
GENDER VERIFICATION TEST: ANALYZING THE LEGAL RAMIFICATIONS ON WOMEN ATHLETES

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ABSTRACT

Gender Verification Test as the name suggests essentially means to determine an athlete's gender, i.e., whether they are male or female since both males and females have been competing separately in competitive sports. The purpose of this research paper is to trace the history behind the need to indulge in such tests, the various methods by which it has been done over the years, the criteria and the studies the CAS (Court of Arbitration for Sport) has placed its dependence on, the impact all this has on an athlete's career and how it ends up violating human rights of female athletes by using a few topical examples. The paper would begin by analyzing the different methods that have been used to identify an athlete's gender and the reason behind starting such a test in the field of sports. Further, the paper will glance over the policies followed by IAAF (the International Association of Athletics Federations), which are flawed and based on restrictive research (for example, just relying on scientific statistics and studies that are not always accurate), and which are enforced by CAS as well, giving rise to problematic precedents. The paper will also cover the cases of Caster Semanya and Dutee Chand very briefly, touching upon the important contents in the CAS judgments concerning their eligibility to participate in sports internationally. Lastly, the author intends to develop an argument as to how this verification tests could be humiliating (because only females are subjected to these), could lead to a tarnished reputation globally and how it is unfair because certain legal policies could determine how much female-ness is enough to be considered a female. The paper aims to conclude by showing an interplay between the Indian constitutional protections offered by Article 14 (equality before law) and Article 21 (right to life and personal liberty) and gender testing that violates the said fundamental rights of female athletes.

KEYWORDS

Sex Verification Test, IAAF, CAS, Fundamental Rights.

1. INTRODUCTION

Sports play a very crucial role in a person's overall development and growth. Being involved in any kind of sport teaches an individual the value of a disciplined life, helps them to focus, hones their analytical and logical skills, and ripens their personalities. But often, in the process of being a source of entertainment, it can also cause a series of controversies in any sports personality's life, posing a serious threat of public scandals. An instance of this could be the gender testing of an athlete. The suspicion of one's appropriate gender, the manner in which it is questioned and how it is conducted can be demeaning for any human being especially when you are in the public eye with no iota of privacy. This paper aims to look at what the gender verification test entails, what standards and methods are set by The International Association of Athletics Federation (IAAF), and how female athletes have suffered on unequal and discriminatory grounds violating their basic human rights.

2. WHAT IS GENDER VERIFICATION TEST? WHAT IS THIS TEST BASED ON?

The reason why gender as a concept comes up in the arena of sports is that both men and women have been competing in sports separately.¹ This test was considered important to ensure that only females took part in events hosted for females, and not males, who could use their 'superior' physical attributes over females to win.² Women have been subjected to various deplorable methods to prove their sex after being allowed to participate in sports at the international level. Sex verification in the 1950s and 1960s was entirely based on the physical examination of the female body, to an extent of expecting the female athletes to indulge in a "naked parade", where they were asked to strip entirely and parade before a panel of female doctors, for instance, at the European Track and Field Championship (1966), to determine whether or not a sex fraud has taken place.³ Over time, while concluding that laboratory testing is insufficient, the testosterone levels of female athletes became the premise on which athletes were expected to defend their sex identity.⁴ In the 1960s, chromosome testing became a predominant method of testing too. Scientifically, chromosome pairing of XX from a male and

¹ Claudia Wiesemann, *Is there a right not to know one's sex? The ethics of 'Gender Verification' in women's sports competition*, 37 JOURNAL OF MEDICAL ETHICS 217 (2011).

² *Id.*

³ Alice Dreger, *Where's the rulebook for sex verification?*, THE NEW YORK TIMES (August 21, 2009), Essay - Where's the Rulebook for Sex Verification? - NYTimes.com (archive.org).

