



The right to dignity and prevention of discrimination of women/girl participation in athletics: The Caster Samanya Dilemma

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Abstract

Historically, the participation in sports had being restricted to spectatorship until recently when their participation has become a norm especially at the last Olympics of 2016 where women participation amounted to about 5000. However, there are still some modern day pockets of these discriminatory activities which come in form of mandatory sex verification, testosterone suppression and these processes breach the right to consent to medical practice and experimentation which consequently culminates in the breach of Caster Semanya's right to dignity and freedom from discrimination.

Keywords: participation, spectatorship, historically, freedom

Introduction

Sporting activities all over the world has become a financially lucrative activity despite being in the informal sector of most economies. The lucrative nature of these sporting activities have consequentially lead to spurious inflow of youths with obvious talent into a niche sport to exchange their talent which is of entertainment value for monetary consideration for such participation with a whole value chain of persons and institution benefiting from such participation in respective sports and ultimately affecting the local and global economy.

Sporting participation can be distilled into several categories depending on the context preferred but majorly the sporting world recognises categories such as professional, interscholastic, intercollegiate, youth and grass roots participation^[1]. Nevertheless, there are other categorisations in sports in the recognition of particular peculiarities of certain demography of the world's population to ensure a fair and equitable participation in every sport and to prevent in theory an overwhelming participation of a certain demography of people over the other with respect to that sport to entrench the spirit of belonging in the entire society. Furthermore, these categorisations pay attention to issues of gender, disability, age, region in the world and more importantly competence proven through some form of qualifying competition. In general, evidence suggests that as age increases participation in sporting activity decreases. Participation in sports should be viewed from the lens of age, sex and geographical location to ensure local and international evidence-based, well targeted program and sports policy development. Sport participation patterns are usually analysed through age and gender. There are scholars who argue based on evidence that sport participation is a young persons' activity with observations that participation peak at ages 12–13 years. However, other scholars suggest that in Belgium boys between the ages of 13–18 years, there

was a linear increase in sport participation until age 16.8 years, before participation deteriorated^[2].

However, the emphasis of this work is on the participation in sports based on sex most especially the women gender. However, it is noteworthy to realise that women clamoured for equality in sport and were not allowed historically to view the Olympic games and after eventually securing participation in sports, women had to undergo sex verification to prevent them from cheating the system^[3] in the first summer Olympic games, only male athletes participated because the founder of the event Pierre de Coubertin only pictured a male only featured Olympic games and these games were perceived as a platform for men to exhibit their masculinity and inherent strength and endurance and the women at those games were restricted to being spectators. Some scholars believe that this was because organisers at the time operated under the presumption that women were not physically fit enough to engage in strenuous activities^[4].

Fortunately, this ideology changed at 1900 Olympic games where a total of 22 women participated in the golf and tennis competitions and gradually the gender gap in sports began to diminish. The International Swimming federation was the first International Organisation to elect to include women in its competition which acted as the paradigm shift to change all other organisations to change their perceptions and to include women in their respective games. After the Second World War the participation of women in sports rose astronomically and by 1968 the participation of women at the Olympics had risen to about a 1000 and in 2016 it is

²Rochelle M. Eime *et al.*, "Age Profile of Sports Participants" *BMC Sports Science, medicine & Rehabilitation*
<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4788892/> last accessed on 4/6/2019

³ Travis Scaedler, "Audrey Wagstaff, "Exposure to Women Sports: Changing Attitudes towards Female Athletes" *The Sports Journal*
<http://thesportjournal.org/article/exposure-to-womens-sports-changing-attitudes-toward-female-athletes/>

⁴ Vasileios Stavropoulos "The Evolution of Women Participation in Sports Events" *Statathlon* <https://statathlon.com/the-evolution-of-women-participation-sports-events/> published 2/9/2018 last accessed on 4/6/2019

¹ Joey Gawrysiak, Linda. E. Swayne, Mark Dodds "Categorizing Sports" *Encyclopedia of Sports Management*
<http://sk.sagepub.com/reference/sportsmanagementmarketing/n91.xml> last accessed on 4/6/2019

recorded that the women population who participated at the Olympic Games had risen to 5000^[5].

