

# **Sprinting towards justice: The Caster Semenya case and human rights in sports**

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## **Abstract**

In July 2023, Caster Semenya’s case against all odds, was accepted before the European Court of Human Rights (ECtHR). The case concerned with World Athletics’ Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development), 2018 (DSD Regulations). The DSD Regulations were challenged before the Court of Arbitration for Sport (CAS) and then subsequently in front of the Swiss Federal Tribunal (SFT), leading to a crucial judgement by the ECtHR. This case comment looks at the complex legal issues and how the DSD Regulations cause discrimination against athletes such as Semenya. The ECtHR’s ruling acknowledging the violations of Semenya’s rights under Articles 8, 13, and 14 of the European Convention on Human Rights, raises questions for the reforms in international sports law to align with human rights principles. It also examines the limitations of current sports dispute mechanisms, particularly CAS’s ability in addressing human rights concerns. The commentary suggests enhancing the training of CAS arbitrators in human rights and including experts within its arbitrator pool to ensure thorough rights-based analyses.

## **Keywords**

Caster Semenya, European Court of Human Rights, Differences of sex development, Human dignity, Privacy, Effective remedies.

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## 1. Introduction

The world of sport is often synonymous with values such as justice, equality, and fairness. It is often expected that international sports will uphold such values, yet the recent debates and disputes have reached the European Court of Human Rights (ECtHR).<sup>3</sup> In a case involving Caster Semenya,<sup>4</sup> ECtHR addressed the human rights implications of the World Athletics' (WA) 'Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development)' (DSD Regulations).

Mokgadi Caster Semenya is a South African middle-distance runner with a naturally elevated level of testosterone which is the result of a variation in her sex characteristics. In 2018, to maintain fair competition, the WA implemented the 2018 DSD Regulations. These regulations excluded women athletes with elevated levels of testosterone from certain events unless they reduce it below the acceptable limit for an extended period.

Semenya contested these regulations in the *Caster Semenya & Ors v. the IAAF*<sup>5</sup> case before the Court of Arbitration for Sport (CAS) based on them being unnecessary, disproportionate, discriminatory, and unreliable. CAS upheld the validity of these regulations but also acknowledged their discriminatory nature.<sup>6</sup> According to the CAS panel, these regulations are necessary to maintain fair competition, as athletes with elevated testosterone levels have significant performance advantages. In response to the CAS ruling, Athletics South Africa (ASA) issued a scathing statement in 2019, condemning the decision as 'disgraceful' and asserting that it condones discrimination. ASA went on to emphasise the severity of the situation, likening the CAS decision

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<sup>3</sup> Bowman-Smart et al. (2024).

<sup>4</sup> Semenya v. Switzerland app.no. 10934/21.

<sup>5</sup> CAS 2018/O/5794 Mokgadi Caster Semenya v. International Association of Athletics Federations & CAS 2018/O/5798 Athletics South Africa v. International Association of Athletics Federations.

<sup>6</sup> The Panel concluded that the DSD Regulations are prima facie discriminatory because they impose differential treatment based on protected characteristics. The regulations specifically target a subset of female/intersex athletes with certain biological characteristics, without imposing equivalent restrictions on male athletes thereby discriminating on the grounds of legal sex and innate biological traits.

to “*opening the wounds of apartheid*,” the oppressive system of racial segregation that plagued South Africa until 1991 and was universally condemned as a “crime against humanity”.<sup>7</sup>

Semenya, as a next step, knocked the doors of the Swiss Federal Tribunal (SFT) which had the power and jurisdiction to overrule the CAS award, but it upheld the CAS decision in *Caster Semenya & Ors v. IAAF*.<sup>8</sup> This validation of the CAS award by SFT opened the doors for Semenya to appeal before the ECtHR. The *Semenya v. Switzerland judgement*<sup>9</sup> revolved around three key issues. Firstly, it examined whether it had the jurisdiction to adjudicate. Secondly, it assessed whether the DSD Regulations infringed upon Semenya’s personal autonomy, potentially violating Articles 8, 13, and 14 of the European Convention on Human Rights (ECHR). Thirdly, it scrutinised the availability of effective remedies for Semenya in the event of violation of the ECHR.<sup>10</sup>

## **2. Jurisdictional analysis: Who has the authority?**

One of the main arguments put forward by the Swiss government was that the ECtHR did not have the authority, as outlined in Article 1 of the ECHR, to intervene. This perspective was supported by judges who dissented from the majority opinion (the judgement was in favour of Semenya 4-3). Article 1 of the ECHR requires countries that have signed it to ensure that everyone within their borders enjoys the rights and freedoms laid out in the ECHR.