⁴ *Id.*

a female lead to the birth of a girl child, whereas an XY pairing will always create a male.⁵ Many geneticists and endocrinologists disagreed with the data that IAAF relied on to detect an individual's sex because other genetic, hormonal, functional and physical factors are crucial to this study too.⁶ All these factors determining one's sex is very different from gender, which essentially means how one identifies themselves – a male, a female or a separate category altogether who are beyond the two sets of pairing and identify as an intersex or DSD (difference of sexual development), whose hormones or reproductive organs do not develop as they classically should.⁷ Ewa Klobukowska was one of the earliest sprinters to have been affected by this test as she was discovered to possess both sets of chromosomes.⁸ This is harrowing for any woman who has grown up thinking that she most definitely is a female, but is told otherwise via inaccurate and misguided theories.

Men and women both produce a certain level of testosterone, and this is exactly where the IAAF makes the error of linking high levels of testosterone automatically with higher levels of athletic performance.⁹ The human body is way more complex than that. High levels of androgen and testosterone are seen as red flags for females to compete in female events because the IAAF and the International Olympic Committee rely on studies that regard these hormones to be associated with male characteristics that presumptuously give females an added advantage when competing against other females.¹⁰ Testosterone helps build muscle mass, but that is not the only criteria that contribute to an athlete's better performance. An athlete's performance is based on other factors like the amount of work put in by them, the nutrition levels, the quality of coaching they receive and the kinds of equipment they can work on to enhance their performance.¹¹ Scientifically, there is no conclusive evidence but many studies have shown different results and perspectives. Katrina Karkazis, a research fellow with Global Health Justice Partnership at Yale University and author of the book on the same subject believes that studies that show women using testosterone cream increasing the time to fatigue do give one an athletic edge but this is irrelevant to the discussion of naturally occurring

⁵ Ruth Padawer, *The Humiliating practice of sex testing female athletes*, THE NEW YORK TIMES (June 28, 2016), <https://www.nytimes.com/2016/07/03/magazine/the-humiliating-practice-of-sex-testing-female-athletes.html>.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ Kathryn Henne, *The Science of Fair Play in Sport: Gender and the Politics of Testing*, 39 THE UNIVERSITY OF CHICAGO PRESS 790 (2014).

¹⁰ *Id.*

¹¹ Martin F. Huber, *The IAAF'S new Gender Rule is a disaster*, OUTSIDE (July 20, 2018), <https://www.outsideonline.com/2328971/iaaf-gender-rule-update-caster-semenya>.

hormones in a body.¹² Pumping extra hormones into a sportsperson's body essentially means doping which does enhance your performance.¹³ It renders the entire study meaningless. So, if testosterone added to the body cannot be studied, the next logical step is to study the naturally occurring hormones in the body.¹⁴ Joanna Harper, a physicist at Loughborough University says that even though the conventional mindset prompts at testosterone being this powerful hormone that helps you build muscle mass, is the driver of red blood cell that carries oxygen to your muscles which all help a person's aerobic capacity, there is no established study that proves the correlation between a hormone and enhanced performance.¹⁵ Richard Holt, an endocrinologist suggests that a male range of testosterone is from 10 to 25 nanomoles *per liter* but nobody can prove that a man at a level of 25 will outperform a man at a level 10 and the same stands true for women.¹⁶ A study done on weightlifting teenage boys and girls concluded that there was no relation between boys' performance and testosterone whereas for girls performed better when their testosterone levels were low.¹⁷

The discrimination against female athletes becomes manifest at this point. For instance, in *Mokgadi Caster Semenya v. International Association of Athletics Federation*, Caster Semenya, the South African runner, was penalized by the Court of Arbitration for Sports (CAS) for having high levels of naturally occurring testosterone in her body, whereas Michael Phelps, one of the most successful American Olympians has never been subject to any discernment owing to his large feet and torso, features that could put Phelps in an advantageous position over other male athletes in a competition.¹⁸ These should be accepted as biological differences. Why question a woman for the things that can naturally be a part of her physical being but celebrate a man with the same characteristics?

¹² Katrina K., *Stop Talking about Testosterone- there's no such thing as True Sex*, THE GUARDIAN (March 6, 2019), <https://www.theguardian.com/commentisfree/2019/mar/06/testosterone-biological-sex-sports-bodies>.

¹³ *Id.*

¹⁴ KATRINA K., *supra* note 12.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Kathryn Henne, *The Science of Fair Play in Sport: Gender and the Politics of Testing*, 39 THE UNIVERSITY OF CHICAGO PRESS 790 (2014).