The non-inclusion of women in the Olympics also replicated itself in athletics which consequently led to Alice Milliat agitations for women participation in Athletics but this agitations became more forceful due to interventions by several women in their respective jurisdictions for example in 1913 a women athletic federation was registered in Australia and in 1918 Austria started its women athletics championships and also sent a female contingency for the 1919 games in Budapest.

In the same year there was the Armed forces athletics championships in Britain. Alice Milliat decided to act based on these pockets of improvements in several jurisdictions to implore the International Olympic Committee to add the women events into the Olympics game programme which was rejected. However in 1921, In order to further to push this agenda she organised a multi-national athletics event with 5 countries participating and on the following day of the Competition the Federation Sportive Feminine Internationale with Alice Milliat as its head to govern women athletics till 1936 and named their games the Olympic games to the dissatisfaction of the IOC who complained that the name Olympics be dropped in exchange for 5 game participation for women to the disappointment of the FSFI Unfortunately at the games, there was the presumption that 800- 1000metres was too far for women to undertake which is quite ironical^[6].

In the 1930's especially in the United States especially in the United States there were women participation in sports to at least 70% mostly especially basketball and after the 1940's due to the war many women occupied several workplace positions left by men when they joined the army and the positions occupied by women ignited the esteem of women to the extent that it permeated all sectors including sports and by 1943 there was the first women athletics team coupled with the agitation for women participation led to the enactments such as the Title ix of Education Amendment act of 1972 which was to ensure equality in all sectors of college of education and even intercollegiate sports and ensure that women participate equally with men in all aspects of education and sports especially athletics^[7].

Sex verification in sports

Discrimination of women in sports participation, wages, etc still occurs on a large scale but this paper focuses on the legal ramifications to issues surrounding sex verification or suppression medical processes on women, the possible discriminatory issues that may result from such verification. Sex verification in sports was introduced to curtail persons with high testosterone levels, huge masculine features such as huge muscles etc and this has led to the disqualification of some women because of such characteristics. The sex chromatin test was first used which identifies the sex chromosome but was later discredited for being misleading and later settled for the polymerase chain reaction to increase the DNA sequences on the Y chromosome to identify sex but this was later abolished by the International Association of Athletics Federation who decided to suspend

verification testing in 1992 because of its breach of rights to privacy and because it offends the right to the dignity of human persons and other corresponding rights but with a right to test any athlete it reasonably suspects to have the ability or capacity of a male but participating in female event^[8] In fact the case of Santhi Soundarajan of India was stripped of a silver medal after failing a sex verification test at the 2006 Asian games^[9].

Caster Semanya

Caster Semanya was investigated in 2009 after beating her own record in the 800 metres by seconds and was subjected to gender testing because of her hyperandrogenic condition i.e female athletes with high testosterone levels and by IAAF regulations athletes with such high testosterone levels are expected to lower their natural testosterone levels on purpose or be banned from participating in the event^[10]. Caster Semanya initially approached the Court of Arbitration for sports to set aside the regulation by the IAAF mandating athletes with her condition to reduce their testosterone on purpose to participate in 400 metres to a mile. The CAS ruled that the rule was *discriminatory* to athletes with differences in sexual development such as Caster but two of the members of the panel accepted the viability and importance of the regulation and accepted their argument because such conditions give undue advantage in size, strength and power and that the policy was necessary for reasonableness and proportionality in the sport she believes the policy is targeted at her^[11].

Legal Analysis

The Court of Arbitration for sports has jurisdiction over disputes in the sports world either through agreement or the total surrender of disputes by a particular sports body to the Court ratified by almost 125 countries^[12]. This therefore means that the jurisdiction of the Court is based on acceptance so a rather extreme measure to avoid the ruling of that Court is for South Africa to withdraw its signature to being bound by the decision of the Court.