The Switzerland government argued that because of the limited authority of the Swiss Federal Supreme Court (SFSC) to review decisions made by the CAS, and because there was no direct territorial connection with Switzerland (given that WA is based out of Monaco, and Semenya is South African), they were under no obligation to take responsibility for these regulations affecting the athlete. The connection to Switzerland, and subsequently to the ECHR, stemmed from the requirement that disputes between Semenya and WA be resolved through the CAS (as it is the case

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<sup>7</sup> BBC Sport (2019).

<sup>8</sup> Mokgadi Caster Semenya v. International Association of Athletics Federations, cases 4A\_248/2019 4A\_398/2019.

<sup>9</sup> Semenya v. Switzerland app.no. 10934/21.

<sup>10</sup> James (2023).

in most of the sports related disputes), rather than through the national courts of South Africa or Monaco.<sup>11</sup>

The Switzerland government also highlighted that the ECtHR had historically only intervened in international arbitration matters when the complaint pertained to the right to a fair trial (procedural matters).<sup>12</sup> It has established and acknowledged the jurisdictional link for a dispute in front of the civil courts,<sup>13</sup> but in Semenya's case it is less likely because CAS is not a civil court, and it is a matter of substantive rights. However, in the past, in the case of *Mutu and Pechstein v. Switzerland*,<sup>14</sup> the same has been extended to the arbitral panels and the panels have accepted the jurisdiction to hear appeals from the CAS, giving legal force to such awards. Furthermore, the ECtHR emphasised the significance of the appeals process from the CAS to the SFT. This process strengthens the link to Switzerland and falls squarely within the jurisdiction of the ECtHR. This highlights the ECtHR's role in ensuring that professional athletes have access to justice, particularly in cases where mandatory arbitration clauses mandate the CAS jurisdiction, which is needed, especially for the sports human rights disputes. This determination holds significant and welcome implications for all sporting organisations and the community, as it necessitates that the rights which are safeguarded by the ECHR are followed by all the international sporting federations.

### **3. DSD Regulations and Articles 3, 8, and 14 of the ECHR**

#### **3.1. DSD background**

Historically, sex verification in sports relied on physical examinations, often subjecting female athletes to invasive testing. With advancements in molecular medicine, testing for genetic markers such as X and Y chromosomes became possible but remained prone to errors due to genetic mutations. In 2011, the International Association of Athletics Federation (IAAF), now called the

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<sup>11</sup> Ibid.

<sup>12</sup> *Semenya v. Switzerland* app.no. 10934/21, para 89.

<sup>13</sup> *Markovic and others v. Italy* ([GC], no 1398/03).

<sup>14</sup> *Mutu and Pechstein v. Switzerland*, nos. 40575/10 and 67474/10, 2018.

WA, introduced the Hyperandrogenism Regulations, marking a shift towards considering testosterone levels as a primary determinant of eligibility for female competition.<sup>15</sup> These regulations aimed to restrict the involvement of hyperandrogenic females in elite athletic competitions by imposing a cap on permissible testosterone levels for female athletes at 10 nmol/L.

In 2015, the CAS suspended IAAF Hyperandrogenism Regulations, citing unjustifiable discrimination due to insufficient evidence of performance advantages for “hyperandrogenic” females. IAAF was given two years to provide additional evidence, or the regulations would be held void. To comply with the ruling, the WA replaced the Hyperandrogenism Regulations with the DSD Regulations after a challenge by Dutee Chand.<sup>16</sup> This ruling was welcomed by athletes such as Chand and Semenya as it allowed them to resume competitive running without the requirement for hormone treatment to reduce the testosterone levels.

The WA opted for a different regulatory approach compared to the previous regulations as the regulations were applicable only to specific track events ranging from 400 m to 1 mile. Under this new approach, it also introduced a transition from a broad testosterone limit for female athletes to more targeted regulations applicable to specific categories of female athletes, particularly those with Disorders of Sex Development (DSDs).

