

# The doctrine of proportionality: A proposed solution to human rights infringements in sports adjudication

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## SUMMARY

The primary aim of this study is to emphasise the importance of applying consistent standards in the adjudication of human rights matters, particularly in the context of sports disputes. This study will investigate the judgments handed down by various courts in matters pertaining to the eligibility of female athletes with Difference of Sex Development to compete in elite competition and the impact thereof on international human rights. Conclusions are drawn regarding the need for a standard approach when considering the legality of limiting human rights in arguing that all courts should apply the same standards required by Human Rights courts when adjudicating human rights issues, even within the realm of sports disputes. The Doctrine of Proportionality is proposed as an appropriate standard to ensure that limitations of fundamental rights are just and reasonable.

## 1 Introduction

On 30 April 2019, the Court of Arbitration for Sport (“CAS”) dismissed *Caster Semenya* and Athletics South Africa’s (“ASA”) requests’ for arbitration that called for World Athletics’ (formally “IAAF”) Eligibility regulations for the Female Classification (Athletes with Differences of Sex Development) (“DSD Eligibility Regulations”) to be declared invalid.<sup>1</sup> In her bid for the invalidation of the DSD Eligibility Regulations, *Semenya* appealed the CAS award in the Swiss Federal Supreme Court on grounds that the regulation unfairly discriminates against female athletes, specifically those affected by Differences of Sex Development (“DSD”). The appeal focused on the notion that, should the regulation exist merely to ensure fair competition, it would result in a significant disproportion

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1 Court of Arbitration for Sport, *Mokgadi Caster Semenya v. International Association of Athletics Federations (IAAF)*, CAS 2018/O/5794, & *Athletics South Africa v. International Association of Athletics Federations (IAAF)*, CAS 2018/O/5798, Decision of 30 April 2019 [hereinafter referred to as the “*Semenya*” case].

in consideration of the irreparable harm it would bear on the affected female athletes.<sup>2</sup> The Swiss Federal Supreme Court however rejected the request to appeal based on the notion that the CAS, being a competent court of law, made an informed and assumed correct decision.

The *Semenya* case presently stands as precedent for all matters pertaining to the exclusion of female athletes with DSD, prioritising fair sporting practise in limitation of an array of human rights. On appeal, the verdict was vindicated on grounds that, even if the regulations were found to infringe upon human rights, the infringement could be justified in light of fair play. The lack of special regard given to the constitutional value of the matters at hand by the CAS highlights its inadequate application of the fundamental standard required of all courts to adjudicate human rights disputes.

## 2 Human rights infringements in sport adjudications

In its report written in advocacy for the elimination of discrimination against women, the United Nations Human Rights Council noted its concerns that the implementation of the DSD Eligibility Regulations inevitably leads to the violation of the right not to be discriminated against. The council emphasises that the DSD regulations may impede on the human rights of female athletes affected by DSD, violating a multitude of fundamental rights including, but not limited to, “the right to freedom from torture and other cruel, inhuman or degrading treatment or punishment, the right to work and to the enjoyment of just and favourable conditions of work, the right to the highest attainable standard of physical and mental health, the right to sexual and reproductive health, the right of everyone to be free from arbitrary interference with their privacy, and the right to respect for the dignity, bodily integrity and bodily autonomy of the person.”<sup>3</sup> Due to its findings, the council reminds states not only of their obligation to prevent the violation of human rights at all costs but also to ensure that should such violation take place; aggrieved individuals are granted access to effective remedies to alleviate such breach.<sup>4</sup> The report concludes with the confirmation that a lack of “remediation of human rights abuses in sport” exists currently, “neither in general nor in terms of the equal rights of women and girl athletes specifically.”<sup>5</sup>

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2 The *Semenya* case (note 1 above).

3 United Nations Human Rights Council, 2020, “Intersection of race and gender discrimination in sport”, *United Nations Human Rights Council*, Forty-fourth session, Agenda items 2 & 3, A/HRC/44/26, Available at: <https://undocs.org/en/A/HRC/44/26> (accessed on 12 February 2021) [hereinafter referred to as the “UN report 2020”].

