

# Hormonal Eligibility Criteria in Women's Professional Sports Under the ECHR: The Case of Caster Semenya v. Switzerland



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**Abstract** Although society is (slowly) evolving, rigid gender stereotypes still persist in the world of professional sports. In line with the creation of a strict binary division of athletes, sex-testing policies based on stereotypical considerations of womanhood have come to target ‘overly masculine’ women athletes with variations of sex characteristics (VSC), as elevated levels of testosterone are believed to constitute a competitive advantage.

Some international sports federations, such as World Athletics, have adopted hormonal eligibility criteria (HEC) for women’s sports competitions, although the underlying scientific evidence has been strongly contested. Athletes are excluded if they do not comply with these requirements. The standard way of reducing testosterone levels is via the use of hormonal contraceptives, although irreversible surgical treatment also occurs. HEC for sports competitions raises important issues in respect of the fundamental rights of professional women athletes with VSC, and have been challenged before the Court of Arbitration for Sports (CAS).

In this chapter, we analyze the HEC set by World Athletics in light of the European Convention on Human Rights (ECHR), which is the relevant framework for addressing human rights concerns since Switzerland accepts jurisdiction for appeals against CAS decisions. We discuss the relevant societal background, argue how HEC for sports competitions violates the individual’s right to bodily and mental integrity as protected by Article 3 ECHR, and explain that the scope of the state’s positive obligations under Article 8 ECHR needs to be interpreted as encompassing a duty to ensure the effective protection of an athlete’s bodily and psychological integrity. Finally, we set out why HEC directed at women athletes with VSC amounts to intersectional discrimination in breach of Article 14 ECHR in conjunction with Articles 3 and 8 ECHR.

## 1 Introduction

Should women with variations of sex characteristics (VSC) be excluded from professional women’s sports?<sup>1</sup> In recent years, this question has spurred considerable controversy around the globe. In November 2021, the International Olympic Committee (IOC) released its new Framework on Fairness, Inclusion and

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<sup>1</sup>This chapter was finalized in March 2023 and therefore before the European Court of Human Rights adopted its judgment in the case of Caster Semenya v. Switzerland (ECtHR, Semenya v. Switzerland, 11.07.2023). For an early analysis of the judgment, see Cannoot (2023).

Non-Discrimination on the Basis of Gender Identity and Sex Variations.<sup>2</sup> According to the IOC, “every person has the right to practise sport without discrimination and in a way that respects their health, safety and dignity. At the same time, the credibility of competitive sport – and particularly high-level organized sporting competitions – relies on a level playing field, where no athlete has an unfair and disproportionate advantage over the rest”.<sup>3</sup> This need to find a balance in sports between, on the one hand, inclusion and non-discrimination, and on the other hand, fairness, is at heart of the issue that we will address in this chapter: namely, hormonal eligibility criteria (HEC) for the participation of athletes with VSC in women's professional sports competitions.

While the Framework is based on the acceptance that no athlete should be excluded from participating in sport based on their gender identity or sex characteristics, it allows the establishment of eligibility criteria that determine the participation conditions for male/female categories for certain contests in high-level organized sports competitions. However, according to the IOC, these criteria must not lead to physical or psychological harm, or targeted testing aimed at determining athletes' sex, gender identity, or variation in sex characteristics. Moreover, they should be based on robust and peer-reviewed research, and applied so as to respect the athlete's integrity and requirements of procedural fairness. According to the Framework, every athlete should be able to participate in a gendered category on the basis of self-determination.

The IOC Framework is not designed as a one-size-fits-all policy. Indeed, the IOC has recognized that it must be for each sport and its governing body to determine how exactly an athlete may have a disproportionate advantage, and which eligibility criteria for professional sports competitions are necessary to provide compensation for such an advantage. In response to the new Framework, the International Federation of Aquatics (FINA) adopted new eligibility criteria for participation in men's and women's competitions, excluding trans women and women with 46 XY chromosomes who had experienced 'male puberty' beyond Tanner Stage 2 or before age 12 (whichever is later).<sup>4</sup> Following FINA's decision, the International Rugby League

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<sup>2</sup>This chapter will interchangeably make use of the terms 'persons with variations of sex characteristics' and 'intersex persons'. We recognize that these terms are often accompanied with distinct connotations and are not universally accepted by persons who have a variation of sex characteristics. In any case, no offense was intended by our terminological choices.

<sup>3</sup>International Olympic Committee (2021) IOC Framework on Fairness, Inclusion and Non-Discrimination on the Basis of Gender Identity and Sex Variations, [https://stillmed.olympics.com/media/Documents/News/2021/11/IOC-Framework-Fairness-Inclusion-Non-discrimination-2021.pdf?\\_ga=2.126449807.389375767.1653928341-809039675.1653928341](https://stillmed.olympics.com/media/Documents/News/2021/11/IOC-Framework-Fairness-Inclusion-Non-discrimination-2021.pdf?_ga=2.126449807.389375767.1653928341-809039675.1653928341) (last accessed 20 October 2022), p. 1.

<sup>4</sup>The new regulations are available at <https://resources.fina.org/fina/document/2022/06/19/525de003-51f4-47d3-8d5a-716dac5f77c7/FINA-INCLUSION-POLICY-AND-APPENDICES-FINAL-.pdf> (last accessed 20 October 2022).

announced that it would also develop a new inclusion policy and banned trans women from competing in women's international competitions for the time being.<sup>5</sup>

In March 2023, World Athletics, the international federation for athletics, decided to update its controversial 'Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development)'—often referred to as the 'DSD Regulations'—so as to exclude all trans women who had experienced 'male puberty' either beyond Tanner Stage 2 or after age 12 (whichever comes first).<sup>6</sup> On the basis of the updated DSD Regulations, women athletes with a certain variation of sex characteristics that leads to levels of testosterone beyond the 'normal' female range, are excluded from all World Rankings events, unless they have reduced their level of testosterone to below 2.5 nmol/l for a continuous period of at least 24 months, and as long as they want to remain eligible to compete. Any relevant athlete has the duty to inform World Athletics when they might have such variation in sex characteristics, and can be asked to undergo testing on a suspicion-based model. While no athlete may be forced to undergo testing or certain forms of treatment, all relevant athletes have a duty to cooperate in good faith, and will be excluded from competition if they fail to reduce their level of testosterone to the required level or fail to cooperate with World Athletics.

Before the 2023 update, the DSD Regulations set by World Athletics excluded the affected women athletes from events such as 400m (hurdles) races, 800m (hurdles) races, 1500m races and one mile races, unless they reduced their level of testosterone to below 5 nmol/l for a continuous period of at least six months, and as long as they wanted to remain eligible to compete. Ever since they were adopted, these DSD Regulations have been strongly contested. Two affected athletes in particular, Dutee Chand and Caster Semenya, have challenged the regulations before the Court of Arbitration for Sport (CAS). In 2015, in the case of Chand, the CAS suspended World Athletics' (then called IAAF) 'Hyperandrogenism Regulations', for lack of sufficient evidence that the affected women athletes indeed had a disproportionate competitive advantage over fellow competitors who did not have elevated levels of testosterone.<sup>7</sup> Following the CAS ruling, in 2018 World Athletics repealed the 'Hyperandrogenism Regulations' and adopted new DSD Regulations, citing new evidence and data showing "that testosterone, either naturally produced or artificially inserted into the body, provides significant performance advantages in female athletes".<sup>8</sup> Caster Semenya challenged the new DSD Regulations before the

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<sup>5</sup>The IRL's statement is available at <https://www.intrl.sport/news/statement-on-transgender-participation-in-women-s-international-rugby-league/> (last accessed 20 October 2022).

<sup>6</sup>The newly updated version 3.0 of the DSD Regulations is available at <https://worldathletics.org/about-iaaf/documents/book-of-rules> (last accessed 28 March 2023), under Book C, C3.6. They entered into force on 31 March 2023. Since we focus on hormonal eligibility criteria for women athletes with variations of sex characteristics, we will not address the exclusion of trans women.

<sup>7</sup>CAS 2014/A/3759 Dutee Chand v. Athletics Federation of India (AFI) and The International Association of Athletics Federations (IAAF), 24 July 2015.

<sup>8</sup><https://www.worldathletics.org/news/press-release/eligibility-regulations-for-female-classifica> (last accessed 20 October 2022).