The Semenya case challenged these 2018 DSD Regulations by the WA. These were challenged on grounds of discrimination and inequity. Semenya contended that the regulations constituted gender-based discrimination as they exclusively targeted female athletes with specific physiological attributes and not the male athletes. Moreover, she claimed that the regulations lacked a sound scientific basis, were irrelevant for ensuring fair competition within the female category and inflicted irreparable harm upon the affected female athletes.

DSD pertains to congenital anomalies affecting genes, hormones, and reproductive organs. The DSD Regulations set criteria for eligibility in specific events like the 400m, 800m, and 1500m

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<sup>15</sup> Sánchez (2013).

<sup>16</sup> CAS 2014/A/3759 Dutee Chand v. Athletics Federation of India (AFI) & The International Association of Athletics Federations (IAAF).

events.<sup>17</sup> ‘Relevant Athletes’ must have “*specific sex development differences, testosterone levels above 5 nmol/L, and sufficient androgen sensitivity*”.<sup>18</sup> To qualify, athletes must be officially recognised as either female or intersex, undergo a reduction in testosterone levels to below 5 nmol/L<sup>19</sup> for a period of six months, and sustain this level thereafter. The WA’s Medical Manager can investigate Relevant Athletes based on reliable information. Regulation 3.14 allows disqualification of results if a Relevant Athlete competes with a testosterone level above 5 nmol/L. Disputes are under the exclusive jurisdiction of the CAS as per Regulation 5.<sup>20</sup>

### **3.2. Semenya’s fight for human rights through Articles 3, 8, and 14 of the ECHR**

Article 3 of the ECHR explicitly prohibits torture and inhuman or degrading treatment, stating, “*No one shall be subjected to torture or to inhuman or degrading treatment or punishment.*” The contention in Semenya’s case rested on whether the regulations imposed by the WA, where they compelled the athletes to lower their testosterone levels, amounted to a form of treatment that could be deemed degrading or inhuman. Additionally, the right to respect for private life, enshrined in Article 8 of the ECHR, became a focal point. Article 8 of the ECHR asserts, “*Everyone has the right to respect for his private and family life, his home and his correspondence.*” Semenya argued that the regulations encroached upon her personal and private sphere by mandating a reduction in her natural testosterone levels, questioning the balance between sports regulations and an individual’s fundamental right to privacy.<sup>21</sup> The combination of these rights, as highlighted in Article 14 of the ECHR, talks about the prohibition of discrimination. Article 14 of the ECHR states, “*The enjoyment of the rights and freedoms set forth in ECHR shall be secured without discrimination on any ground such as sex.*” The assertion is that the regulations disproportionately impact female athletes with variations in sex characteristics, potentially leading to discriminatory practices.

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<sup>17</sup> DSD Regulation 2.2(b).

<sup>18</sup> DSD Regulation 2.2(a).

<sup>19</sup> Alongside narrowing the regulations to apply solely to athletes with specific DSDs, WA has notably decreased the threshold for blood testosterone levels over time. The testosterone limit, in 2019 for female athletes with a DSD, was reduced to 5nmol/L from the previous 10nmol/L under Hyperandrogenism Regulations in 2011. Subsequent updates to DSD requirements in 2023 brought about a further reduction to the limit, now standing at 2.5 nmol/L.

<sup>20</sup> DSD Regulation 5.

<sup>21</sup> *Semenya v. Switzerland* app.no. 10934/21.

Semenya's main contention was that she was treated differently in comparison to the male, and in fact, the other female athletes as well, because it impacted her rights enshrined in Article 8 due to variations in sex and biological characteristics. She argued that this treatment lacks objective justification because of two primary reasons. Firstly, the Regulations led to significant violations of human dignity and confidentiality, as athletes were compelled to undergo intrusive medical examinations and disclose private medical information publicly.<sup>22</sup> Secondly, the justification for the Regulations, aimed at ensuring fair competition, relied on assumptions about the extent of the performance advantage of athletes with relevant variations and the effects of medical treatments to suppress testosterone levels.<sup>23</sup> However, scientific evidence on these matters is contentious, and the impact of such treatments on elite athletes remains unclear. The courts' struggle to handle faulty science and ethical violations calls into question their capability to effectively address such issues. This also raises concerns about their ability to ensure fairness and uphold integrity in legal proceedings related to medical and scientific matters.<sup>24</sup>

