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# Beyond Fairness: Gender Testing as Institutional Discrimination in International Sports Law

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## ABSTRACT

*Looking at gender rights in sports, it's essential to dig into the current legal rules and social conditions that shape how athletes participate and are categorized in competitions. A key issue is the regulatory challenges that impact gender rights protection, especially as sports organizations wrestle with the evolving understanding of gender identities and biological traits. How gender is regulated in sports has been a source of disagreement, sparking debates about fairness, inclusion, and possible discrimination. Researchers have pointed out that gender bias continues to exist within the bodies that make these rules, which results in inequalities for female athletes and those who don't fit into traditional gender categories.*

*Also, how sex verification standards are used brings up ethical questions about privacy and personal autonomy. Athletes might have to undergo invasive medical tests based on their perceived gender identity. Such things spotlight a notable regulatory conundrum, where the aspiration to ensure fair play conflicts with individual's rights to self-identify and participate in sports on an equal footing.*

*From this whole complex issue, it's clear that while there's been progress toward greater inclusion, the regulations protecting athletes' gender rights still have some major gaps. To sum up, the continuing issues with athletes' gender rights in sports, especially when seen through the regulations, shows that we need to re-think the standards and practices that are in use today in competitive settings. As we dive into this subject, we hope to help close the visible gaps in how athletes' gender rights are protected and hopefully shed some light on the regulatory mystery that has stalled progress in this important area for so long.*

**Keywords:** *Gender Testing, Human Rights, Athletes' Gender Rights, Gender Identity in sports.*

## I. INTRODUCTION

The issue of gender rights in sports is certainly complex. It mirrors larger societal debates while trying to ensure fair competition. Even as sports organizations work towards being more

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inclusive, some real problems remain in how they protect athletes' gender rights. These problems show up most clearly in rules about who can participate and in how those rules are enforced; sometimes, they just don't seem to get the nuances of gender identity and expression. Borges, for example, points out that old prejudices against women in sports are still around, creating stereotypes and leading to discrimination against transgender and non-binary athletes because gender is seen as just male or female<sup>3</sup>. Take the testosterone rules from the International Association of Athletics Federations (IAAF) and the International Olympic Committee (IOC). They're supposed to be fair but can end up being discriminatory, pushing aside the athletes they're meant to protect and suggesting that gender can be measured with biology.

It's pretty clear there's a gap between what international human rights say and how sports organizations interpret those rights. Because there isn't a consistent global approach to gender rights in sports, gender verification policies get applied inconsistently, which raises ethical questions about how female athletes are treated, especially with invasive testing. A lot of research suggests female athletes feel left out and pressured to fit into traditional gender roles, which keeps bias alive in sports<sup>4</sup>. Plus, it's hard to be inclusive when the framework doesn't really consider different ways people express their gender argue that athletes should be able to define their own gender. This means we probably need to rethink our rules and embrace the idea that gender isn't so rigid.

These regulatory problems don't just affect individual athletes. They also impact sports culture and how society views gender. Young athletes, especially girls and those from underrepresented groups, can really be affected. If sports are seen as mostly for one gender, biases can make it harder for them to get educational and developmental opportunities. Also, the media and institutions often perpetuate stereotypes that womens sports aren't as exciting as mens So, while there's been some progress, like more women in elite sports, systemic barriers continue to hold back true fairness and inclusivity.

It's vital that we take a good look at the regulations we have. Studies show that we need changes that line up with international human rights and also consider the different realities of athletes and their gender identities<sup>5</sup>. This involves rethinking if our current policies are working and looking at other options that support gender self-identification and respect

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<sup>3</sup> Yvette John Borges, Longstanding Gender Prejudice in Sports: Uncovering IOC (International Olympics Committee) Reforms That Maintain Gender Equality, 2 Indian J.L. & Legal Rsch. (2022).

<sup>4</sup> Claudia L. Reardon et al., Mental Health in Elite Athletes: International Olympic Committee Consensus Statement (2019), 53 Brit. J. Sports Med. 667 (2019).