2.1. DUTEE CHAND'S JOURNEY

In 2014, the testosterone limit for female athletes had been set at 10 nanomoles *per liter* by the IAAF, which they considered was the lower range for normal male hormone levels.¹⁹ Indian Sprinter Dutee Chand failed this test because her body produces a high level of testosterone, and she was compelled to appeal the decision to ban her for failing the gender test she was subjected to, in the case of *Dutee Chand v. Athletic Federation of India and International Association of Athletics Federation* before CAS.²⁰ CAS was established in 1984 as an institution to resolve sports disputes and a dispute can be referred to CAS only when both parties have an arbitration agreement. However, according to the Olympic Charter, any issue pertaining to the Olympic Games comes under CAS' jurisdiction. (Rule 61).²¹ In matters of appeal to CAS, the arbitrators' rule based on regulations and procedures followed by the body affected by the appeal and also the law of the country where the body is based.²² Since athletics is an Olympic sport, she could appeal her decision at CAS with AFI and IAAF involved. According to *Procedural Rule 47 of the CAS Code*, appeal against any federation/association/sport-related body's decision can be entertained by CAS if the body in question's regulations allows for it or if the parties have finished arbitration agreement and the appellant has exhausted all domestic legal remedies.²³ In Dutee Chand's case, IAAF and AFI were the bodies in question. According to Article 7.2 of the Hyperandrogenism Regulation of the IAAF, decisions regarding an athlete's ineligibility can be appealed to CAS.²⁴ Article 1 of the AFI states that it recognizes, applies, and accepts the Constitution including IAAF's rules and regulations especially in matters of anti-doping, disputes and relationship with athletic representatives.²⁵ Although the hyperandrogenism regulation allows appeal against IAAF's decision and Dutee was asked to disengage from all competitions by the AFI, the issue about CAS jurisdiction did arise. But the CAS panel was satisfied that AFI has submitted to its jurisdiction since it did not explicitly question its jurisdiction, participated in the process of nominating an arbitrator for hearing, requested IAAF to pay on its behalf for all expenses and had no objection in filing answer brief by the IAAF hinting that they were comfortable with

¹⁹ Kenan Malik, *Caster Semenya is a victim of rules that are confusing and unfair*, THE GUARDIAN (May 5, 2019) <https://www.theguardian.com/commentisfree/2019/may/05/caster-semenya-is-a-victim-of-rules-that-are-confusing-and-unfair>.

²⁰ Dutee Chand v. AFI and IAAF, CAS 2014/A/3759.

²¹ OLYMPIC CHARTER, art. 61 (2017).

²² *Id.*

²³ Tribunal Arbitral du Sport/CAS 47 R (2004).

²⁴ Dutee Chand v. AFI and IAAF, CAS 2014/A/3759.

²⁵ Memorandum of Association of AFI art 1 (2020).

the athlete's option to go ahead and arbitrate.²⁶ The applicable law in Dutee Chand's case was laid down by Rule 60.25 of the IAAF Competition Rules that states that any appeal to CAS against IAAF's decision shall be bound by IAAF's Constitution, Rules and Regulations.²⁷

She claimed that the IAAF lacked scientific data and material to affirm this connection between high testosterone levels and better athletic performance, and the CAS lifted her ban, claiming that the IAAF has to mandatorily establish this link to prove such advantage that the female athletes with higher testosterone levels enjoy.²⁸ Even though this ruling aided athletes like Semenya and Dutee Chand to participate in the 2016 Rio Olympics, the IAAF, in 2018, bounced back with new level requirements of 5 nanomoles *per liter*, with evidence.²⁹ The IAAF managed to establish that women with higher free/functional testosterone levels have a crucial competitive advantage over females who have low free testosterone levels in 400-800 meter races, pole vault and hammer throw by analyzing around two thousand track competition performances of both men and women.³⁰

