

The Participation of Gender-Diverse Athletes in Sports: An International Human Rights Perspective*

1.0 Abstract

In sports, the categorization and separation of male and female is not just accepted, but mandatory. This is to give room for fairness and balance and to recognize that the male and female genders are not endowed with the same strength and capabilities. In some countries where lesbians, gays, bisexuals, transgender and queers (LGBTQ) are legalized, the problems and issues arising therefrom are more complex. It is not as simple as male and female, because the categorization of sexes has been expanded to accommodate the LGBTQs. In such cases do sports organizers balance gender fluidities. This and other related questions are the issues this article sets out to present answers and possible solutions. In Nigeria, the LGBTQ is completely banned. The researchers adopted the doctrinal method of research with the narrative and descriptive approach. The researchers' source of data was from primary sources like laws and judicial decisions of courts, and secondary sources of data like books, journal articles, internet materials and from the opinion of learned writers. This research found that there is a need for a firmer and more balanced human rights approach to sports to balance the new category of genders known as LGBTQ. The researchers also found out that the world sports governing bodies have accepted LGBTQ. The researchers recommended among other things that since the world sports governing bodies had accepted LGBTQ, they should take more proactive steps to balance the sporting activities between the enlarged categories of sexes including the LGBTQ. By this approach, they would have respected their rights to equal sports activities with their peers consistent with international, regional and domestic laws on human rights.

2.0 Introduction

Sports are one of the human endeavours where traditional gender binary is permissible. This separation is necessary to protect the essence of sport, achieve fair play and balance in competition, and celebrate outstanding performances.¹The participation of athletes in sports over the years has traditionally been in the binary categories of men and women. Recently, however, sports have witnessed the emergence, recognition, and acceptance of other gender identities other than men and women.

The broadening of the categories of gender in sport has created a conundrum for sport governing bodies with regards to protecting the essence of sports whilst sustaining inclusion within the ambits of sporting rules. There is no one way to consider this issue as it is at the intersection between sports law, human rights law, science, and even biology.²

Gender-diverse athletes for this work refer to transgender and intersex athletes. Transgenders refer to individuals who experience a mismatch in their gender identity. Some transgender persons may also undergo sex re-assignment surgery to achieve congruence with their gender identity. Intersex on the other hand refers to people who have physical or chromosomal characteristics that blur the line between male and female. They are more commonly referred to as people with differences in Sex Development (DSD).³

Bodily integrity is the right against uninvited contact with or interference with your body.⁴Legally speaking, it is 'the right to be free from physical interference'.⁵ Bodily integrity presupposes 'the right to have one's own body whole and intact and...to take decisions about one's own body'.⁶Jurisprudentially, the concept of bodily integrity is the right to control what happens to your body.

*Glory Uloma Ejike LLB (Nnamdi Azikiwe University); BL (Nigerian Law School); LLM Sports Law (Nottingham Trent University); Doctoral Candidate, Nottingham Trent University.

**Prof. M.N. Umenweke, Professor of Law, Nnamdi Azikiwe University, Awka, Anambra State

¹Jamie Schultz, 'Sex Segregation in Elite Sport: What's the Problem?' in Gemma Witcomb and Elizabeth Peel (eds), *Gender Diversity and Sport: Interdisciplinary Perspectives* (Taylor and Francis Group 2022).

² Seema Patel, 'Gaps in the Protection of Athletes' Gender Rights in Sports – A Regulatory Riddle' (2021) 22 *International Sports Law Journal* 257-275.

³Joanna Harper, *Sporting Gender: The History, Science, and Stories of Transgender and Intersex Athletes*(Rowman & Littlefield 2020).

⁴Jonathan Herring and Jesse Wall, 'The Nature and Significance of the Right to Bodily Integrity' (2017) 76 *Cambridge Law Journal* 566.

⁵ David Feldman, *Civil Liberties and Human Rights in England and Wales*(2nd edn, Oxford University Press 2002).

⁶*Re A (Conjoined Twins)* [2001] Fam147, 258 per Walker LJ.

Dignity is a state of being worthy of honour or respect; it is a distinction of honour.⁷ Generally, respect from others, self-worth, and autonomy are considered components of dignity.⁸ Sport is based on moral principles, and the idea of dignity is essential to its conception. Athletes are required to represent their sport with decency, respect officials and one another, and adhere to all rules. Regulatory authorities on their part are expected to control sport in a manner that treats athletes as humans with dignity, not as objects or machines.⁹

As sports governing bodies try to regulate athlete participation in sports by revising sports rules regularly to meet current realities, the emergence and participation of gender-diverse athletes in sports has led to issues surrounding bodily integrity and dignity of athletes (and by implication, human rights) taking pole position.