Furthermore, it is quite important to establish that gender testing tests have been carried out on Semanya but those results have never been released and the IAAF is not interested in tagging Semanya^[13] as a man which in itself is a breach of fair hearing in the sense that fair hearing does not mean just hearing the other side but considering all evidence material to do justice in a case.

⁸ E.A.E Ferris, "Gender Verification testing in Sports" published in 1992 <https://doi.org/10.1093/oxfordjournals.bmb.a072571> last accessed on the 17/6/2019

⁹ Jere Longman, "South African Runner's Sex Verification Result won't be Public"

<https://www.nytimes.com/2009/11/20/sports/20runner.html> November 9, 2019 last accessed on the 17/6/2019

¹⁰ Martin Lipton, "Who is Caster Semanya. What is Hyperandrogenism can she race and who is her wife"

<https://www.thesun.co.uk/sport/2568578/caster-semenya-gender-row-hyperandrogenism-iaaf-testosterone-wife-race/> updated may 2019 last accessed on 17/6/2019

¹¹ Sean Ingle "Semanya loses landmark legal Case on testosterone levels" <https://www.theguardian.com/sport/2019/may/01/caster-semenya-loses-landmark-legal-case-iaaf-athletics>

¹² Court of Arbitration For Sports, "frequently asked questions" <https://www.tas-cas.org/en/general-information/frequently-asked-questions.html> last accessed on 18/6/2019

¹³ Sport "Caster Semanya Unquestionably a woman" <https://www.bbc.com/sport/athletics/47244017> updated 14 february 2019 last accessed on 18/6/2019

⁵ Ibid

⁶ Ibid

⁷ Richard C. Bell, "A History Of Women In Sport Prior to the Title IX" Sports Journal <http://thesportjournal.org/article/a-history-of-women-in-sport-prior-to-title-ix/> last accessed on the 17/6/2019

Furthermore it is also important to note that even the CAS admitted that its ruling was discriminatory and in the author's opinion breaches international law provisions which state that Party States shall ensure that all individuals within its territory would have their rights recognised without any distinction between sex, colour, race, language, birth or other status ^[14]

The convention further provides that no individual shall be subjected to cruel, inhuman treatment or punishment. In particular no one shall be subjected without his or her free consent to medical or scientific experimentation ^[15]. Caster Semanya is protected under this international law and being forced to take testosterone suppressants amounts to forcing her to undergo a medical experiment to see whether it will affect her overall performance on the tracks.

Furthermore, the United Nations declaration on human rights also mandates that all state parties or organisations must ensure persons are entitled to fair hearing in disputes between persons in order to attain justice through an independent and impartial tribunal ^[16]. It is however obvious that the tribunal were not objective in reaching their decisions because they admitted that the regulation of the IAAF was discriminatory but still ruled in the favour of the IAAF so Caster did not get justice because of a partial jury. Also, the issue of sex verification or the provision of testosterone levels in Caster is a violation of her right to privacy. The author concedes to the fact that the IAAF ought to be able to conduct tests to verify drugs or supplement intake on athletes calculated to boost performance which is not a breach of privacy because that will amount to cheating or an unfair advantage but it becomes a breach of privacy when what gives the athlete the advantage is entirely natural and not induced by the athlete himself.

The request of gender verification offends the right to privacy and even the request for the testosterone levels of a person is a clear breach of privacy and not an information for public consumption which is also capable of damaging the reputation of the person involved as envisaged by the United Nations declaration on human rights ^[17].

The author concedes that the hyperandrogenic condition of Caster Semanya gives her a physical, enduring, masculine advantage over the other women participating in the event as indicated by the CAS but the argument is the advantage is not unfair but fair since her physicality or gift was not artificially induced by her but it is entirely natural.

In fact she did not choose her condition but rather her condition chose her. The Caster Semanya incident can be likened to a class in a school where all students are supposed to operate on the same pedestal in attainment of education but the truth is some students have a higher Intelligent quotient than the others which gives them a fair advantage and not an unfair advantage over the others in the class because their IQ is not artificially induced but entirely natural. It is then surprising that the natural endowments that give persons competitive advantage that is usually celebrated in education is frowned against in athletics or sports in general.

