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## Pragmatism, lex sportiva and the fair play principle in sports law.

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## Abstract

Philosophers of sport have theorized on aspects of law that carry over into sport. These include rule-making and interpersonal relationships in sports (Russel, 2011), the enforcement of regulations in sport, and the role that the Court for the Arbitration of Sport plays in determining sport behavior. Throughout these discussions, we have learned that law intersects with sport in the court sector, in issues of human rights, privacy and athlete control (in the case of doping), and within-sport jurisdiction (and understanding the role of rules in sport-playing). One case that can contribute to studies of sport law is that of South African middle-distance runner Mokdadi Caster Semenya. Her public hearing against the IAAF has highlighted the ways in which regulating the female classification in sport overlaps with current understandings of the social and medical constructs around gender/sex, as well as the role that sport plays in determining social, medical and legal issues. As a welcome addition to this FairPlay special issue, this article interrogates the ways that *lex sportiva* (Posner, 1990) and the fair play principle (Vieweg, 2014) can decipher the conflating arguments surrounding Caster's case. Pragmatism helps to clear away the superfluous information that makes this case so confusing. At the end I argue that Caster could use the argument of *lex sportiva* to bypass the Court for Arbitration of Sport and argue within the European Justice system on claims that her trial was systematically unfair.

**Key words:** Caster Semenya; *lex sportiva*; fair play; pragmatism

## 1. Introduction

Philosophers of sport have theorized on aspects of law that carry over into sport. These include rule-making and interpersonal relationships in sports, the enforcement of regulations in sport, and the role that the Court for the Arbitration of Sport (CAS) plays in determining sport behavior. Throughout these discussions, we have learned that law intersects with sport in the court sector, in issues of human rights, privacy and athlete control (in the case of doping), and within-sport jurisdiction (and understanding the role of rules in sport-playing). One case that can contribute to studies of sport law is that of South African middle-distance runner Mokdadi Caster Semenya. Her public hearing against the IAAF has highlighted the ways in which regulating the female classification in sport overlaps with current understandings of the social and medical constructs around gender/sex, as well as the role that sport plays in determining social, medical and legal issues.

Caster's case appears as a trend in the historic practice for the Olympic platform to medically test that female athletes are somehow scientifically female. Since 1967 formally, World Athletics (formerly the International Association of Athletics Federation; IAAF) and the International Olympic Committee (IOC) have required females to undergo this testing. While these tests, otherwise known as sex testing or gender verification, have been contentious, and in the past the Court for the Arbitration of Sport (CAS) has even ruled the regulations to be unfounded (*Dutee Chand v AFI & IAAF*, 2015), the CAS ruled in May of 2019 that the tests and segregating sport based on sex, in regards to the case filed by Mokgadi Caster Semenya and Athletics South Africa (ASA), to be a necessary form of discrimination to ensure the vitality and safety of women athletes. Based on this assertion and what is known about the history of sex testing, it is critically important to examine the role that the CAS has played in determining fair play in sport through Caster's most recent case.

There are a multitude of claims of social justice issues involved in testing female athletes to identify biological sex, which is a problem that scholars are faced with when attempting to dissect this quandary. Some of these claims require inquiry into medical ethics, the fair play system in sport, athlete's rights, human rights, issues of informed consent, and the scientific debate on sex determination, to name a few. In many ways, the breadth of knowledge required to properly dissect the moral permissibility of sex testing, as well as approaching common ground on agreed upon definitions of sex, has also provided conditions for a naturally occurring interdisciplinary field to exist in broader society.

Due to the extreme amount of complexity surrounding this topic, and as a welcome contribution to this special issue in Fair Play, this article will take advantage of two congruent events: the call for this special issue to consider Caster Semenya within the bounds of fair play, legal theory and ethics, and Alun Hardman's Presidential Address on pragmatism at the 2019 IAPS conference.

The usefulness of pragmatism when considering the overlapping legal issues will be presented, and pragmatism will be applied to the issues present in the case of *Caster Semenya & ASA v IAAF* (2018). For use in this paper, Richard Posner's 1990 article "What Has Pragmatism to Offer Law" will be presented as it creates a useful bridge between the core concepts of pragmatism, its history, its effectiveness in challenging a particular issue, and its relevance to the philosophy of sport. Alun Hardman's introduction to pragmatism also offers a unique set of attributes for scholars attempting to make sense of the many confounding issues that surrounds intersexual athletes participating in sport.

## ***1. Pragmatism and legal scholars***

Historic legal theory has long been entranced by the debate of legal realism versus pragmatism, and many within this discipline would argue that the debate has been settled and pragmatism has been dissolved. Pragmatism within an understanding of justice and law was and continues to be criticized as a model that does not provide effective tools to be used within a normative practice within jurisprudence.

Richard Posner's penultimate question is a good place to start: what characteristics does pragmatism have that would benefit law? Posner's article was presented during a distinct shift for legal theorists, and this was when pragmatism tried yet again to gain traction within

legal theory. Presenting decades worth of research in the realms of legal theory and economic theory, Posner is the ideal source from which to draw legal theory's history, its natural shifts to and from legal realism and logical positivism, and his insight as a contributor during its revitalization in the 1980s. In this volume, Posner's (1990) proposed that pragmatism "stands for more emphatic rejection of Enlightenment dualisms such as subject and object, mind and body, perception and reality, form and substances; these dualism being regarded as the props of a conservative social, political, and legal order" (p.1654). He suggests that pragmatism moves to understand life in more realistic, and therefore fluid terms.

The sentiment that Posner presents correlates with the viewpoint established by Romantic poets and philosophers during the Romantic era (typically 1780 to 1930s). This era was one that was so full of transitions that historians cannot identify the emergence of a dominant unit of thought. Romanticists were involved fundamental ruptures in moral ideologies. While it was commonly believed that God was found in nature, empiricists like Newton were eschewed as being too narrow to rely on the rigid scientific paradigm to identify any type of God. The viewpoints of the Romantic poets, that of Blake and Wordsworth, Pierce, and Holmes, was that human exertion could not be considered a merely objective reality. Romanticists firmly believed that whether the world existed of a natural order or of a social attraction, humans beset a level of creativity in which, in the social realm of it, humans must creatively adapt to solve very human problems. To Posner, this creativity to solve problems required a level of human exertion. No matter in what realm an issue existed, the solution represented a will of human spirit, of human exertion, and of shifting human desires.

Within pragmatist thought, seeking definitions of any sort, even necessary definitions like "truth" and "objectivity," became impossible to define under standards of fluidity. Within a Romantic ideal, something like truth can only be represented by the individual observer and it therefore cannot represent a fixed reality. For legal theorists, the situation of pragmatism might be emerging as ever more clearly something that fundamentalists might reject. If the final case of law, an institution created by and large for the people, is dependent on the observer, then what stands in as its foundation? And for whom should the law represent?