This work considers the need for a firmer human rights-centered approach in sports for the protection of gender-diverse athletes. Human rights provisions relevant to sports are considered together with an x-ray of sports cases where human rights approaches have been applied, and cases where the adjudicatory body failed to. The work concludes with why a firmer enforcement of human rights provisions relevant to sports can help achieve balance and make participation in sports fairer for gender-diverse athletes.

3.0 Human Rights Provisions Relevant to Sports

Human rights are privileges that every person has by nature. These privileges are inalienable and essential to living a life of dignity.¹⁰ Since humans are the major participants in sports, there is a relationship between human rights and sports. The rules of many international, regional, and national legislation reflect this relationship.

3.1 International law

The Universal Declaration of Human Rights serves as the international legal framework for human rights. It outlines fundamental rights everyone must uphold. Article 1 declares that ‘all human beings are born free and equal in dignity and rights’. Article 7 further buttresses the equality of all persons in dignity and rights by adding that ‘all persons are equal before the law and are entitled without any discrimination to equal protection of the law’.¹¹

Article 10(g) of the Convention on the Elimination of all forms of Discrimination Against Women provides that ‘states parties shall take all appropriate measures to eliminate discrimination against women to ensure to them equal rights with men to the same opportunities to participate actively in sports and physical education’.¹² Guidelines for preventing, addressing, and resolving human rights violations perpetrated in the context of business are provided by the United Nations Guiding Principles on Business and Human Rights.¹³ Sport-regulating organizations are independent businesses, and as such, are required to abide by the rules.

The United Nations Educational, Scientific and Cultural Organization International Charter of Physical Education, Physical Activity and Sports are an international sport charter that promotes inclusion and participation in sports by all without any form of discrimination. Article 1 of the Charter states that ‘the practice of physical education,

⁷Bryan Garner (ed), *Black’s Law Dictionary* (8th edn, West Group 2004).

⁸Nicole T. Kirk, Justin A. Haegele and Cathy McKay, ‘Exploring Dignity Among Elite Athletes with Disabilities During A Sport-Focused Disability Awareness Program’ (2021)26(2) *Sport, Education and Society* <<https://www.tandfonline.com/doi/full/10.1080/13573322.2020.1713078>> accessed 1 April 2023.

⁹ Emmanuel Isidori and Mirca Benetton, ‘Sport as Education: Between Dignity and Human Rights’ (2015) 197 *Procedia – Social and Behavioural Sciences* 686-693 <<https://reader.elsevier.com/reader/sd/pii/S1877042815040549?token=62114AD0E6B38048C3B24706BA034098C2E2265A1C8955495F149218375C61F5D65EBE5D22648AF198A3489078A278CC&originRegion=eu-west-1&originCreation=20230415162400>> accessed 1 April 2023.

¹⁰Bruce Kidd and Peter Donnelly, ‘Human Rights in Sports’ (2000) 35(2) *International Review for the Sociology of Sport* 131-240.

¹¹United Nations Office of the High Commissioner, ‘Universal Declaration of Human Rights’ <<https://www.ohchr.org/en/universal-declaration-of-human-rights>> accessed 1 April 2023.

¹² United Nations Office of the High Commissioner, ‘Convention on the Elimination of all Forms of Discrimination Against Women’ <<https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women>> accessed 1 April 2023.

¹³Business and Human Rights Resource Center, ‘UN Guiding Principles’ <<https://www.business-humanrights.org/en/big-issues/un-guiding-principles-on-business-human-rights/>> accessed 1 April 2023.

physical activity, and sports is a fundamental right for all'. The Charter is used as a standard in the design, implementation and evaluation of sports programmes and policies.¹⁴

3.2 Regional Law

At the regional level, European Union community law recognizes and protects human rights through several legislation and treaties. The provisions of the European Convention on Human Rights (ECHR) offer extensive protection for human rights in the Council of Europe's 46 member nations. Article 3 of the Convention prohibits the subjection of any person to torture, inhuman and degrading treatment. Article 8 recognizes the right to private and family life and has been interpreted by the European Court of Human Rights to include the right to respect for bodily integrity.¹⁵ Article 14 of the Convention enshrines the protection against discrimination in the enjoyment of these rights. This protection is further extended by Article 1 of Protocol No. 12 to the Convention which prohibits discrimination more generally, in the enjoyment of any right laid down by law. It is noteworthy, however, that Article 14 is not a free-standing right. For Article 14 to be applicable, the facts of the case must fall within the wider ambit of one or more of the Convention Articles.¹⁶

Another regional law that contains human rights relevant to sport is the Charter of Fundamental Rights of the European Union. Article 1 provides that everyone should be treated with dignity. Article 3 recognizes the right to respect for the physical and mental integrity of every person. It included in this regard, the free and informed consent of every person in relation to carrying out medical and biological procedures.¹⁷ Article 21 prohibits the discrimination of any person on any ground, including sex.