CAS, which found the regulations discriminatory on the basis of sex and of 'innate biological characteristics', yet necessary and proportionate in light of the objective of maintaining fairness in women's professional sports.<sup>9</sup> The ruling was upheld by the Swiss Federal Tribunal, which found that the CAS award did not breach Swiss public policy.<sup>10</sup>

Caster Semenya brought her case before the European Court of Human Rights (hereafter 'the ECtHR' or 'the Court'), which communicated the case to the respondent State (Switzerland) in May 2021. Semenya *inter alia* claimed that the (then applicable) DSD Regulations set by World Athletics violate several provisions of the European Convention on Human Rights (ECHR), such as the prohibition of torture and inhuman or degrading treatment (Article 3 ECHR) and the right to respect for private life (Article 8 ECHR), taken alone and in combination with the prohibition of discrimination (Article 14 ECHR). In this chapter, we will focus on how—in our view—the DSD Regulations and their application to Caster Semenya (i.e., before the March 2023 update) should be substantively assessed under the ECHR, taking into account the ECtHR's case law and other standards of international human rights law. We will therefore not elaborate at length on the process through which the DSD Regulations were established, on the prior challenges of the regulations by other athletes such as Dutee Chand, or on the procedures that Semenya initiated before the CAS and the Swiss Federal Tribunal. For those analyses, we refer to the extensive body of work by other authors.<sup>11</sup>

While the involvement of the Swiss courts in the case of Caster Semenya is the formal anchor point for application of the ECHR and jurisdiction of the ECtHR, substantively the case is about rules that are part of the so-called *lex sportiva*, set by a private sports governing body. While ECtHR rulings necessarily focus on the facts of the case, their impact can be much broader. For private sports governing bodies, as well as for state courts monitoring them, the judgment in the case of Semenya is likely to become a central reference point concerning the role of human rights standards in sports. As such, it has the potential to strengthen, or disable, dynamics calling for increased human rights protection for athletes. Indeed, the inherent threat to human rights stemming from HEC set by sports bodies has also been stressed by several special procedures of the UN Human Rights Council. In their *amicus curiae* submission to CAS<sup>12</sup> in the Semenya case, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; and the Working Group on the issue of discrimination against women in law and in practice, signaled that both the World Athletics

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<sup>9</sup>CAS 2018/0/5794 and 2018/O/5798 Mokgadi Caster Semenya and Athletics South Africa v. International Association of Athletics Federations, 30 April 2019.

<sup>10</sup>Swiss Federal Tribunal 25 August 2020, 4A\_248/2019 and 4A\_398/2019.

<sup>11</sup>See for recent analyses *inter alia* Holzer (2020), Karkazis and Jordan-Young (2018), Gilleri and Winckler (2021), Byczkow and Thompson (2019).

<sup>12</sup>The *amicus curiae* cannot be publicly consulted but is referenced in the CAS decision.

eligibility criteria as well as procedures for their implementation appear to contravene international human rights standards.<sup>13</sup>

Our contribution is based on our written third party intervention in Semenya's case before the Court, under the supervision of Professor Eva Brems. As academics who are affiliated with the Human Rights Centre at Ghent University—an academic center of expertise on European and international human rights law, which has a long tradition of submitting third party interventions in important cases before the ECtHR—we took on the task of assisting the Court by clarifying relevant legal standards that are applicable to the case.<sup>14</sup> In other words, we did not comment on the facts of the case, nor did we take on the role of Semenya's counsel. In this contribution, we first set out the societal background against which HEC should be assessed (Sect. 2). In Sect. 3, we argue that HEC for women sports competitions that apply to women with variations of sex characteristics, such as the DSD Regulations set by World Athletics, violate the prohibition of inhuman and degrading treatment as protected by Article 3 ECHR. We proceed to argue, in Sect. 4, that the scope of the state's positive obligations under Article 8 ECHR needs to be interpreted as encompassing a duty to ensure the effective protection of a professional athlete's physical and psychological integrity. Before concluding, we set out in Sect. 5 why HEC directed at women athletes with a variation of sex characteristics amounts to intersectional discrimination in breach of Article 14 ECHR in conjunction with Articles 3 and 8 ECHR.

## 2 Hormonal Eligibility Criteria in Women's Professional Sports in Context

### 2.1 *Persisting Structural Sex and Gender Discrimination in Sports*

While society is currently undergoing significant changes in the ways sex and gender identity are understood, recognized, and organized,<sup>15</sup> rigid culturally-constructed gender stereotypes still persist. This is also (and arguably especially) true for the world of professional sports. As the United Nations High Commissioner for Human Rights has pointed out, women and girls are structurally confronted with exclusion

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<sup>13</sup>CAS 2018/O/5794 Mokgadi Caster Semenya v. The International Association of Athletics Federation (IAAF) and CAS 2018/O/5798 Athletics South Africa v. The International Association of Athletics Federation (IAAF), 30 April 2019, § 553.

<sup>14</sup>Our intervention is available at <https://hrc.ugent.be/wp-content/uploads/2021/10/Final-Submission.pdf> (last accessed 20 October 2022).

<sup>15</sup>Patel (2021).

and discrimination in sports.<sup>16</sup> According to the High Commissioner, the underlying reasons can be,

both external to sport, such as discriminatory social norms or obstacles to reconciling the burdens of care, work and sport, and internal to sport, including the lack of programmes to create a gender sensitive and safe sporting environment or to address the harassment and other forms of gender-based violence in sport, including sexual exploitation and abuse.<sup>17</sup>

Importantly, the High Commissioner has also pointed out that broader sociocultural gender norms—such as culturally-constructed expectations about a woman's sex characteristics—hinder women and girls from participating in sport.<sup>18</sup> While this structural discrimination affects all women, trans and intersex women are especially vulnerable. Indeed, in their recent report on LGBTI (lesbian, bisexual, trans and intersex) women in sport, ILGA Europe, OII Europe,<sup>19</sup> EL\*C<sup>20</sup> and EGLSF<sup>21</sup> note that sport is “a social environment where sexism and misogyny are still present an deeply linked with the history, structure and dynamics of participation of women in sport”.<sup>22</sup> They held that, bearing in mind this structural sexism in sports, it is “not surprising that women perceived as non-conforming in society at large, due their sexual orientation, gender identity and/or expression, or sex characteristics (SOGIESC), are exposed to additional stigma and societal pressure”.<sup>23</sup>

The beginning of women's participation in international professional sports only dates back to the beginning of the twentieth century. Since then, women's full inclusion has been hindered by cultural expectations about women's bodies and appearance—from early concerns about the public exhibition of female bodies, physical exertion and risk, to gender stereotypes about women's appearances.<sup>24</sup> Moreover, the start of women's participation in professional sports also coincided with so-called sex verification tests, since the participation of women was managed

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<sup>16</sup>UN High Commissioner for Human Rights, “Intersection of race and gender discrimination in sport”, A/HRC/44/26, p. 2.

<sup>17</sup>UN High Commissioner for Human Rights, “Intersection of race and gender discrimination in sport”, A/HRC/44/26, p. 2.

<sup>18</sup>UN High Commissioner for Human Rights, “Intersection of race and gender discrimination in sport”, A/HRC/44/26, p. 3.

<sup>19</sup>Organisation Intersex International Europe.

<sup>20</sup>EuroCentralAsian Lesbian\* Community.

<sup>21</sup>European Gay and Lesbian Sport Federation.

<sup>22</sup>ILGA Europe, OII Europe, EL\*C and EGLSF (2021) “LBTI women in sport: violence, discrimination and lived experiences”, <https://oieurope.org/wp-content/uploads/2021/08/20210810-violence-and-discrimination-against-LBTI-women-in-sport-2.pdf> (last accessed 20 October 2022), p. 5.

<sup>23</sup>ILGA Europe, OII Europe, EL\*C and EGLSF (2021) “LBTI women in sport: violence, discrimination and lived experiences”, <https://oieurope.org/wp-content/uploads/2021/08/20210810-violence-and-discrimination-against-LBTI-women-in-sport-2.pdf> (last accessed 20 October 2022), p. 6.

