful if the applicant is seeking to compare himself to others in comparable positions, or analogous situations or, in another formulation, is in a „relevantly similar“ situation to those others.<sup>19</sup>

The Court has emphasised that, advancement of equality of the sexes being a major goal in Contracting States, it would require very weighty reasons for a difference in treatment on grounds of sex to be compatible with the Convention. Such reasons have been lacking in a number of cases, which, interestingly, tend more to concern discrimination against men than against women (Reid, 2008, p. 276).

Transgenderism and the development of jurisprudence in this area belong to examples of evolutionary development, because it is such an area of medical progress that has undergone turbulent development. The individual's right to self-determination,

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<sup>14</sup> Explanation of the authors: Professor James M. Tanner, a child development expert, was the first to identify the visible stages of puberty. Today, these stages are known as the Tanner stages or, more appropriately, sexual maturity ratings (SMRs). They serve as a general guide to physical development, although each person has a different puberty timetable. Here's what you can expect to see based on the Tanner stages in males and females during puberty. Stage 2 is around the age, when hormones begin to send signals throughout the body (for more see Marshall and Tanner, 1969, 1970).

<sup>15</sup> World Athletics Council decides on Russia, Belarus and female eligibility. In: *World Athletics*, published on 23 March 2023. Available at: <https://worldathletics.org/news/press-releases/council-meeting-march-2023-russia-belarus-female-eligibility> (accessed on 02.02.2024).

<sup>16</sup> Reports by the Parliamentary Assembly of the Council of Europe and the Office of the High Commissioner for Human Rights included in the judgment of Semenya v. Switzerland.

<sup>17</sup> TGEU (Transgender Europe) is a trans-led nonprofit for the rights and wellbeing of trans people in Europe and Central Asia; hereafter "TGEU".

<sup>18</sup> LBTI women in sport: violence, discrimination, and lived experiences August 2021. Prepared by ILGA-Europe, a EuroCentralAsian Lesbian\* Community (EL\*C), TGEU, Organisation Intersex International Europe (OII Europe), and European Gay & Lesbian Sport Federation (EGLSF), published on 16 August 2021. Available at: <https://www.ilga-europe.org/report/lbti-women-in-sport-violence-discrimination-and-lived-experiences/> (accessed on 28.05.2024).

<sup>19</sup> ECtHR, *Marckx v. Belgium*, app. no. 6833/74, 13 June 1979, para. 32; ECtHR, *Van der Musselle v. Belgium*, app. no. 8919/80, 23 November 1983, para 46; ECtHR, *Larkos v. Cyprus*, app. no. 29515/95, 18 February 1999, etc.

personal development, as well as moral and physical security must be perceived with understanding. "(...) *State governments can no longer claim in these questions that the matter falls within their area of discretion, if we do not mean the choice of means to achieve protection under the Convention. However, there are no significant public interest factors that may outweigh the applicant's interests in obtaining legal recognition of gender reassignment (...)*"<sup>20</sup> this shows that the concept of gender discrimination is sufficiently plastic to include persons who face unequal treatment, laws and policies because of their sexual characteristics. Similarly, the jurisprudence of the Court of Justice of the EU is a proof that guarantees of gender equality are able to protect a wide category of transgender participants. Additionally, exploring the boundaries of gender stereotyping jurisprudence that prohibits discriminatory treatment that holds trans and intersex people within historical stereotypes of masculinity and femininity may be of substantive benefit.<sup>21</sup>

On the other hand, however, many individuals, especially those who defend the rights of transgender and intersex people in Europe, object to the adequacy of purely gender-oriented guarantees. From a practical point of view, it is important to understand that in certain circumstances, transgender and intersex people do not experience discrimination that exactly matches the accepted understanding of gender discrimination.

We think, that while in some cases a trans woman may face inequality because of her female gender, in other cases she will face discriminatory behaviour because of her self-identification, her self-expression, and how both of these personal characteristics are perceived by other subjects. Reducing a woman's experience to terms of gender inequality not only mischaracterises wrongful conduct, but also threatens to stifle the ability of law to respond appropriately and meaningfully to the harm caused. Indeed, given the binary nature in which gender has historically been interpreted as a matter of human rights and EU law, considerable doubt remains whether current EU gender equality legislation embraces non-binary identities. The same argument applies to cases of discrimination motivated by intersex difference.

United States Supreme Court Justice Ruth Bader Ginsburg, who as a lawyer and later a US Supreme Court Justice was the chief architect, in her majority opinion in *United States v. Virginia*, where she explains that "*[i]nherent differences between men and women ... they remain a cause for celebration, but not for denigrating members of both sexes or for artificially limiting opportunities for the individual.*"<sup>22</sup> Classifying gender as "male only" or "female only" categories is unacceptable if it serves to cause where a woman needs to be subjugated and where inherent differences are not demonstrated, which are acceptable if they do not aim to relegate women to a subordinate position (Coleman, 2017).

The revised European Sports Charter, adopted by the Committee of Ministers of the Council of Europe on October 13, 2021, under Article 6, paragraph 2 states: "*A due diligence approach to human rights in sport requires respect for the human rights of those*

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<sup>20</sup> ECtHR, *Christine Goodwin v. United Kingdom*, no. 28957/95, 11 July 2002, para. 93.

<sup>21</sup> The 1996 decision in *P. v. S. and Cornwall County Council* is the starting point of this evolution. It concerns the dismissal of a post-operative trans woman for no reason other than her 'gender reassignment'. Also worth mentioning is decision in *K.B. v National Health Service Pensions Agency and Secretary of State for Health*, where the female partner of an FtM postoperative trans man went to court to secure her right to marry him so that she could leave him her pension at death. For more details see CJEU, judgment of 30 April 1996, *P v S and Cornwall County Council*, C-13/94, ECLI:EU:C:1996:170; and CJEU, judgment of 7 January 2004, *K.B. v National Health Service Pensions Agency and Secretary of State for Health*, C-117/01, ECLI:EU:C:2004:7.

<sup>22</sup> Supreme Court of United States, *United States v. Virginia et al.*, 518 U.S. 515 (1996).

involved in or exposed to sport-related activities and should therefore: a. ensure that the human rights of athletes and everyone involved in sport are respected, protected and promoted; b. combat arbitrariness and other abuses in sport to ensure full respect for the rule of law in sporting activities, including access to remedies, justice and fair trial in accordance with applicable human rights standards; c. to work on gender equality in and through sport, especially by implementing a gender mainstreaming strategy in sport.<sup>23</sup> At the same time, the revised European Sports Charter aims to implement such a policy of zero tolerance of violence and all forms of discrimination.<sup>24</sup>

It is necessary to balance very sensitively and carefully the rights of women in sports, as well as the rights of transgender people. It will not always be possible to follow the criteria of gender identities and at the same time not bring into disrepute an approach that, based on the essence of competitive advantages, will create an environment with the absence of fair play and clear predictable criteria and equal access to all.

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<sup>23</sup> Revision of the European Sports Charter. Available at: <https://www.coe.int/en/web/sport/revision-esc> (accessed on 10.02.2024).

<sup>24</sup> *Ibid.*

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