Before the exit of the United Kingdom from the European Union, these regional laws applied within the UK, but following resolutions reached after Brexit and by virtue of the Brexit Freedoms Bill 2022, all EU legislation will now be amended, repealed, or replaced with national legislation.¹⁸

3.3 Domestic Law

Domestically, the UK has a wide range of legislation on human rights relevant to sport. Section 1 of the Human Rights Act incorporates the provisions of Articles 2-12 of the European Convention on Human Rights and Article 14, which guarantees the right of all persons within the UK to non-discrimination in the enjoyment of human rights.

The Equality Act is a piece of legislation that codifies anticipated norms of conduct in terms of advancing equality and accepting diversity. The Act accommodates variety in terms of gender identification and acknowledges current societal and cultural changes.¹⁹ Section 4 of the Act provides that it is unlawful to discriminate against a person based on certain protected characteristics including gender reassignment, sex, and sexual orientation. Sections 13 and 14 broadly define what constitute discrimination under the Act.

The Gender Recognition Act gives transsexuals legal acknowledgment for the gender they have chosen for themselves. Section 1 of the Act empowers transsexuals to modify their birth certificates and change their legal gender by obtaining a gender recognition certificate.²⁰ This affirms their present legal gender/sex and protects them from misgendering and sex discrimination.²¹

¹⁴ UNESCO, 'International Charter of Physical Education, Physical Activity and Sport' <<https://www.unesco.org/en/sport-and-anti-doping/international-charter-sport>> accessed 1 April 2023.

¹⁵ *X and Y v The Netherlands* App no 8978/80 (ECtHR, 26 March 1985).

¹⁶ European Court of Human Rights, 'Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention' (2022).

¹⁷ Citizens Information Board, 'Charter of Fundamental Rights' (*Government of Ireland*, 31 January 2023) <https://www.citizensinformation.ie/en/government_in_ireland/european_government/eu_law/charter_of_fundamental_rights.html#13aeb8> accessed 1 April 2023.

¹⁸ Home Office, 'UK Government to Set its Own Laws for its Own People as Brexit Freedoms Bill Introduced' (*Home Office*, 22 September 2022) <<https://www.gov.uk/government/news/uk-government-to-set-its-own-laws-for-its-own-people-as-brexit-freedoms-bill-introduced>> accessed 1 April 2023.

¹⁹ Simon Gardiner and Louisa Riches, 'Racism and Homophobia in English Football: The Equality Act, Positive Action and the Limits of Law' (2016) 16 *International Journal of Discrimination and the Law* 102-121.

²⁰ Gender Recognition Act 2004, s 1.

²¹ University and College Union, 'The Gender Recognition Act Reform: A Guide for UCU Members and Reps' (2022).

3.4 Sport-Governing Bodies

Principle 2 of the Olympic Charter lists the protection of human dignity through the advancement of sport as one of its core values. Participation in sport is recognized as a human right under Principle 4. According to the Olympic Charter, everyone must be able to participate in sport without facing any type of discrimination.²²

The UN Guiding Principles of Business and Human Rights form the foundation of the Federation of International Football Associations (FIFA) human rights policy. According to Article 2 of the policy document, FIFA upholds all internationally acknowledged human rights, with special attention to the rights of disadvantaged groups like women, children, and people with disabilities.²³

Since human rights apply to all people regardless of their sex or other circumstances, sports regulatory authorities must acknowledge and uphold human rights irrespective of the unique characteristics of gender-diverse athletes. The next section examines whether sports governing bodies have considered these laws in the protection of gender-diverse athletes.

3.5 The Nigerian Law

Chapter 4 of the 1999 Constitution of the Federal Republic of Nigeria provides for the Fundamental Human Rights of all persons, irrespective of their sexes. The Nigerian Constitution is silent on any category of sexes aside from male and female. The Interpretation Act states “words importing the masculine gender include females”.²⁴ The Nigerian Law does not recognize LGBTQ. The Nigerian National Assembly enacted the Same Sex Marriage (Prohibition) Act of 2013. This law banned any form of union between persons of the same sex. There are very stiff penalties for the contravention of this law. Aside from this, most of the Northern states of Nigeria have equally banned same-sex marriages and any form of LGBTQ activities.

4.0 Protection of Gender-Diverse Athletes: A Human Rights Perspective

Globally, sport is organized as a private enterprise and is largely self-regulating, with minimal government interference. However, it is the responsibility of sport governing bodies to safeguard athletes' human rights when enacting legislation to control sport.

Although, sex segregation is a type of discrimination that is incompatible with the principles of human rights, it may be justified if it is required to accomplish a legitimate aim provided it is reasonable, necessary, and proportionate. Sex segregation is accepted in sport because it is required to preserve sport's core values, ensure fair play and balance in competition, and celebrate outstanding performances.