4 As above.

5 As above.

Generally, only courts of superior or constitutional status hold the necessary jurisdiction to hear matters where human rights are of concern. Human rights hold fundamental value due to its importance in society and therefore binds all legislation and creatures of state. Therefore, in exceptional circumstances human rights are subject to limitations should such limitation be justifiable. The justification of the limitation of human rights requires experts of the highest calibre to interpret legislature in ensuring that justice is met, with many turning to the Doctrine of Proportionality as the chosen method for the resolution of human rights.<sup>6</sup> The Doctrine of Proportionality can be characterized as an array of conditions to be considered by an interpreter before a fundamentally protected right may be limited<sup>7</sup> and consists of a three-fold test designed to ensure that limitations of fundamental rights by statutes are both balanced and reasonable<sup>8</sup>. While it is not mandatory to apply the Doctrine of Proportionality, this study will advocate therefore in order to establish a set standard of interpreting fundamental limitations.

Although the CAS is not deemed a superior court, during its adjudication of the *Semenya* case it claimed jurisdiction of a matter where human rights were limited and determined the limitation justified. Whether or not the CAS had the necessary jurisdiction to deliver such a verdict, in doing so it amplified its status on the hierarchy of courts and assumed superior status and, as such, should be held to the same standard as is expected from superior courts.

The *Semenya* case specifically emphasises the need of a standardised approach to be followed by sporting adjudication bodies such as CAS, even if its main function is sports arbitration, as the absence of such definitive procedures related to constitutional matters would inevitably result in sporting principles taking preference over humanitarian laws.

### 3 Analysis of the doctrine of proportionality

With a profound increase in its popularity in constitutional courts worldwide, the Doctrine of Proportionality seems the chosen method for the resolution of human rights adjudications in the ECHR.<sup>9</sup> As such, it

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6 Cianciardo, J., 2010, "The Principle of Proportionality: The Challenges of Human Rights", *Journal of Civil Law Studies*, Available at: <https://digitalcommons.law.lsu.edu/jcls/vol3/iss1/11> (last accessed 2021-02-05).

7 Barak, A., 2010, 'Proportionality and Principled Balancing', *Law and Ethics of Human Rights*, Vol 4(1), p 1-16, Available at: DOI: 10.2202/1938-2545.1041 (last accessed 2022-08-22).

8 Barak, A., 2012, 'Proportionality: Constitutional Rights and their Limitations (Cambridge Studies in Constitutional Law)', *Cambridge: Cambridge University Press*, Available at: doi:10.1017/CBO9781139035293 (last accessed 2021-02-05).

9 United Nations Special Rapporteur, 2022, "Intervention: *Mokgadi Caster Semenya v Switzerland*, Application no: 10934/21 in the European Court of

came as no surprise that the principle was invoked by both the CAS and the Swiss Federal Supreme Court in the *Semenya* case. This does, however, not mean that the principle goes without criticism, with critics emphasising the detrimental effects its vague and ambiguous application could have on the interests of individuals and minorities.<sup>10</sup> This was specifically brought forward by the UN Special Rapporteur's intervention in "Pursuant to Article 36(2) of the European convention on Human Rights and Rule 44(3) of the Rules of Court".<sup>11</sup> The intervention gave an insight into the *Semenya* case and the way the Doctrine of Proportionality was applied thereto.<sup>12</sup>

To accurately examine the application of the principle, it is imperative to understand the mechanism of 'proportionality' and the manner in which it was designed to produce the best possible outcome. The principle of proportionality can be characterized as an array of conditions to be considered by an interpreter before a constitutionally protected right may be limited.<sup>13</sup> This limitation may be a consequence of the application of a statute that was promulgated, which may result in the infringement of a constitutional right of an individual, or even the enforcement of a constitutional right of an individual which may infringe upon the constitutional right of another individual. As the principle of proportionality is one with a rather complex stature, it allows for many contrasting interpretations and modifications of the conditions and steps to be followed, this being merely the first of several criticisms the principal faces.

With reference to statutes affecting human rights, the most prominent procedure followed in the application of the principle of proportionality seemingly takes the form of a three-fold test, (1) Adequacy – the principle of suitability; (2) Necessity; and (3) Proportionality *stricto sensu*.<sup>14</sup> These steps were designed to ensure that limitations of constitutional rights by statutes are both balanced and reasonable. The first sub-step discusses adequacy, also referred to as proper purpose or the suitability of the interference of a right. It holds that the statute affecting the constitutional right must portray adequacy or suitability in achieving the proper

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Human Rights [hereinafter referred to as the "UN Special Rapporteur Intervention: *Semenya* case"] 3.