<sup>5</sup> Carlos E. Mendoza-Ramírez et al., Augmented Reality: Survey, 13 Appl. Sci. 1 (2023)

individual rights. Ultimately, dealing with these regulatory gaps isn't just about following rules. It's about creating a sports culture that truly celebrates diversity and inclusion. So, the need to rethink and revise existing regulations to protect athletes' gender rights is clear. It highlights the challenges that need urgent attention from everyone involved in sports.<sup>6</sup>

The ongoing evolution of sports brings the complexities of gender rights for athletes to the forefront, highlighting significant regulatory challenges that require attention. Historical perspectives have fueled gender stereotypes and discrimination within sports, leading to disparities in how male and female athletes are treated and represented. Governing bodies, such as the International Olympic Committee (IOC) and the International Association of Athletics Federations (IAAF), have focused on physical metrics, like testosterone levels, in their regulations, instead of fostering inclusivity and equity for all athletes. Such gender verification policies can inadvertently marginalize female athletes, and those with diverse gender identities, perpetuating exclusion and undermining sportsmanship and equality. For instance, the IOC's approach to gender testing has been criticized for its invasive and discriminatory nature, often relying on outdated ideas of gender binaries and disregarding the fluidity of gender identity.

Moreover, Borgess' exploration of female participation in the Olympics reveals additional barriers, such as societal misconceptions about women's physical capabilities and the value of their sports. While female representation on the Olympic stage has increased, exemplified by nearly 49% female athlete participation in the Tokyo 2020 Games, issues such as wage disparities, lack of media coverage, and underrepresentation in coaching/administrative roles persist. Therefore, regulatory reforms must extend beyond numbers to encompass a broader commitment to gender rights.

Despite inclusivity initiatives, regulatory inconsistencies still fail to fully uphold all athletes' rights. Regulations can oscillate between promoting inclusion and reinforcing discriminatory practices<sup>7</sup>. Analyzing these regulations uncovers a broader socio-political struggle, where policies often reflect social attitudes about gender rather than prioritizing athlete welfare. Sailors, Teetzel, and Weaving, for example, advocate for a paradigm shift emphasizing self-identification in sports, reflecting individual athlete experiences over rigid biological classifications. This tension highlights a crucial point within current regulations: prioritizing

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<sup>6</sup> Pam R. Sailors, Sarah J. Teetzel & Charlene Weaving, *The Complexities of Sport, Gender, and Drug Testing*, 12 *Am. J. Bioethics* 1 (2012).

<sup>7</sup> Owen Hargie, David Mitchell & Ian Somerville, "People Have a Knack of Making You Feel Excluded If They Catch on to Your Difference": Transgender Experiences of Exclusion in Sport, 50 *Int'l Rev. Soc. Sport* 152 (2015).

individual rights and identities versus historical norms that favor a simplified understanding of gender.

Addressing these regulatory gaps requires a holistic approach that includes policy changes and educational frameworks for stakeholders—coaches, administrators, and athletes—within sports communities. Training and operational guidelines should integrate awareness of gender diversity and the implications of gender-based discrimination. These proactive measures can help dismantle biases that have plagued sports. By fostering inclusivity, sports can move toward a framework that respects and upholds the rights of all athletes, regardless of gender identity or expression<sup>8</sup>

In conclusion, the evolution of gender rights in sports must address systemic biases, regulatory shortcomings, and societal perceptions, which have historically shaped athletes' experiences. This research paper examines the intricacies of these regulatory challenges. Addressing gender gaps is not just a bureaucratic task but an ethical imperative that warrants urgent attention. Only by addressing these opportunities for reform can we cultivate a sports culture that champions the rights and identities of all athletes, and truly paves the way for a more equitable future in the world of sports.

## **II. HISTORY OF GENDER TESTING IN SPORTS**

The journey of gender testing in sports showcases substantial changes influenced by evolving societal views and regulatory structures. It really began around the mid-20th century because people were starting to ask questions about fairness in athletics, particularly for women. Back in 1966, the International Olympic Committee (IOC) started doing gender verification tests. Historically, women were thought to be weaker, and these tests aimed to keep things fair. However, these steps actually reinforced harmful stereotypes that questioned if female athletes were truly women and deserving to compete<sup>9</sup> Essentially, the old methods—mostly physical exams—focused too much on biology, pushing a simple, binary view of gender that missed the real variety in people's identities.