<sup>24</sup>UN High Commissioner for Human Rights, “Intersection of race and gender discrimination in sport”, A/HRC/44/26, pp. 6–7.

through the creation of a strict binary division of athletes.<sup>25</sup> In other words, women's participation in professional sports has always co-existed with some degree of suspicion towards 'overly masculine' women athletes and the 'policing' of women's bodies.<sup>26</sup> While elements such as dominance, strength, and stamina are traditionally celebrated in sports, they are still predominantly associated with masculinity and are thus treated as an advantage in sports.<sup>27</sup> As Holzer has argued, the lack of any HEC for men's professional sports and the absence of sex verification procedures for men show that men can never be 'too masculine' or have too much androgens, while professional women athletes may be scrutinized for being too 'manly'.<sup>28</sup> Historic methods of sex verification of women athletes have been strongly criticized for their humiliating nature and inaccuracy.<sup>29</sup>

## ***2.2 Intersectionality and Racialized Constructions of Womanhood***

As soon as women were allowed to enter the world of sports, women athletes' bodies and gender were policed and met with suspicion. Eligibility criteria for women's sport competitions reflect (and participate in) the social regulation of who 'is', and 'is not', a woman. While this policing of womanhood applies to all women, it is a form of discrimination that is particularly familiar for Black women, who have throughout history been stereotyped as 'overly masculine' and have been denied being recognized as 'feminine' or even as 'women'.<sup>30</sup> Their marginalization occurs on the basis of both race and gender, so that they are confronted with specific forms of oppression that white women or Black men do not face. Black women are subjected to specific stereotypes—such as their perceived toughness, aggression and anger, tying into the 'Angry Black Woman' stereotype—which ensure that their femininity is constantly scrutinized.<sup>31</sup> Indeed, gender is constructed through a racialized lens: the social category of 'woman' is influenced by the ideal of the white woman.<sup>32</sup> This factor

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<sup>25</sup>UN High Commissioner for Human Rights, "Intersection of race and gender discrimination in sport", A/HRC/44/26, p. 7.

<sup>26</sup>See also Holzer (2020), pp. 395–396 and 408.

<sup>27</sup>Patel (2021). As the Rapporteurs and Working Group Joint Letter points out: "natural physical traits associated with above-average performance by elite male athletes are applauded and admired", <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=24087> (last accessed 20 October 2022), p. 4.

<sup>28</sup>Holzer (2020), p. 400. See also Karkazis and Jordan-Young (2018), p. 7.

<sup>29</sup>Holzer (2020), p. 400.

<sup>30</sup>Kauer and Rauscher (2019).

<sup>31</sup>Jones and Norwood (2017).

<sup>32</sup>Yuval-Davis (2006) and Olofsson et al. (2014).



played an important role in Semenya's exclusion from sporting competitions; her womanhood was first suspect by virtue of her Blackness, and then denied.

In this sense, it is no coincidence that the 2020 Summer Olympics in Tokyo saw two more Black women being disqualified from the running competitions, after three Black women (including Semenya herself) had already suffered the same fate in 2016.<sup>33</sup> It is telling that the testosterone rule has, to date, overwhelmingly been enforced against Black women; the definition of a woman in sports is built around, and for, white women.<sup>34</sup> Whenever applied to Black women, eligibility regulations that force women with variations in sex characteristics to lower their level of testosterone perpetuate a societal tendency to deny them their womanhood as they are not considered 'woman enough' to participate in women's sport competitions.<sup>35</sup> The fact that Semenya is lesbian is relevant as well, as lesbian womanhood is often considered suspect, due to the widespread conflation between gender and sexual orientation. The stereotype is that real women are (exclusively) attracted to men, so lesbians cannot be considered 'real' women.<sup>36</sup> Thus, the womanhood of a Black lesbian woman is considered suspect on the grounds of their race *and* their sexual orientation, and can lead to their exclusion from sporting events.

### ***2.3 The Erroneous Universality of Binary Sex and Rising International Attention for the Bodily Integrity of Persons with VSC***

While sex-testing policies based on stereotypical considerations of womanhood ultimately affect all women athletes, they predominantly target transgender athletes and women athletes with VSC. Although World Athletics has claimed that the DSD Regulations are "in no way [intended] as any kind of judgement on or questioning of the sex or the gender identity of any athlete",<sup>37</sup> it is still the case that 'non-conforming' athletes are challenged in their 'true' sex,<sup>38</sup> which is informed by stereotypical constructions of sex and gender. In most societies, human beings are discretely 'sexed' into two categories, male and female, leading to the construction of 'sex' as a binary notion. However, between at least 1–1.7% of the population are

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<sup>33</sup>Zaccardi N (2021) "Top 400m sprinters ruled ineligible due to testosterone rule, officials say" OlympicTalk | NBC Sports, <https://olympics.nbcsports.com/2021/07/02/namibia-400-christine-mboma-beatrice-masilingi-testosterone/> (last accessed 20 October 2022).

<sup>34</sup>Holzer (2020); see also Bruening (2005).

<sup>35</sup>Holzer (2020).

<sup>36</sup>Gonzalez-Salzberg (2018) and Theilen (2018).

<sup>37</sup>§ 1.1.5 of the regulations.

<sup>38</sup>Karkazis and Jordan-Young (2018), p. 8.

born with one or more natural variations of sex characteristics.<sup>39</sup> Persons with VSC thus show that strict and universal sex bipolarity does not exist in human nature, even if it does exist in culture or cultural norms. In other words, standards for ‘normality’ and ‘abnormality’ regarding the presence of certain sex characteristics (such as hormonal levels) in males and females deny the natural, congenital variations that human bodies can show. While persons with VSC will have *physical sex characteristics* that fall outside of the male/female binary, the majority of people with this range of conditions still identify their gender within the binary, and therefore identify as either a man or a woman.<sup>40</sup>

Over the last decade, several institutional human rights actors have called attention to the human rights violations that many people with VSC have suffered; central to the discussion is the protection of bodily integrity.<sup>41</sup> Variations of sex characteristics cannot be explained satisfactorily under the essentialist binary theory of sex, revealing inner contradictions in the theoretical framework.<sup>42</sup> The dominant approach has therefore consisted of routinely subjecting persons with VSC to medical and surgical sex ‘normalizing’ treatments (shortly after birth or during adolescence), without their prior and informed consent, even though they do not usually face actual health problems due to their status.<sup>43/44</sup> Several UN bodies have expressed concerns about non-consensual treatment of persons with VSC, and called for a legal prohibition of deferrable surgical and other medical treatment on children with VSC until they reach an age when they can provide their full informed consent.<sup>45</sup>

The same concern for guaranteeing the human rights of persons with VSC, and especially their autonomy rights, can be found among European institutional human rights actors. In October 2017, the Council of Europe Parliamentary Assembly (PA) adopted a comprehensive and ground-breaking resolution, “Promoting the human rights of and eliminating discrimination against intersex people”, which called for a legal prohibition of deferrable sex ‘normalizing’ treatment.<sup>46</sup> The resolution recognized the serious breaches of physical integrity for children or infants with VSC who have undergone non-consensual, medically unnecessary sex ‘normalizing’ treatment, based on considerations of ‘social emergency’. The PA

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<sup>39</sup>EU Fundamental Rights Agency (2020) “A long way to go for LGBTI equality”, <https://fra.europa.eu/en/publication/2020/eu-lgbti-survey-results> (last accessed 20 October 2022), p. 58; Council of Europe Commissioner for Human Rights (2015) “Human Rights and Intersex People” <https://rm.coe.int/16806da5d4> (last accessed 20 October 2022), p. 16.

<sup>40</sup>Richards et al. (2016), p. 95.

<sup>41</sup>Cannoot (2022), pp. 112–118.

<sup>42</sup>Weiss (2001), p. 163.

<sup>43</sup>Garland and Travis (2018).

<sup>44</sup>See also Holzer (2020), pp. 391–392.

<sup>45</sup>See Cannoot (2022), pp. 112–116.

<sup>46</sup>Parliamentary Assembly of the Council of Europe, Resolution 2191 (2017) “promoting the human rights of and eliminating discrimination against intersex people”, <http://assembly.coe.int/nv/xml/XRef/Xref-XML2HTML-en.asp?fileid=24232> (last accessed 20 October 2022).

therefore called for a legal prohibition of medically unnecessary sex ‘normalizing’ surgery, sterilization and other treatments practiced on children with VSC without their informed consent.

While the case of *Semenya v. Switzerland* does not concern non-consensual sex ‘normalizing’ treatment, attention to the autonomy rights of persons with VSC within the international human rights community, as well as the historical vulnerability of persons with variations of sex characteristics for violations of their bodily integrity is needed when assessing the case. In any case, as Holzer, referencing Camporesi, states, “singling out testosterone as the only physical factor that could potentially create a comparative advantage is ‘based entirely on heteronormative standards for how a female athlete should look’”.<sup>47</sup>

## 2.4 HEC for Women's Sports Competitions and Their Scientific Basis

As Seema Patel points out, evolutions in modern understandings of human variation in sex characteristics and the recognition of human diversity from a human rights perspective has “created tensions with the traditional binary structures of sport”, triggering “a global debate mostly framed around science and athletic advantage” that tends to overlook the human rights of the affected athletes.<sup>48</sup> It is within this context that eligibility criteria for women's sports competitions, like World Athletics' DSD Regulations have to be situated. As mentioned above, on the basis of the rules applicable until 31 March 2023, athletes with VSC<sup>49</sup> who wanted to compete in the women's category of a certain event,<sup>50</sup> not only needed to be legally recognized as female or ‘intersex’ (or equivalent), but also needed to reduce blood testosterone levels to below 5 nmol/l for a continuous period of at least six months, and as long as they wished to remain eligible to compete.<sup>51</sup> Since the 2023 update, in order to compete in any women's competition, athletes with VSC must reduce testosterone levels to below 2.5 nmol/l for a continuous period of at least 24 months, and as long

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<sup>47</sup>Holzer (2020), p. 403; Camporesi (2019), p. 797.