The participation of gender-diverse athletes in sport has led to the revision and updating of several regulations by sport governing bodies. It has been contended that these new laws are exclusionary, discriminatory, and a violation of the human rights of these athletes.

This heading makes a critical analysis of the application of human rights provisions relevant to sport in cases involving gender-diverse athletes.

4.1 World Athletics as a Case Study

World Athletics (formerly the International Association of Athletics Federations) is the sport governing body that oversees all track, field, and athletics competitions. It makes rules for athletics and sets the eligibility criteria for athletes participating in different competitions, including the Olympics. One such rule is the Eligibility Regulations for the Female Classification (Athletes with Differentials in Sex Development (DSD)).

4.2 Intersex Athletes

In 2011, World Athletics adopted the first regulations limiting the participation of female athletes with high androgen levels. Known as the **Hyperandrogenism Regulations**, these rules set the testosterone limit for women with hyperandrogenism at 10 nmol/L (10 nanomoles per liter of blood). The Regulations were the subject of a

²² International Olympic Committee, ‘Olympic Charter’ (17 July 2020) <<https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/General/EN-Olympic-Charter.pdf>> accessed 1 April 2023.

²³ FIFA, ‘FIFA’s Human Rights Policy’ (2017).

²⁴ Session 14 Interpretation Act, Cap 123 Laws of Federation of Nigeria, 2004

legal challenge from 2014-2015, which went up to the Court of Arbitration for Sport. In early 2018, World Athletics withdrew the Hyperandrogenism Regulations and introduced the DSD Regulations a month later.²⁵

The DSD Regulations first came into effect in November 2018 and has undergone several updates. Its current version came into effect on 23 March 2023. The regulations apply to individuals who are legally female (or intersex) and who have one of a certain number of specified DSDs, which means that they have: male chromosomes (XY) not female chromosomes (XX); testes not ovaries; circulating testosterone in the male range (7.7 to 29.4 nmol/L) not the (much lower) female range (0.06 to 1.68 nmol/L); and the ability to make use of that testosterone circulating within their bodies (i.e., they are 'androgen-sensitive').²⁶

The first version of this regulation applied only to athletes competing at the international level in track races between 400m to one mile in distance. They were required to reduce the level of testosterone in their blood to below 5 nmol/L (because according to World Athletics, that is the highest level that a healthy woman with ovaries could have). The 2018 regulations did not apply to DSD Athletes competing below the international level and in races above the 400m to one-mile distance.²⁷

However, the updated 2023 version now requires any relevant athletes to reduce their testosterone levels below a limit of 2.5 nmol/L for a minimum of 24 months to compete internationally in the female category in any event, not just the 400m to one-mile races. For athletes who were already competing in unrestricted events, the Regulations now include a requirement to suppress their testosterone levels below 2.5nmol/L for a minimum of six months, before they are eligible to compete again.²⁸

To reduce their testosterone levels, the affected athletes have three options: to either take a daily oral contraceptive pill; take a monthly injection of a drug; or, have their testes surgically removed (a medical procedure called a gonadectomy).²⁹

4.3 Transgender Athletes

The International Olympic Committee enacted the first rule governing transgender athletes' participation in sport in 2004. The controversial Stockholm Consensus on Sex Reassignment in Sport mandated that transgender athletes who wanted to compete in sport after puberty had to undergo both internal and external anatomical surgery, obtain legal recognition of their new gender, and receive hormonal therapy for at least two years.³⁰

The policy was updated in 2015 to include that transgender male athletes could compete without any restrictions while transgender female athletes could compete only after declaring their gender identity as female for at least four years, maintaining testosterone levels below 10 nmol/L for at least a year before competition, and consenting to monitoring by testing.³¹

However, by the provisions of the World Athletics Eligibility Regulations for Transgender Athletes, effective from 31 March 2023, transgender women athletes who have been through male puberty are now completely excluded from the female world rankings competition.³²

It is instructive to note that these restrictions exist only for biologically female and transgender women athletes. There are no corresponding restrictions for transgender male athletes competing in male athletics events. Also, these regulations are based on the single medically controversial and scientifically unproven assumption that the hormone, testosterone, is a primary driver of performance in athletics and thus, gives an unfair competitive advantage to female athletes with naturally occurring elevated levels.

²⁵Zing K. Goh, Evelyn Watta, and Ed Knowles, 'DSD Athletes: What Does It Mean To Be DSD and How Gender and Sex are the Big Issues in Athletics' (*IOC*, 25 September 2019) <<https://olympics.com/en/news/semenyayoniyonsaba-wambui-what-is-dsd-iaaf-regulations>> accessed 20 April 2023.

²⁶World Athletics, 'IAAF Publishes Briefing Notes and Q&A on Female Eligibility Regulations' (*World Athletics*, 2019) <<https://worldathletics.org/news/press-release/questions-answers-iaaf-female-eligibility-reg>> accessed 20 April 2023.