- 10 Tsakyrakis, S., 2008, "Proportionality: an assault on human rights?", *International Journal of Constitutional Law*, Available at: DOI: 10.1093/icon/mop011 (last accessed 2021-02-05).
- 11 UN Special Rapporteur Intervention: *Semenya* case (note 9 above).
- 12 As above.
- 13 Barak, A., 2010, "Proportionality and Principled Balancing", *Law and Ethics of Human Rights*, Vol 4(1), p 1-16, Available at: DOI: 10.2202/1938-2545.1041 (last accessed 2022-08-22).
- 14 Barak, A., 2012, "Proportionality: Constitutional Rights and their Limitations" (Cambridge Studies in Constitutional Law), Cambridge: Cambridge University Press, Available at: doi:10.1017/CBO9781139035293 (last accessed 2021-02-05).

purpose intended by the legislator.<sup>15</sup> In summary, the interpreter must determine the end (goal) which the legislator strived for in comparison to the means which the legislator designed in order to achieve the said end, ultimately determining whether the means is an adequate/suitable measure to achieve the end (goal).

The second sub-step ascertains the necessity of the means involved and whether that are “no alternative measures that may similarly achieve that same purpose with a lesser degree of limitation”.<sup>16</sup> The third sub-step, and undoubtedly the most used step of the principle of proportionality, is the concept of proportionality *stricto sensu*. Proportionality *stricto sensu* can be said to be the act of balancing between the “importance of achieving the proper purpose and the social importance of preventing the limitation on the constitutional right”.<sup>17</sup> Once weighed, the interpreter will then theoretically be in a position to make a better calculated decision on the legitimacy of the limitation of the constitutional right in correlation to the proper purpose of the statute.

Whereas many critics argue that the need for the first and second sub-step is diminished due to the rarity of an utterly irrational statute as well as the rarity of a legislator’s inability to reasonably justify the necessity of its aim,<sup>18</sup> others argue that it is imperative not to surpass these steps due to the third sub-step’s vague and ambiguous nature. A more in-depth analysis of proportionality *stricto sensu* suggests the imagery of lady justice holding up the scales of moral equality, with the idea of balancing the advantages and disadvantages of the statute reflecting on either side of her scales. The advantages would, in theory, substantiate the need for the statute, whereas the disadvantages would reflect the level of deprivation of liberty the limitation would have on the individual. Judge Bernhard Schlink attempted to place same in layman’s terms: should a mean be found unhelpful/unnecessary in achieving the end, using such mean would be considered out of proportion. It would also be considered disproportionate to use a means that is more than necessary in achieving the ends, thus, more harmful upon the constitutional right than needs be.

Also considered disproportionate would be using inappropriate means. Enough is enough, as more than enough or more than appropriate is out of proportion.<sup>19</sup> While this seems to make sense, the question that goes without a definitive answer is what metric is used

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15 Cianciardo, J., 2010, “The Principle of Proportionality: The Challenges of Human Rights”, *Journal of Civil Law Studies*, Available at: <https://digitalcommons.law.lsu.edu/jcls/vol3/iss1/11> (last accessed 2021-02-05).

16 Feldman, D., 1999, “The Human Rights Act 1998 and constitutional principles”, *Legal Studies*, Vol 19(2), p 165-206, Available at: DOI:10.1111/j.1748-121X.1999.tb00091.x (last accessed 2022-08-22).

17 Feldman (note 16 above).

18 Tsakyrakis (note 10 above).

19 Schlink, B., 2012, “Proportionality in Constitutional Law: Why Everywhere but Here”, *Duke Journal of Comparative & International Law*, Vol 22(2), p 291–302.

when balancing or weighing up the applicable interest.<sup>20</sup> Justice Aharon Barak argues that a common denominator in the form of social importance exists and that the marginal significance that each interest has for society is required to administer the balancing principle.<sup>21</sup> This approach suggests that any interest that is protected by a right may be considered equivalent to the constitutional rights held by an individual – in such a situation, the interests of the majority will almost always take precedence over the interests of an individual or minorities.<sup>22</sup> The absence of the supremacy of Constitutional rights or its authority to take precedence over ordinary private interest would lead to the dissolution of constitutional value entirely. In fact, if constitutional right's constitutional value were absolved, there would be no need for the principle of proportionality, supporting the vitality of the third sub step.