The Switzerland government, along with the SFSC, CAS, and WA, argued that they had discretion in determining the justifiability of differences in treatment. They emphasised the legitimate objective of ensuring fair competition in female athletics and the acceptance of evidence indicating a significant competitive advantage for athletes with relevant differences. They relied upon the contention that the 'justifiable differential treatment' fell within the state's margin of appreciation.<sup>25</sup>

As mentioned, the case resulted in a 4:3 majority decision by the ECtHR's third section. The ECtHR found Switzerland in breach of Article 14 of the ECHR, which prohibits discrimination, in conjunction with Article 8, safeguarding the right to respect for private life. The Court

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<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> Pielke (2020). Roger Pielke Jr., alongside other experts, served as a witness for Caster Semenya's case and personally witnessed the acknowledgment by the IAAF of their responsibility for the flawed research.

<sup>25</sup> *Semenya v. Switzerland* app.no. 10934/21. The margin of appreciation is a doctrine developed by the ECtHR that allows member states a degree of discretion in implementing legislative, administrative, or judicial actions concerning the ECHR rights, subject to ECtHR's supervision. This doctrine acknowledges the differing legal and cultural traditions among member states and provides the ECtHR with the flexibility to balance state sovereignty with Convention obligations. See, Greer (2000)

emphasised that Semenya had not been provided with adequate institutional and procedural safeguards before the SFT,<sup>26</sup> hindering a thorough examination of her credible claims of discrimination based on her sex characteristics.<sup>27</sup>

Another critical aspect underscored by Semenya's case is the issue of forced arbitration, which fundamentally lacks the element of free consent and thus requires careful evaluation. The ECtHR in the past has acknowledged that the appeal mechanism to the CAS constitutes forced arbitration, leading to due process concerns, particularly in light of Article 6(1) of the ECHR.<sup>28</sup> Moreover, the power dynamics inherent in the realm of sports and competition present a stark contrast to the idealised notion of autonomy typically associated with commercial arbitration scenarios. Athletes often find themselves in a position where they have little to no choice regarding medical interventions if they wish to continue competing, highlighting the complexities of decision-making in such contexts. The *Pechstein case*<sup>29</sup> is a great example of this power dynamic in sports where players are often left with a difficult choice of choosing to earn and accept the forced arbitration clause or not earn at all.<sup>30</sup> The case establishes a precedent whereby the ECtHR extends its jurisdiction to arbitral panels, particularly in cases involving mandatory arbitration clauses such as those mandating the CAS jurisdiction for professional athletes. Additionally, the cursory examination of human rights considerations reflects a systemic failure to adequately address contextual nuances, ultimately resulting in insufficient protection against discrimination within Switzerland's jurisdiction.<sup>31</sup>

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<sup>26</sup> IAAF v. Athletics South Africa, 4A\_248/2019.

<sup>27</sup> Semenya v. Switzerland app.no. 10934/21.

<sup>28</sup> Duval (2019). Article 6 (1) of the ECHR states that "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

<sup>29</sup> Mutu and Pechstein v. Switzerland, nos. 40575/10 and 67474/10, 2018.

<sup>30</sup> Ibid, para 113.

<sup>31</sup> Semenya v. Switzerland app.no. 10934/21.



### **3.3. Article 13 of the ECHR: Ensuring effective remedies**

Article 13 of the ECHR guarantees individuals an effective remedy before national authorities in cases where their ECHR rights are violated, irrespective of whether the violation is committed by state officials.<sup>32</sup>

The ECtHR's judgement highlighted the necessity for domestic laws, regulations of international sporting organisations and dispute resolution authorities to provide a way for organisations such as the CAS or domestic laws to address the claims of the ECHR rights violations, ensure thorough consideration of the substance of such claims, and offer appropriate avenues for redressal.<sup>33</sup> In the case of Semenya,<sup>34</sup> the majority opinion concluded that Switzerland fell short of meeting these requirements, failing to adequately address her discrimination grievances and consequently providing an ineffective remedy. Specifically, the ECHR criticised the SFT's review process for its failure to address doubts regarding the practical application and scientific basis of the 2018 DSD Regulations. Moreover, it highlighted concerns raised by various entities regarding potential discrimination against women and intersex athletes due to these regulations. The ECHR also noted the CAS's concerns over hormonal treatment side-effects and the possibility of compliant female athletes breaching the 2018 DSD Regulations, along with limited evidence supporting substantial advantages for DSD athletes in specific races.<sup>35</sup>