To address this, Posner invites in Benjamin Cardozo's (1921) contribution to legal pragmatism as espoused in his 1921 book *The Nature of the Judicial Process*. Cardozo's arguments for legal pragmatism are grounded in human beliefs about goodness. Therefore, a law governing moral matters cannot exist in a space of their own, but there must be an agreed upon level of understanding between one and another. Posner quotes this excerpt: "In such matters, the thing that counts is not what I believe to be right. It is what I may reasonably believe that some other man of normal intellect and conscience might reasonably look upon as right" (1990, p. 88-89). Cardozo's line of thinking further argues for an instrumentalist viewpoint when considering law pragmatically. Furthermore, no laws can be considered "so well established that they may not be called upon any day to justify their existence" (p. 88-89) as law is always adapting, malleable, and is applicable to an impossible number of scenarios. Cardozo's, and Posner's, main argument against the formalist line of thought is that a law cannot prove itself to exist based on an originating authoritative source, which is what formalist thinking argues in favor for. Instead, Cardozo argues that where the decision for something to be right, wrong, or unrelated, cannot be contrived in an original source, it

must look to the future, to establishing social homeostasis, and to consider this drive for balance as its main goal rather than considering any original source.

What Posner, Cardozo and eventually new-age theorists including Hardman and others propose is that at its core, legal pragmatism is entirely humanist in its construction, so much so that law cannot be considered to be densely and fundamentally latched onto a certain point in time. These laws are constantly in flux simply by being applicable to a variety of contexts, contexts that organically evolve over time. Since an omnipotent law cannot exist naturally, then all laws are open to interpretation for when it comes time for the law to be applied. A judge's decision rests on interpretation of the law which ultimately is a creative freedom within legal bounds, and rests within the bounds of the limitations of the applicable law. Pragmatism can therefore offer a more in flux understanding of a given reality.

When applying pragmatic thinking into legal terms, it's crucial to delineate what pragmatism will contribute. Going back to Posner, he suggests that this new 'neo-pragmatism' has and requires three common elements to be considered pragmatic: (a) a distrust of metaphysical entities (i.e., 'reality,' 'truth,' 'nature,' etc) as certitudes in philosophical thinking; (b) "an insistence that propositions be tested by their consequences, by the difference they make – and if they make none, set aside" (p. 1660); and (c) the assertion to judge projects, either scientific, legal, political or ethical, by their "conformity to social or other human needs rather than to "objective," "impersonal" criteria" (p. 1660). Therefore, while these parameters can also be applied to other areas of life, such as medicine, science and whatnot, the legal application of pragmatism needs to assimilate with these three components in isolation.

Alun Hardman's application of pragmatism within the realm of sports law specifically related to Caster's case and is supportive of broader criticisms of how her case was handled. His approach to pragmatism in sports law was developed from a type of 'third-wave' of pragmatism that begins to account for some of the glaring holes that pragmatism has been criticized against and stand similar to the arguments developed by Posner. Hardman credits third-wave pragmatism to authors such as Berstein, Pappas and Koopman for bringing pragmatic thinking into a very relevant area of sports studies.

While there are larger differences between Hardman and Posner's relation to pragmatism, the core values of pragmatism still hold true in Hardman's theory. However, his viewpoint of pragmatism derives from Koopman's article Pragmatism as Transition, which rests on the idea that social practices are transitional and that one practice of the customs of this given reality and given existence is to be labelled "meliorative cultural criticism[s]" (Hardman, pre-print). These meliorative criticisms can be referred to as the justice norms of the time, place and culture. In this definition, justice exists within an ever-improving cultural framework that seeks to define morally normative practices along a(n) (relatively) existential and (fixed) exponential timeline. Similar to Posner's articulation, Koopman's ideals of pragmatism are based on addressing current and vital social issues on the level of moral normative ethics, and that speak to the heart of human interactions, and at the heart of who we want to become. Koopman's pragmatism is human-centric, similar to Posner. And in both matters of thinking, pragmatism exists to account for the subjective fluctuations of the human enterprise in ways that a fixated legal, medical, or otherwise linguistic point of view of our society cannot fully account for.

Moving on, Hardman's primary aim in his article was to position the issue of Caster Semenya in terms of a neo-pragmatic viewpoint. How can philosophers in legal and sport theories conceptualize the dilemmas that Caster is facing within this framework? He does this first through Nancy Fraser's use of 'normal justice' and 'abnormal justice' (Fraser, 2008, 2009). According to Fraser, 'normal justice' exists where there is: (a) a shared assumption (social and theoretical) around what justice is; (b) shared ontological assumptions about who is entitled to make claims about/against/toward whom; and (c) stable assumptions around the scope of justice so that delimitations around how justice can be carried out are clear. It's important to recognize that this type of justice can never truly exist, and that they represent an ideal, if not utopian form of justice, as well as a type of pedigree in which justice can strive to attain. In Fraser's point of view, 'abnormal justice' marks a period of time when these core components of 'normal justice', the what of justice, the who, and the how, are absent.

Pragmatism as a utility for Caster's case should also be considered a functional and remarkable bridge between pragmatism and the area of philosophy of science, which is a function of pragmatism that Posner presented readers with. Of concern for Caster Semenya, pragmatist thinking is ultimately tied to scientific and medical ethics in that she is bound to the roles that medicine, primarily genetic and endocrinological research, play in determining her corporeal reality. Therefore, as prescribed by Posner, the practices of determining sex through objective, albeit abstract scientific means, need to be regularly reassessed to ensure that while the end goal for the enterprise, for example science, is to observe nature through as normal processes as possible, there is the understanding that the role of science still should abide by the pragmatist viewpoint (as well as the Popperian viewpoint). This pragmatist viewpoint is ultimately a realistic one, one bound by materialistic experiences, subjective truths and shared assumptions.

Unfortunately, Posner's suggestion of a pragmatist point of view for the philosopher of science could contraindicate the philosopher of science's enterprise since it rests on a detrimental (through the downfall of either pragmatism or science itself) form of anti-materialism and anti-positivism. Here he states that the shift in the direction of the pragmatist thought poses a direct challenge to positivism: "But it shifts the emphasis in philosophy of science from the discovery of nature's laws by observation to the formulation of theories about nature that are motivated by the desire of human beings to predict and control their environment" (p. 1656). In contrast, this line of thought could be a beneficial tool as a way to redirect problematic scientific endeavors to consider the humanistic role that we play in science's processes.