Right to Freedom of Informed Consent to Medical Practise and Experimentation

The freedom to consent to a particular medical practice is recognised by both international law and several local jurisdictions. In fact the international covenant on Civil and Political rights recognises the rights to informed consent to any medical practise ^[18] and this provisions are further entrenched in local laws or case laws of several countries for instance in the United states the Courts have held that the doctrine of informed consent is based on the right of every person to determine what he or she will do with his/her body ^[19] and an extension of such right is the right of each person to freely consent to medical procedures to be done on their bodies since the body is their's.

More so, it is important to note that apart from the right of a person to determine what happens to his or her body, persons are also entitled by right to adequate information about a particular medical procedure before it is done on them in order for such persons to make an informed decision expected from a reasonable to determine whether the medical procedure is to continue in line with the right of each individual to their bodies which means that Caster Semanya ought to be properly informed based on research as to the possible side effects of a drug that is targeted at reducing the testosterone levels in her body because the absence of that is a violation of her right to informed consent to medical practise ^[20].

Nevertheless, persons shall not be forced to undergo medical practise because it will be an infringement on their right to freely consent to medical practise and more importantly in the case of Semanya, the testosterone reduction pills may subdue her masculine qualities but the emphasis seems to be on the reduction of her testosterone levels but not on other side effects of such drugs on her health which may infringe on her right to informed consent to a medical procedure.

A recent study on hormone suppression and in particular the androgen suppression or blocking suggests that testosterone or androgen is higher in men but it is smaller in women who possess oestrogen. Anti-androgen drugs works by suppressing the work of testosterone at ait optimal levels and they are usually taken by patients during surgical procedures but some women possess high androgen levels such as Caster Semanya which may be caused by adrenal hyperplasia, ovarian tumors, adrenal gland tumors ^[21].

Despite the good effects of anti-androgen blockings in the prevention of prostate cancer the intake also contains the following side effects;

- a. Low sex drive
- b. Increased risk of depression
- c. Elevated liver enzymes
- d. Reduced facial and body hair
- e. birth defects if taken during pregnancy
- f. hepatitis
- g. Liver injury
- h. Liver injury

¹⁸ Ibid 15

¹⁹ Johnson v Whitehurst 652 S.W.2D441,444 1982

²⁰ Russel G. Thorton, "Informed Consent" Baylor University Medical Centre Proceedings 2000

file:///C:/Users/Gbenga%20Atere/Desktop/Downloads/Informed%20conse nt.html last accessed 14/7/2019

²¹ Corinne O'Keefe Osborn "Your Guide to Anti-Androgens"

<https://www.healthline.com/health/anti-androgen#uses> updated February 5 2018 last accessed 14/7/2019

¹⁴ Article 2 International Covenant on Civil and Political rights 1966

¹⁵ Article 7 international Covenant on Civil and Political rights 1996

¹⁶ Article 10 the United Nations Declaration on human rights 1948

¹⁷ Article 12 the United Nations Declaration on human rights 1948

- i. Erectile dysfunction
- j. Diarrhoea
- k. Skin rash ^[22]

The foregoing are possible complications that may result from complications from testosterone suppressants or blocking and this is a procedure that Caster is supposed to undergo for participation in athletics which would mean that she would be in her rights to decline such medical procedure on the basis of the above side effects and for the Athletics federation to insist would breach her right to informed medical consent.

Freedom from medical or scientific experimentation

The freedom from medical or scientific experimentation is an international right resident in the International Covenant of Economic social and Cultural rights which provides that no one shall be subjected to medical or scientific experimentation without their consent which is equally predicated on the Universal Declaration of Human Rights ^[23] which proclaims that all humans are born free with equal dignity endowed with reason and conscience.