²⁷World Athletics Eligibility Regulations for the Female Classification 2018 (Athletes with Differences of Sex Development), Art 3.

²⁸World Athletics Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development) (Version 3.0, 2023), Art 3.2.

²⁹World Athletics Eligibility Regulations for the Female Classification 2018 (n 26).

³⁰Stockholm Consensus on Sex Reassignment in Sport 2004, Art 2.

³¹IOC Consensus on Sex Reassignment and Hyperandrogenism 2015, Art 2.

³²World Athletics Eligibility Regulations for Transgender Athletes (Version 2.0, 2023), Art 3B.

4.4 Issues Arising as a result of the Regulations

These Regulations created a lot of concerns among DSD and transgender athletes as it affected their eligibility to compete. The regulations were legally challenged by affected athletes, notably Dutee Chand and Caster Semenya. In 2014, Indian female athlete, Dutee Chand, legally challenged the Hyperandrogenism Regulations before the Court of Arbitration for Sport (CAS) after she was banned from competing following hormonal testing which revealed a level of testosterone in her system higher than the stipulated threshold. Chand argued that the Regulations were discriminatory, based on unsupported scientific evidence, and disproportionate to the aim which they sought to achieve. World Athletics refuted these Arguments. CAS partially upheld Chand's claim by deciding that there was a scientific basis for using testosterone as a benchmark in the Regulation, but the evidence was insufficient to show that Chand or any other androgenic female athlete enjoyed any advantage. The Regulation was suspended and the ban on Chand's eligibility to compete was lifted.³³

South African athlete, Caster Semenya, and Athletics South Africa (ASA) challenged the validity of the IAAF's 2018 DSD Regulations in arbitration proceedings after she was banned from competing because of her high testosterone levels. Semenya and the ASA claimed that the Regulations were discriminatory, unnecessary, and disproportionate. World Athletics argued that the Regulation sought to create a division between men and women in athletics with a view to ensuring fair competition in the sport. It categorized female DSD athletes having 46 XY chromosomes as men and as such, the restriction made by the Regulation was justified. CAS held that the Regulations were reasonable and proportionate but raised concerns about its fairness in the long run.³⁴ Semenya appealed this decision, and the Swiss Federal Supreme Court temporarily lifted her ban, but this was overturned by a tribunal decision. Semenya then filed her matter before the European Court of Human Rights in 2021; while awaiting a decision, she remained ineligible to compete.³⁵ In 2023, the European Court of Human Rights ruled that Semenya's complaints of discrimination based on World Athletics' 2018 eligibility regulations for female athletes with differentials in sex development were substantiated and credible. The Court held that her rights against discrimination had been violated under Articles 13 and 14 of the European Convention on Human Rights.³⁶

4.5 A Human Rights Angle to the Chand and Semenya Cases

In its press release following the publication of the updated DSD Regulations in 2019, World Athletics said that as a private body exercising contractual powers, it is not subject to human rights instruments. It asserted that even though all humans possess human rights, these rights are not absolute, and the DSD Regulations were a 'necessary, reasonable, and proportionate means of achieving the legitimate objective of fair and meaningful competition in female athletics'.³⁷

Both Chand and Semenya testified that they had to undergo invasive physical and medical examination when the Regulations took effect. Semenya was quoted in an interview saying that she had been subjected to unwarranted scrutiny of her 'most intimate and private details'; this constituted an infringement of her human rights, particularly her rights to dignity and privacy.³⁸ Athletics officials in India also ordered Chand to undergo physical and medical examination without her informed consent. This is clearly against the Olympic Principle 2 of the preservation of human dignity through sport.

Again, World Athletics Regulations contain confidentiality protections for all athletes during investigations but somehow, in the Chand and Semenya cases, information leaked to the press about speculations over doping claims and a 'gender test'. This violation of their right to private life (as provided under Article 8 ECHR) puts affected athletes under undue and unfair public and media scrutiny.

Also, Olympic Principle 4 states that sport is a human right, and every individual must have the possibility of practicing sport without discrimination. However, the World Athletics' Regulations seem to be a negation of this principle of non-discrimination. The non-existence of any corresponding regulations for male athletes gives the impression that the sport governing body is deliberately discriminating against female DSD and transgender female athletes.

³³ *Chand v AFI and IAAF*, CAS 2014/A/3759.

³⁴ *Semenya v IAAF* CAS 2018/O/5794.

³⁵ Notification of *Semenya v Switzerland* App no 10934/21 (ECtHR, 18 February 2021).

³⁶ *Semenya v Switzerland* App no 10934/21 (ECtHR, 11 July 2023).

³⁷ World Athletics (n 25).