Furthermore, as Posner points out, pragmatic thought lines, particularly that of Cardozo's, seem to stem from John Dewey, who was a leading philosopher on pragmatism in the 1990s. Where Posner posits that new ideas in pragmatism were not emerging, the area of philosophy, namely logical positivism, was benefiting from pragmatic ideals. He states, "Logical positivism itself, with its emphasis on verifiability and its consequent hostility to metaphysics, is pragmatic in demanding that theory make a difference in the world of fact, the empirical world. Popper's falsificationist philosophy of science is close to Pierce's philosophy of science; in both, doubt is the engine of progress and truth an ever-receding goal, rather than an attainment" (p 1659). Therefore, he argues, the thought lines of Dewey and other major pragmatist can be seen streaming through disciplines outside of philosophy, such

as specialists in analytic philosophy (Davidson, Putnam, Rorty), political philosophy (Habermas), anthropology (Geertz), literary criticism (Fish), and academic lawyers (Simpson, Rorty, and more).

Notwithstanding, Posner's correlation here on all the veritable forms of pragmatism that are still alive today, thirty years after they were supposedly discontinued, speaks volumes then to the usefulness of aspects of pragmatism over a variety of channels. He cites that the strengths of pragmatism better appreciated today are "due in part to the apparent failure of alternative philosophies such as logical positivism, but more to a growing recognition that the strengths of such alternatives lie in features shared with pragmatism, such as hostility to metaphysics and sympathy with the methods of science as distinct from faith in the power of science to deliver final truths" (p. 1660).

The remainder of Posner's article is for elucidating direct links where pragmatism can service law. For our purposes here, these are unfortunately useless. However, it seems that since a variety of other philosophies can apply a certain pragmatic ideal, that which is in the shared volume of categories that pragmatism as an ideology can offer, pragmatism can operate as a supportive umbrella term rather than struggling as the dysfunctional theory in which it has historically been viewed. This non-theoretical interpretation of pragmatism can offer many functions in sport philosophy; it does not leave pragmatism unrestrained with no theoretical foundation. Instead, it opens room-to-grow for pragmatic values, principles or virtues to be developed.

In concluding his main arguments around the functions of pragmatism, Posner offers two summarizations of the term pragmatism. That of R.W. Sleeper: that pragmatism is "a philosophy rooted in common sense and dedicated to the transformation of culture, to the resolution of the conflicts that divide us"; and that of Cornel West: that pragmatism is a "common denominator" and is "a future-oriented instrumentalism that tries to deploy thought as a weapon to enable more effective action" (see Posner, 1990, p. 1661). While pragmatism is inherently anti-metaphysical, pragmatism exists under the three common elements listed earlier which in turn imply an outlook. This outlook is not fetishized common sense, but common sense as a profundity.

In this reading, pragmatism is not the underlying theory but the primary principle from which the aspects of law involved in Caster's case should be interpreted. It aims to act as a brush-clearing method.

## ***2. Norms of lex sportiva and enforceable fair play***

The issue of Caster's eligibility rests on several values within sport, namely that the regulation stands to uphold fair play. Fair play is interpreted through sports law through the analysis performed in Ioan-Radu Motoarca's case study of known versus unknown violations of fair play in sport. First, this paper will present a brief overview of the necessary definitions of lex sportiva and fair play.

### **2.1 Limitations**

In recognizing that both lex sportiva in sports law and fair play in sports have been illusive of an agreed-upon definition, this paper will hopefully contribute useful insight to

both these concepts. This paper will not attempt to define *lex sportiva* and its use in my paper should support some form of discussion around sports law, such as identifying the boundaries of where *lex sportiva* can be applied, if it can be applied, and whether or not it is acting outside of any clear boundaries. Caster's case highlights the role that *lex sportiva* plays in determining the sex and gender divide. It is also a very commonly understood example (what is sex/gender is a relatable social concept) and can delineate sport's extension of authority in enforcing the IOC's value of fair play. This paper will also not attempt to define fair play, which has been taken up in the philosophy of sport literature.

## **2.2 Lex sportiva**

*Lex sportiva* has been a topic of discussion in sports law for some time now, and this is primarily due to its power as a potentially all-encompassing definition of sports law since sports has become increasingly international and profoundly influenced by commercialism. Therefore, a comprehensible and manageable definition of what sports law is, what it can and cannot influence, and its role in various international conflicts was sought. *Lex sportiva* does not have an agreed upon definition, but Klaus Vieweg (2014) describes it as a "basis for decisions" in legal academic articles, and seems to think that *lex sportiva* represents "the rules and regulations that the stakeholders in the realm of sport create in order to create a global, uniform sports law, independent of nationality and detached from the states themselves" (p. 384). He uses the term *lex sportiva* or *lex sportive* as an encompassing, self-enacted, non-state law of international sport, specifically those rules and regulations as enacted by national and international sports federations and legal principles that stem from the CAS. While his use of *lex sportiva* is a bit grandiose (he argues that it can be useful in dissolving tensions between the various conflict resolution on national and international sporting levels), his exploration of the term in regards to the fairness principle in law and fair play in sport is entirely relatable and worthy of consideration for this research, and it will be referred to in a later section.

To contrast Vieweg, Alfonso Valero (2014) argues that current definitions of *lex sportiva* cannot stand as they are based primarily on self-referential means. Here he references that while *lex sportiva* is cited in CAS courts, it is then referenced by other cases and academics. He argues that these references fail to account for a solid, working definition of what *lex sportiva* can do, its functions, and so on. Therefore, these references cannot replace any comprehensive definition for the state of sports law. In these instances, *lex sportiva* can only be defined by the limited cases in which it was successfully used. The definition that Valero ultimately sets to delineate, that *lex sportiva* is a set of "general principles of the regulations of sport shared by the sports community," (p.10) he argues, speaks to two main uses for *lex sportiva*: respect for self-regulation in conjunction with mandatory but selective law oversight, as well as a conceptual tool that can define the elements unique to sport.

He is right to suggest that his definition is still too ambiguous. *Lex sportiva* is waived around when the CAS seeks outside support from the governments. It is also used as a stalwart when the CAS asks for separation from this same government oversight in sensitive moments. He cites several instances where the court has manipulated *lex sportiva* based on these bounds, which draws significant attention to the potential of misuse that a lacking defi-

nition in *lex sportiva* can convey. In order to move away from traditional *lex sportiva* arguments, he develops a definition that is based on its nature as opposed to its existence.

In general, it is commonly agreed that *lex sportiva* grants sports law recognition over individual state laws. For example, in article 12 (1) of the Charter of Fundamental Rights of the European Union, autonomy is granted to the individual sports federations in enforcing their own rules and regulations. The authority to exact law ultimately derives from state laws (Valero, 2014). Individual sports federations cannot create their own *lex sportiva* and if there is conflict, then the EU can supersede *lex sportiva*. There is serious doubt as to whether a uniform, international law can effectively navigate the multitude of intersecting social, moral, national, and international conflicts that arise in sport. This is by and far the biggest critique of *lex sportiva*; however, it is necessary to consider that *lex sportiva* exists in some capacity regardless of an affirmed definition considering that conceptually *lex sportiva* represents the role of the CAS in disputing international sport conflict, and (regardless of Valeros' sound arguments) the CAS has indeed used *lex sportiva* as rationale for decisions in past cases.