In the context of Semenya's profession as an international athlete, the ECHR concluded that Switzerland failed to adequately justify the discrimination against her, thereby breaching her human rights under Articles 8 and 14 of the ECHR. Furthermore, the ECHR found that the CAS and the SFT did not provide Semenya with an effective remedy as required by Article 13, considering her complaints regarding human rights breaches substantiated. The domestic remedies available to Semenya were deemed ineffective in addressing the ongoing discrimination, indicating systemic shortcomings in the sporting justice system. It is for these reasons that the

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<sup>32</sup> Ibid, p.88, para 240.

<sup>33</sup> Ibid, pp. 57-58, para 112.

<sup>34</sup> Ibid, p.79, para 202.

<sup>35</sup> Ibid, para 181.

ECtHR judgement signals a significant advancement in the protection of human rights for intersex athletes, challenging the application of regulations that may disproportionately impact individuals with variations in sex characteristics. This decision opens new avenues for sports law and the regulations in light of human rights principles.

#### 4. The ECtHR appeal: Switzerland's bid to overturn Semenya ruling

Switzerland had a three-month window to appeal the ECtHR decision by requesting a referral to the Grand Chamber,<sup>36</sup> which would convene for a final ruling according to Article 43 of the ECHR.<sup>37</sup> Upon the release of the ECtHR judgement, the WA promptly urged Switzerland to appeal, reaffirming its commitment to enforce the even narrower 2023 DSD Regulations.<sup>38</sup> The organisation expressed readiness to collaborate with the Swiss government and underscored the serious concerns raised by dissenting judges supporting its stance.<sup>39</sup>

For a referral to the full Grand Chamber to be accepted, the panel of five judges must determine the presence of exceptional circumstances. The Grand Chamber considers requests only for cases involving “*a serious question affecting the interpretation or application of the Convention or the Protocols thereto, or a serious question of general importance*”.<sup>40</sup> If a party's referral is rejected, the Chamber's decision becomes final upon the rejection of the request.<sup>41</sup> The outcome of Switzerland's appeal to the Grand Chamber, which has been accepted for final ruling, remains to

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<sup>36</sup> European Convention on Human Rights, Article 44(2)(b).

<sup>37</sup> European Convention on Human Rights, Article 43 provides “Referral to the Grand Chamber: 1. Within a period of three months from the date of the judgment of the Chamber, any party to the case may, in exceptional cases, request that the case be referred to the Grand Chamber. 2. A panel of five judges of the Grand Chamber shall accept the request if the case raises a serious question affecting the interpretation or application of the Convention or the Protocols thereto, or a serious issue of general importance. 3. If the panel accepts the request, the Grand Chamber shall decide the case by means of a judgment.”

<sup>38</sup> The regulations regarding blood testosterone levels for female athletes with DSDs have undergone significant changes over the years. Initially set at 10 nmol/L in 2011, this limit was lowered to 5 nmol/L in November 2019, and further reduced to 2.5 nmol/L in March 2023. The justification for these adjustments by WA is based on medical literature which suggested a threshold of <5nmol/L to accommodate women with mild hyperandrogenism. Notably, the 2023 regulations now require athletes to maintain serum testosterone concentrations below 2.5 nmol/L for a continuous period of at least 24 months, a significant increase from the previous requirement of six months.

<sup>39</sup> World Athletics (2023).

<sup>40</sup> European Convention on Human Rights, Article 43(2).