After lowering the threshold level of testosterone permitted in a female athlete's body, the CAS ruled that to avoid a blanket ban on an athlete's career, females should take medications to reduce their natural testosterone levels.³¹ This landmark ruling defeats the right of Caster Semenya, amongst many other athletes, to compete, which has been highly criticized by scientists and people of the medical fraternity. This aspect goes against the fair-play and encourages the use of steroids to prevent something that occurs naturally.³² This also violates a female athlete's human rights, because they are subject to such tests and suspicion based on their physical characteristics which could not fit into the narrow purview of stereotypical views that females are supposed to be less muscular or bulky than males. This is a skewed notion because no authority should ideally have the power to decide the appropriate amount of testosterone for an individual to biologically qualify as a 'female athlete'. Putting women under the scanner impacts their dignity and the various accolades attached to their sporting careers. Pumping drugs into someone's body alters their natural characteristics, in addition to attacking

²⁶ Dutee Chand v. AFI and IAAF, CAS 2014/A/3759.

²⁷ *Id.*

²⁸ *Id.*

²⁹ Stephane Bermon, *Serum androgen levels and their relation to performance in track and field: mass spectrometry results from 2127 observations in male and female elite athletes* 51 BRITISH JOURNAL OF SPORTS MEDICINE 1310 (2017).

³⁰ *Id.*

³¹ *Id.*

³² KATHRYN HENNEN, *supra* note 18.

the female's identity, who is being administered such drugs. This is ethically problematic, too. This issue is not only limited to Semenya, but athletes like *Francine Niyonsaba* (Silver Medalist) and *Margaret Wambui* (Bronze Wambui) have also been pulled into this ambit via this discriminatory ruling that does not take into account the talent, dedication and hard work that goes into making a career in professional athletics.³³ If sportswomen are asked to regulate their hormone levels through reluctantly consuming drugs, it violates the *fundamental principle of agency* one has over her own body.

Sport is a combination of skill and athletic capacity.³⁴ No one thing can determine success. Isolating the testosterone level in one's body does not help. Speed, flexibility, endurance, strategy, communication, use of a particular body part, the type of sport are all important factors. So, neither is an only factor nor it is a necessary factor in this debate.

3. THE AFTERMATH

This entire process of gender verification testing leads to serious problems regarding naturalization, and which authority should be allowed to determine who is female enough to compete with females. Flat chest, muscular arms and legs are not particularly associated with women. It violates a sportswoman's basic human right to privacy by vociferously leaking intimate details of her genitals and reproductive organs to the press and the media industry to print as scandalous stories with demeaning headlines for increased viewership. It is unfair to women who win medals for their country, only to be stripped of the same for reasons like not fitting some organization's and the public's perception of being female enough.

Taking the Indian example of Dutee Chand, it is a clear case of violation of Article 21 of the Constitution of India that enshrines the right to life.³⁵ She was subjected to a ruthless routine of submitting her urine and blood samples without being provided with legitimate reasons, and an ultrasound was also ordered, which, on inquiry by her, was informed to be the *modus operandi* in athletics, and an alleged response to her complaint regarding abdominal pain.³⁶ Her

³³ Sarah Knapton, *Intersex Athletes to learn if they will be forced to take drugs to suppress testosterone*, THE TELEGRAPH (August 11, 2017), <https://www.telegraph.co.uk/science/2017/08/11/intersex-athletes-learn-will-forced-take-drugs-suppress-testosterone/>.

³⁴ Doriane Lambelet Coleman, *A victory for female athletes everywhere*, QUILLETTE (May 3, 2019), <https://quillette.com/2019/05/03/a-victory-for-female-athletes-everywhere/>.

³⁵ INDIA'S CONST., art. 21 (2018).

³⁶ RUTH PADAWER, *supra* note 5.

prominent muscles and longer stride for a relatively short person prompted the Federation to make her undergo the verification test.³⁷ The right to life includes a life of freedom and personal liberty, which was something that Chand was deprived of, by virtue of such mortifying tests. It is important to understand the background that Chand hails from. This ordeal must have made her feel unquestionably exposed to the ignominious limelight for reasons beyond her comprehension due to her lack of education. The IAAF also includes measurement and examination of the vagina and the clitoris, and evaluation of personal body parts, like the breast size (on a five-grade scale) for clarity.³⁸ These tests are dreadful and demeaning for sportswomen like Chand, who have undergone agonizing revelations on this subject.