As argued by Vieweg (2014), that although "...*lex sportiva* is by no means a cure-all, it does offer participants in the realm of sport the "chance to self-regulate"" (p. 388). *Lex sportiva* is subject to strong influences by the national and state laws considering that the state allows the existence of a *lex sportiva*, and by doing so the state also has ultimate power in regulating decisions within the bounds of *lex sportiva*. This becomes a mutual relationship then; when decisions in CAS are based on *lex sportiva*, then these decisions can be recognized in national courts as well (notable in the Swiss Court; Vieweg, p. 387). However, these decisions are restricted in that they cannot violate the principle of the *ordre public*, which means that the decision cannot violate mandatory international norms in order to be internationally recognized. Therefore, the CAS must regard international moral norms in order to inform a properly enforced decision both inside and outside of its court. And in applying national law to sports cases (where, for example, the Court of the EU must step in), the Court of Justice of the European Union would classify characteristics of sports federations' rules and regulations as confirming to EU law so as to not erode the unique features of sport and to recognize the necessary organization of sport.

Since a definable notion of *lex sportiva* is still in flux, but its existence is not denied, then caution must be exercised if it is to be used in notable aspects of the argument presented here. In this paper, *lex sportiva* should be interpreted as largely conceptual, as a tool for understanding sports law, and a tool for understanding the power that sports law has in relation to international law. As stated earlier in the introduction, the findings that this paper procures can only contribute to a definition or a dissolution of the term itself. The use of *lex sportiva* here is not mere resourcefulness but a measurement to determine how Caster's case has navigated the court system.

### ***2.3 The fairness principle in sport and sports law***

The fairness principle exists in law, in the recognition that everyone has the right to fair trial, and in sport through normative beliefs around behaviors of fairness and the recognition that everyone has the right to participate in sport on a global level. In both areas, it has been broadly researched. Fair play in sport, as argued by sport scholars, is considered a moral norm system that has grown through the development of sport stakeholders. It is con-

sidered to be, simply, something that is agreed upon as permissible in a given sport and contrasts with acts that are agreed upon as impermissible in that given sport. Examples are as specific as ‘you do not check a player from behind’ and even something as broad as ‘do not dope’ (Loland, 2013; Schneider & Butcher, 1997; Sheridan, 2003; Suits, 2014; Wells & Darnelle, 2014). These types of assertions around fair play can be traced back to the development of sport and sporting culture around amateurism and sports-personship. Because sport has piqued the interest of so many worldwide, small and large acts of fair play have remained central to many games in both international, professional, and amateur sport.

The unique case of Mokdadi Caster invokes both definitions of fair play. Caster violated a fair play principle in sport when her eligibility to participate in the woman’s category was challenged. Caster then challenged the fair play ruling from the sporting officials and requested that her challenge be received in sport mediated court. By doing so she requested a fair hearing. Therefore, abiding by either definition of fair play fails a proper analysis of Caster’s case. It is simply inadequate to determine to only use the fair play principle in sport because Caster did not agree to that principle. Additionally, due to the level of contention surrounding this case, it cannot be said that the fair play principle in question is agreed upon.

Vieweg’s arguments around the fairness principle in sports law is a good stepping off point to abate this divide in the literature. The principal of procedural fairness as acknowledged by the CAS requires that for the trial to be upheld as valid, a fair procedure must exist, in congruence with a number of other minimum requirements necessary. One way in which this principle acts is that the CAS has required sports federations to clearly draw out an appeals procedure in which athletes and related parties can seek recourse. The CAS also abides by the right to a fair hearing as a fundamental legal principle and this right must be respected even within internal hearings. Vieweg finds cause for concern in regards to upholding the principle of legal fairness on several procedural levels, though. The first is if, for example, a federation court violates a procedural rule. The CAS could cure this violation through a comprehensive review of the decision and a *de novo* decision can be approved. This procedure is only appropriate if it can be determined that the violation affected the final decision, and given that the decision can be reached by the CAS in any regard. In instances where a margin of appreciation is a consideration in the hearing, the CAS cannot intervene.

This procedural inefficacy stands remarkably important in the case of Caster Semenya whereby, on a level of scientific discrimination, a margin of appreciation is the primary consideration. A ruling in the case of Caster to allow her participation could, in the world of sport, become a cause of interest for the entire enterprise of athletics, and it might also have ripple effects within other sports federations. It also seeks to remedy the potential for disorder if in the instance that ‘sporting’ unrest occurred, and a wide population of stakeholders disagreed with the ruling. However, this is most likely not the case; the concern of intersex athletes participating in sport has already occurred, and intersex athletes have been previously cleared on the grounds that the IAAF did not provide enough evidence (*Dutee Chand v AFI & IAAF*, 2015). Caster has participated in competition even with the allegations well-known, and it has not contributed to any type of unrest detrimental to the sport itself.

The fairness principle is also acknowledged in the interpretation and application of the substantive sport laws, a perspective that Motoarca also takes. The court relies on the fair-

ness principle in substantive laws to apply federation rules. While the fairness principle allows for participants to more freely practice their rights within the context of sport, it could also limit their abilities in the same sense. For example, the fairness principle applies in that a sanction must be able to be applied to another athlete in a similar case. The fairness principle also applies in the interpretation of regulatory documents, good faith, and *venire contra factum proprium*.

Vieweg's line of questioning around fairness and *lex sportiva* is useful because it prods CAS' authority. Through his analysis, for example, he was unable to identify what authority the CAS has in limiting the authority of the sports associations from enacting their own rules, and questions if the CAS must act upon that enforcement if a federation is determined to be in violation of a fairness principle. It is also not clear of the extent of application in regards to the oversight of the European Union.

#### ***2.4 On essential offenses of the fairness principle***

Ioan-Radu Motoarca's (2015) analysis of a fair play infraction provides a useful categorical structuring model which can be used to assess types of fair play infractions in sport itself. His analysis proposes a system of principles directed at how officials distinguish between a fair play rule infraction that is enforceable comparative to varying levels of enforceable infractions. In turn he maps the ways fairness is enforced to identify types of fair play keeping and regulation enforcement.