<sup>41</sup> European Convention on Human Rights, Article 44(2)(c).

be seen. On 15 May 2024, the Grand Chamber of the ECHR will hear the Swiss government's appeal against the ECtHR's judgement.<sup>42</sup>

## 5. Another Bosman?<sup>43</sup>

### 5.1. Emulating FIFA's approach

The Semenya case raises a fundamental question regarding the role of dispute resolution in the realm of sports. The WA firmly asserted its status as a private entity during the proceedings before the CAS panel, emphasising its exemption from direct human rights obligations as a non-state actor. The absence of a clear enforcement mechanism in the courts poses a challenge to ensuring adherence to these standards by international federations and their affiliated national governing bodies. One potential solution could be to emulate Federation Internationale de Football Association's (FIFA) approach, which incorporates these principles into its statutes,<sup>44</sup> thereby signalling its commitment to upholding internationally recognised human rights. FIFA's key focus lies on enhancing its corporate social responsibility (CSR) initiatives, notably by introducing a new human rights framework. To align its governance structures with internationally recognised standards, in 2015, FIFA engaged John G. Ruggie to give recommendations for embedding human rights in FIFA's global operations.<sup>45</sup> The Ruggie report recommended that FIFA should establish a human rights policy, assess risks to human rights, and also facilitate access to effective remedies for such breaches by FIFA member nations.<sup>46</sup> It is of significance to mention that Ruggie proposes the establishment of internal operational and accountability structures to ensure adequate

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<sup>42</sup> South African Government (2024).

<sup>43</sup> Union royale belge des sociétés de football association ASBL v. Jean-Marc Bosman, Royal club liégeois Case C-415/93, SA v. Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v. Jean-Marc Bosman [1995] ECR I-4921. This ruling had a huge impact on the rights of Football player. Before this ruling, football players were not allowed to move to a different club at the end of their contract without a transfer fee. The previous club had the right to demand transfer fee, even after the expiry of contract. This ruling allowed players to move freely between EU clubs at the end of their contracts and prevented the previous clubs from demanding transfer fee. Clubs began negotiating contract renewals earlier to avoid losing players for free, shifting the rights in favour of the Players, changing the transfer market and system forever.

<sup>44</sup> Article 3 of FIFA Statutes.

<sup>45</sup> John G. Ruggie was the United Nations Secretary General's special representative for business and human rights.

<sup>46</sup> Ruggie (2016).

protection of human rights. However, recent events for which Ruggie was engaged to give his recommendations, that is the Qatar World Cup, raised questions on FIFA's ability to effectively safeguard the human rights of all involved parties,<sup>47</sup> casting doubts on the efficacy of such an approach. It raises concerns that such commitments may remain mere lip service rather than translating into tangible protection in practice.

Furthermore, it is the responsibility of states not only to prevent human rights violations but also to provide accessible and effective remedies when such violations occur. However, this becomes significantly more challenging when international federations such as the WA establish contractual provisions granting exclusive jurisdiction to bodies like the CAS, thereby circumventing recourse to national courts and leaving athletes with no option but to follow the CAS route. This reveals a significant deficiency in the international sports law framework, especially the protection of athletes' human rights. The recent ruling highlights the urgent need for reforms in the dispute resolution mechanisms within international sports to effectively address human rights violations. The ECtHR's determination that Switzerland failed to ensure adequate procedural and institutional safeguards to protect Semenya's right to non-discrimination highlights a gap in the human rights protection afforded to international athletes, especially for the international athletes who have non-conformational identities. The limited authority of the SFSC to overturn the CAS awards further complicates the thorough assessment of regulations such as the DSD Regulations against the ECHR.

## **5.2. Balanced approach in sports dispute resolution**

This case also highlights the contrast between the methodologies of private law, represented in and by CAS's decision, and public law, which is embodied by the ECtHR's human rights approach in the case. Arbitration is governed by the private law principles with the special emphasis on confidentiality and the limited public oversight. Whereas the human rights law is a facet of public law which advocates for transparency and accountability. While arbitration typically focuses on sector-specific issues, human rights principles transcend boundaries and have universal applicability. Arbitration seeks efficient and pragmatic solutions, whereas human rights

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<sup>47</sup> Human Rights Watch (2023).

law is rooted in fundamental principles and the safeguarding of human dignity.<sup>48</sup> This disconnect has significant implications, particularly in ensuring timely and adequate protection of athletes' human rights. The current emphasis on speedy resolution in sports often comes at the expense of human rights considerations, leading to delayed justice and potentially detrimental consequences for athletes' careers. This lacuna underscores the urgent need for a more balanced approach that integrates principles from both arbitration and human rights law. One of the solutions for such a lacuna could be that the CAS should enhance the training provided to its arbitrators to effectively address human rights concerns in cases like Caster Semenya's.<sup>49</sup>