³⁸ Payoshni Mitra, Katrina Karkazis and Kyle Knight, "They're Chasing Us Away From Sport": Human Rights Violations in Sex Testing of Elite Women Athletes' (*Human Rights Watch*, 4 December 2020) <<https://www.hrw.org/report/2020/12/04/theyre-chasing-us-away-sport/human-rights-violations-sex-testing-elite-women>> accessed 20 April 2023.

Further, by relying on unscientifically proven claims to prescribe medical intervention aimed at controlling or suppressing a naturally occurring phenomenon, World Athletics is failing to protect the health and wellbeing of athletes within its sport. For instance, side effects of the hormonal drug have been reported by the athletes to include diuretic effects that cause excessive thirst and urination; metabolism problems; fatigue; nausea; sleep disturbance; and ultimately, loss of form. Cancer is also a risk that comes with a gonadectomy.³⁹

From the above, it can be gleaned that although, World Athletics' argument of creating Regulations to achieve the legitimate aim of fair competition is valid, a human rights perspective is required in the making of these regulations if indeed, the law is to achieve the aim of fair competition in sport.

5.0 Participation of Gender-Diverse Athletes in other Sports

5.1 Football: The curious case of Barbra Banda

Barbra Banda is the current captain of the Zambia women's national football team. She is Zambia's first female footballer to turn professional. In 2022, she was set to play for her country in the Women's Africa Cup of Nations (WAFCON) competition hosted by Morocco, but to her surprise, she was omitted from the squad a day before the competition began. Reasons for her omission from the squad were vague. It was later revealed that she had failed the gender verification tests conducted by the medical staff of the Football Association of Zambia (FAZ), as laid down by the rules of Africa's football governing body, the Confederation of African Football (CAF). This led to a series of back-and-forth between FAZ and CAF which left Banda ineligible to play at WAFCON 2022.⁴⁰

Banda's tests were said to have revealed elevated levels of testosterone, although naturally occurring, but beyond the permitted limits according to CAF's gender rules. FAZ's medical staff contended that testosterone level was not the only parameter for gender testing and verification, but both FAZ and CAF failed to reveal what the other criteria were.

An official in CAF's communications office told the British Broadcasting Corporation (BBC) that there was no such decision from CAF's medical committee to ban Banda. CAF claimed that they had nothing to do with Banda's disqualification as FAZ had named the squad in their opinion as they deemed fit.⁴¹ In essence, from CAF's end, there was no basis for her disqualification from competing at WAFCON 2022.

It turned out that FAZ officials had themselves eliminated Banda based on CAF's standards which problematically differed from FIFA's. While FIFA leaves it up to federations to make sure players match gender requirements and only requests testing if there have been complaints about a player's gender, CAF rules require all female players to pass a pre-tournament gender verification test.

There were no complaints as to Banda's gender in the build-up to WAFCON 2022. Prior to the testing, Banda had refused to undergo hormone suppression treatment for her naturally occurring levels of testosterone because of medical side effects which had been reported by other athletes who had opted for the treatment.⁴² Therefore, FAZ in its 'wisdom' decided to disqualify Banda and omit her from the squad, rather than include her and have her squad nomination rejected by CAF again, as it happened in 2018.

In July 2023, Banda captained the Zambia women's national team in their first ever FIFA Women's World Cup appearance without any speculations regarding her gender. In 2024, she was cleared to compete at the Paris Olympics, just as she also led her team to the 2021 Olympic in Tokyo.

It is important to note that Barbra Banda is a woman, and she identifies as female, she always has. There have been reports of some players who are masculine-presenting having to undergo intimate and invasive physical body checks just to verify their gender before they could be declared eligible to play. This is a form of human right violation which exists within women's football.

Although, FIFA confirmed it is reviewing its gender eligibility regulations as world sports governing bodies seek to establish policies that will make their competitions fair and inclusive across board, the global football-governing

³⁹*Ibid.*

⁴⁰Nick Miller, 'The Sad, Confusing Case of Barbra Banda' *The Athletic* (18 July 2022) <<https://theathletic.com/3426458/2022/07/18/barbra-banda-womens-football/>> accessed 20 July 2023.

⁴¹Celestine Karoney, 'Women's World Cup 2023: How Banda Overcame Gender Eligibility Row' *BBC* (17 July 2023) <<https://www.bbc.co.uk/sport/africa/66191557>> accessed 20 July 2023.

⁴²Osasu Obayiuwana, 'Zambia's Barbra Banda: I Want to Create My Own Name, Leave My Mark' *The Guardian* (25 July 2023) <<https://www.theguardian.com/football/2023/jul/25/zambias-barbra-banda-create-my-own-name-leave-my-mark>> accessed 31 July 2023.

body currently has no rule regulating the eligibility and participation of gender-diverse athletes in the sport. Pending when the new regulations will be in place, FIFA has said any such case will be dealt with on a case-by-case basis, taking into account its clear commitment to respect for human rights.⁴³

5.2 Boxing: Imane Khelif

Algerian boxer, Imane Khelif was at the centre of the 2024 Paris Olympics controversy, which escalated when she beat Italy's Angela Carini in the boxing event. Carini withdrew 46 seconds into the fight, after being hit clean by Khelif once. Following this, Khelif became the target of social media vitriol amid inaccurate claims from some corners that she is a transgender athlete. She has never identified as transgender or intersex.