<sup>48</sup>Patel (2021).

<sup>49</sup>See § 2.2 (a) (i) of the regulations (before the 2023 update).

<sup>50</sup>See § 2.2 (b) of the regulations (before the 2023 update). Note that experts have criticized the arbitrariness of the selection of the events for which the eligibility criteria apply. They point out that there is no scientific basis for such selection. See for instance Stebbings S, Herbert A, Heffernan S, Pielke Jr R, Williams A (2021) The BASES Expert Statement on Eligibility for Sex Categories in Sport: DSD Athletes, [https://www.bases.org.uk/imgs/8931\\_bas\\_bases\\_tses\\_summer\\_2021\\_online\\_pg\\_12\\_130.pdf](https://www.bases.org.uk/imgs/8931_bas_bases_tses_summer_2021_online_pg_12_130.pdf) (last accessed 20 October 2022).

<sup>51</sup>See § 2.3 of the regulations (before the 2023 update).

as they wish to remain eligible to compete.<sup>52</sup> The standard way of reducing natural testosterone levels is the use of hormonal contraceptives.<sup>53</sup>

While the policy does not foresee the possibility of forced hormonal treatment, it does result in the exclusion of certain athletes so long as they do not comply with the requirements. The policy is justified on the basis that the affected athletes allegedly have a significant performance advantage over other women whose hormonal levels come within the ‘normal’ female range.<sup>54</sup> However, since the eligibility criteria were adopted, the underlying scientific evidence has been strongly contested.<sup>55</sup> For instance, in September 2021, the authors of a 2017 study paid for by World Athletics and cited by the latter as “peer-reviewed data and evidence from the field”,<sup>56</sup> published a statement correcting their earlier conclusions. According to the authors, “there is no confirmatory evidence for causality in the observed relationships [between levels of testosterone and performance advantage] reported”, and “our results cannot be used as confirmatory evidence for the causal relationship but can indicate associations between androgen concentrations and athletic performance”.<sup>57</sup>

Other experts have stated that, while one’s level of testosterone is connected to sporting advantages and women with VSC might have natural testosterone levels exceeding the ‘typical’ female range, the extent of any performance advantage remains unclear; indeed, due to genetic factors, the ability to process these higher levels of testosterone may be compromised.<sup>58</sup> Other genetic characteristics such as height, eye sight, lung capacity, and socio-economic factors such as wealth, access to nutrition and training facilities, and family support, can equally create a competitive advantage.<sup>59</sup> The absence of a demonstrated relationship of causality between high levels of natural testosterone in women and their sports performance was pointed out in a letter addressed to the president of World Athletics by the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, and the UN Working Group on the

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<sup>52</sup>See § 2.1 of the regulations.

<sup>53</sup>However, more invasive and irreversible procedures such as a surgical gonadectomy also occur.

<sup>54</sup>See § 1.1 (d) of the regulations (before the 2023 update) and § 1.1.2 of the currently applicable regulations.

<sup>55</sup>Indeed, the 2011 version of the regulation was suspended for two years by the Court of Arbitration for Sports in the case of Dutee Chand v. Athletics Federation of India and the IAAF, 2014/A/3759. See also Berman and Garnier (2021). See also Karkazis and Jordan-Young (2018), p. 8, Pielke et al. (2019), pp. 18–26.

<sup>56</sup>See § 1.1 (d) of the regulations (before the 2023 update).

<sup>57</sup>Berman and Garnier (2021).

<sup>58</sup>Stebbing S, Herbert A, Heffernan S, Pielke Jr R, Williams A (2021) The BASES Expert Statement on Eligibility for Sex Categories in Sport: DSD Athletes, available at [https://www.bases.org.uk/imgs/8931\\_bas\\_bases\\_tses\\_summer\\_2021\\_online\\_pg\\_12\\_130.pdf](https://www.bases.org.uk/imgs/8931_bas_bases_tses_summer_2021_online_pg_12_130.pdf) (last accessed 20 October 2022).

<sup>59</sup>Holzer (2020), p. 402.

issue of discrimination against women in law and in practice (hereafter, Rapporteurs and Working Group Joint Letter).<sup>60</sup>

### 3 Hormonal Eligibility Requirements as Inhuman and Degrading Treatment Under Article 3 ECHR

In this section, we argue that HEC for women’s sports competitions that apply to women with VSC, such as the DSD Regulations set by World Athletics, violate the prohibition of inhuman and degrading treatment as protected by Article 3 ECHR. When deciding on whether a certain practice or treatment falls within the scope of Article 3, the Court has held that the “ill-treatment must attain a minimum level of severity”.<sup>61</sup> In assessing whether such treatment meets this threshold, the Court looks to “the nature and context of the treatment, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim”.<sup>62</sup> Further, the Court held that “the infliction of psychological suffering [...] can be qualified as degrading when it arouses in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them”.<sup>63</sup>

As outlined above, it remains common practice for persons with VSC to be targeted from birth as requiring medical procedures to ‘normalize’ them. A rapidly growing number of UN Member States, including Switzerland, have been notified that they must adopt a legal framework that addresses the multiple human rights violations experienced by those who have been forced to undergo sex ‘normalizing’ treatment. In this light, we argue that mandatory medical treatment, *in casu*, is an extension of this ‘normalization’ and results in stigmatization and psychological suffering.

It is not disputed that non-compliance with HEC leads to the effective exclusion from participation in several women’s sports competitions. The affected women athletes with VSC still maintain the possibility to exercise their profession as long as they undergo (hormonal) medical treatment, predominantly by taking contraceptives.<sup>64</sup> In its judgment in *V.C. v. Slovakia*, which concerned the forced sterilization

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<sup>60</sup>Letter by the Mandates of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, and the Working Group on the issue of discrimination against women in law and in practice, OL OTH 62/2018 (hereinafter: Rapporteurs and Working Group Joint Letter), <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=24087> (last accessed 20 October 2022), p. 2.

<sup>61</sup>ECtHR, *Identoba and Others v. Georgia*, 12.05.2015, § 65.

<sup>62</sup>ECtHR, *Identoba and Others v. Georgia*, 12.05.2015, § 65.

<sup>63</sup>ECtHR, *Identoba and Others v. Georgia*, 12.05.2015, § 65.

<sup>64</sup>Sometimes irreversible surgeries, such as gonadectomies or even clitoridectomies, are performed. In the case of athlete Annet Negesa, a gonadectomy was performed without her full and prior informed consent. See the report by Human Rights Watch, <https://www.hrw.org/sites/default/files/>

of Roma women, the Court attached significant importance to the protection of meaningful informed consent ('free will') under Article 3 and Article 8 of the Convention,<sup>65</sup> especially taking into account the impact of the treatment concerned on the applicant's reproductive health status. In its assessment of the applicant's claim under Article 3, the Court noted that,

sterilisation constitutes a major interference with a person's reproductive health status. As it concerns one of the essential bodily functions of human beings, it bears on manifold aspects of the individual's personal integrity including his or her physical and mental well-being and emotional, spiritual and family life. It may be legitimately performed at the request of the person concerned, for example as a method of contraception, or for therapeutic purposes where the medical necessity has been convincingly established.<sup>66</sup>

In the same case, the Court refuted the paternalistic actions on behalf of the hospital staff concerned, which meant that "in practice, the applicant was not offered any option but to agree to the procedure".<sup>67</sup> However, in the recent case of *Y.P. v. Russia*,<sup>68</sup> the Court seemed to bring nuance to its findings in *V.C. v. Slovakia*. Even though the former case also concerned the non-consensual sterilization of a woman in the absence of any pressing necessity to protect her life, the Court, surprisingly,<sup>69</sup> found that the case did not meet the threshold of severity of Article 3 ECHR. While it pointed out that the sterilization was clearly disrespectful of the applicant's autonomy, the Court paid particular attention to the circumstances of the case, such as the absence of any particular vulnerability of the applicant,<sup>70</sup> the lack of an intent of ill-treatment on behalf of the medical team, and the consultation of a panel of doctors that had backed the proposed treatment.