As we learned more about gender identity and the wide range of human biology, the problems with those early tests became clear. Relying on just looking at someone or checking their chromosomes didn't account for intersex people or those with different hormone levels, often leaving them out of sports While the introduction of hormone tests in the late 20th century

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<sup>8</sup> Jonathan Stray et al., Building Human Values into Recommender Systems: An Interdisciplinary Synthesis, ACM Transactions on Recommender Systems (forthcoming 2023).

<sup>9</sup> Nicole M. LaVoi & Hannah Silva-Breen, Longitudinal Analysis of Head Coach Occupational Turnover of Women's NCAA D-I Teams, 15 J. Intercollegiate Sport 1 (2022)

tried to fix these issues, it also brought up new ethical concerns about privacy. Athletes faced intrusive tests that measured testosterone but also increased stigma for anyone not fitting typical gender norms, which led to a lot of discrimination.

Around the early 2000s, governing bodies worldwide started rethinking gender verification. The 2009 case of Caster Semenya, the South African runner, really highlighted the ethics of these tests. After she won at the World Championships, she faced intense scrutiny. Her situation showed the need for rules that balance fair play with athletes' rights and dignity. Because of this criticism, the IOC created new guidelines in 2015. These guidelines recognized self-identification as important but still required female athletes to have testosterone levels below a certain point. Even with this progress, these rules still cause debate because they don't fully include all the different gender identities and experiences of athletes.

Looking back, gender testing shows not only changes in policies but also ongoing problems in protecting athletes' rights. Trying to create a fair playing field, many sports organizations—both nationally and internationally—have taken steps that often ignore how complex gender identity is. Sadly, this leads to discrimination against intersex and transgender athletes. Such oversights lead to significant concerns about fairness in sports and in the rules. Although fairness is desired, current methods often fail to protect athletes from the psychological and social harm of gender testing. The difficulty is the current understanding of gender diversity questions the quality of current rules, because athletes still have to deal with environments affected by bias and exclusion.

In the end, gender testing has been a tough regulatory challenge, where the goal of fairness has clashed with the actual experiences of athletes whose identities don't fit neatly into the man/woman box. As sports move toward being more inclusive, we must rethink the ways we handle gender in athletics. A shift toward appreciating variety and protecting athletes' autonomy, along with solid ethical guidelines, is vital. This will protect athletes' rights and ensure fair competition. So far, the journey shows that gender testing hasn't really solved fairness issues, but has instead made them worse, so reform is critical to safeguard the gender rights of athletes in sports<sup>10</sup>

### **III. THE REGULATION OF GENDER IN SPORTS AND HUMAN RIGHTS: INTERNATIONAL AND NATIONAL NORMS**

The subject of how sports govern gender reveals a complicated back-and-forth between

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<sup>10</sup> Ahmed Al Kuwaiti et al., A Review of the Role of Artificial Intelligence in Healthcare, 13 J. Pers. Med. 123 (2023)

accepted human rights and the ever-shifting rules of athletic organizations. Although global documents—like the Universal Declaration of Human Rights—promise equality, putting this into action in sports is spotty and contradictory. Take the International Olympic Committee (IOC): its work toward gender equality, such as its ongoing plans to get more female athletes involved, shows the difference between what they hope for and what's actually happening. Sure, the Tokyo 2020 Olympics were a big step, with almost half of the athletes being women. But the rules that decide who gets to play still treat genders differently. This is especially true for those who don't fit neatly into what people think gender should be<sup>11</sup>. National groups that make the rules try to follow international guidelines but are also influenced by local culture. This makes it hard to balance what the world expects and what feels right at home, which only makes things more complex. To illustrate, laws differ greatly: some countries are ahead of the curve, promoting gender inclusion, but others still use old-fashioned rules that box gender into two categories. This often leads to people being left out, not included.

Plus, how gender is checked in sports raises some serious ethical red flags. The increasing focus on female athletes' testosterone—something not always done the same way or based on solid science—might be a breach of human rights. Athletes are being put through tests that invade their privacy and take away from their dignity. These methods seem to target female athletes unfairly, especially those who are intersex or transgender. This highlights some biases in the sports world and society in general. The International Association of Athletics Federations (IAAF) put in place rules that many believe violate athletes' human rights, showing the need to move beyond just following international standards and embrace a consistent, rights-focused approach. These skewed rules don't just affect fairness in sports; they also affect society by reinforcing gender and athleticism stereotypes, which leads to further discrimination against women and other gender identities in sports.