The right to consent to medical experimentation was necessary because of the treatment of persons at the concentration camps during the Second World War and in order to forestall such behaviours in the future ^[24]. Also, the Committee on the Elimination of the discrimination against Women emphasizes the need for women to have the right to an informed treatment by properly trained personnel with alternatives for treatment or research including the merits and demerits of medical procedures ^[25]

Also, the Oviedo convention which is the convention for the protection for the protection of human rights and dignity of human beings pertaining to biological and medical applications with emphasis on free and informed consent to such biomedical activities by individuals ^[26]

The African Union also recognises the need for informed consent to medical processes which was evident in the African Union resolution on Bioethics to aggressively enlighten the continent about the need for State parties to ensure the obligation of free and informed consent to biomedical process ^[27].

The Union in its wisdom in order to protect women on the continent also developed the Maputo protocol which recognises the right to dignity of every woman and the prohibition of all medical or scientific experiments on without their informed consent ^[28].

The foregoing already suggests that the right to dignity is all encompassing and the right to informed consent to a medical procedure is one of the legs on which such right to dignity stands. It is therefore safe to submit that Caster

Semanya should not be compelled to accede to testosterone suppression pills against her informed consent because it will be tantamount to a breach of her right to dignity.

The argument of the Athletics for a compulsory use of the suppression drugs is to prevent cheating of other contestants which is just like the ideology of compulsory doping test for all athletes because the use of performance enhancing drugs provides an artificial competitive advantage over the other participants and more recently the challenge of these mandatory tests on the basis of its invasion of the privacy has been jettisoned by the Courts in a bid to uphold the mandatory testing ^[29].

However, the “performance”, “enhancing”, and “drugs” suggest that the physical ingestion of the drug will produce a temporary and artificial boost or performance over and above other participants producing an unfair advantage over others but in the case of Caster Semanya, her physical abilities are natural and not artificially induced so her advantage is a fair advantage and not an unfair advantage requiring suppression pills and the mandatory application of the suppression pills on her is a violation of her rights to consent to a medical procedure.

More so, this paper further highlights the consistent discriminatory process in the use of suppression pills on females in sports because it is quite obvious that suppression pills are used on females that have excessive testosterone in their bodies that gives them fair physical advantage but is not applied to men who have an excessively amount of testosterone compared to other men which also gives them a fair advantage which is never debated as being unfair.

In fact, empirical data suggests that normal testosterone levels in men can range from 270-1070 ng/dl with an average of 679 ng/dl which gives room for some men to have or produce more testosterone levels than other men which then culminates in better physical performance than other men in their field or category ^[30].

Conclusion

The Caster Semanya testosterone pills dilemma has produced a nexus between the right to freedom to consent to medical process and experimentation which is a leg of the right to dignity and the right to freedom of discrimination on the basis of sex which are all rights recognised by international law and should be enforced to protect women in athletics and sports in general.

Recommendation

I submit that since in strictly men sports where it is permissible for men with more testosterone to use it to their advantage with respect to other male participants then it is only fair and just that the same should apply to women sports and anything otherwise is highly discriminatory.

I am also of the view that the decision of the IAAF on the suppression pills should be challenged at the International Court of Justice since the subject matter touches on rights recognised under international law and which cannot be addressed by local Courts.

²² ibid

²³ UDHR 1948

²⁴ Andres Constantinn “Human Subject Research: International and Regional Human Rights Standards” <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6293356/> updated 20/2/18 last accessed on the 14/7/19

²⁵ General Recommendation No. 24, Women and Health UN Doc. No. CEDAW/C/1999/I/WG.II/WP.2/Rev.11999 para. 20.

²⁶ Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (Oviedo Convention), European Treaty Series No. 1641997 art. 27

²⁷ Organization of African Unity, Resolution of Bioethics, AHG/Res.254 (XXXII), para 2, 3.e.

²⁸ Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa (Maputo Protocol) 2003 art. 3.1, 4.2.h.

²⁹ US legal “Drugs and Testing” updated 18/7/19

<https://sportslaw.uslegal.com/drugs-and-testing/> last accessed on 19/7/2019

³⁰ Charles Patrick Davies “High and Low Testosterone Levels in Men” updated 29/3/19

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