However, she did fail a gender eligibility test at the 2023 World Championships, leading to her disqualification. According to the International Boxing Association (IBA), Khelif's test results revealed very high levels of testosterone, and chromosomes that made her ineligible to compete in the women's category. Taiwan's Lin Yu-ting has also faced similar backlash in Paris, after she was disqualified from the same tournament as Khelif for failing the same test.⁴⁴

This situation is further complicated by the fact that in June 2023, the International Olympic Committee (IOC) stripped the IBA of its status as the global governing body for boxing, citing failures in governance, finance, and ethics reforms. In its stead, the International Olympic Committee (IOC) has arranged the boxing at the Paris Olympics, and has set up the Paris Boxing Unit to oversee the event.

The IOC criticized the IBA's 'arbitrary' decision to disqualify Lin and Khelif, highlighting that these athletes had competed at the top level for many years. The IOC stated that the current aggression against the two athletes was based entirely on this arbitrary decision, which was taken without any proper procedure.⁴⁵

This controversy raises significant questions about the treatment of female boxers and the inconsistent criteria at the international level. Although neither athlete identifies as transgender, the debate around DSD athletes has resurfaced as well.

5.3 Rugby

In 2019, World Rugby issued its first Transgender Policy allowing transgender athletes to compete in World Rugby competitions in the category consistent with their gender identity.⁴⁶ However, in October 2020, it revised its Transgender Policy, banning transgender women from participating in international sporting events like the Olympics and the women's Rugby World Cup, but leaving each nation to decide whether to continue allowing their participation in domestic competitions. World Rugby said the benefits that testosterone confers on body size, strength, and power during puberty and adolescence, and the concerns this poses to player safety made the ban imperative.⁴⁷

Following this, the Rugby Football Union published its Gender Participation Policy, stating that transgender women will no longer be allowed to compete in the female category for contact rugby, regardless of previous participation.⁴⁸

The revised policy however allows transgender males to participate in men's rugby after providing proof of their physical fitness, to ensure they are not putting themselves in an excessive amount of danger by competing against

⁴³ PA Media, 'FIFA to Review its Gender Eligibility Regulations in Wake of FINA Ruling' *The Guardian* (21 June 2022) <<https://www.theguardian.com/football/2022/jun/21/fifa-to-review-its-gender-eligibility-regulations-in-wake-of-fina-ruling>> accessed 6 August 2024.

⁴⁴ Alex Pattle, 'Imane Khelif Failed Gender Eligibility Tests Due to Chromosomes, says IBA' *Independent* (5 August 2024) <<https://www.independent.co.uk/sport/olympics/imane-khelif-xy-chromosomes-gender-test-boxing-b2591357.html>> accessed 6 August 2024.

⁴⁵ International Olympic Committee, 'Joint Paris 2024 Boxing Unit/IOC statement' *IOC* (1 August 2024) <<https://olympics.com/ioc/news/joint-paris-2024-boxing-unit-ioc-statement>> accessed 6 August 2024.

⁴⁶ International Gay Rugby, 'A Rugby Guide to Trans Inclusion' <<https://igrugby.org/wp-content/uploads/2020/04/Rugby-For-Transgender-Athletes-2020.pdf>> accessed 27 April 2023.

⁴⁷ World Rugby, 'Transgender Guidelines' <<https://www.world.rugby/the-game/player-welfare/guidelines/transgender>> accessed 27 April 2023.

⁴⁸ Rugby Football Union, 'RFU Gender Participation Policy – Frequently Asked Questions' <[https://www.englandrugby.com/dxdam/cc/cc222f52-677f-43f8-a4f9-75735f120986/RFU Gender Participation Policy FAQs.pdf](https://www.englandrugby.com/dxdam/cc/cc222f52-677f-43f8-a4f9-75735f120986/RFU%20Gender%20Participation%20Policy%20FAQs.pdf)> accessed 27 April 2023.

men, but they are not permitted to participate in women's rugby if testosterone replacement therapy is used throughout the sex reassignment process.⁴⁹

There are currently no rugby guidelines for players with DSD. The Transgender Policy however advised that players should be treated individually by adhering to the values of inclusiveness, fairness, and safety, while considering the potential advantages of and organization in these situations.

Notwithstanding, all players (including transgender players and players with *DSD*) can however play mixed-gender touch or tag *rugby*.