3.1. THE CASE OF SANTHI SOUNDARAJAN

The unfortunate incident in the Indian athlete Santhi Soundarajan's life is a testament to the grave violation of her rights, which drove her to the point of attempting suicide.³⁹ During the 2006 Asian Games in Doha, Qatar, she attracted the media's attention because of her flat chest and deep male voice.⁴⁰ Soon after winning a silver medal in an 800-meter race, she was stripped of her medal after failing a sex test conducted by the Athletics Federation of India (AFI), and the incessant examination and scrutiny harassed her to such an extent that she ingested poison.⁴¹ Her complaint to the National Human Rights Commission (NHRC) for human rights violations against the AFI and Indian Olympic Association was rejected on grounds of maintainability under Section 36(2) of the Protection of Human Rights Act, 1993, which claimed that State Commissions could not look into matters after a year of its occurrence.⁴² A year had already passed since the gender test was conducted, and, thus, she did not receive any remedy from the NHRC. In 2016, she was presented with some respite by being provided with a permanent government job, but this cannot compensate for the ban imposed on her for participating in sports and the ramifications of such displeasing accusations on her life and sports career.⁴³ Her fundamental right to privacy was infringed when she was made to stand naked for half a day in 2006 while getting tested, massacring the little dignity she could cling

³⁷ *Id.*

³⁸ *Id.*

³⁹ Sonam Joshi, *A Decade After Being Banned For Failing A Controversial Gender Test, Athlete Shanthi Soundarajan Gets A Government Job*, HUFFPOST (October 19, 2016), https://www.huffingtonpost.in/2016/10/19/a-decade-after-being-banned-for-failing-a-controversial-gender-t_a_21586711/.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² The Protection of Human Rights Act Section 36(2) (1993).

⁴³ SONAM JOSHI, *supra* note 35.

on to.⁴⁴ But to distinguish Santhi's case from Caster Semenya, South Africa did file a human rights complaint with the United Nations when she was publicly defamed by the press and put under heavy scrutiny for her physique, alleged baritone, unshaved armpits, and decision to wear a pair of shorts instead of a bikini while competing in the sexist IAAF ruling.⁴⁵

These violations also attract the *offence of defamation*, where other sports opponents and newspapers take to social media and other avenues to pass nasty comments against sportswomen, without there being a shred of truth to such allegations. Publishing headlines that raise suspicions in people, for instance, she could be a female but maybe not in entirety, or claim by the competitors that a certain athlete does not have the right to run with them for looking different from the other females is a categorical violation of a female's personal liberty.⁴⁶ The right to equality embodied in the Indian Constitution under Article 14 is also violated in this process, where female athletes are subjected to such humiliation and tarnishing of reputation, whereas male athletes have never been subjected to such careful examination.⁴⁷ Even though gender testing was developed to prevent males from masquerading as females in sports events, there has been no documentation of such an incident ever taking place.⁴⁸ Thus, the United Nations Human Rights Council has claimed that these IAAF regulations contravene a female's bodily integrity and autonomy.⁴⁹

There is unprecedented misogyny in the field of sports, where female participation has always been a bone of contention, and they also do not receive the high appreciation or admiration like their male counterparts do.⁵⁰ This segregation between males and females was intentional to come up with a level playing field for everyone and to develop fairness in sports, but this has led to controversial procedures where women are targeted for unambiguous gender identity, which is unjust. They are not deceiving the public deliberately, unlike sportspersons who take

⁴⁴ *Id.*

⁴⁵ RUTH PADAWER, *supra* note 5.

⁴⁶ *Id.*

⁴⁷ INDIA'S CONST., art. 14 (2018).

⁴⁸ Laxmi Murthy, *A sporting chance for gender*, 47 ECONOMIC AND POLITICAL WEEKLY 18 (2019).

⁴⁹ Julian Savulescu, *Ten Ethical flaws in Caster Semenya decision on intersex in sport*, THE CONVERSATION (May 10, 2019), <https://theconversation.com/ten-ethical-flaws-in-the-caster-semenya-decision-on-intersex-in-sport-116448>.