While mandatory hormonal treatment, in order to participate in a professional sports competition, does not necessarily amount to the same severity as an irreversible sterilizing surgery, we consider it vital that necessary parallels are drawn between the ECtHR's judgment in *V.C. v. Slovakia* and Semenya's case. Indeed,

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[media\\_2020/12/lgbt\\_athletes1120\\_web.pdf](#) (last accessed 20 October 2022), as well as the report by ILGA Europe, OII Europe, EL\*C and EGLSF, "LBTI women in sport: violence, discrimination and lived experiences", <https://oiiueurope.org/wp-content/uploads/2021/08/20210810-violence-and-discrimination-against-LBTI-women-in-sport-2.pdf> (last accessed 20 October 2022), pp. 8–10.

<sup>65</sup>ECtHR, *V.C. v. Slovakia*, 08.11.2011, § 112.

<sup>66</sup>ECtHR, *V.C. v. Slovakia*, 08.11.2011, § 106–7.

<sup>67</sup>ECtHR, *V.C. v. Slovakia*, 08.11.2011, § 114.

<sup>68</sup>ECtHR, *Y.P. v. Russia*, 20.09.2022, § 31–38.

<sup>69</sup>See Tongue Z L and Graham L (2022) "Y.P. v. Russia: sterilisation without consent, Article 3, and weak reproductive rights at the ECtHR", *Strasbourg Observers*, <https://strasbourgobservers.com/2022/09/30/y-p-v-russia-sterilisation-without-consent-article-3-and-weak-reproductive-rights-at-the-ecthr/> (last accessed 20 October 2022).

<sup>70</sup>Based on the concurring opinion by Judge Elósegui, it seems that the fact that the sterilisation of the applicant was not based on the same eugenic, racist logic applicable to the non-consensual sterilisation of Roma women was of importance to the majority's reasoning under Article 3 ECHR. To the contrary, dissenting Judges Serghides and Pavli pointed out that unconscious women undergoing sterilising treatment that they did not consented to are inherently in a condition of (situational) vulnerability.

women athletes with VSC who have a natural high level of androgens, a group that has suffered historical vulnerability,<sup>71</sup> have no other choice but to consent to long-lasting hormonal treatment during their careers, which negatively affects their reproductive health status and may also lead to unforeseen bodily or psychological side-effects. The Court has consistently observed that “the very essence of the Convention is respect for human dignity and human freedom”,<sup>72</sup> and that medical treatment “without the consent of a mentally competent adult patient would interfere with his or her right to physical integrity”.<sup>73</sup>

With respect to forced consent to take hormonal contraceptives, the temporal nature of contraceptive medication and its effect on persons with VSC has not been medically proven and, as such, there is no clear understanding of the effect that hormonal contraceptives could have on their reproductive system and bodies. In that regard, the Commission already held in *X v. Denmark* that there can be a violation of Article 3 if the “medical treatment [is] of an experimental character and [has been given] without the consent of the person involved”.<sup>74</sup> Accordingly, we argue that forced consent to contraceptives for women athletes with VSC—in the absence of reliable research on the effects of such treatment—is a clear violation of a person’s bodily integrity and therefore a violation of Article 3. The same conclusion was reached in the Rapporteurs and Working Group Joint Letter to the president of World Athletics.<sup>75</sup> Similarly, the UN High Commissioner for Human Rights noted that hormonal eligibility criteria for professional sports may violate the right to freedom from torture and other cruel, inhuman or degrading treatment or punishment.<sup>76</sup>

#### 4 Positive Obligations Under Article 8 ECHR in the Context of Hormonal Eligibility Requirements

The case of *Semenya v. Switzerland* calls for a clarification of the nature and scope of the state’s obligation to ensure the effective protection of the right to private life of professional athletes under Article 8 ECHR. In this section we will first elaborate on

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<sup>71</sup>The need to show special consideration regarding the protection of the informed consent of persons with variations of sex characteristics to medical treatment due to vulnerabilities stemming from economic, social and cultural circumstances was also pointed out in the Rapporteurs and Working Group Joint Letter, <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=24087> (last accessed 20 October 2022), p. 8.

<sup>72</sup>ECtHR, *V.C. v. Slovakia*, 08.11.2011, § 105.

<sup>73</sup>ECtHR, *V.C. v. Slovakia*, 08.11.2011, § 105.

<sup>74</sup>ECmHR, *X. v. Denmark*, 02.03.1983, 32 DR 282, at 293.

<sup>75</sup>Rapporteurs and Working Group Joint Letter <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=24087> (last accessed 20 October 2022), p. 1.

<sup>76</sup>UN High Commissioner for Human Rights, “Intersection of race and gender discrimination in sport”, A/HRC/44/26, p. 8.

the scope of the state's positive obligation and the state's margin of appreciation (Sect. 5.1), before addressing the elements that affect the balance between the general interests and the private interests in cases that concern HEC for participation in sports competitions (Sect. 6).

#### **4.1 Scope of the State's Positive Obligation and Margin of Appreciation**

The Court has held before that Article 8 ECHR may impose certain positive obligations on the state,<sup>77</sup> even in the horizontal relation between two private parties.<sup>78</sup> In *Hämäläinen v. Finland*, the Court mentioned several factors that have been considered relevant for the assessment of the content of positive obligations on states: the importance of the 'interests at stake', whether 'fundamental values' or 'essential aspects' of private life; the impact on an applicant of a discordance between the social reality and the law; the coherence of the administration and legal practices within the domestic system; and the impact of the alleged positive obligation on the state concerned.<sup>79</sup>

The case of Caster Semenya is arguably concerned with essential aspects of private life. Indeed, in the case of *A.P., Garçon, Nicot v. France*, which centered on the issue of compulsory sterilizing treatment as a precondition for legal gender recognition, the Court already held that cases that directly impact individuals' physical integrity have an essential aspect of an individual's intimate identity at their core.<sup>80</sup> In *Y.P. v. Russia*, the Court repeated that a person's reproductive status concerns one of the essential bodily functions of human beings, and bears on manifold aspects to personal integrity, including physical and mental well-being, as well as emotional, spiritual, and family life, as protected by Article 8 ECHR.<sup>81</sup>

The Court has previously found that Article 8 imposes on states a positive obligation to ensure the right to effective respect for a person's physical and psychological integrity.<sup>82</sup> In cases involving violence by private individuals, the Court has held that this positive obligation may include a duty to maintain and apply an adequate legal framework affording effective protection of an individual's physical integrity.<sup>83</sup> It is without question that HEC for women's sports competitions, which could lead to effectively mandatory hormonal or surgical treatment, directly

<sup>77</sup> ECtHR, *Bărbulescu v. Romania*, 05.09.2017, § 108.

<sup>78</sup> ECtHR, *Evan v. United Kingdom*, 10.04.2007, § 75.

<sup>79</sup> ECtHR, *Hämäläinen v. Finland*, 16.07.2014, § 66.

<sup>80</sup> ECtHR, *A.P., Garçon, Nicot v. France*, 06.04.2017, § 123.

<sup>81</sup> ECtHR, *Y.P. v. Russia*, 20.09.2022, § 51.

<sup>82</sup> ECtHR, *Glass v. United Kingdom*, 09.03.2004, § 74.

<sup>83</sup> ECtHR, *Söderman v. Sweden*, 12.11.2013, § 80.



impacts an athlete's physical and psychological integrity.<sup>84</sup> Such cases therefore fall within the scope of the state's positive obligations under Article 8 as earlier defined by the Court.

In cases concerning the Convention rights of persons with VSC, only a narrow margin of appreciation should arguably apply, especially when their right to bodily integrity is at stake. According to the Court's case law, the margin is substantially more narrow when restrictions apply to a particularly vulnerable group in society that has "suffered considerable discrimination in the past" and there must be weighty reasons to justify the restrictions.<sup>85</sup> It is hard to deny that persons with VSC form such a particularly vulnerable group in society, since they have suffered considerable discrimination and violations of fundamental rights on the basis of the perceived abnormality of their sex characteristics. The vulnerability of persons with VSC, and the stigmatization and discrimination they have face, has been raised by the Parliamentary Assembly of the Council of Europe in the aforementioned resolution 2191(2017).<sup>86</sup>

#### ***4.2 Balance Between General Interests and Private Interests in Cases Concerning HEC for Sports Competitions***

In determining whether the state has abided by its positive obligation under Article 8 ECHR, the Court will determine whether a fair balance has been achieved between the competing interests of the individual and the community as a whole, taking into account the margin of appreciation enjoyed by the state.<sup>87</sup> In this section we discuss that, while protecting fairness in sports is a legitimate general interest, considerations of bodily and psychological integrity outweigh the need to create a level playing field in women's sports competitions.