However, alongside the global push for compliance and sameness, voices advocating for individual rights have started to change the conversation around excluding athletes. Lawyers and human rights groups are pushing for a change in how gender is understood in sports. They want policies that value self-identification over outdated medical tests. This is especially important now that society is starting to see gender as a spectrum, not just two options. Regulatory groups need to catch up. Consider Caster Semenya, an athlete who faced questions about her natural testosterone levels. Her situation highlights the need for rules that protect

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<sup>11</sup> Pam R. Sailors, Sarah J. Teetzel & Charlene Weaving, *The Complexities of Sport, Gender, and Drug Testing*, 12 *Am. J. Bioethics* 1 (2012).

dignity while keeping competition fair<sup>12</sup> Cases like hers show there's a real hole in the current rules, and we need to rethink how gender is defined and checked in sports.

What's more, when institutions stay quiet about these issues, it often keeps discrimination going. Organizations don't always address athletes' concerns about their gender rights and the policies that affect them<sup>13</sup> While the IOC and national groups might release statements about gender equity, the lack of real action to protect athletes' rights creates an illusion of progress without anything actually changing. Therefore, the link between international human rights and national regulations needs serious attention and changes to make sure that protections exist not just on paper but in real life. Closing these gaps means having open talks with everyone involved—athletes, governing bodies, and human rights advocates—to create an environment where gender rights in sports are truly respected. So, the regulatory puzzle of athletes' gender rights calls for a careful plan that includes different viewpoints and puts the dignity and agency of all athletes first, paving the way for a fairer and more inclusive sports world.

#### **IV. ROLE OF COURT OF ARBITRATION FOR SPORTS (CAS)**

Navigating gender rights in sports presents complex challenges, requiring institutions that can both resolve disputes and uphold athlete rights while ensuring fairness. The Court of Arbitration for Sport (CAS) has become a central player, tasked with addressing sporting disputes, including those related to gender identity and discrimination. CAS, established in 1984, is the primary forum for resolving sports-related legal issues and often must navigate the complex relationship between regulatory frameworks and individual rights. This role is especially important given recent controversies surrounding gender verification policies and their effects on female athletes, leading to questions about current regulations.

Several high-profile cases have highlighted the limitations of current gender regulations in sports, with CAS often asked to provide clarity and resolve disputes. For instance, Caster Semenya's case showed how hormone level regulations impact female athletes, sparking debates about fairness and equality<sup>14</sup>. The CAS ruling that upheld the IAAF's eligibility regulations for women athletes with hyperandrogenism demonstrates the legal challenges athletes face, but also the broader implications for gender rights. While legally grounded, the

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<sup>12</sup>Andy Nguyen et al., *Ethical Principles for Artificial Intelligence in Education*, 27 *Educ. & Info. Tech.* 789 (2022).

<sup>13</sup> Kimberley Anh Thomas et al., *Explaining Differential Vulnerability to Climate Change: A Social Science Review*, 9 *Wiley Interdisciplinary Revs. Climate Change* e555 (2018)

<sup>14</sup> Antonio Pelliccia et al., *2020 ESC Guidelines on Sports Cardiology and Exercise in Patients with Cardiovascular Disease*, 41 *Eur. Heart J.* 12 (2020).



ruling may not have fully accounted for the deeper societal implications of enforcing binary gender norms, revealing the limitations of CAS in addressing the ethical dimensions of gender identity.

The CAS decisions often reflect a need to balance sporting integrity with individual rights. Many argue that CAS standards often align more with traditional gender notions rather than a more inclusive understanding<sup>15</sup>. The legal reasoning used in significant rulings might not fully align with contemporary social perspectives on gender identity, possibly reinforcing existing biases. The role of CAS becomes scrutinized not only as a legal arbitrator but also as a player in shaping gender rights in sports.

However, the existence of CAS doesn't automatically guarantee equitable outcomes for all athletes. The reliance on scientific and regulatory standards can sometimes overlook the experiences of transgender and intersex athletes. This creates a tricky situation where protecting athletes' rights is overshadowed by enforcing conventional gender classifications, leading to persistent gaps in gender rights protection. Critics, including legal scholars and advocates, suggest CAS should adopt a more progressive stance that prioritizes athlete autonomy in self-identification and considers the legitimacy and relevance of regulations from bodies like the IAAF and IOC.

