

# Gender, Athletes' Rights, and the Court of Arbitration for Sport

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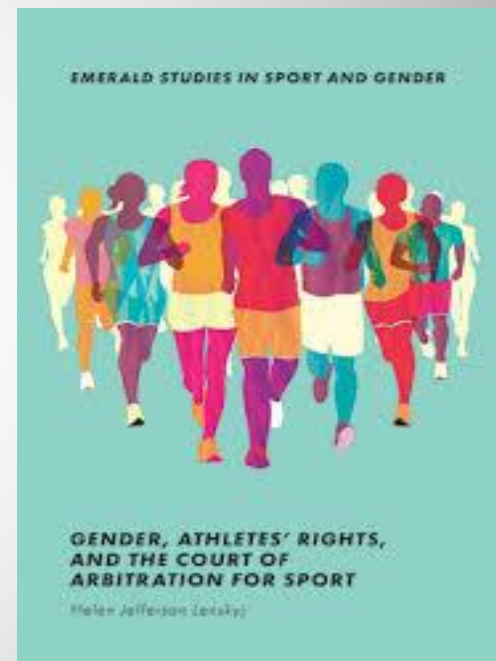
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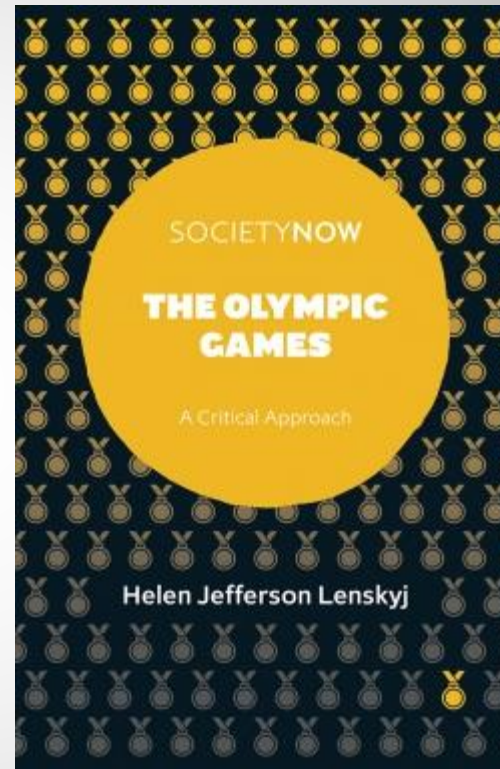
# Gender, Athletes' Rights, and the Court of Arbitration for Sport (Emerald, 2018)

- Sports Law and the Court of Arbitration for Sport
- CAS and Sport Exceptionalism
- The War on Doping
- Doping, Genes and Gender
- Conclusion, Recommendations



# The Olympic Games: A Critical Approach (Emerald, 2020)

- Olympic Resistance
- 'Sport and Politics Don't Mix'
- Olympic Industry Impacts
- Reform: 'To Restore Reputation'
- Athletes, Politics, and Protest
- 'Educating Youth Through Sport'
- Athletes' Rights, Athletes' Lives
- Gender Policies: Challenges and Responses
- The Olympics: 'Not a Welfare Program but a Business Venture'



# The Court of Arbitration for Sport (CAS)

**The International Olympic Committee (IOC)** =  
'supreme authority' for world sport

- global, unelected, undemocratic, self-regulating, relying on its 'moral authority'

**CAS** = 'supreme court' for world sport

- international arbitration tribunal, subject to Swiss law; immune from domestic courts

Where is the **objective, scholarly** critique of CAS and sport exceptionalism? law? sport sociology?

'Render unto sports the things that are sport, and unto courts the things that are legal' (Michael Beloff, 2012)

# CAS: early years

- IOC under Samaranch moved to 'take sport out of the courts', established CAS in 1983;
- Samaranch = president of IOC and CAS, 1983-93
- Small numbers of cases = athletes' lack of faith in the CAS system?
- Rationale: speed, efficiency, expertise (Ad Hoc Division, 1996)
- Effective dispute resolution 'within the Family of Sport ' (sic) (Ian Blackshaw, 2003)
- The basis of CAS's legal authority: Olympic Charter Rule 61: Any sport-related disputes 'shall be submitted exclusively to the Court of Arbitration for Sport'
- But 'athletes did not give up their legal rights within... national courts' (Richard McLaren, 1998) - really?