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<sup>84</sup>Next to the potential side-effects of hormonal treatment for a person's mental condition, qualitative research with intersex athletes has also indicated that the affected persons often suffer from intense public scrutiny, stress and psychological challenges stemming from the public suspicion and doubts concerning their gender identity and sex characteristics. See in particular the recent report by Human Rights Watch on DSD eligibility criteria, <https://www.hrw.org/report/2020/12/04/theyre-chasing-us-away-sport/human-rights-violations-sex-testing-elite-women>, (last accessed 20 October 2022).

<sup>85</sup>ECtHR *Alajos Kiss v. Hungary*, 20.05.2010, § 42.

<sup>86</sup>Parliamentary Assembly of the Council of Europe, Resolution 2191 (2017) "promoting the human rights of and eliminating discrimination against intersex people".

<sup>87</sup>ECtHR, *Bărbulescu v. Romania*, 05.09.2017, § 112.

### 4.2.1 The General Interest of Ensuring Fairness in Sports

The essence of professional sports is to test human difference. Indeed, if all athletes would perform in exactly the same way, no true competition would exist. In other words, differences in bodily characteristics, training opportunities, nutrition, and socioeconomic background, among others, are common and almost intrinsically related to the world of professional sports. Should athletes who differ in strength, stamina, height, weight, eye sight, lung capacity, wealth, be prevented from competing against each other? At the same time, fairness and the assurance of a level playing field are as central to professional sports as human difference.<sup>88</sup> The question then becomes what forms of difference can be considered as undermining the need for fairness, and indeed whether all (women) athletes are served by hormonal eligibility criteria in their needs for a level playing field.<sup>89</sup> In this light, we do not submit that the organization of sports along binary lines (women–men) is necessarily untenable from the perspective of the ECHR. Nevertheless, as the case of Semenya demonstrates, it needs to be questioned whether the highly contested use of a single bodily characteristic (i.e., the (natural) level of testosterone) in women’s sports competitions meets the requirements of the ECHR; taking into account the impact on the bodily integrity, mental and physical health, professional life, and reproductive status of the athlete concerned (as well as its connection to outdated understandings of ‘normality’ of women’s bodies). In the following section, we will elaborate on two important issues: the lack of meaningful informed consent to (hormonal) treatment aimed at reducing testosterone levels, and the impact of HEC on the athletes’ professional life.

### 4.2.2 The Lack of Meaningful Informed Consent to Medical (Hormonal) Treatment

As we demonstrated above, non-compliance with HEC leads to the effective exclusion from participation in a number of women’s sports competitions. The affected women athletes with VSC still maintain the possibility to exercise their profession as long as they forcibly undergo (hormonal) medical treatment (predominantly via

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<sup>88</sup>Nevertheless, importantly, in September 2021 three major global women’s sports organisations (WomenSport International, International Association of Physical Education and Sport for Girls and Women, and International Working Group on Women and Sport) called for action to immediately withdraw controversial DSD eligibility criteria by World Athletics and other Olympic movement sports bodies. See <https://iwgwomenandsport.org/womens-sport-calls-for-global-action-on-flawed-female-eligibility-regulations/?fbclid=IwAR1jsZNx218Tp1k85mWBGPEaANuOKCEBeKCrw0XfWPJeHh6cbXcFkUjp-Ss#eng> (last accessed 20 October 2022).

<sup>89</sup>Karkazis and Jordan-Young (2018), p. 10.

contraceptives).<sup>90</sup> We consider it necessary to draw parallels under Article 8 ECHR between the ECtHR's existing case law, and the case of Semenya. In the aforementioned judgment in *V.C. v. Slovakia*, which concerned the forced sterilization of Roma women, the Court attached importance to the protection of meaningful informed consent ('free will') under Article 3 and Article 8 of the Convention, especially taking into account the impact of the treatment concerned on the applicant's reproductive health status. In its assessment of the applicant's claim under Article 3, the Court noted that the imposition of such medical treatment without the consent of a mentally-competent adult patient is incompatible with the requirement of respect for human freedom and dignity as one of the fundamental principles on which the Convention is based.<sup>91</sup>

In the same case, the Court refuted the paternalistic actions on behalf of the hospital staff concerned, which meant that "in practice, the applicant was not offered any option but to agree to the procedure".<sup>92</sup> In *V.C. v. Slovakia*, the Court found that the state breached its positive obligations under Article 8 ECHR, on the basis of its failure to give special consideration to the reproductive health of the applicant as a Roma woman, taking into account the historical vulnerability and targeting of the Roma minority.<sup>93</sup> In the recent case of *Y.P. v. Russia*, the Court again stressed that, under Article 8 ECHR, sterilization cannot be routinely carried out unless the patient has given her express, free and informed consent to that particular procedure. The only exception to this rule is an emergency situation in which medical treatment cannot be delayed to obtain the appropriate consent.<sup>94</sup>

While the mandatory hormonal treatment in order to participate in a professional sports competition does not necessarily involve the same severity as an irreversible sterilizing surgery, a clear parallel can be drawn. Indeed, women athletes who have a naturally high level of androgens have no other choice but to 'consent' to medical (hormonal) treatment during their careers, which negatively affects their bodily and mental integrity, and their reproductive health status. It must therefore be strongly questioned whether any exercise of free will is possible in this context. As the Court similarly held in *A.P., Garçon, Nicot v. France* and *X. and Y. v. Romania*, the

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<sup>90</sup>Sometimes irreversible surgeries, such as gonadectomies or even clitoridectomies, are performed. In the case of athlete Annet Negesa, a gonadectomy was performed without her full and prior informed consent. See the report by Human Rights Watch, <https://www.hrw.org/report/2020/12/04/theyre-chasing-us-away-sport/human-rights-violations-sex-testing-elite-women>, (last accessed 20 October 2022), as well as the report by ILGA Europe, OII Europe, EL\*C and EGLSF (2021), "LBTI women in sport: violence, discrimination and lived experiences", <https://oiieurope.org/wp-content/uploads/2021/08/20210810-violence-and-discrimination-against-LBTI-women-in-sport-2.pdf> (last accessed 20 October 2022), pp. 8–10.

<sup>91</sup>ECtHR, *V.C. v. Slovakia*, 08.11.2011, § 106.

<sup>92</sup>ECtHR, *V.C. v. Slovakia*, 08.11.2011, § 114.

<sup>93</sup>ECtHR, *V.C. v. Slovakia*, 08.11.2011, § 138–155.

<sup>94</sup>ECtHR, *Y.P. v. Russia*, 20.09.2022, § 53.

athletes concerned are presented with an impossible dilemma:<sup>95</sup> either they undergo the required hormonal treatment against their wishes, thereby relinquishing the full exercise of their right to respect for their physical and psychological integrity (as protected under Articles 3 and 8 ECHR), or they waive the right to exercise their profession (which is also protected under Article 8 ECHR, see *infra*).<sup>96</sup> In the Rapporteurs and Working Group Joint Letter, it was concluded that the athletes are left with no real choice but to undergo medically unnecessary treatment in order to maintain their livelihoods.<sup>97</sup> This view is shared by the UN Human Rights Council,<sup>98</sup> and the UN High Commissioner for Human Rights, who stated that “female eligibility regulations may push some athletes to undergo investigations, tests and interventions, [. . .] which may have negative physical and mental health impacts”.<sup>99</sup> They stressed that “particular care is required where there are power imbalances resulting from inequalities in knowledge, experience and trust between health-care providers and individuals, particularly those from vulnerable groups”.<sup>100</sup>

### 4.2.3 Impact on an Athlete’s Access to Chosen Profession

While the ECtHR has not recognized a general right to employment, or the right to freely choose a particular profession, Article 8 ECHR does not exclude activities of a professional nature from the notion of ‘private life’.<sup>101</sup> A summary of the general principles of the case law in employment-related disputes can be found in the Court’s judgment in *Denisov v. Ukraine*.<sup>102</sup> In particular, the Court held that,

there are some typical aspects of private life which may be affected [. . .] by dismissal, demotion, non-admission to a profession or other similarly unfavourable measures. These aspects include (i) the applicant’s “inner circle”, (ii) the applicant’s opportunity to establish and develop relationships with others, and (iii) the applicant’s social and professional reputation.<sup>103</sup>

<sup>95</sup>In their 2018 paper, K. Karkazis and M. Carpenter also refer to the situation of the affected intersex athletes as a set of impossible ‘choices’. See Karkazis and Carpenter (2018).