Even though proportionality *stricto sensu* purports the appearance of a complicated calculation with mathematical metrics that will always supply a correct outcome, the incommensurability of values and interests suggest that the principle is actually one of a simple structure. The interpreter will balance the interests based on the hierarchical status of the constitutional right and the severity of the infringement thereof, in correlation to the legitimacy of the need of the end and the consideration of the significance thereof in society. In theory, the higher the constitutional right's hierarchical status, the more important the proper purpose behind the limitation should be for it to be considered proportional. Similarly, the lesser the hierarchical status of the constitutional right is, the less substantial the proper purpose behind the limitation will have to be.<sup>23</sup> Another critique behind the principle of proportionality lies in the fact that the discretion of balancing lies solely with the interpreter. While, ideally, we would like to believe that it is possible for courts and judges to remain objective, “the balancing of rights, interests and values entailed in the analysis of appropriateness is unavoidably subjective.”<sup>24</sup>

#### **4 *Mokgadi Caster Semenya v International Association of Athletics Federations (World Athletics)***

The Doctrine of Proportionality played a significant role in the consideration and outcome of both *Semenya* cases as held in the CAS and Swiss Federal Supreme Court, with both courts concluding that the DSD Eligibility Regulations met the requirements of limitation according to the

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20 Tsakyrakis (note 10 above).

21 Barak 2012 (note 8 above).

22 Tsakyrakis (note 10 above).

23 Bendor, A., 2015, “How proportional is proportionality?”, *International Journal of Constitutional Law*, Vol 13(2), Available at: DOI: 10.1093/icon/mov028 (last accessed 2021-02-05).

24 Schlink (note 19 above).

principle of proportionality. Unfortunately, both courts seemed to erroneously place emphasis on only certain aspects of the principle of proportionality and ostensibly evaded other aspects thereof.

In consideration of the first sub-step of the principle, it can be construed that the interpreter in the *Semenya* case was the Swiss Federal Supreme Court, the legislator was World Athletics, the end perused by the DSD Eligibility Regulations was fairness in sport and “preserving the integrity of female athletics”,<sup>25</sup> and the means was “drug related lowering of the testosterone level”<sup>26</sup> of DSD athletes. As CAS concluded in its findings that testosterone provides an insurmountable competitive advantage to its holder, the Swiss Federal Supreme Court adopted the same finding as true and correct. In the context of this finding, enlisting medical sterilisation and/or testosterone limiting drugs to achieve the end result is, so to say, capable. Thus, the DSD Eligibility Regulation passes the first sub-step of adequacy. The second sub-step is where the decision-making process appears to go inherently wrong in the Swiss Federal Supreme Court’s application of the principle of proportionality. The requirement of necessity should not be assumed to be an ‘easy’ hurdle to cross in proving proportionality as ‘necessity’ is, in fact one of the cornerstones of human rights law. As aforementioned, necessity requires the absence of “alternative measures that may similarly achieve that same purpose with a lesser degree of limitation”.<sup>27</sup>

In its 2019 award in favour of World Athletics, the CAS panel by majority held that the DSD Eligibility Regulations are “necessary and reasonable” due to the measures contained in the regulation allowing for “the minimum treatment invasion”, that are “commonly prescribed” as a treatment for women to “reduce the level of testosterone”.<sup>28</sup> Regrettably, neither the CAS panel nor the SFT council accurately grasped the essence of the requirement of necessity. Instead of satisfying themselves that the medical treatment required by the DSD Eligibility Regulations was not the most serious or most invasive measure that the regulation could have taken; therefore, necessity is present, the courts should have made an inquisition into whether any alternative measure exists that could achieve a similar result to the oral contraceptives with a lesser impact on the athletes’ fundamental rights.

The risks of utilising oral contraceptives as a method of reducing testosterone levels should not have been downplayed by the courts,

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25 Swiss Federal Supreme Court, *Mokgadi Caster Semenya v. International Association of Athletics Federation*, 4A\_248/2019, Swiss Federal Supreme Court, 29 July 2019 [hereinafter referred to as the “Swiss decision”].