# Problems

- 1983-93: Financial dependence on the IOC, self-regulating, self-replicating
- 1993: External pressure to reform, IOC created International Court of Arbitration for Sport (ICAS) to oversee CAS (Gundel, 1993)
- Selection of arbitrators: sport expertise or law expertise?
- Closed list of about 300, appointed by ICAS
- Mandatory arbitration clause in all athletes' contracts with international federations
  - cf. Fox CEO Roger Ailes vs Gretchen Carlson sexual harassment case
- Differences in power, knowledge, and bargaining power between employer & employee Kevin Lindgren, 2016)
  - role-switching, repeat parties, stacked decks, potential conflict of interest e.g. Francois Carrard/Kellerhals Carrard

# CAS jurisprudence = global sports law? (*lex sportiva*)

- Sport exceptionalism, autonomy of sport:  
CAS = 'private law-maker and judge' (Klaus Wolf, 2014)
- No required consideration of precedents
- Minority of decisions published (30% >2017)
- **Strict liability** (presumption of guilt) and the global, expensive and ineffective 'war on doping'
- No appeal to domestic courts
- Limited procedural grounds for appeal to Swiss Federal Supreme Court

# CAS: Questions and contradictions

1. Forced arbitration or litigation
2. Specialist or generalist arbitrators
3. Precedential or non-precedential decision-making
4. *Lex sportiva* or international legal principles
5. Civil or criminal burden of proof (in doping cases)



# Future Directions: Reform?

- All CAS proceedings open to the public (e.g. Sun Yang)
- All CAS decisions published
- Open, democratic process for appointing arbitrators
- Goals & timetables for achieving equitable representation re gender, nationality, etc.
- All unlikely...

# What about a Court of Arbitration for the Arts?



# Sex, Gender, and Athletes' Rights



# Caster Semenya

- August 2009: Caster Semenya (CS) won 800m race at International Association of Athletics Federations (IAAF) World Championships
- August 2009: IAAF conducted medical tests, ruled CS ineligible to compete for 11 months
- July 2010: IAAF cleared CS on completion of treatment to lower testosterone

# IAAF Regulations

- April 2011: IAAF regulations for eligibility in female events, based on two criteria:
  1. Endogenous (naturally occurring) testosterone levels no greater than 10 nanomoles per litre (nmol/L)
  2. Physical examination to assess androgen sensitivity or insensitivity 'by extent of virilization' (IAAF, 2011)

# Dutee Chand

- May 2014: Dutee Chand (DC) won 200m sprint at Asian Junior Track and Field Championships
- July 2014: DC subjected to gender verification tests
- Aug. 2014: Athletics Federation of India (AFI) banned DC indefinitely, citing IAAF regulations
- Sept. 2014: DC appealed to CAS, naming AFI and IAAF as respondents

# CAS Interim Decision

- July 24, 2015: CAS required IAAF to produce evidence of testosterone advantage; CAS suspended IAAF regulations for 2 years
- 2015-2018: DC and CS cleared to compete in international events
- Nov. 2018: IAAF regulations required T levels below 5 nmol/L for events 400m-1 mile (CS's middle distance events - evidence-based policy or policy-based evidence?)
- June 18/25, 2018: CS and Athletics South Africa appealed to CAS

# Semenya, 2019-20

- May 1, 2019: CAS rejected CS's and ASA's appeal
- May 29: CS appealed to Swiss Federal Supreme Court (SFSC)
- June 3: SFSC granted temporary stay
- July 29: SFCS overturned stay on procedural grounds
- March 13: CS announced switch to 200m
- March 25: 2020 Olympics postponed



# Disorders/differences of sexual development (DSDs): Two categories

1. Women with Androgen Insensitivity Syndrome (AIS): their bodies cannot use androgens (testosterone)
2. All the other women with DSDs: (allegedly) benefit from 'higher than normal' levels of testosterone, therefore disqualified from women's events

# How do IAAF's in-house medical experts diagnose DSDs?

Virilization = alleged proof a woman does not have AIS, therefore benefits from higher T levels:

- deep voice, breast atrophy, failure to menstruate, muscle mass, hirsutism, no uterus, and 'large' clitoris
- In other words, mostly subjective criteria that 'vary by historical period, place, racial ideologies, and individual situation' (Karkazis and Jordan-Young, 2018)

# What does the clinical examination women with DSDs involve?

- ‘Palpation and measurement of breast, vagina, clitoris and rectum’ (Pielke, 2019)
- ‘Terrible psychological harm’ and ‘unprecedented’ human rights violation (CS’s lawyers, 2019)
- Compare sexual abuse perpetrated by US Gymnastics team doctor

# Binaries Define Sport

- 'Girls are girls and men are men'
- All men are faster and stronger than all women
- 'The female category in sport is a protected category' that ensures 'a level playing field'
- Transgender women and women with DSDs are 'biological males'

# Beyond Binaries, not a new idea

Keith Moore (1968) identified nine 'components of sexual phenotype':

- external genitalia, internal reproductive organs, structure of the gonads, and endocrinological, genetic, nuclear, chromosomal, psychological and social sex

Therefore 'no single index or criterion can signify the appropriate sex for an individual'

# Future Directions?

- Continued discrimination against women with DSDs, especially women of colour
- A third classification – women with DSDs
- The end of Olympic sport as we know it

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