The fair play infraction that he focuses on is one that occurred by Luiz Adriano in an FC Nordsjaelland versus FC Shakhtar Donetsk game. To Motoarca, the common understanding evident in popular fair play infractions is that they violate something about sport that was more or less broadly agreed upon. To each degree, the examples he invites are instances where the act occurred and ended up altering the effects of the game. Fair play infractions that seem the most contentious polarize the athlete as similar to a cheater who either got away or got caught. Where the large majority of stakeholders recognize that the fair play infraction exists, the play was still made (in regards to the Moradona's hand goal, for example) and in this way, the player in the very least is made aware of the infraction. Whether the officials in question were duped or not is not necessarily the point (although the officials do bear much of the brunt of the responsibility in the moment). What's important is that the player in question could have avoided the infraction; therefore, if the infraction occurs the player is put in a subliminal grey area until the infraction is resolved.

The situation of Adriano is like this: On November 20, 2012, in a UEFA Championship game (FC Nordsjaelland versus FC Shakhtar Donetsk), Shakhtar of the Ukraine ended up winning over Nordsjaelland of Denmark 5-2. Around minute 26, officials stopped play due to the injury of a Nordsjaelland and Danish had possession. Upon resuming the game, possession automatically goes to Shakhtar, and common courtesy states that the ball would be returned to the team who had possession before the injured stoppage (Danish). One of Shakhtar's players kicked the ball to the Danish, but Adriano of Shakhtar picked it up and scored. A decision was made after the game by the UEFA's Control and Disciplinary Body to penalize Adriano with a next game suspension and a day of community football service. The UEFA's Disciplinary Regulations were invoked, where anyone "who behaves in an un sporting manner to gain advantage" can be suspended for one game (Motoarca, 2015, p. 123).

Motoarca's aim in addressing this incidence of unsporting conduct is unique in various ways, although he does not want to address whether the actions of Adriano could be considered an intention act of cheating since intention during the play cannot be established. However, it is important to recognize that Adriano's penalty of the suspension and community football service is based on an understanding of the proper sporting behavior of soccer. Regardless of whether or not Adriano knew he was potentially cheating the fair play rules of soccer, and regardless of if his intention was to take advantage of an otherwise unclear in-bound kick, the rules of the Disciplinary Regulations remain vague an act as a long-form to encapsulate the broad range of sporting conduct behavior that could be violated.

While it is clear that Adriano's behavior was considered unsporting, the rules had never been applied in this manner before. Furthermore, he argues that similar behaviors of unsporting behavior, which to a lesser degree might not have been considered as blatant or significant, could also be interpreted from the same UEFA rule, but they are not. His argument seeks to draw a line where violations of the fair play principle, in soccer specifically, can incite the UEFA's regulations and when it is an abuse of the Disciplinary Regulations.

Motoarca's articulates that at least specific to soccer, there are three types of fair play principles: rules required to play the game that are also considered fair play (sport-specific; which he labels FP-1), rules related to good sports-person-ship that are not written rules (which generally are intended to provide respect in sport and might be applied to a variety of sports; FP-2), and other forms of fair play principles that would fall under the term etiquette (sport-specific; FP-3). I think his distinction between types of fair play is an important aspect of fair play regulatory behavior, particularly when considering violations around participating in sex categories. However, let's first clarify what he means by each of these three types of fair play.

In the first regard, fair play principles that are constitutive to a given game are specific to the game played in that the principle might be included in the rule book and, in some sense, the withdrawal of that rule from the official rule book would change the nature of the game. These rules are not intended to invoke metaphysical harm, but they are, by all intents and purposes, required as we have defined the sport to exist as it does today. It's also important to note that his use of a 'required' principle, as per the term constitutive, he means in the enlarged sense. Therefore, the rules are not necessarily constitutive (or regulatory) in nature, but they are at least considered a requirement of the game regardless of how the rule is classified. His general example is that of regulating a foul. While some may consider this to be a regulatory rule, it could also very well be classified as a constitutive rule because it is in place to enforce a safety requirement which would allow the game to get out of hand if it were not in place.

The secondary form of a fair play principle, FP-2, are rules not directly tied into the structure of a game, however, their "purpose is to promote an atmosphere of cordiality, respect and equal opportunity on the pitch (and sometimes outside of it)" (Motoarca, 2015, p. 126). He classifies these rules as tied to aspects of social behavior and may be regulated by broader, social governing of behavior within a culture. For example, there are general rules around inciting racist remarks while under proper sporting conduct, yet these types of fair play principles will still be invoked even when outside play and outside of the intimate actors in a sport. There are recent incidences in professional basketball where all one needs to do is

google “NBA racist slurs” to see the amount of times fans have been held accountable for this type of fair play breach. These types of fair play principles are usually based around a common social morals and processes of ethical enforcement that exist external to any given sport. These are more fluid but can also be tied to legal jurisdiction outside of sport.

The third form of fair play principles, FP-3, will be tied to a game but also reflect proper social behaviors in relation to etiquette. An etiquette related fair play principle will not be fundamentally tied to a game’s structure, but it would cause an effect in the game environment if the rule was violated in some way. An example of this is when (often at the beginning and end of a big game) hockey players shake the hands of the opposing team. Hockey is one of the only sports that has carried on the tradition of shaking hands even though it is not a rule *per se* and being a part of this procession is a form of etiquette. Boston Bruins’ star Sidney Crosby was criticized for failing to shake hands in their win over the Detroit Red Wings for the 2009 Stanley Cup. This “fair play infraction” is still incited in popular news stories, even though the post-game after the Bruins’ Stanley Cup win can be considered less than a normal experience. Moreover, at the 2020 World Juniors, Team Canada captain Barrett Hayton forgot to remove his helmet during the Russian national anthem, and in turn was criticized for a lack of class. Directly after the anthems, when the players were supposed to shake hands, several Russian players intentionally averted shaking his hand and commented that his behavior was a sign of disrespect. Therefore, signs of etiquette are often tied to a sport, and generally offer a level of respect for when an otherwise reasonable physical behavior is considered out of hand.

Through much philosophical deliberation, Motoarca arrives to the point that where a certain fair play infraction might occur, it might occur on many levels with a variety of outcomes. It becomes impossible to enforce all three types of principles without stepping on any toes. His argument therefore clarifies the need to determine those essential offenses to ensure that there is not a level of lax regulatory oversight or over-regulation. Motoarco also argues that fair play rules around etiquette (FP-3) are an extension of the rules around cordiality and the spirit of sport. However, this distinction plays a role in fair play enforcement.

### ***3. The DSD Regulations and what this means for fair play regulation***

The following section will apply the principles of fairness through sporting behavior (as espoused by Motoarca) and the principles of fairness in aspects of law (as done so by Vieweg) to the recent legal decision around Caster Semenya.