<sup>96</sup>ECtHR, A.P., Garçon, Nicot v. France, 06.04.2017, § 132; X. and Y. v. Romania, 19.01.2021, § 165.

<sup>97</sup>Rapporteurs and Working Group Joint Letter <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=24087> (last accessed 20 October 2022), p. 5.

<sup>98</sup>UN Human Rights Council, Resolution 40/5 “Elimination of discrimination against women and girls in sport”, A/HRC/RES/40/5.

<sup>99</sup>UN High Commissioner for Human Rights, “Intersection of race and gender discrimination in sport”, A/HRC/44/26, pp. 8–9.

<sup>100</sup>UN High Commissioner for Human Rights, “Intersection of race and gender discrimination in sport”, A/HRC/44/26, pp. 8–9.

<sup>101</sup>ECtHR, Bărbulescu v. Romania, 05.09.2017, § 71.

<sup>102</sup>ECtHR, Denisov v. Ukraine, 25.09.2018, § 115–117.

<sup>103</sup>ECtHR, Denisov v. Ukraine, 25.09.2018, § 115.

The Court has developed two different tests to assess the state's compliance with Article 8: a reasons-based approach and a consequence-based approach. On the basis of the latter, it is for the applicant to present evidence substantiating consequences of the impugned measure, as well as their level of severity. The Court will only accept that Article 8 is applicable where these consequences are very serious and affect the applicant's private life to a very significant degree.

In its admissibility decision in *Platini v. Switzerland*,<sup>104</sup> the Court, applying the criteria set out in *Denisov*, held that the level of severity under the consequences-based approach was reached in the case where the applicant had worked all his life in the world of football and was banned from any football-related professional activity for four years by FIFA. The Court accepted, first, that the negative consequences of the measure were likely to occur within the framework of the 'inner circle' of the applicant, who was provisionally prohibited from earning a living in the world of football, the only source of income throughout his life, a situation aggravated by the dominant position, even monopoly, of FIFA in the global organization of football and by his age. Secondly, it considered that the sanction could have a negative impact on the possibility of forming and developing social relations with others given the very broad nature of the sanction imposed, which extended to 'any' football-related activity. In this regard, the Court considered that it should be borne in mind that the applicant was commonly, in the public and in the media, identified in relation to football. Finally, the Court considered it probable that the sanction pronounced against the applicant had negative effects on his reputation in the sense of a certain stigmatization.<sup>105</sup>

Despite the clear contextual differences between the sanction imposed in *Platini v. Switzerland* and HEC for participation in a sports competition, parallels between the ECtHR's existing case law and the case of Caster Semenya can be drawn. Indeed, professional women athletes with VSC who choose to preserve their bodily integrity and reproductive status are effectively banned from their profession, which in many cases is their main or only source of income. Given the monopoly position of most international sports federations, these athletes have no other possibility but to agree to the required treatment or to engage in other professional activities. Indeed, the UN High Commissioner for Human Rights found that HEC for professional sports may violate the right to work and to the enjoyment of just and favorable conditions of work, since "they may constitute a barrier limiting disproportionately equal access to work for athletes with variations in sex characteristics".<sup>106</sup>

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<sup>104</sup> ECtHR, *Platini v. Switzerland*, 05.03.2020.

<sup>105</sup> ECtHR, *Platini v. Switzerland*, 05.03.2020, § 57–58.

<sup>106</sup> UN High Commissioner for Human Rights, "Intersection of race and gender discrimination in sport", A/HRC/44/26, p. 8.

## 5 HEC and (Intersectional) Discrimination Under the ECHR

As mentioned above, sport regulations that impose forced hormonal treatment to determine eligibility to compete in women's sports competitions may also be in violation of the prohibition of discrimination (Article 14 ECHR), in conjunction with Articles 3 and 8 ECHR, when they are applied to women with VSC, and especially to intersex women of color as well as intersex lesbian women. In this section, we argue that these regulations can be characterized as both discrimination on the basis of sex characteristics (Sect. 7.1), as well as a specific form of intersectional discrimination on the basis of gender, race and, in Caster Semenya's specific case, sexual orientation (Sect. 8).

### 5.1 *Discrimination on the Basis of Sex Characteristics*

HEC that force women with VSC to lower their levels of testosterone in order to compete in women's sports competitions treat them differently than women without such variations (i.e. endosex women), precisely on the basis of their sex characteristics. Under such regulations, people who identify as women and whose bodies meet the normative medical and social expectations of women's bodies are allowed to participate in sports competitions without undergoing hormonal treatment. In contrast, women whose bodies have a variation of sex characteristics (such as high levels of androgens) are forced to undergo such treatment in order to participate in these sport competitions.

While Article 14 ECHR does not literally mention 'sex characteristics', it prohibits differential treatment on the basis on 'sex'. Even though the notion of sex has traditionally been understood as a binary, determined on the basis of an individual's genitalia, recent scientific insights have made clear that an individual's sex refers to their unique composition of several sex characteristics. It seems logical, therefore, to understand the prohibition of differential treatment *on the basis of sex* as meaning the prohibition of differential treatment *on the basis of sex characteristics*. The ECtHR has made clear in the past that the list of prohibited grounds of discrimination is not exhaustive.<sup>107</sup> The Court has extended protection to individuals treated differently on the basis of their sexual orientation and/or gender identity as inherently personal and intimate characteristics that relate to their sexual identity.<sup>108</sup> Thus, the case of Caster Semenya provides the opportunity to extend the prohibition of discrimination enshrined in Article 14 to differences in treatment on the basis of sex characteristics.

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<sup>107</sup> ECtHR, *Engel and others v. Netherlands*, 08.06.1976, § 72.

<sup>108</sup> ECtHR *Salgueiro Da Silva Mouta v. Portugal*, 21.12.1999, § 28; *Identoba and others v. Georgia*, 12.05.2015, § 96.

Applicants bringing a claim under Article 14 ECHR need to show that they were not only treated differently than others on the basis of a specific ground of discrimination, but also that they are similarly situated compared to these other individuals. Under World Athletics regulations, women who present a variation in sex characteristics are forced to undergo hormonal treatment to lower their testosterone level if they wish to participate in women's sport competitions. In contrast, other women whose bodies conform to medical and societal expectations of a woman's body—for instance, endosex women, who are, however, diagnosed with polycystic ovary syndrome (PCOS)—are allowed to compete in women's sport competitions without having to undergo hormonal treatment. This is the case even if PCOS causes them to have 'androgen excess' or 'hyperandrogenism', that is, 'ovarian overproduction of testosterone'.<sup>109</sup> Although both categories of women are similarly situated, insofar as they have high levels of testosterone, women with VSC are subjected to invasive regulations and hormonal treatment whereas the right of the other women to compete in women's sport competitions is left unquestioned.

Comparing intersex and endosex women more generally, one should note that the Council of Europe's Commissioner for Human Rights, and the EU Agency for Fundamental Rights have recently pointed out that people whose bodies present a variation in sex characteristics face structural forms of exclusion in all areas of life.<sup>110</sup> This is because they defy normative binary understandings of sex and gender—arguing that women with VSC and women without VSC are not similarly situated in relation to sports competitions amounts to subscribing to precisely such a normative understanding of sex. It also amounts to perpetuating the structural oppression of people who present variations in sex characteristics. Indeed, forcing women with VSC to lower their levels of testosterone in order to participate in a women's sports competition reproduces the idea that a woman is a person whose level of testosterone does not exceed a certain threshold. However, the very existence of women with VSC demonstrates that all bodies, and thus all women, in fact differ. As a result, intersex and endosex women are actually, as women, similarly situated when it comes to their eligibility to compete in women's sport competitions.

Under Article 14 ECHR, differential enjoyment of Convention rights by similarly situated individuals on the basis of a prohibited ground of discrimination only becomes discrimination when it lacks an objective and reasonable justification. In order to assess whether such justification exists, the Court usually performs an assessment of the legitimate aim and the proportionality between the measure and the aim pursued. States often allow sports bodies to regulate the eligibility of individuals to compete in women's competitions with the aim of ensuring a fair competition. As noted above, ensuring fairness in sports is unquestionably a

<sup>109</sup>National Institutes of Health (2019) "Polycystic Ovary/Ovarian Syndrome (PCOS)" [https://orwh.od.nih.gov/sites/orwh/files/docs/PCOS\\_Booklet\\_508.pdf](https://orwh.od.nih.gov/sites/orwh/files/docs/PCOS_Booklet_508.pdf) (last accessed 20 October 2022).