### **5.3. Integrating human rights in sports arbitration**

The ECtHR judgement and hopefully an affirming Grand Chamber judgement, would provide an opportunity to the CAS and other international sporting organisations to redefine their approach by prioritising comprehensive analyses of rights outlined in international conventions. The Semenya judgement shows that the CAS is not equipped to handle human rights specific cases. Including the role of the CAS to deal with human rights, CAS's independence and legitimacy have faced scrutiny in various aspects, from conflicting stances on similar issues to the appointment process of arbitrators.<sup>50</sup> Addressing these concerns requires proactive measures, including enhanced transparency in functioning, appointments, and awards.<sup>51</sup> While the Semenya ruling presents a chance for prioritising human rights, it is also crucial to acknowledge CAS's foundational purpose to pave the path for future reforms. Initially established to handle private sports disputes, the CAS predominantly deals with cases involving regulatory challenges, doping allegations, commercial issues such as employment and sponsorship, and general disciplinary matters within the realm of sports. The arbitrators of the CAS generally do not possess significant expertise in human rights, as noted by several experts including Ruggie.<sup>52</sup> Therefore, training CAS arbitrators and including those with expertise in human rights on the closed list of the CAS

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<sup>48</sup> Shahlaei (2023).

<sup>49</sup> Chanda (2022).

<sup>50</sup> Shahlaei (2024).

<sup>51</sup> Duval (2019).

<sup>52</sup> Ruggie (2016).

arbitrators could prove advantageous. In 2019, only three out of 389 listed CAS arbitrators had human rights expertise, highlighting the limited human rights knowledge.<sup>53</sup> It will offer flexibility and enforceability (as the CAS awards are enforceable internationally) and would also allow parties to select the arbitrators who are either trained or possess human rights expertise. To realise this potential, the world of sports must advocate for those affected.<sup>54</sup> By bridging the gap between arbitration and human rights perspectives through active training and transparency initiatives, the CAS can significantly contribute to safeguarding athletes' rights while ensuring effective and consistent dispute resolution of all kinds of sporting disputes including those concerning human rights. It will definitely boost the integrity of the sports justice system, including CAS's role within it, but also upholds the fundamental principles of fairness and transparency in international sports. Whether this case could potentially set a precedent for future challenges to CAS decisions, highlighting the increasing significance of human rights in sports governance is yet to be seen. However, the forthcoming Grand Chamber decision is eagerly anticipated by sports lawyers and human rights advocates which reflects the growing importance of this issue.<sup>55</sup>

## 6. Conclusion

The ECtHR judgement, irrespective of what the Grand Chamber will decide, highlights the importance of including human rights training in sports dispute resolution. It also provides an opportunity to take steps towards harmonising international sports law and human rights principles for the adequate protection for athletes' rights and anyone involved in sports. Drawing parallels to the Bosman Ruling,<sup>56</sup> which revolutionised football transfers by granting players more autonomy and shifting the power from clubs to the players, Semenya's case has the similar potential to reshape the landscape of athlete rights in sports. However, despite the groundbreaking nature of such ruling/s, the practical implications for the individuals involved, such as Semenya, can be complex and uncertain. Just as Jean Marc Bosman faced a prolonged legal battle spanning five

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<sup>53</sup> Cooper (2023).

<sup>54</sup> Heerdts (2019).

<sup>55</sup> EU Office (2024).

<sup>56</sup> Union royale belge des sociétés de football association ASBL v. Jean-Marc Bosman, Royal club liégeois Case C-415/93, SA v. Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v. Jean-Marc Bosman [1995] ECR I-4921.

years before justice was served, Semenya's journey to secure her rights may also be met with such disappointment for her career and the outcome may not be immediately transformative. Nonetheless, Semenya's perseverance and determination in challenging discriminatory regulations are commendable and have already sparked important conversations and reforms within the sports community. Regardless of the eventual outcome, her case serves as a catalyst for progress in safeguarding the rights and dignity of athletes worldwide.

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