According to the Executive Summary for the April 30<sup>th</sup>, 2019 decision regarding Caster Semenya, Athletics South Africa, and the IAAF, the Regulations around Disorders of Sex Development (DSD) were the regulations called into question, not the sex binary in sport (*Caster & ASA v IAAF*, 2019). Furthermore, the regulations were deemed as a necessary form of discrimination in that the differences between the fairness of allowing Caster to participate in regard to Caster’s rights and the rights of allegedly non-46XY athletes presented an ultimately confounding case for the Panel. Additionally, the Panel specifically stated that while Caster was the main claimant involved in the case, in no way was the hearing a case over her deliberate cheating. The Executive Summary stated that “while much of the argument in this proceeding has centred around the “fairness” of permitting Ms. Semenya to compete against other female athletes, there can be no suggestion that Ms. Semenya (or any

other female athletes in the same position as Ms. Semenya) has done anything wrong. This is not a case about cheating or wrongdoing of any sort. *Ms. Semenya is not accused of breaching any rule.* Her participation and success in elite female athletes is entirely beyond reproach and she has done nothing whatsoever to warrant any personal criticism” (*Caster & ASA v IAAF*, 2019, p. 6; emphasis added).

In the instance of Caster’s most recent case, and in reading this summary through a pragmatic lens, consider the following items to be of importance: the DSD Regulations were the only regulations called into question as opposed to regulations around the sex binary in sport; the IAAF has proved to the CAS that the regulations governing female athletes with 46XY DSD must remain in tact due to ethical concerns around fairness for biologically female athletes and the right for non 46XY female athletes to participate in athletics; Caster Semenya has not knowingly violated a fair play principle, nor is she being accused of such behavior, as stated by CAS; Caster is not being charged as violating a fair play principle in any case even though her eligibility stands to rest on the IAAF’s adoption of fair play as a primary principle in athletics; Caster is being subjected to medical and public scrutiny even though she has not violated the fair play principle, or knowingly cheating; this case also incites the voluntarist external principle that is fundamental to games (in that they are not a necessary requirement to our human survival).

It would seem based on the CAS decision that our normal understanding around regulating fair play does not apply to the unique situation of Caster’s eligibility. For one, as clearly established by the CAS and as commonsensical as it is, it is impossible to ask that (a) a female athlete be responsible and aware of her genetic makeup in order to comply with this regulation around DSDs, but it is furthermore (b) unnecessary to consider Caster Semenya to be an athlete who is in violation of a fair play principle as she is not being accused of this. However, this would stand corrected to the historical basis for sex testing which was in place to protect against males who masquerade in the female category (Pieper, 2018).

There brings about the fundamental question of the definitive role that fair play contributes in this case. As Motoarca describes it, the enforcement of the separation of biological sex, some would argue, would be considered a constitutive fair play rule. This is based on the thought that if this enforcement was not present, then the game of athletics (as is this case) would not take place as it does today. There is a necessary distinction around whether the enforcement itself is the constitutive element or if it is concerned with the separation of sexes through legal (and inevitably biological) sex is the constitutive element. In any case, the division and management of sex segregation in sport would be fundamental to athletics. Therefore, by invoking the necessary requirement to separate the sport of athletics into categories of *biological* and not legal sex, it would be logical for World Athletics to be required to determine sex-based categories based on a method of verifying the biological sex for all athletes, instead of the traditional means of legal sex.

It also can be said that the other types of fairness principles (FP-2 and FP-3) could be applied to the segregation and enforcement of sex segregation in athletics. FP-2 is considered to abide by an external social rule. Therefore, regulating sex for physical reasons might be regulated within mandated courts (so outside of CAS regulation) in the instance of physical violations. Sex regulation in broader, socio-legal understandings is very case-specific, and there are none in which a situation applies directly or even relatively as it does in sport. Ne-

cessary discrimination of biological sex is not usually enforced in international courts until it confers upon an individual an advantage or disadvantage in the social sense and in the potential case where harm can be caused upon another individual. The discrimination of sex is usually most well-regarded in sex selection, including IVF, sperm separating, and selective termination of a pregnancy. Historically, Western medicine has adopted proactive measures around the social regulation of sex. This did not have to deal with physical advantages, but rather social normalization.<sup>1</sup>

The role and enforcement of sex segregation for etiquette (FP-3) could play a factor if, under completely alternative circumstances, an athlete deemed to be “more male” than a majority of female athletes approached the starting blocks. This is essentially where the DSD Regulations are concerned. Regardless of the knowing or unknowing violation of this rule, the violation of the DSD Regulations labels the person in question to be in violation of social etiquette, in not abiding by social and expected Western normative behavior, and to be shaming sporting etiquette around the tradition of normative gender expectations. An alternative word needs to be used to encapsulate what Caster is going through; since she is not accused of being a cheater, her role is undetermined. The court respects boundaries of gender identity as they say and claims that Caster has done nothing wrong. However, this speaks directly in contrast to what is at stake: Caster’s gender identity was never at stake to Caster, and Caster is being accused of being biologically wrong even though she has never believed herself to be biological wrong at all. The enforcement of DSD regulations are labelling levels of etiquette along a spectrum or degree. The regulations therefore are marking the territory around where a blatant violation of the fair play principle for sex stands. It is also dictating that the enforcement of the fair play principle in regard to sex is not up to the decree of the individual at stake, but to levels of acceptability of the broader social community. Most importantly, the inconsistent language around Caster’s case stands to reasons that Caster has never been knowingly implicated in the issue in which her body has been implicated. Because she has never questioned her gender identity, and because she has never questioned her sex, Caster has been subjected to scientific and Westernized scrutiny in an oppressive form. While intentionality is not assumed in this manner (on Casters or that of the IAAF), the choice to determine Caster’s biological sex and regulate her participation based on such is an oppressive behavior and forcing a determinedly i/empirical notion of a person onto that person. That Caster is from South Africa and a woman of color could also argue that her role in this is forced docility, as a body required to be complicit to Western gender-norms. This act is colonial by extension.

When discussing all three violations of the fair play principle, it is agreed that their level of infraction exist on a spectrum of allowances. This spectrum rests on the (a) social perception around expected athletic ability dependent upon gender and the prioritized culture; and (b) the definition of sex differentiation according to the prioritized knowledge-base, in this case the medical experts in the field of sex differentiation. Therefore, concerns for upholding the eligibility requirements for sex/gender are predicated on a necessary cultural, physical, and social component, because that is what sport requires and the capacity in which

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<sup>1</sup> Where an infant would display some time of disorder of sex development, doctors have historically rectified this through medical interventions, such as hormone, surgical modifications and psychiatric development. This practice has been recommended to be discontinued, but doctors are still medically obliged to label sex upon delivery of a baby. See Karkazis, K. (2008). *Fixing sex: Intersex, medical authority, and lived experience*. Duke University Press.

sport resides. In this sense, those who violate the fair play principle of the DSD Regulations are violating the expected athletic ability that the gender of the prioritized Western culture is perceived to have even though this expectation unfairly discriminates female bodies and is not an accurate representation of the full spectrum of embodied womanhood. Those also deemed to be in violation violate the definition of sex according to medical experts, even though they are not violating any personal definitions of their own biological makeup. They also violate social and culture norms around gender-identity, expected gender behaviors, and the expectation of the heteronormative gender-sex alignment.