⁵⁰ LAXMI MURTHY, *supra* note 48.

performance-enhancing drugs.⁵¹ These rules are disproportionate as it intervenes with the body of a normal functioning female, with dubious results.⁵²

3.2. THE CASE OF PINKI PRAMANIK

Public imagination is just limited to two gender identities and that is when such issues arise. A long torturous process was inflicted on Pinky Pramanik after her partner accused her of rape. She was forced to spend 26 days in a male cell of a West Bengal jail before making bail, underwent several sex verification tests which were leaked online, received a suspension from the Railways, was drugged and tied while being subject to more inconclusive tests in custody and lost every shred of dignity she tried to cling on to. After two long years in 2014, the West Bengal Court acquitted her on grounds of being intersex. Medically speaking this category is called DSD (Disorder of Sexual Development) under which Pinki' exclusion from being a woman did not mean she was a man. Her case did stir up the suppressed emotions of ethics, privacy, identity and consent. Her prime years as an athlete were spent in jails, hospitals and courts instead of the tracks. Although she returned to her natural habitat of sports, atonement for the lost honour is difficult.

4. CONCLUSION

It is high time that such policies and requirements of sexual segregation are looked into, and there is no point in drawing such distinctions, which even nature does not allow. Talking about a fair balance, it is necessary to have rules in place to prevent certain sportspersons of taking advantage of their physical attributes, but this should bring males under its ambit too. Introducing drugs into their bodies to alter the natural hormone levels is discriminatory, and above all, the IAAF has failed to prove that a high level of testosterone does lead to a higher level of performance.⁵³ The Court of Arbitration for Sports did realize the inadequate and inconclusive scientific study IAAF relied on while lifting the ban on Dutee Chand, stating that there is no mathematical precision in identifying whether higher levels of testosterone drives an athlete to victory, or other factors like nutrition, training and biological factors.⁵⁴ However, there is also an ongoing debate about how unjust it is to permit self-identified females to

⁵¹ *Id.*

⁵² JULIAN SAVULESCU, *supra* note 49.

⁵³ KENAN MALIK, *supra* note 19.

⁵⁴ *Id.*

compete with other females when they have masculine features, and critics claim that it is not reasonable to allow any person who has lived through male puberty but transitioned into a female to compete as a woman after taking suppressing hormone drugs for a year.⁵⁵ On the other hand, an absolute ban on transgender women in women sports is inequitable too.⁵⁶ The regulatory bodies need to be conscious of the value they are trying to promote. There is an established dilemma on whether *Trans*' athletes' decision to identify as a woman is the only factor to consider or other biological aspects are significant too in the scheme of affairs. Every single individual has different traits and characteristics, if German women are identified as stout, Indonesians have an average height of 5 feet. The purpose of sports should be inclusionary.

The primary focus of this paper is to highlight that the practices of sending notices to female athletes, forcing them to undergo ultrasounds, ambushing them into a medical room and inquiring about personal body parts, and taking measurements and conducting an examination of their private parts are humiliating. More so is leaking this information to the press, and openly debating whether a female is less of a female and more of a male, which lacks sensitization and sensitivity. It infringes an athlete's right to privacy because sports organizations often fail to keep this information confidential. It also defames the female athletes and breaches their right to peacefully participate in sports after being affixed with a certain reputation, post fighting numerous stereotypes and sexist perceptions.

Taking more responsibility and informing women about the various tests and rights could serve as a saving grace. This does not make the practice right but having no respect for the athlete will create further problems. Since there are so many studies hinting at varied factors assisting athletes to perform better, all gender verification testing policies should be done away with till a conclusive study is not set as a precedent. These tests should also act as deterrents for the right reasons and to make sure that if a woman tries to compete with unfair advantages, she will have to face a penalty of a harsh nature that may even go up to a life ban. The same should apply to males who attempt to compete with women too. Until the result is not final, every

⁵⁵ Joanna Harper, *Sports Transgender debate needs compromise not conflict*, THE GUARDIAN (April 1, 2019), <https://www.theguardian.com/sport/blog/2019/apr/01/sports-transgender-debate-compromise-not-conflict>.

⁵⁶ *Id.*

athlete's privacy must be maintained and not speculated over news channels and papers because it can cause irreparable damage to an athlete's already short career.