The main challenge for CAS is developing a framework that fosters inclusivity and fairness, rather than just enforcing existing norms. This requires a nuanced approach that considers both empirical evidence and the subjective experiences of athletes facing discrimination. CAS landmark rulings call for a reassessment of legal frameworks governing gender in sports, potentially shifting towards policies that affirm diverse gender identities<sup>16</sup>. Ultimately, CAS plays an important role in sports dispute resolution, but its effectiveness depends on adapting to the evolving understanding of gender rights, ensuring athletes are treated with the dignity and respect their identities warrant. As regulatory discussions continue, the path forward depends on judicial bodies, sports organizations, and advocates to create an equitable environment for all athletes.

## **V. CONCLUSION**

The complexities surrounding gender rights in sports reveal regulatory shortcomings, indicating a clear demand for widespread change. Studies show current systems often don't

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<sup>15</sup>Panagiotis Kourtesis, A Comprehensive Review of Multimodal XR Applications, Risks, and Ethical Challenges in the Metaverse, 8 *Multimodal Technol. & Interaction* 24 (2024).

<sup>16</sup>Pam R. Sailors, Sarah J. Teetzel & Charlene Weaving, The Complexities of Sport, Gender, and Drug Testing, 12 *Am. J. Bioethics* 1 (2012).

adequately protect female athletes, perpetuating inequalities rooted in history and social stereotypes. Yvette John Borges points out that these differences appear not only in participation and media attention but also in discriminatory practices like gender verification tests, which disproportionately affect female athletes, especially those who don't fit conventional gender roles. The International Olympic Committee (IOC) and other sports organizations have taken steps to recognize these issues, but much more needs doing. For example, the Tokyo 2020 Olympics saw a significant rise in female athlete participation, nearly 49%; yet, the continuing underrepresentation of women in coaching and management positions shows a wider problem in sports governance. Additionally, the critical examination of sex verification policies by Sailors, Teetzel, and Weaving suggests a growing agreement on the need for fairer, more ethical treatment of athletes.

The dependence on old-fashioned ideas of a gender binary obstructs progress. This can, in turn, leads to situations where athletes are subject to rules not in sync with current understandings of gender identity and rights. Gender testing, as the discussion indicates, not only violates athletes' rights to privacy and self-identification but also distracts from important issues such as equal access to resources and opportunities. It is important to note that addressing possible performance advantages related to testosterone levels is certainly needed, but it's also important to understand that things like access to good training facilities, excellent coaching, and a positive socio-economic background greatly affect how well an athlete performs and that these factors may overshadow biological factors. Focusing too much on hormone levels takes attention away from the most important discussions about how female athletes are treated and the systemic issues they face.

Furthermore, the relationship between gender rights and wider social structures often goes unexamined in regulatory frameworks, leaving considerable opportunities for advocacy and changes to those frameworks. Current research indicates there's a lack of thorough data on how gender bias affects participation in sports, calling for more research into how these things affect educational and professional choices for female athletes. Overcoming these obstacles is essential for creating an environment where athletes can excel without facing discrimination. The existing situation is made even more complicated by socio-political environments, where, in some areas, cultural norms continue to undermine women's rights in sports. This suggests that regulatory frameworks must be adaptable to different situations to protect the rights of every athlete, whatever their gender identity.

In conclusion, addressing the regulatory riddle surrounding athletes' gender rights will require a concerted effort by governing bodies, policy makers, and advocates. They must design

frameworks that are more inclusive and equitable. By assessing and changing existing policies, stakeholders can start to remove the obstacles created by old biases and societal stereotypes. These changes should put athletes' voices first, making sure they're central to discussions that affect their rights and experiences in the sports world. The future requires vigilance and a commitment to fairness. This commitment is vital to acknowledging that the struggle for gender rights in sports is not just a single issue but a representation of bigger social struggles for equality and justice. It is only through such transformative actions that the sports community can hope to achieve true gender equality, providing a solid foundation for future athletes to compete, do well, and be recognized as equals.

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