By issuing this ruling, the CAS's decision was permitted as a topical authority in procedures around medical practices in sport regarding sex enforcement. This reflects broader issues in medical ethics since the case of Caster Semenya, and the DSD Regulations, is reflective of broader medical and scientific (Westernized) understandings of sex, in which case it cannot be simply determined by a court case. It also perpetuates the extent of authority that medicine has over certain bodies and that the IOC has in determining definitions of another person's body. By limiting the ruling to either take the oral supplement or not participate, then CAS and IAAF in turn are effectively forcing Caster and other athletes with a DSD condition to either abide by a forced medical program or face ostracism.

The ostracism associated with violating the DSD Regulations correlates to the character of the fair play cheater. Even though there are assertions from the CAS that the claimant is not cheating, the lack of support from the sport justice system to provide an avenue for women like Caster confirms that the IAAF and the CAS, reflective of the broader international society, bear no brunt of the responsibility for their shared Western normative expectations and enforced regulatory measures around gender. Athletes affected by the DSD Requirements will never be accepted in categories of "Men's Sports" and "Women's Sports" because they are violating at least two arguments of the fair play principle on which the requirements rest. These athletes are also unable to reconcile any of the types of fair play principles since the advantages are inherent to their biological makeup and *personal* identity.

This echoes of the gendered argument around genetic advantages in sport, which could be recognized as selectively enforcing fair play infractions. As both Vieweg and Motoarca approach it, the fairness principle in the interpretation and application of the substantive sport laws is limiting Caster's ability to practice her rights within the context of sport. If Caster has unknowingly committed a fair play violation through genetic endowment but is still being held to account for that infraction, then the CAS is required to pursue the enforcement of this violation through all genetic endowments according to *lex sportiva*. Since Caster's biological makeup has been put up on trial, the fairness principle can be invoked to question cases of genetic and biological endowment as potentially cheating across the board, throughout genetic and gender categories, as *lex sportiva* and the fairness principle state that this form of regulatory behavior must be able to apply to other athletes. Therefore, by only regulating the biological and genetic makeup of the women's category, then this policy is supportive of scientific sexism and is sexist by enforcement.

Considering that sports resides on notions of necessary physical sex segregation, then those who violate the DSD Requirements are violating the constitutive rules of the game. There is no evidence either that the IAAF nor the CAS panel determined Caster to be considered a woman or a man nor does their ruling invite any alternative option other than medical

supplementation. The CAS determined that the male-female divide in sport does not have anything to do with the recognition of legal sex or gender identity. Instead:

the purpose of the male-female divide in competitive athletics... is to protect individuals whose bodies have developed in a certain way following puberty from having to compete against individuals who, by virtue of their bodies having developed in a different way following puberty, possess certain physical traits that create such a significant performance advantage that fair competition between the two groups is not possible... Natural human biology does not map perfectly onto legal status and gender identity. The imperfect alignment between nature, law and identity is what gives rise to the conundrum at the heart of this case. (*Caster & ASA v IAAF*, 2019, p.4)

Through the selective language chosen by the court, it is clear that the court prevails ‘normally’ developed female bodies to be of the main concern in a paternal way. That the sex-divide is in place to protect normal bodies, *individuals whose bodies have developed in a certain way following puberty*, from abnormal bodies, those *who, by virtue of their bodies having developed in a different way following puberty, possess certain physical traits*. The rules are therefore emancipatory from those who did not have said virtue *from having to compete against* Other bodies.

It is also stated that these individuals have *such a significant performance advantage that fair competition between the two groups is not possible*. However, where the Panel draws the line between male-female, female-superfemale is not clear. The Panel distinguishes the necessary component of protecting the normal female athlete group against apparent loss and, when considering the *insuperable performance advantages derived from biology*, they deem that the organizing committee’s drive to regulate participation to the biological component necessary on this argument alone. Therefore, the case rested on the basis that genetic males are predisposed to higher levels of circulating testosterone, even though it is known that not all males nor all types of testosterone will benefit in this way.<sup>2</sup>

A common misunderstanding with the evidence around sex differences is that there is evidence sufficient to delineate male versus female performance in the biological sense and that the evidence as presented currently is the necessary underlying factor for differences in sport performance.<sup>3</sup> The logic to determine differences in sport performance between an athlete who has an intersex condition and one who does not does not equate to differences in

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<sup>2</sup> As stated in the executive summary: “On the basis of the scientific evidence presented by the parties, the Panel unanimously finds that endogenous testosterone is the primary driver of the sex difference in sports performance between males and females.” There are plenty of sports where testosterone is not the primary factor, including sports like the marathon, which is part of the athletics program. The body can also produce testosterone but its receptor sites not accept the testosterone, so this type of grandiose statement is inflammatory. *Caster & ASA v IAAF*, 2019, p. 4.

<sup>3</sup> As stated, again, in the Executive Summary: “The IAAF submitted that if the purpose of the female category is to prevent athletes who lack that testosterone-derived advantage from having to compete against athletes who possess that testosterone-derived advantage, then it is necessarily “category defeating” to permit any individuals who possess that testosterone-derived advantage to compete in that category.” *Caster & ASA v IAAF*, 2019, p. 4.

sport performance between male and female.<sup>4</sup> The scientific uniqueness of the intersex athlete has not been defined so it cannot be used to determine an arbitrarily appropriate amount of physical advantage that is being invoked in violation of the fair play principle.

This issue bears the question: Can athletes and or the CAS be scrutinized against international laws around fairness as well? Extending the argument of *lex sportiva* could sight a cultural bias in that she was not provided a fair trial. She was also held accountable for a biological condition that is not socially accepted that she be aware of. Stakeholders could question whether or not that the principles of fairness as applied by the CAS are obliged to mandate European law. The margin of appreciation in this sense would not necessarily apply. The IAAF and IOC cannot afford to suggest that any ruling in regard to enforcing sex segregation could drastically turn the sport of athletics on its head. Allowing Caster to compete might make for uncomfortable experiences, but Caster was not setting world records, nor was she close to the male times. In many instances, Caster would have lost – naturally.