5.4 Swimming

On the other hand, Swim England's updated Transgender and Non-Binary Competition Policy for Swimming which is expected to take effect from September 2023 includes an open category for athletes with a birth sex of male, transgender or non-binary competitors, while only athletes who have declared a birth sex of female will compete in the 'female' category.⁵⁰

Although World Rugby's consideration of player safety as a justification for the banning of transgender female players may be necessary for protecting female players from the risk of injury, the Transgender Policy completely excludes only transgender female players from the sport without creating an alternative. This may constitute a violation of their human rights against discrimination based on sex.

By creating an open category for gender-diverse athletes, Swim England's approach provides a 'fully inclusive, non-discriminatory competitive environment', essentially showing an exemplary application of the principles of human rights to sports, by recognizing that irrespective of their difference, gender-diverse athletes have a right to participate in and enjoy the sport of swimming.

6.0 The Application of Human Rights in Sports

Despite the regulatory gaps, it is not the case that sports regulating and affiliated bodies do not recognize human rights or rise to the occasion when it is required. The recognition of human rights has been used to drive reforms in sport and widen the inclusivity net in some areas.

In 1999, Dave Morrison, father of two female gymnasts brought a complaint against the City of Coquitlam in British Columbia, Canada. He claimed that the city's allocation of financial resources to sports and recreation facilities discriminated against certain groups of persons based on their gender, contrary to Section 8(1) of the British Columbia Human Rights Code. This was based on the city's refusal to contribute to a girls' gymnastics programme while making large contributions to boys' ice hockey. His complaint led to several sports reforms in the City of Coquitlam and significant changes to municipalities, school boards and sport organizations throughout Canada. Most notably, the City established a gender equity committee, set up a gender equity fund, and instituted a gender equity policy with a view to reducing gender inequality in the city within five years.⁵¹

In *Richards v. U.S. Tennis Association*,⁵² the New York Appellate Court rejected the United States Tennis Association's requirement that the plaintiff, a transsexual woman, had to pass a sex-chromatin test to be eligible to participate in a tournament. The court described this requirement as 'grossly unfair, discriminatory and inequitable, and violative of her rights under the Human Rights Law of the state of New York'. Following this decision, the plaintiff was able to participate in the 1977 US Open.

7.0 Conclusion and Recommendation

Traditionally, the categorization of sporting competitions has always been in the binary divisions of male and female. Although, sex segregation is a form of discrimination, it is accepted in sport as it is seen as a means of preserving the essence of competition. However, the recent emergence and participation of gender-diverse athletes in sports has led to confusion about where these athletes fit in within the binary categories. Sport governing bodies have had to review sporting rules to include eligibility criteria for this group of athletes and in doing so, sparked debates about the legality and otherwise of these rules. This had led to various reactions including legal action.

⁴⁹ World Rugby (n 45).

⁵⁰ Swim England, 'Updated Transgender and Non-Binary Competition Policy for Swimming' <<https://www.swimming.org/sport/transgender-competition-policy-swimming-events/>> accessed 27 April 2023.

⁵¹ Scott Simpson, 'New Sports Equity Policy Could Change B.C' *Vancouver Sun* (14 March 1999) <<http://fact.on.ca/newspaper/vs990314.htm>> accessed 25 April 2023.

⁵² 93 Misc.2d 713, 400 N.Y.S.2d 267 (1977).

On the one hand, sport governing bodies argue that these rules are necessary to ensure fairness within sport, while gender-diverse athletes are of the view that the rules are discriminatory and aimed at excluding them from participating in sport.

The United Nations Human Rights Council (UNHRC) Resolutions 2019 expressed concern that the eligibility rules for the female classification published by World Athletics in November 2018 were incompatible with international human rights norms and standards, including the right to equality and non-discrimination, the right to privacy, and respect for the dignity, bodily integrity, and bodily autonomy of the human person.⁵³

With its consistence in inconsistent decisions and its unwillingness to rule firmly on matters having human rights angles which have come before it, CAS has shown to be an inadequate system for delivering justice to affected athletes. As a court, its terms of reference do not compel it to consider human rights. As an arbitration body, it bases its rulings on sporting regulations, which in the case of World Athletics do not include human rights.⁵⁴

While it is necessary to make laws to regulate athletes' participation in sport, it is important that these laws are made with due consideration for the protection of athletes and their rights. Adequate thought should be given to the peculiarities of the various participants in sports. Human rights should be at the forefront of sport regulation. The best way to ensure that sport retains its fairness and inclusivity is when the human rights of all athletes are assured, respected, and protected.

Sports Laws and regulations should be made and amended to protect the human rights of sports participants of all sexes, including the gender-adverse individuals.

⁵³UNGA 'Report of the Human Rights Council' UN GAOR 74th Session Supp No 53 UN Doc A/74/53.

⁵⁴Payoshni Mitra, Katrina Karkazis and Kyle Knight (n 38).