<sup>110</sup>EU Fundamental Rights Agency 2020 "A long way to go for LGBTI equality" <https://fra.europa.eu/en/publication/2020/eu-lgbti-survey-results> (last accessed 20 October 2022); Council of Europe Commissioner for Human Rights (2015) "Human Rights and Intersex People" <https://rm.coe.int/16806da5d4> (last accessed 20 October 2022).

legitimate aim, even if sport competitions are by essence about testing human difference. In that regard, one could argue that human rights issues arise not because of gender segregation in sports as such, but rather because of the disproportionate measure to determine admission to women's sport competitions based on a single bodily characteristic (i.e., level of testosterone); and the fact that this results in the exclusion of, or enforced hormonal treatment for, women with VSC.

With all of that said, relying on testosterone levels is not even a suitable method to achieve the desired aim. Although the World Athletics' eligibility criteria are adopted based on the assumption that the amount of testosterone is causally linked to performance, recent scientific studies contradict, or at the minimum, strongly question this assumption.<sup>111</sup> Even if one assumes that an athlete's level of testosterone is an adequate proxy for their performance (which is nevertheless doubtful), excluding women with VSC unless they undergo hormonal treatment to lower their level of testosterone does not achieve the aim pursued of ensuring fairness in sport competitions. This is because excluding women with VSC does not eliminate the natural variation in levels of testosterone observed in women without VSC. As a result, and under the assumption that testosterone and performance are causally related, women with higher levels of testosterone will still perform better (for instance, women with PCOS). The only effect of excluding women with VSC is to eliminate this category of woman (i.e., women who happen to have a variation in sex characteristics) rather than eliminating the advantage that high(er) levels of testosterone provide to *some* women athletes.

Related to this last observation is the fact that excluding people who identify as women and whose bodies display variations in sex characteristics from participating in women's sport competitions unless they undergo hormonal treatment questions their womanhood (see Sect. 2.2). Given that women's sport competitions are reserved for women, refusing women who present a variation in sex characteristics to participate in these competitions unless they lower their level of testosterone boils down to scrutinizing their gender. As such, allowing sports bodies to adopt eligibility regulations such as those of World Athletics jeopardizes their right to have their gender identity recognized at all.

Regarding the proportionality assessment, one can also not ignore that, as mentioned above, people with VSC continue to face considerable and structural stigma, prejudice, and discrimination. Based on the Court's own definition of vulnerability, people with VSC should be considered a vulnerable group in society and be subject to the 'very weighty reasons' principle.<sup>112</sup> This would narrow the state's margin of appreciation regarding differences in treatment of people without VSC and people with VSC.<sup>113</sup> As we have argued in the previous sections, the reasons invoked to justify intersex women's exclusion from women's sports competitions fail to stand up to scrutiny, and can consequently not be regarded as being sufficiently 'weighty'

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<sup>111</sup> See Sect. 2.2.

<sup>112</sup> ECtHR, *Alajos Kiss v. Hungary*, 20.05.2010, § 42; *Kiyutin v. Russia*, 10.03.2011, § 63.

<sup>113</sup> ECtHR, *Alajos Kiss v. Hungary*, 20.05.2010, § 42.



to satisfy the proportionality test. Given the above, we argue that sport regulations that force women with VSC to undergo hormonal treatment to lower their levels of testosterone in order to be allowed to participate in women sport's competitions are discriminatory under the ECHR.

## 5.2 *Intersectional Discrimination on the Basis of Gender, Race, and Sexual Orientation*

Intersectional oppression refers to a situation in which multiple grounds of oppression interact to create a new situation that cannot be reduced to the simple sum of its parts.<sup>114</sup> The absence of an intersectional approach of inequalities and oppressions can result in a lack of attention to the least privileged members of a marginalized community, and to inadequate redress for the human rights violations they suffer.<sup>115</sup> In order to avoid this, it is important to pay attention to patterns of sameness and difference between individuals and communities.<sup>116</sup>

The concept of intersectionality has been increasingly recognized by international human rights monitoring bodies in the last few years, including by the ECtHR. In *B. S. v. Spain*, the Court stressed that the vulnerability of a person or a group may result from the interaction of several characteristics such as gender, social, and ethnic origins.<sup>117</sup> Moreover, the Court considered an intersectional subject of a *prima facie* case of discrimination in *S.A.S. v. France* when stating that the ban “has specific negative effects on the situation of Muslim women”.<sup>118</sup> In *Carvalho Pinto de Sousa Morais v. Portugal*, the Court tackled an intersectional stereotype based on age and gender.<sup>119</sup> These developments offer a promising basis to develop a case law that does justice to intersectional vulnerability.

Semenya's positioning as a Black lesbian woman with VSC is inextricably tied to the intersectional discrimination she suffered. As argued above, her race, sexual orientation, and variation in sex characteristics combined to make her womanhood suspect to a normative society that links stereotypes of womanhood with whiteness, heterosexuality, and ‘typical’ female sex characteristics (i.e., endosex).<sup>120</sup> This led to her quite literal exclusion from the category of ‘woman’ in a core area of her life, impacting both her access to her preferred career, as well as her perceived identity as a woman in the eyes of the public, in a blatant form of intersectional discrimination. As a Black lesbian woman with VSC, Semenza combines at least three grounds

<sup>114</sup>Crenshaw (1989).

<sup>115</sup>Bouchard and Meyer-Bish (2016), p. 186.

<sup>116</sup>Atrey (2020), pp. 17–38.

<sup>117</sup>ECtHR, *B.S. v. Spain*, 24.07.2012, § 62.

<sup>118</sup>ECtHR, *S.A.S. v. France*, 01.07.2014, § 161. See Brems (2021).

<sup>119</sup>ECtHR, *Carvalho Pinto de Sousa Morais v. Portugal*, 25.05.2017, § 52–56.

<sup>120</sup>*Cf. 2.2. Racialised constructions of womanhood.*

related to ‘vulnerable groups’ as identified by the ECtHR in, among others, the Alajos Kiss and Kiyutin judgments: sex, race, and sexual orientation.<sup>121</sup> As argued above, people with VSC should be considered a vulnerable group in their own regard; the intersection of all of these characteristics puts Semenya in a particularly vulnerable position. It would considerably strengthen protection under Article 14 ECHR if the intersectional discrimination inherent in this case was recognized and it was confirmed that her differential treatment can only be justified by ‘very weighty reasons’. We have already argued that justification of Semenya’s exclusion is based on normative assumptions of sex and gender, and not, in fact, on any ‘very weighty reasons’. Consequently, Semenya is the subject of intersectional discrimination.

## 6 Conclusion

As Holzer has argued, “being a woman who is affected by the testosterone rules means that one’s athletic performance is valued according to so-called ‘scientific’ tests of womanhood, informed by stereotypical, white and intersexphobic notions of femininity”.<sup>122</sup> In this chapter, we have explored how the case of *Semenya v. Switzerland*, in which Caster Semenya challenged the validity of the HEC set by World Athletics, should be assessed under the ECHR. We have demonstrated that there are compelling arguments, and sufficient parallels with existing case law, to find that HEC for the participation in women’s professional sports competitions are incompatible with Articles 3 and 8 ECHR, read alone and in conjunction with Article 14 ECHR.

It is important to stress that the case of *Semenya v. Switzerland* does not challenge the binary organization of professional sports competitions as such. While the case could lead to an abolition of the *de facto* mandatory hormonal treatment that face women athletes with VSC who want to compete at the highest levels in their sport, it will not bring the policing of the boundaries of the ‘male’ and ‘female’ categories to an end. Given that this chapter established that the organization of sports competitions along the sex/gender binary is strongly related to persistent gender discrimination, racialized constructions of womanhood, and the erroneous universality of natural binary sex, a move away from HEC will no doubt evoke new challenges for athletes who do not meet the socially constructed normative standard in their sport. As mentioned in the introduction, the example set by FINA and World Athletics, which exclude all women who have experienced ‘male’ puberty beyond Tanner Stage 2 or before age 12, irrespective of their current levels of testosterone, shows that the inclusion of women with VSC in women’s sports competitions will remain illusory in the near future.

<sup>121</sup> ECtHR, Alajos Kiss v. Hungary, 20.05.2010, § 42; ECtHR, Kiyutin v. Russia, 10.03.2011, § 63.

<sup>122</sup> Holzer (2020), p. 411.

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