Allowing Caster to compete in athletics in a third category would also not drastically alter the sport of athletics to any noticeable proportions. These types of categorical changes are intuitive to the growth of elite, international sport. Throughout history, the Olympic platform has made room for this type of growth, such as the inclusion of women to compete in the marathon. A third gender category also exists in the 2020 program for the sport of shooting, which was mixed gender up until 1992 primarily because there were not many women who competed in shooting altogether.

Since the CAS uses *lex sportiva* regularly to ask for support from the Court of Justice of the European Union, then why can't this be done from the level of the claimant? And on what level would the European Union be required to intercede on human rights injustices? There are additional, alternative avenues that Caster can take as well. Since a competing athlete is bound by the contract, she initially signs, Caster could ultimately step down from competing to challenge the IAAF on issues of human rights in her home country of South Africa. She would be furthermore supported by the United Nations' (UN) statement that the CAS's 2019 ruling conflicted with the UN's March, 2019 resolution on the "Elimination of Discrimination against Women and Girls in Sport" (Ewing, 2019).

#### **4. Considerations of scholarship**

The scholarship in regard to sex testing represent a wide range of approaches. Through no fault of their own, scholars simply unable to dedicate time to effectively address the

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<sup>4</sup> This is similar to arguments that were being made about the ethics of transgender participation in sport. There is not science that verifiably addresses the sport performance of transgender athletes, of intersex athletes and true disadvantages or advantages. There is a large amount of data being drawn from the endocrine profiles of 454 men and 239 women from within IAAF competition sample to assess endocrinological profiles. What is cited here is only a small sample. Bermon, S., Garnier, P. Y., Hirschberg, A. L., Robinson, N., Giraud, S., Nicoli, R., Baume, N., Saugy, M., Fenichel, P., Bruce, S. J., Henry, H., Dolle, G., & Ritzen, M. (2014, Nov). Serum androgen levels in elite female athletes. *J Clin Endocrinol Metab*, 99(11), 4328-4335. <https://doi.org/10.1210/jc.2014-1391> Healy, M. L., Gibney, J., Pentecost, C., Wheeler, M. J., & Sonksen, P. H. (2014, Aug). Endocrine profiles in 693 elite athletes in the postcompetition setting. *Clin Endocrinol (Oxf)*, 81(2), 294-305. <https://doi.org/10.1111/cen.12445> A letter requested that the study from Healy and colleagues be redacted for inaccuracies. Ritzen, M., Ljungqvist, A., Budgett, R., Garnier, P. Y., Bermon, S., Linden-Hirschberg, A., Vilain, E., & Martinez-Patino, M. J. (2015, Feb). The regulations about eligibility for women with hyperandrogenism to compete in women's category are well founded. A rebuttal to the conclusions by Healy et al. *Clin Endocrinol (Oxf)*, 82(2), 307-308. <https://doi.org/10.1111/cen.12531>

breadth of knowledge around sex testing. Therefore, those who should be involved in this debate do so through the wide array of inputs that are needed to contribute to a definition of sex; depth can be limited in this sense. These approaches are not altogether linear, and the wide range of inputs means the literature is fragmented.

Those who have the space to or those who are already experienced in the science of sex determination specifically have contributed to discussions of sex differentiation in sport, although this can limit who is contributing the knowledge. Bioethicists, geneticists, specialized endocrinologists and somehow the international sporting administration, Olympic team doctors, sport philosophers, sport historians, feminists, theorists and lawyers in international law and sports law, sociologist, and athletes have all contributed to this growing foundry.

What is needed is a cohesion of the fractured literature. It's also needed that international oversight on the level of international law should be required to step in. This type of reach is possible and has been successful used; retired Canadian cyclist Kristen Worley and gender advocate, successfully navigated the international and national legal systems and won her trial against the UCI and IOC around discriminatory practices regulating hormone levels for transgender athletes. Kristen's case was unique in that she never signed the affidavit that legally bound her from seeking legal action from outside the CAS and she also stepped away from the sport. She was able to pursue recourse through the Human Rights Council in Toronto, Canada.

Scholarship that supports inclusive and equal sport should begin with a pragmatic approach to addressing the heart of the issue, as opposed to broad-sweeping descriptive approaches. Pragmatism has been useful considering that it opens doors to understanding such a broad and complex topic on its basic level. By using pragmatism to approach and clear this web of social, moral and legal issues, it can become clearer as to direction the literature needs to approach this topic, the ways that moral ambiguity is present, and the lack of definitive answers that are presented in regards to solving this matter. Therefore, the use of pragmatism here is hopefully effective at drawing a clear line as to (a) how testing for the female sex is demonstrative of fair play regulation and (b) the relationship that athletes and the IAAF within *lex sportiva*.

Lastly, in recognizing the words of Zine Magubane, scholars need to consider Caster Semenya a teacher within this subject as it is her own. Caster has been subjected to public scrutiny without her consent, and her name has been blatantly represented and misrepresented as a name that signifies many things, including 'man', 'intersex', and more. This paper did not address Caster's voice as a point of departure for educating the scholarship around her issue; however the aim in repositioning Caster as a teacher opens up the literature from restricting her lived experience as it may do when considering Caster as an object of study.

## **5. Conclusion**

The decision ruled in *CAS & ASA v IAAF* represents a broader misunderstanding of the fair play principles that Caster's situation resides on. It furthermore conflates the requirement of the regulations to regulate the women's category as a regulation of the sex binary. The rationales used by the CAS to uphold the ruling do not account for the multifaceted biological states of being, nor does it prescribe any future-looking way at incorporating all biological body-types.

The application of *lex sportiva* should be assessed to consider the ways that the CAS might be regulated under European law. Additionally, through Ioan-Radu Motoarca's case study of known versus unknown violations of fair play in sport, it is clear that Caster has never knowingly violated the fair play principle in regard to sex regulation in sports. Her body was forcibly held to biological scrutiny and judged in ways that Caster never agreed to. The question of gender identity and biological sex was a determinant that the IAAF and by extension the IOC forced upon Caster; its act can be considered an extension of colonial normative customs and superiority of the biological/scientific paradigm, and a type of cultural whitewashing.

Because of the complexity of the case, *lex sportiva* and the cultural assumptions that underly the fairness principles, it could be argued that Caster was never provided a fair trial. She is also be held accountable for a genetic endowment even though other athletes are not also being held accountable for such endowments. The CAS also determines Caster to violate the rules of the regulations and in turn disrupting the bipolar boundaries of male/female even though they do not address where Caster lies within those boundaries. They furthermore do not provide ample support for Caster to navigate and in turn ostracize her from the sport.

While the scope related to intersex athletes and navigating the sex-binary in sport can quite easily get out of hand, failing to recognize all overlapping issues present in an analysis of this sort would be imprecise. Not one solution has not been applied successfully. Therefore, this article was written in hopes that it can provide scholars with potential methods and direction for future research.

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