26 As above.

27 Ellis, E., 1999, “The Principle of Proportionality in the Laws of Europe”, *Hart Publishing*, p 117-144.

28 Court of Arbitration for Sport, 2019, “Media release – CAS Arbitration: Caster Semenya, Athletics South Africa (ASA) and International Association of Athletics Federations (IAAF): Decision”, Available at: [https://www.tas-cas.org/fileadmin/user\\_upload/Media\\_Release\\_Semenya\\_ASA\\_IAAF\\_decision.pdf](https://www.tas-cas.org/fileadmin/user_upload/Media_Release_Semenya_ASA_IAAF_decision.pdf). [hereinafter referred to as the “The CAS Award”].

especially when such contraceptives are administered at a much higher dose than that of the intended use thereof by manufacturers as such risks can be fatal.<sup>29</sup> It is for this reason that the United Nations Human Rights Council held that “there is no clear relationship of proportionality between the aim of the regulations and the proposed measures and their impact”.<sup>30</sup>

As a result of the CAS and the SFT’s obscured application of the requirement of necessity in reaching its’ decisions, it appears as if the courts accordingly omitted from satisfying the third sub-step of proportionality *stricto sensu*. Proportionality *stricto sensu* places emphasis on the “importance of achieving the proper purpose and the social importance of preventing the limitation on the constitutional right”.<sup>31</sup> Although omitted, the compliance to the third sup-step could arguably lead to the DSD Eligibility regulations toughest encounter yet. It is, however, difficult to begin to conceptualise how World Athletics could possibly justify the concerns raised by the United Nations Human Rights Council related to the DSD Eligibility Regulations, in that it contravenes a substantial amount of “international human rights norms and standards, including the right to equality and non-discrimination, the right to the highest attainable standard of physical and mental health, the right to sexual and reproductive health, the right to work and to the enjoyment of just and favourable conditions of work, the right to privacy, the right to freedom from torture and other cruel, inhuman or degrading treatment and harmful practices, and full respect for the dignity, bodily integrity and bodily autonomy of the person.”<sup>32</sup>

## 5 Findings

This study examined whether the CAS award of 30 April 2019, which led to the ineligibility of female athletes with differences in sexual development to compete in the female category of elite athletics unless their natural testosterone levels are restricted by way of medical intervention, correctly applied fact to law and whether such award is appropriate. A particular focus of this research was to examine whether the same result would be achievable if the Doctrine of Proportionality was correctly applied to the limitation of human rights caused by the DSD regulations.

29 Savulescu, J., 2019, “Ten ethical flaws in the Caster Semenya decision on intersex in sport”, *The Conversation*, Available at: <https://theconversation.com/ten-ethical-flaws-in-the-caster-semenya-decision-on-intersex-in-sport-116448> (last accessed 2021-04-17).

30 United Nations Human Rights Council, 2019, “Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development”, *United Nations Human Rights Council* Fortieth session, agenda item 3, Available at: <https://undocs.org/pdf?symbol=en/A/HRC/40/L.10/Rev.1> (last accessed 2021-04-17).

31 United Nations Human Rights Council (note 30 above).

32 United Nations Human Rights Council (note 30 above).



When considering the severe impact that the DSD regulations have on female athletes with DSD's human rights in conjunction with the necessity of fair sporting practices, it is found that these limitations of human rights cannot be justified when applying the threefold test of the Doctrine of Proportionality. For this reason, this study finds irregularity in the CAS award dated 30 April 2019 in that a lack of a neutral consideration was given to fundamental fairness.

It is important to note that the intention of this study is not to question the CAS jurisdiction over sport matters. Instead, it seeks to highlight the need for a nuanced approach when the CAS is called upon to adjudicate human rights disputes within the realm of sports. While the CAS plays a crucial role in resolving sports-related disputes, we believe that ensuring fundamental human rights protections should be a paramount consideration in its decisions.

## **6 Recommendations**

This study concludes with the recommendation that any court that elects to hear human rights disputes be held to the same standard as is true for Constitutional or Supreme Courts. It is proposed that this standard include that courts familiarise its judges/arbitrators with the international human rights standards and norms by "collecting and publishing data on the number and types of discrimination and abuse, specifically data disaggregated by race, gender and with attention to marginalized communities". Additionally, it should be each court's primary goal to ensure the protection of human rights when matters concerning the limitation of human rights are heard. It is suggested that the threefold test of the Doctrine of Proportionality be satisfied before a limitation can be affirmed. Any court failing to meet these perimeters should not bear the jurisdiction to hear human rights specific matters.